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# REPORTS OF CASES

IN THE

# Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1939

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## VOLUME CXXXVI

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HENRY P. STODDART
OFFICIAL REPORTER

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CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1939

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## LAURIDS JORGENSON, ADMINISTRATOR, APPELLANT, V. DEPARTMENT OF BANKING, APPELLEE.

284 N. W. 747

FILED MARCH 17, 1939. No. 30434.

1. **Banks and Banking.** A plaintiff in equity who claims a trust fund payable in full from the assets of an insolvent state bank in the hands of the receiver, but held by the latter as an asset of the bank, has the burden of establishing title to the fund.
2. ———. In a suit in equity to recover $12,000 as a trust fund in the hands of the receiver of an insolvent state bank on the ground that it was contributed by the deceased cashier from his personal estate to meet contingent assessments of the bank under a void statute, the fund is *held* to be an asset of the bank as shown by evidence outlined in the opinion.
3. ———. "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership." Comp. St. 1929, sec. 8-1,102. *State v. State Bank of Omaha*, 128 Neb. 148, 258 N. W. 260.
4. ———. When it is determined in a suit in equity to recover a trust fund in the hands of the receiver of an insolvent state bank that the fund is an asset of the bank, a court of equity must follow the banking law which specifically deals with it as such.

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

*McKillip & Barth, J. J. Thomas* and *Ivan A. Blevens,* for appellant.

*F. C. Radke, Robert H. Downing* and *Harold Johnson, contra.*

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

ROSE, J.

This is a controversy between Laurids Jorgenson, administrator of the estate of John L. Jorgenson, deceased, plaintiff, and the department of banking as receiver of the Bank of Staplehurst, an insolvent corporation, defendant, over an alleged trust fund of $12,000 in possession of the receiver.

John L. Jorgenson was controlling stockholder, director, cashier and active manager of the bank. He died January 27, 1933. The administrator of his estate filed with the receiver August 13, 1934, a claim for the trust fund of $12,000 against the receiver, payable in full from the assets of the bank. The fund in controversy was claimed by the administrator on the ground that John L. Jorgenson, individually, entrusted it to the bank to meet a contingent liability for bank assessments levied by the banking department under a statute challenged as void in pending litigation.

By act of March 18, 1930, the legislature attempted to add to the state banking laws a provision for the creation of a "depositors' final settlement fund," in addition to the "depositors' guaranty fund." Laws 1930 (Special Session) ch. 6. The purpose of the new act was to provide funds for payment of depositors in insolvent state banks by assessments levied from time to time by the state banking department on solvent state banks, an act adjudged void November 10, 1932. *Hubbell Bank v. Bryan,* 124 Neb. 51, 245 N. W. 20. Assessments levied against the Bank of Staplehurst under the legislative act of 1930, before it was adjudged void, aggregated $16,961.04, but were never paid.

The claim of plaintiff is, in effect, that John L. Jorgenson was coerced by the presumptively valid legislation, by the orders of the banking department under it, by the assessments and by drafts on the bank for their payment, to contribute personally from his own estate to the bank a temporary contingent fund of $12,000 to meet those assessments, if the act of 1930 should be adjudged valid, and that his money, in equity, should be restored to his estate as a trust fund, since the assessments and contingency had no existence in fact or law, the fund being his alone at all times. There is also the alternative claim that the fund, even if voluntarily created, was provided through mistake and consequently is recoverable as a trust fund.

The receiver rejected the claim as invalid, and plaintiff, the administrator, brought this suit in equity in the district court for Seward county December 6, 1934, to recover the fund as trust property belonging to the estate of decedent.

Defendant denied that the fund in controversy was a trust fund and pleaded in substance, among other things, that it was a voluntary contribution to avoid a formal stock assessment, to reduce existing deficits in bank funds, to increase depleted bank reserve and to keep the bank open for business.

In a reply to the answer it was alleged that the 12,000-dollar fund was placed in the bank for the sole purpose of paying the assessments for the benefit of the "depositors' final settlement fund," in the event of their adjudicated validity; that otherwise it was to be returned to the owner; that the bank never acquired title to it or any interest in it at any time.

Upon a trial of the cause the district court found that the fund in controversy was not a trust fund and dismissed the suit. Plaintiff appealed.

It is earnestly argued on behalf of plaintiff that the undisputed evidence establishes his equitable right to this 12,000-dollar fund. In this connection reference is made to the following evidential items of proof: The fund obtained

by the bank consisted of Ocken note and mortgage for $8,000 and cash of $4,000, personal funds of John L. Jorgenson. The bank books showed as "contingent reserve for depositors' final settlement fund," $12,434.04. There was a corresponding charge to profit and loss of $12,434.04. Comments of counsel for plaintiff on these and other entries are that there were no assets in the undivided profit account and that "this was a mere setting up of figures—a nullity;" that when the bank was next examined it was criticized by the banking department for so doing and ordered "to put up some actual reserves." In compliance the 12,000-dollar reserves were put up by John L. Jorgenson, he making at the time on the bank books an entry showing Ocken note placed to take care of reserve for depositors' guaranty fund set up previously by order of banking department, $8,000; cash put in by John L. Jorgenson, same as above, $4,000; that these funds were traced into the bank and into the hands of the receiver and are trust funds recoverable in full from the assets of the bank in preference to other creditors, funds in the hands of the receiver being sufficient for that purpose; that, regardless of bank book entries, condition of the bank and orders of the banking department, the real purpose of the $12,000 in the bank was the creation of a temporary contingent "depositors' final settlement fund" which had no existence after the act of 1930 was decreed invalid, leaving the title and right of possession in the owner. These propositions were argued at length with reference to evidence and to decisions applying rules of equity to plaintiff's theory of the case.

Does the preponderance of the evidence prove that the fund in issue was a trust fund? In the transactions involved John L. Jorgenson acted for himself personally and for the bank as cashier, director, owner of 75 per cent. of its stock and manager. He was an experienced banker with authority to make his bank books and his bank records divulge the true nature of his banking transactions. He owed that duty to the minority stockholders, to the bank, to the depositors, to creditors and to the banking depart-

ment of the state. Was he both the contributor of the fund and the beneficiary of the trust, if the legislation under which his bank was assessed for the final settlement fund should be adjudged void? The petition alleges and the evidence shows that he put the 12,000-dollar fund in the assets of the bank. The statute gives depositors and holders of exchange preferential liens on all assets of bank, taxes excepted. Comp. St. 1929, sec. 8-1,102. Plaintiff did not prove any oral or written contract between Jorgenson and the bank creating the trust as a ground for equitable relief. If the fund belonged to Jorgenson or his estate at all times it was never an asset of the bank but a liability. A specific designation of the fund as a special deposit to be reclaimed as such has not been found in the evidence. There was no specific account or record to show definitely that the fund was a liability owing by the bank to Jorgenson. After demands had been made by the banking department for a liability account on the bank books to meet the assessments for the depositors' final settlement fund, additional money for that purpose was not at first put into the bank, but credits to such an account were charged against other accounts, overdrawing them. There is evidence tending to prove that the 12,000-dollar fund was a voluntary contribution to restore overdrawn accounts and was retained and used as an asset of the bank. March 23, 1932, Jorgenson reported to the banking department an earning's deficit of $12,444.19 and $12,000 placed in profit and loss account. June 30, 1932, the same fund was reported by the cashier, Jorgenson, to the banking department as "voluntary contributions to surplus or profits." That it was so considered is indicated by minutes of a meeting of the bank directors July 1, 1932. It was so communicated to the banking department in a report by Jorgenson, July 12, 1932. Published reports of the bank fail to show a liability to him for this fund.

Official examinations of the bank and directions of the banking department from time to time tend to prove the following facts: January 4, 1932, the bank was found to

have for elimination assets aggregating $188,292.55. On the date of the examination, the legal reserve was only 2 per cent. and the average since the last previous examination was only 8 per cent.—an insolvent condition. February 29, 1932, was the date on which the 12,000-dollar fund was placed in the bank and credited to the profit and loss account.

Employees of the bank testified to the effect that Jorgenson knew the condition of the bank, that there was an impairment of capital and that the fund was put in the bank to take up deficits.

As early as April 22, 1930, the bank had been examined with the result that it was ordered to eliminate assets totaling $41,806.11. To take up bank losses Jorgenson on different occasions contributed from his personal estate approximately $40,000. His devotion to the interests of the bank is reflected by his personal contributions to its assets during a distressing financial depression. He kept it open for commercial business at the risk of his personal contributions to its assets. It is a reasonable and logical inference from all the facts and circumstances, including his own acts, that he was more concerned about the safety of his bank than of the hazard of his $12,000. If that item was a trust fund in the bank, it was an additional liability of the bank when in an insolvent condition, a precarious place for a trust fund within the knowledge of Jorgenson. If it was an asset, as he certified in his reports, it stood for integrity of the bank and for the protection of its depositors and other creditors who put their trust in him.

A plaintiff in equity who claims a trust fund payable in full from the assets of an insolvent state bank in the hands of the receiver must establish his title to it. *In re State Bank of Elkhorn,* 129 Neb. 506, 262 N. W. 15. In the present instance plaintiff did not sustain the burden of proof on that issue. The proper deduction from the evidence is that the fund in litigation was an asset of the bank. As such the banking law deals with it as follows:

"The claims of depositors, for deposits, not otherwise

secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership." Comp. St. 1929, sec. 8-1,102. *State v. State Bank of Omaha,* 128 Neb. 148, 258 N. W. 260.

When it is determined that the fund is an asset of the bank in the hands of the receiver, a court of equity must follow the banking law specifically dealing with it as such. The finding upon the trial *de novo* is that the fund in issue is an asset of the bank and not a trust fund belonging to the estate of John L. Jorgenson, deceased. It follows that the judgment below is

AFFIRMED.

MESSMORE, J., dissenting.

The 1930 legislature, for the purpose of creating a fund with which to pay depositors in state banks previously closed, provided for the creation of a "depositors' final settlement fund," levying an assessment of two tenths of one per cent. of the average daily deposits on all corporations engaged in the business of banking, said assessments to continue for a period of 10 years, beginning with the year 1931. During the time that the action was pending in the supreme court of this state in which the constitutionality of the act was being tested, assessments were made against Jorgenson's bank at Staplehurst, in the aggregate amount of $16,961.04. Three sight drafts were drawn for the payment of these assessments which were refused. The bank was examined by the department of banking under date of April 22, 1930, as shown by defendant's answer. The report of the department showed: "Guaranty fund assessments, all unpaid assessments up to and including 1930 should be set up on the books and shown as liability." May 16, 1931, the examiner, on behalf of the department of banking, ordered the bank to set up on its books a reserve account for guaranty and final settlement funds. In obedience to this order, the bank set up on its books an account entitled

"Contingent Reserve for Depositors' Final Settlement Fund," and entered in that account a credit of $12,434.04. As an offset entry the undivided profits account was debited with a like sum. Immediately prior to this order the account was overdrawn in the amount of $5,198.66, and the additional debit charge of $12,434.04 resulted in increasing the deficit to $17,632.70. On February 20, 1932, a further credit was entered on the "Contingent Reserve for Depositors' Final Settlement Fund" account in the sum of $1,365.97, and a like amount debited to the profit and loss account, creating a total credit in the final settlement fund of $13,800.01, resulting in a deficit in the undivided profits account of $13,864.73. While the undivided profits account was overdrawn in the amount of $13,864.73, of this sum $13,800.01 was created by the credits to the contingent reserve account. Eliminating the credits to the contingent reserve account, it would leave the profit and loss account overdrawn in the sum of $64.72.

On January 4, 1932, another examination of the bank was made, and the examiner reported that there existed a deficit in the undivided profits account in the sum of $12,444.19. This of course indicated an impairment of the capital structure, and Mr. Jorgenson was directed to restore this impairment which had been caused by the credits to the contingent reserve account. On February 29, 1932, Mr. Jorgenson put up the two items in controversy, to wit, a note and mortgage of L. C. Ocken for $8,000, and cash from his personal funds in the sum of $4,000, and, as an offset entry, this 12,000-dollar fund was credited to the undivided profits account. The journal entry of this $12,000 is as follows:

"Note #24910 L. Ocken placed to take care of Res(erve) for Dep(ositors) Guar(antee) Fund set up previously by orders of Banking Dept.....$8,000
"Cash put in by J. L. Jorgenson. Same as above.....$4,000"

This entry of figures to the credit of this account did not

create a reserve. To create a reserve it is necessary to make a transfer from an existing reserve account, or to put up new assets. The entry of a credit of $12,434.04 to the contingent reserve account and a debit of a like amount to the undivided profits account would effect a transfer of reserve assets, provided there were assets in the account that could be transferred; but there were none.

On this bookkeeping, as shown by placing the 12,000-dollar fund in the account of profit and loss, the department of banking contends that the funds were intermingled and constituted an asset of the bank and were voluntary contributions made for that purpose, and there is evidence to this effect by the oral statement of a bank clerk of Jorgenson. However, the evidence is more persuasive that Jorgenson put up this 12,000-dollar fund, and it was carried and designated as "Contingent Reserve for Depositors' Final Settlement Fund," carried in the same title on the books of the banking department, and shown in the published reports. In other words, the fund was so placed under the direction of the department of banking that it constituted a condition contingent on the validity of the act of March 18, 1930. The reason for examining the bank in the first instance, the notations made relative to the funds of the bank, all relate to the assessments; that is the history previous to the closing of the doors of the bank. In this connection, and as stated in the majority opinion, Mr. Jorgenson did contribute more than $40,000 of his own personal funds in an effort to protect his depositors and creditors, truly commendable and unusual. In this connection the majority opinion states: "If that item was a trust fund in the bank, it was an additional liability of the bank when in an insolvent condition, a precarious place for a trust fund within the knowledge of Jorgenson."

We are concerned with a specific fund which Jorgenson was directed and ordered to put up for a specific purpose. He was not in a position to much longer refuse, and when this fund was put up by him the validity of this act was being questioned. No one knew whether it would be held

valid, but, inasmuch as it was in existence, Jorgenson was requested to comply with it, and he did so.

Some contention is made that there was no agreement between the department of banking and Jorgenson, oral or written, as to how the fund should be carried, or that he was to receive it back in the event that the act should be declared void, or, if valid, whether the fund would be used for the purpose for which the act was created. This issue was one of intention. The intention with which the money was placed in the reserve fund controls, and the evidence in this case, without question, supports the plaintiff. Mathiesen, who worked for Jorgenson and was later assistant receiver in the department of banking, and Dahl, who also worked for Jorgenson, testified that the 12,000-dollar fund was placed in the undivided profits account to cover the contingent reserve for depositors' final settlement fund. This evidence is not controverted. The intention of the parties may be inferred from all the facts and circumstances surrounding the transaction. This principle of law is too well established to require citation of authority.

Without further setting out the documentary evidence, but repeating that throughout the record this fund was carried through all of the reports, as far as I am able to ascertain from the documentary evidence in this record, it shows that the fund was a contingent reserve for depositors' final settlement fund. This court declared the act of March 18, 1930, void, and its final death-blow occurred May 22, 1933, when a petition on writ of certiorari was denied by the United States supreme court. Therefore, all of the funds accruing during the life of the act would be released; they could not be legally used for the purpose intended by the act. Mr. Jorgenson died before the act in question was finally adjudicated. The plaintiff here was not familiar with the situation, and had to acquaint himself with the facts as best he could. He filed this action in time.

I believe the position of the plaintiff, that this 12,000-dollar fund was put up by Mr. Jorgenson for a specific purpose, conditioned upon the validity of the act of March 18,

1930, and that this was the only reason therefor, is well taken. This fund was his money, and it was not taken out of the bank or out of any other fund in the bank, as shown by the record. In the event of the failure of this condition, upon which this money was placed by Jorgenson, his estate is entitled to the fund.

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RODNEY S. DUNLAP ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.
284 N. W. 742

FILED MARCH 17, 1939. NO. 30436.

1. **Eminent Domain**: EASEMENT: DAMAGES. When a perpetual easement is taken for the erection of an electric power line across farm land far from any buildings, the condemnor need not pay for the entire fee of the land over which the line runs, but simply for the damage to the owner's entire property caused by the construction thereof.
2. ———: DAMAGES: INSTRUCTION. Instruction to jury is approved, which reads in part as follows: "You will then proceed to determine from a preponderance of the evidence, the damages to the whole farm caused by the construction of the line over the same, and in determining this you may take into consideration every element of annoyance, inconvenience, danger and disadvantage resulting from the construction and maintenance of the line which would influence an intending purchaser's estimate of the market value of such property, including danger from the transmission lines, if any; annoyance, if any you find, which would result from defendant's perpetual right to enter plaintiffs' lands to maintain, repair and rebuild the line; inconvenience, if any, by reason of the structures and lines; danger, if any, that weeds might grow around the poles and structures; damage, if any, by the cutting of trees and all other disadvantages, annoyances, dangers and inconveniences referred to in the evidence."
3. ———: ———. Mere general fears from the presence of a transmission line cannot be made the basis upon which to predicate any depreciation in market value, for ill-defined fear that at some unknown time in the future some misfortune may come to man or beast by reason of the transmission line cannot enter into the consideration of those who are required to fix the amount of the damages.

4. ———: ———. A perpetual easement across a farm is an infringement upon the previous rights of the owner, and as one of the elements of his loss, he is entitled to recover damages to whatever extent his former methods of farming the land have been interfered with by the erection of such electric power line.

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

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

*Cook & Cook* and *Abbott, Dunlap & Abbott, contra.*

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

PAINE, J.

This action for damages arose out of an application of the Loup River Public Power District, defendant and appellant, to acquire a perpetual right of way easement across lands of the plaintiff by eminent domain for the purpose of erecting a high power transmission line. As a result of the proceedings in the county court, the five appraisers on October 1, 1937, allowed the following sums: $1,500 for damage to farm, $15 for crop damage, and $175 for damage to trees, making a total allowance of $1,690 damages. From this award an appeal was taken to the district court by the defendant power district, and a jury returned a verdict for $50 crop damage, and for other damages $2,066, making a total, with interest, of $2,158, for which judgment was entered. The defendant has appealed.

Plaintiff is the owner of 240 acres of bottom land in the Platte valley, located about five miles southeast of Fremont. This farm is highly improved, and is used as a dairy farm. The north 160 acres is crossed diagonally by a large drainage ditch of the Elkhorn Drainage District, the right of way being 60 feet in width, although the ditch itself is only about 20 feet wide, but it separates the 160 acres into two parts. All of the buildings are located in the northeast corner of the 160-acre tract, being at the farthest point from the ditch and the transmission line, which is on the far

side of the ditch from the buildings. The 80 acres lie directly south of the 160 acres.

Nearly all of the land is tillable, and practically all is under cultivation, and requires the use of heavy machinery, such as large tractors, plows, harvesters, and combine, said farm being alleged to be of the reasonable value of $48,000. The defendant's high-powered transmission line will carry an electric current having a voltage of 115,000 volts to Omaha from the defendant's power plant near Columbus. In the petition it is alleged that, by reason of the construction of this high-powered line, the plaintiff's land will be damaged in the full sum of $11,300.

The evidence discloses that this power transmission line enters this land some 224 feet east of the northwest corner of the land, and runs in a straight line southeast across the middle of the northwest quarter, running almost parallel with, but from some 200 to 300 feet to the west of, the drainage ditch across said quarter-section, and continues in a straight line across the northeast corner of the plaintiff's south 80 acres.

The first structure to be built as it enters the farm from the north is 115 feet from the boundary line, and is a four-legged steel tower, type "TAP," being 23 feet square on the ground. The second structure is type "HTP," being located 660 feet away, and consists of two large poles, set 14 feet, six inches apart, with necessary bracing between the poles, and two cross-arms at the top extending 29 feet in width, all set at right angles with the line. It is 675 feet to the third structure, similar to the "H" type structure just described, and the fourth, fifth, and sixth structures are built on the same plan. The entire length of the transmission line is 3,978 feet upon the farm of plaintiff, and the three wires of the line itself will be 27 to 30 feet in the air.

On January 12, 1938, the plaintiff duly filed an assignment of the full amount of any award he might secure to the Federal Land Bank and the Federal Farm Mortgage Corporation, to be applied in reduction of mortgages now held by said corporations upon the land herein.

In the argument much attention was given to the danger inherent in this line. Plaintiff calls attention to the testimony of two engineers, who testified that they would place a limit of 15 feet as the nearest that a person should come to a transmission line carrying 115,000 volts, and that a man on a load of hay would be partially grounded, and if he had a pitchfork in his hand he could receive a shock that might endanger his life.

Testimony was to the effect that it would be very hard to turn a big tractor drawing a drill around these posts. It was also said that weed patches would grow around each one of these big posts, and would have to be cut out by hand, and would be unsightly. It is extremely dangerous to operate a combine near such a transmission line, as the line stretches in hot weather and sags down. We are asked to consider that the power district has a perpetual right to go across this land with trucks and equipment at any and all seasons of the year.

Testimony was given of the difficulty of putting up alfalfa and of planting check-rowed corn near these large poles. Evidence was also taken of the height reached by combine and hay stackers when near this line, which is 27 to 30 feet in the air.

Seven very large cottonwood trees were cut down in building the line. Plaintiff contends they were of great benefit in the pasture to shade the live stock. Defendant claims it was compelled to run its line straight to avoid loss of current, and so could not follow line of drainage ditch, or avoid the large trees, and that the trees are of no real value, and the only damage in cutting them is an inconvenience of farming around the stumps, the same as around the standards erected in the line.

The first assignment of error and proposition of law are based on the overruling of defendant's motion for a change of venue. Section 20-410, Comp. St. 1929, provides for such an order if it appears that a fair and impartial trial cannot be had. There was a nine-page motion filed for change of venue. It appears that two applications were

filed by the defendant in the county court to acquire this right of way. The first was filed July 30, 1937, and certain action of the appraisers was criticized by defendant, and the second application was made on September 11, 1937. The motion for change of venue was supported only by a single affidavit of C. N. McElfresh, one of the attorneys for defendant. This affidavit, although filed in the office of the clerk, was not incorporated in the bill of exceptions, and not offered as evidence in the district court, and therefore cannot be considered. *In re Estate of Lyell,* 116 Neb. 827, 219 N. W. 189; *Hannah v. American Live Stock Ins. Co.,* 111 Neb. 660, 197 N. W. 404. There was no error in the trial court overruling this motion for change of venue. *Markel v. Glassmeyer,* 132 Neb. 716, 273 N. W. 33.

As to the dangers of this line, a great deal of testimony was brought out, over objections, about the respective heights of a combine, a hay stacker, and of a man on a load of hay, and that, because of the tools used in stacking hay, no stack should be placed nearer than 50 feet from the transmission line. Much evidence was also taken as to the necessity of giving warnings of the dangers inherent in a line carrying perhaps the highest voltage in the state.

D. J. DeBoer is the chief electrical engineer of the defendant company. He testified that this transmission line runs straight for nine miles at this point; that it is not practical to follow section lines or drainage ditches; that each of the three "wires" making up the transmission line are made as follows: A steel core, made up of seven strands of wire, with 26 strands of aluminum wire on the outside. With this construction the steel core carries the weight of the span of 600 or 800 feet, while the aluminum carries the electrical current. Under the worst weather conditions, which are one-half inch of ice all around the wire, at a temperature of zero, and a 54-mile-an-hour wind, this line, according to the estimates of the United States Bureau of Standards, would be carrying a load of 6,860 pounds, but this line can stand a load of 14,000 pounds before it will break. The poles are 50-foot western cedar poles, having a

life of 25 to 40 years; the cross-arms are of Douglas fir, with a life of 15 years. The wire will not need replacement for 50 years. A steel tower, such as the one on plaintiff's farm, is erected every four miles to support the line in all directions. Each structure is equipped with protector tubes to drain the lightning or static charges from the line. Mr. DeBoer testified that the safety of any one who would come within 10 feet of these wires might be menaced, that is, their lives might be in danger. The plaintiff's engineers testified that 15 feet was the nearest one should approach the wires.

In the case at bar, the easement simply grants the right to the power district to go upon and over the farm to construct, repair, rebuild, or maintain this one steel structure and five pairs of poles, and the transmission lines. The life of the materials used is so long that the use of the easement by a truck, after the original construction, may only be made at intervals of years. The land can be farmed around the poles as before, with some inconvenience. No land is purchased by the power district, and the plaintiff will still pay all of the real estate taxes upon the land included in the easement.

"When an easement is taken which still leaves the owner with property rights of material and measurable value, the condemnor need not pay for the entire value of the fee simple. But in these cases—such as in the cases where an electric power company runs wires over the owner's property—compensation is based, not on the separate value of the easement but rather on the damage to the owner's entire property attributable to the taking of the easement and to the prospective use which the taker will make of it." Orgel, Valuation Under Eminent Domain, 355.

The main question, therefore, was the damages to the farm as a whole, and the trial court in the case at bar gave the instruction No. 3, in which the court first instructed as to crop damage, etc., and then said:

"You will then proceed to determine from a preponderance of the evidence, the damages to the whole farm caused

by the construction of the line over the same, and in determining this you may take into consideration every element of annoyance, inconvenience, danger and disadvantage resulting from the construction and maintenance of the line which would influence an intending purchaser's estimate of the market value of such property, including danger from the transmission lines, if any; annoyance, if any you find, which would result from defendant's perpetual right to enter plaintiffs' lands to maintain, repair and rebuild the line; inconvenience, if any, by reason of the structures and lines; danger, if any, that weeds might grow around the poles and structures; damage, if any, by the cutting of trees and all other disadvantages, annoyances, dangers and inconveniences referred to in the evidence. In fixing the amount of plaintiffs' damages you will ascertain the reasonable market value of the premises immediately before the building of said line and the reasonable market value immediately after the line is built and allow plaintiffs the difference. Market value is based upon the market value at the time of condemnation on Sept. 11, 1937. The reasonable market value of the land is the price which the real estate would bring if it were offered for sale by one who desires but is not obligated to sell, and is bought by one who is willing to purchase but is not compelled to buy."

Attacks are made upon this instruction from many angles; first, because it allows the jury to take into consideration the "danger" from transmission lines, if any.

Mere general fears from the presence of a transmission line cannot be made the basis upon which to predicate any depreciation in market value, for ill-defined fear that at some unknown time in the future some misfortune may come to man or beast by reason of the transmission line cannot enter into the consideration of those who are required to fix the amount of the damages. But, on the other hand, if such fears be reasonable, not speculative nor ill-defined, but founded on practical experience, and if such fears are entertained so generally as to enter into the calculations of all who propose to buy or sell, can it logically

be said that they do not depreciate the market value of property? If an owner cannot sell his property at as good a figure with this line across it as he could before, then his land may be depreciated on account thereof. See *Kentucky Hydro-Electric Co. v. Woodard,* 216 Ky. 618, 287 S. W. 985; 10 R. C. L. 156, sec. 137; *St. Louis, E. R. & W. R. Co. v. Oliver,* 17 Okla. 589, 87 Pac. 423, 10 Ann. Cas. 748; *Illinois Power & Light Corporation v. Peterson,* 322 Ill. 342, 153 N. W. 577, 49 A. L. R. 692.

In an exhaustive discussion of these questions by Charles T. McCormick, professor of law at Northwestern University, and found in 17 Minn. Law Review, 461, it is said that all of the public injury that will flow from the public improvement is to be considered in the light that it would be considered by a prospective purchaser, but speculative and unlikely possibilities of harm are to be excluded, as well as the possibility of unlawful or negligent construction or operation of the power plant. It has been held, in decisions relating to condemnation of rights of way for electric power transmission lines, that it is necessary to curb the over-imaginative speculations as to possible dangers. Evidence of the necessity of the entry of the power company's employees upon the land to patrol and repair the line, and the probable consequent disturbance of cattle as bearing upon the value of grazing land, is competent (*Missouri Power & Light Co. v. Creed,* 32 S. W. (2d) (Mo. App.) 783), as is also proof of public inconvenience to and obstruction of farming operations by such a power line (*Illinois Power & Light Corporation v. Barnett,* 338 Ill. 499, 170 N. E. 717).

Our court is committed to the rule: "The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239, 78 N. W. 521. See, also, *Kayser v.*

*Chicago, B. & Q. R. Co.*, 88 Neb. 343, 129 N. W. 554; *Beckman v. Lincoln & N. W. R. Co.*, 85 Neb. 228, 122 N. W. 994; *Omaha S. R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326; *McGinley v. Platte Valley Public Power and Irrigation District*, 133 Neb. 420, 275 N. W. 593; *Lilienthal v. Platte Valley Public Power and Irrigation District*, 134 Neb. 281, 278 N. W. 492.

Several of the propositions of law advanced for reversal are based upon the evidence of fear of danger allowed by the court to go to the jury, especially as to this fear expressed by farmers with no scientific knowledge of their own. It is insisted by the power district that it is not an insurer against the dangers arising from such power line, and that no legal duty requires it to give warnings of the danger of such line, and that the court gave undue prominence to, and overemphasized the gravity of, such danger, which was an invasion of the province of the jury.

In the case of an electric line going across a man's farm, the question is simply how much damage has been done to the farm. A perpetual easement constitutes an infringement of the former and previous rights that the farmer had in the land, and, as one of the elements of his loss, he is entitled to recover damages to whatever extent his former method of farming that land has been interfered with. The free use of that land is a property right, and whatever infringes on that must be paid for as damaging the land.

From a painstaking examination of the entire record, we find no prejudicial errors in the instructions, or in the admission of evidence, and yet we are convinced that the evidence does not warrant a recovery of damages in the sum of $2,158, while another trial would cause delay and additional costs.

In the opinion of this court, the sum of $1,500 would be sufficient to cover all the damages to this farm in running this power line over it, considering that its location is far removed from the buildings, and its course is somewhat parallel with and near the drainage ditch which crosses this same farm land.

If the plaintiffs file a remittitur reducing the judgment to $1,500 within 30 days, the judgment of the lower court will be affirmed as thus modified, otherwise the same will be reversed.

AFFIRMED ON CONDITION.

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LAWRENCE GREENOUGH V. STATE OF NEBRASKA.
284 N. W. 740

FILED MARCH 17, 1939. No. 30485.

1. **Criminal Law.** The objection that the defendant in a criminal case has not had a preliminary examination is waived unless raised before he enters a plea of not guilty.
2. **Larceny.** The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury to be considered in connection with all other evidence adduced at the trial.
3. **Criminal Law.** The venue of a crime may be established by circumstantial evidence.
4. ———. Under the provisions of section 29-2620, Comp. St. 1929, a defendant eligible for an indeterminate sentence is entitled thereto only in the discretion of the trial court.

ERROR to the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Affirmed: sentence reduced.*

*Sterling F. Mutz* and *Robert S. Stauffer,* for plaintiff in error.

*Walter R. Johnson, Attorney General,* and *Donald E. Kelley, contra.*

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

CARTER, J.

Plaintiff in error, who will hereafter be referred to as the defendant, was convicted of the crime of larceny of property valued by the jury at $55, and a sentence of five years in the state penitentiary was imposed.

The record discloses that a gasoline station in Ainsworth, Nebraska, belonging to Nicholas A. Sawyer was broken into on the night of February 11, 1938, and robbed of five new automobile tires. It further appears that the defendant and a companion appeared in Valentine, Nebraska, early in the morning of February 12, 1938, and sold the tires to a tire dealer for $2.50 each when their market value was more than twice that amount. The defendant was seen by several people in Valentine that morning and all identified the defendant subsequent to his arrest. The tires were identified beyond question as the ones taken from the gasoline station, and the automobile being used by the defendant on the night of the robbery was subsequently found in the possession of one Everhart in Ainsworth. The defendant offered no evidence. Upon this state of facts the jury returned a verdict of guilty.

Defendant complains of the fact that he did not receive a preliminary hearing. It appears that a complaint was filed in the county court of Brown county and the defendant was taken into custody under a warrant issued from that court. Without a preliminary hearing being held, an information was filed in the district court for Brown county on February 24, 1938, and on that date the defendant was arraigned and a plea of not guilty entered. This clearly was a waiver of his right to a preliminary hearing. The objection that the defendant in a criminal case has not had a preliminary examination is waived unless raised before he enters a plea of not guilty. *Dinsmore v. State,* 61 Neb. 418, 85 N. W. 445; *Meyers v. State,* 104 Neb. 356, 177 N. W. 177; *State v. Boehm,* 68 N. Dak. 340, 279 N. W. 824, 116 A. L. R. 547.

Defendant contends that the evidence is insufficient to sustain a conviction where it does not show that defendant was in the county at the time of the commission of the crime. The evidence must show, of course, that the defendant committed the crime at the time and place charged, but the law does not require an eyewitness. Under the doctrine announced in this state no presumption of guilt

arises from the mere possession of stolen property. The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury when weighed in connection with all other evidence adduced at the trial. *Williams v. State,* 60 Neb. 526, 83 N. W. 681; *Ridenour v. State,* 119 Neb. 688, 230 N. W. 587.

The defendant in this case was in possession of the stolen property very shortly after the robbery and his possession is unexplained. He sold the property late at night for much less than it was worth. The facts and circumstances surrounding the commission of the crime and the subsequent sale of the property by the defendant are in no way inconsistent with his guilt. The jury were clearly justified in concluding that the defendant was guilty after considering the evidence produced.

Defendant complains that it was not established that the crime charged was committed in Brown county. It is true that defendant was seen with the property in his possession only in Cherry county. Venue may be proved, however, by circumstantial evidence. *Union P. R. Co. v. State,* 88 Neb. 547, 130 N. W. 277. The evidence tending to prove that the crime charged was committed by the defendant, when it is established that the crime took place in Brown county, is also evidence which the jury can rightfully consider in determining whether the defendant committed the crime in the county where the charge was filed. The evidence as to venue was sufficient to sustain the finding of the jury.

Defendant complains that the trial court erred in not imposing an indeterminate sentence instead of the flat sentence of five years. The indeterminate sentence law, in so far as it applies to this case, is as follows: "Every person over the age of eighteen years convicted of a felony * * * shall if judgment be not suspended or a new trial granted be sentenced to the penitentiary, but the court imposing such sentence may *in its discretion* and providing such person has not previously been confined in any penitentiary

impose upon such person an indeterminate sentence." Comp. St. 1929, sec. 29-2620. (Italics ours.) It appears that the imposing of an indeterminate sentence under this act is discretionary with the trial judge. There is no evidence in the record which shows that the defendant has or has not been previously confined in any penitentiary. There is nothing in the record from which this court could say that the trial court abused the discretion which the statute confers upon it. There being no error affirmatively appearing, the presumption necessarily is that the trial court acted properly in imposing the sentence.

Defendant relies upon *Griffith v. State,* 94 Neb. 55, 142 N. W. 790; *Brown v. State,* 103 Neb. 271, 171 N. W. 906; *Seaton v. State,* 109 Neb. 828, 192 N. W. 501; *Ingoldsby v. State,* 110 Neb. 495, 194 N. W. 457; *Gragg v. State,* 112 Neb. 732, 201 N. W. 338. These cases all refer to crimes committed prior to the enactment of the present indeterminate sentence law and consequently have no application to the case at bar.

It is argued that a sentence of five years in the penitentiary is excessive. After a consideration of the nature of the offense and the circumstances as shown by the record, we conclude that there is merit in this contention. By authority of section 29-2308, Comp. St. 1929, the sentence is reduced from five to three years in the state penitentiary.

No prejudicial error appearing in the record, the judgment is affirmed as modified.

AFFIRMED: SENTENCE REDUCED.

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FRANK W. BELL, APPELLANT, V. LOUIS DENTON, DOING BUSINESS AS TALMAGE MILLS, APPELLEE.
284 N. W. 751

FILED MARCH 17, 1939. NO. 30559.

1. **Workmen's Compensation.** A claimant for compensation under the workmen's compensation law has burden of establishing that he suffered injury from an accident arising out of and in

the course of his employment. Comp. St. Supp. 1937, sec. 48-152.

2. ———: COMPENSABLE INJURIES. In order that an injury be compensable under the workmen's compensation law, it must arise out of and in the course of employment.
3. ———: ———. "There must be a causal connection between the employment and the injury before a recovery can be allowed on a disability arising out of and in the course of employment." *Sheets v. Glenwood Telephone Co.*, 135 Neb. 56, 280 N. W. 238.
4. ———: ———. Where an employee deviates from his employment and is injured while engaged in his own business or enjoyment, the injury is not compensable under the workmen's compensation law.
5. ———: ———. The evidence in the record examined, and found to establish that the accident and injury resulting therefrom did not arise out of and in the course of employment.
6. ———: APPEAL. "No certified transcript of the pleadings and orders of the workmen's compensation court is required to be filed in the district court in order to give it jurisdiction of an appeal in which a rehearing or retrial has been waived before the compensation court." *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352.
7. ———: ———. "To give the district court jurisdiction in a compensation case in which a rehearing or retrial is waived before the compensation court, it is only necessary that there be filed, within fourteen days, a waiver of rehearing and a notice of intention to appeal in the compensation court, and an application or petition for a trial *de novo* in the district court, setting out the errors on which it is sought to reverse or modify the award of the compensation court." *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352.

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

*Lloyd E. Peterson*, for appellant.

*Tyler & Frerichs, contra.*

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

MESSMORE, J.

This is an appeal from an order of the district court for Otoe county, entered July 23, 1938, setting aside an award made to the plaintiff in the workmen's compensation court, for the reason that plaintiff failed to show with reasonable

certainty that his accidental injury arose out of and in the course of his employment, and that the plaintiff had failed to sustain the burden of proof required of him by law. From this order plaintiff appeals.

The question to be decided is whether or not the injuries received by plaintiff in an accident arose out of and in the course of his employment, within the meaning of the workmen's compensation law.

Defendant Denton, owner of the Talmage Mills, dealing in flour and feed, had employed the plaintiff as a traveling salesman for 14 years, furnishing him with an automobile and paying all expenses incident to its maintenance and operation in the performance of plaintiff's work. The plaintiff worked on a commission, and in addition was to receive $5 a week for making deliveries. The process of taking orders was made in triplicate in an account book, one slip for the customer, one for the mill, and one remaining in the book of the salesman. Deliveries ordinarily were made subsequent to the soliciting of orders, and when collections were made the money was delivered to defendant. The territory covered by plaintiff was within a radius of 60 to 75 miles from the mill and comprised towns in Nebraska, Missouri and Iowa. Before starting upon the territory each day, plaintiff and defendant would talk over and decide upon the territory to be covered. Plaintiff was apparently under the direction of the defendant. There was no specified time in which he was to complete each day's work. The territory was covered in a 1936 Chevrolet pick-up truck, of 3,000-pounds capacity, and often additional merchandise was carried in the truck to supply any purchaser in the territory. The evidence as to the condition of the truck on the day the accident occurred is insufficient to disclose that defective mechanism of the truck caused the accident in question.

On May 10, 1937, 8 or 10 cases of pancake flour were loaded on the truck at the mill, and plaintiff started out to cover certain towns in his territory, arrived in Nebraska City between 4 and 5 o'clock p. m., called on customers

there, and then went to the Olympia Café for supper. He completed his supper shortly before 6 o'clock. While in the café he met Paul Winton, proprietor of the Pine Ridge Tavern. While there, a telephone call came for Mr. Winton, who told plaintiff that Mrs. Winton had called him about some Indians or Gypsies who wanted to camp at the farm. Plaintiff stated that he had been around Indians some place and he would like to go out and see them, and, in addition, he told Mr. Winton that if his son Bruce, who was in Omaha, came in, for him, Winton, to bring him out to the farm. Plaintiff went to the tavern, which was three and a half miles south of Nebraska City, and when he entered asked Mrs. Winton about the Indians. Subsequently he met a former customer from Cook, Nebraska, and they sat in a booth, drank beer and talked for about an hour, and at different times the plaintiff would dance with Mrs. Winton and with a girl who worked at the tavern. Plaintiff testified that he stayed at the tavern for about an hour. Mrs. Winton testified that he was there for about two hours. During this time he requested Mrs. Winton to call the Olympia Café in Nebraska City and ascertain if his son Bruce had arrived. Pursuant to this request, she did call and learned that Bruce had arrived. She suggested that his father desired him to come out to the tavern. Bruce having no means of conveyance, his father directed Mrs. Winton to say that he would come in and get him. Plaintiff is also reported to have stated that he would be back. The foregoing testimony is fairly well corroborated by four witnesses.

The plaintiff then left the tavern and started for Nebraska City. He testified that when about a mile and a half south of Nebraska City he went around another automobile, turned back into his side of the road, "and the car seemed to pull to one side, and I thought I had a flat tire or blow-out and it pulled up on the shoulder and went over the bank," resulting in serious injury to plaintiff. He was removed to a hospital in Nebraska City in an ambulance about 8 o'clock in the evening.

Plaintiff testified that on May 1, 1937, while in Nebraska City, he called at the Grand Hotel, which had been a customer for a year or so, for the purpose of selling pancake flour; that the chef told him that the next time he came to bring him a case. No written order was taken. Plaintiff was in Nebraska City on May 8 and for two hours on Monday, the 10th, prior to the time of the accident in question, but did not deliver the case of pancake flour to the Grand Hotel. He further testified that he would be through Nebraska City two or three times a week, going into other territory. The Pine Ridge Tavern was not a customer of his, and there was no particular reason, except for his own amusement, that he should go there. Nothing was said by plaintiff and the proprietors of the tavern that in any manner had to do with the business in which plaintiff represented the defendant. No business was transacted with the former customer.

After the plaintiff was injured his son Bruce worked for defendant for a period of three weeks, and he delivered a case of pancake flour to the Grand Hotel after having previously told the defendant of the statement, made to him by his father at the hospital, with reference to the sale. There is some evidence of pancake flour being found near the truck after the accident,—four or five 5-pound packages. Bruce testified that he had no arrangement to meet his father that night. At the hearing before the compensation commissioner, plaintiff testified that he had finished his business in Nebraska City. Plaintiff stated that his reason for stopping at the Pine Ridge Tavern was that he thought about the pancake flour and that he had not delivered it to the hotel; that he drove to the tavern "and turned around and come back out." This statement is not corroborated, because he did stay in the tavern for a period of time, as shown by the great weight of the evidence.

Plaintiff's injuries were a fractured vertebra in the neck and one in the back, three ribs broken, a cut over the back of his head, and ruptured blood vessels in his foot. His wages averaged a trifle over $100 a month.

It is well established that the burden of proof is upon the claimant to prove that accidental injuries received by him arose out of and in the course of his employment. The rule, in substance, has been announced in *Pensick v. Boehm,* 124 Neb. 28, 244 N. W. 923; *Kuhtnick v. Carey,* 124 Neb. 762, 248 N. W. 89; *Mullen v. City of Hastings,* 125 Neb. 172, 249 N. W. 560; *Saxton v. Sinclair Refining Co.,* 125 Neb. 468, 250 N. W. 655; *Price v. Burlington Refrigerator Express Co.,* 131 Neb. 657, 269 N. W. 425; *Porter v. Brinn-Jensen Co.,* 131 Neb. 611, 269 N. W. 96; *O'Connor v. Abbott,* 134 Neb. 471, 279 N. W. 207; *McCall v. Hamilton County Farmers Telephone Ass'n,* 135 Neb. 70, 280 N. W. 254.

It is likewise well established in this state that an injury to be compensable under the workmen's compensation law must be received out of and in the course of the employment. There must be a causal connection between the employment and the injury before recovery can be allowed, and the disability must arise out of and in the course of the employment.

The evidence in the instant case shows that when plaintiff left the Olympia Café for Pine Ridge Tavern he deviated from his employment and was at the tavern for his own amusement, and when he left to return to Nebraska City, presumably to deliver a case of pancake flour to the Grand Hotel, he, in reality, was going after his son Bruce, who was not in the employment of defendant, and for whom the defendant was in no way obligated to furnish transportation. Plaintiff had ample opportunity on previous occasions to deliver the case of pancake flour to the Grand Hotel, as shown by the evidence. He had not resumed his employer's business at the time of the accident resulting in his injuries.

Where an employee deviates from his employment and is injured while on his own business and enjoyment, the injury is not compensable under the workmen's compensation law. See *Sheets v. Glenwood Telephone Co.,* 135 Neb. 56, 280 N. W. 238.

Subdivision (c) of section 48-152, Comp. St. Supp. 1937,

in part reads: " 'Personal injuries arising out of and in the course of employment,' it is hereby declared * * * not to cover workmen who on their own initiative leave their line of duty or hours of employment for purposes of their own." Where an employee breaks the continuity of his employment and is injured before he brings himself back into the line of his employment, the injury does not arise out of and in the course of his employment.

The cases cited by the plaintiff are distinguished from the case at bar particularly in the facts. The most pertinent cases cited may be briefly summarized as follows:

In the case of *Perry v. Johnson Fruit Co.*, 123 Neb. 558, 243 N. W. 655, the employee, a traveling salesman, was repairing his automobile so that he could start out on a trip for his employer, as was his custom. In the case of *Struve v. City of Fremont,* 125 Neb. 463, 250 N. W. 663, a fire chief was preparing to attend a firemen's convention, as ordered by the city council. In the case of *Kirkpatrick v. Chocolate Sales Corporation,* 127 Neb. 604, 256 N. W. 89, the employee, a division superintendent of the company, whose duties required him to travel, left his home at 8 o'clock on the day in question, went to his office to perform services for his employer, and while in that service, in going for a taxicab to take him to a railway station where he intended to board a train for Lincoln, he was struck by an automobile and fatally injured. Recovery was permitted. There is nothing in the record to indicate that he started for Lincoln for his own pleasure or business. He at all times was engaged in the business of his employer, which distinguishes the case from the one at bar.

The workmen's compensation law accepts as an inevitable condition of industry the happening of accidents. Its outstanding purpose is to shift from the employee to the industry the burden of economic waste or loss, arising out of and in the course of employment. It is a law of general interest, not only to the workman and his employer, but to the state as well, and, being remedial in its nature, it should be construed so that technical refinements of inter-

pretation will not be permitted to defeat it. At the time of its passage and approval the law did not contemplate extending, and there is now no intention to extend, the course of employment so that all accidents suffered by a workman should be within the scope and arise out of his employment. The legislature did not intend to impose such a liability on employers, and this court, acting under its proper sphere, cannot do so. The work contemplated, to permit a recovery, must arise out of and in the course of the employer's business,—some duty which the workman is employed to perform or a duty incidental to that work. If incidental, it must be incidental to the main character of the business for which the employee was engaged by the employer. It cannot occur independent of the relation of master and servant. In the instant case, the plaintiff did not sustain the burden of proof required of him by law, and the judgment of the district court must be sustained.

Plaintiff filed a motion for a new trial, setting forth newly discovered evidence. We have examined the motion and affidavits in support thereof and are forced to the conclusion that the plaintiff has failed to sustain his case and to assume the burden of proof required of him, even in view of the consideration of such newly discovered evidence, as contended by him. There was no prejudicial error in the overruling of the motion for a new trial.

The plaintiff contends that a certified transcript of the pleadings and orders of the compensation court is necessary to give the district court jurisdiction of an appeal from a decision of one judge of the compensation court, where a rehearing before the full court is waived.

Section 48-174, Comp. St. Supp. 1937, prescribes the general procedure in compensation cases. The same authorities cited by the plaintiff and the defendant in the instant case were cited and presented to this court in the case of *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352, which is determinative of the jurisdictional question involved in the instant case, and which holds as follows:

"No certified transcript of the pleadings and orders of the workmen's compensation court is required to be filed in the district court in order to give it jurisdiction of an appeal in which a rehearing or retrial has been waived before the compensation court.

"To give the district court jurisdiction in a compensation case in which a rehearing or retrial is waived before the compensation court, it is only necessary that there be filed, within fourteen days, a waiver of rehearing and a notice of intention to appeal in the compensation court, and an application or petition for a trial *de novo* in the district court, setting out the errors on which it is sought to reverse or modify the award of the compensation court. The statement of errors in the application or petition does not limit the scope of the hearing in the district court, but merely serves to point out the questions or issues which should be given particular attention on the retrial."

In the case at bar, the exhibits attached to plaintiff's petition on appeal are copies of the plaintiff's petition filed in the compensation court, the defendant's answer filed therein, and the award of a single judge of the compensation court, and virtually constitute a transcript of the proceedings had, which meets the suggestion as set forth in *Hansen v. Paxton & Vierling Iron Works, supra.*

AFFIRMED.

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JOSEPH KRAL ET AL., APPELLANTS, V. LINCOLN STEEL WORKS, APPELLEE.

284 N. W. 761

FILED MARCH 17, 1939. No. 30608.

1. **Workmen's Compensation:** DEPENDENTS. Where the evidence shows that parents, with limited means, actually received contributions for their support from the wages of a son now deceased, such fact constitutes evidence strongly tending to establish dependency, and the question of dependency or partial dependency must be determined from the facts in each case.
2. ———: ———. Under the facts as shown by the record, the

plaintiffs are held to be partial dependents of the deceased employee, and, as such, are entitled to compensation within the meaning and contemplation of the workmen's compensation law. Comp. St. 1929, sec. 48-124, subds. (e), (f), (g), and sec. 48-122, subd. 2.

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

*Lloyd L. Pospishil,* for appellants.

*Chambers, Holland & Locke, contra.*

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

MESSMORE, J.

Plaintiffs brought this action for compensation, claiming to be partially dependent on their deceased son, who admittedly lost his life in the course of his employment. A judge of the compensation court granted an award for burial benefits and $4 a week for 325 weeks to plaintiffs as partial dependents. From this award the defendant appealed to the district court for Lancaster county, where the case was tried *de novo.* Plaintiffs' award was vacated, and the claim for compensation dismissed. Plaintiffs appealed to this court.

The sole question involved in this appeal is whether or not the plaintiffs are dependents, within the meaning and contemplation of the workmen's compensation law of this state.

Joseph Kral, 67, and Emma Kral, 64 years of age, were for many years tenant farmers. About 10 years ago they sold their personal effects, realizing therefor the sum of $500, and purchased a small home in Dodge, Nebraska, valued at about $800. There were nine children in their family; two died, four married, and one son, who several years ago was in a Civilian Conservation camp, made a contribution of $25 a month to his parents for more than a year. This son has not contributed to the parents since then and is now married and living in California. Another

son lives at home and works for the state at intervals, receiving about $16 a month in wages, and he contributes $5 monthly to the support of his parents. The parents have no property other than the home, and the father, who is apparently in good health, does odd jobs when able to obtain employment. A few years ago he worked on a government project, but has not subsequently been regularly employed; nor do he and his wife receive old-age assistance. Apparently, the married children have been unable to contribute to the support of their parents.

The son James, 26 years of age, had been more fortunate than other members of the family in procuring employment. He had been employed at different times for four years during the harvest season at Lodge Pole, Nebraska. He had also worked for the Union Pacific railroad at different times, and had been employed by the state. The winter preceding his death he worked for the state, receiving 35 cents an hour, during which time he lived at home. In March, April and May preceding his death, he worked on an extra gang for the railroad, receiving 40 cents an hour. Subsequently he spent about six weeks in the harvest fields, and had worked five weeks for the defendant, when, on September 20, 1937, he met with an accident which caused his death. His wages were about $18.50 a week or about $75 a month. There was due at the time of his death the sum of $14.25, which was paid to his father by the defendant.

Section 48-124, Comp. St. 1929, after providing for total dependency, in subdivision (e) provides in part: "In all other cases, questions of dependency, in whole of (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." Subdivision (f) of said section provides in part: "No person shall be considered a dependent, unless he or she be a member of the family of the deceased employee, * * * or

ancestor." Subdivision (g) reads: "Questions as to who constitute dependents and the extent of their dependency shall be determined *as of the date of the accident to the employee,* and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto." (Italics ours.)

Subdivision 2, of section 48-122, Comp. St. 1929, provides: "If at the time of the accident which resulted in his death the deceased employee leaves no persons wholly dependent, but leaves persons *partially dependent* upon his earnings for support, compensation shall be paid on account of the benefits provided in subdivision 1 of this section for persons wholly dependent, in the proportion that the average amount regularly contributed by the deceased from his wages *for a reasonable time immediately prior to the accident,* to such persons who were partially dependent, bears to the total wages of the deceased during the time." (Italics ours.) The foregoing provisions of the statute apply in the instant case.

A married sister of James lived at Schuyler, Nebraska, about 32 miles from Dodge. She testified, in substance, as follows: Prior to Labor Day James left $11 with her, to be given to his parents, and she delivered this amount to her father. On the Saturday before his death, James gave her $14, to be delivered to his parents. Anton, a brother, testified as to James working in the harvest fields, on the railroad, and for the defendant company. The father testified that James contributed $25 a month before he died, and more than $25 a month during the summer; that he had been employed most of the time between March 1 and September 20, 1937, and did contribute over $20 a month during the months of March, April, May, June, July, August and September, 1937; that he contributed a dollar a day when he was living at home and working for the state, and had received 40 cents an hour while employed by the railroad company. The testimony in reference to employment of James stands uncontradicted.

Having in mind the provision of section 48-124, Comp.

St. 1929, that the question as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and, further, that the term "dependents," as used in the act, is construed to mean dependents in fact, whether wholly or partially dependent (2 Schneider, Workmen's Compensation Law (2d ed.) 1235, sec. 371), a consideration of the evidence and circumstances in the case and an analysis thereof are necessary in determining the applicability of such evidence and circumstances to the sections of the statute hereinbefore cited.

Where persons of scant means, such as the plaintiffs, actually received contributions for their support from the wages of a son, now deceased, such fact would constitute evidence strongly tending to establish dependency, and the question of dependency or partial dependency must be determined from the facts in each particular case. *Derinza's Case,* 229 Mass. 435, 118 N. E. 942; *McMahon's Case,* 229 Mass. 48, 118 N. E. 189; *Day v. Sioux Falls Fruit Co.,* 43 S. Dak. 65, 177 N. W. 816.

The defendant makes certain deductions from the evidence to defeat plaintiffs' claim for compensation. Anton, the brother, testified, on cross-examination, as to the expenses James would have to bear in living in Lincoln while in the employ of defendant. These expenses were recited in detail and included the purchasing of work clothes, board and lodging, dress clothes, the cost of laundry, and incidentals; and, in addition thereto, defendant, by deduction, concludes that James was contemplating matrimony with a young lady from Schuyler, and that if he spent money for entertainment of various kinds, refreshments or presents, and in addition maintained and operated an automobile, having made at least two trips to and from Schuyler, a distance of 65 miles, the total amount of his expenses would be nearly as much as he received each month while in the employ of the defendant. The alleged matrimonial venture of James and his expenditures for the young lady are not shown with any degree of certainty, and the testi-

mony of Anton as to James' expenses is fallacious, in that there is nothing to show that Anton had the same experience or lived under the same circumstances as James had. James did move to a filling station, presumably to reduce his expense for lodging, when he left a hotel. For 14 days that he had worked for the defendant James received $44.81; for the next 15 days $33.56; and for the four days previous to his death $14.25. Under the circumstances, he could have paid his expenses, and have sufficient money to make the contributions, as testified to, while he was in defendant's employ.

The defendant relies upon a variance in the testimony of the witnesses in the compensation court and their testimony in the district court. James' sister testified in the compensation court that James had worked in the harvest fields about six weeks, and when he returned stated that he had given his parents $25; she knew he gave them this amount because it was left with her, and she delivered it to their parents, and at another time he left $11 with her, in all $36. In the district court she testified that on one occasion James left with her $11 and on another $14, which she delivered to her parents. On rebuttal, she testified that she must have misunderstood counsel; she meant that James gave his parents $25 that he received from his work in the harvest fields, and the only money he left with her was what he had from the defendant, $11 and $14, and that he paid her 70 cents for doing his laundry; that in all he delivered to her $25. The variance in the testimony of Anton in the compensation and district courts is that in the compensation court he did not testify to contributions made, and in the district court testified that he made a contribution of $5 monthly. The variance in the testimony of the father, as given in the compensation and district courts, relates to the amount of contributions. The father testified in the compensation court that James came to Dodge, while he was working for the defendant, two or three times, and in the district court this evidence was denied, the father stating that he received the money from James' sister in

Schuyler. Plaintiffs maintained a small garden and had about a dozen chickens, and the husband worked at odd jobs when he could obtain such employment.

In cases of this character, it is very difficult, due to the change in employment of the son and in his wages, and the lack of opportunity for a common laborer to obtain employment, to properly fix the amounts and time of making contributions to the parents by the son. The plaintiffs are elderly people of foreign extraction, and, due to their environment, lack of advantages, and apparent lack of education, cannot be expected to meet situations with the same degree of exactness as persons of more experience and education would meet them. All of the circumstances must be taken into consideration and allowance made therefor.

While the learned trial judge had the opportunity to observe the witnesses, their general conduct and demeanor while testifying, and to determine the truthfulness or untruthfulness of the stories told by them, and his observations and conclusions as to the credibility of the witnesses are entitled to great consideration, we believe the evidence shows affirmatively that contributions were made by the son James over a reasonable period of time prior to his death; that his parents were partially dependent upon him, and that his contributions were made with reasonable certainty as to amounts and when contributed. This is further borne out by the fact that after James' death his parents were in dire circumstances, and, from necessity, negotiated a loan from their son Frank to pay for the necessaries of life and taxes. The deductions made from the plaintiffs' evidence upon which the defendant solely relies are insufficient to defeat plaintiffs' claim for compensation.

Two Nebraska cases are cited by counsel. One, *Palmer v. Hamer*, 133 Neb. 362, 275 N. W. 322, is cited by defendant on the theory that plaintiffs are not presumed to be dependents, within the meaning of the workmen's compensation law, but must prove the fact of dependency at the time of the death of the deceased son. In that case, an itinerant and intermittent house painter was divorced from

his wife; she was awarded the custody of the children, remarried, and the children were being supported by the stepfather. One daughter testified to contributions made to her by her own father, which testimony the court branded as perjury. Such state of facts did not show dependency on the father, and compensation was denied the plaintiff. In the instant case, contributions were made by the son to his partially dependent parents, and the facts are in no way analogous.

The Nebraska case relied upon by the plaintiffs is *Parson v. Murphy,* 101 Neb. 542, 163 N. W. 847. In that case the son was not living with his mother and was not supporting her at the time of his death. That fact did not bar her right to compensation if she needed support of her son, even though she had $300 or $400 in the bank, drawing interest. Dependency is not based solely on legal obligation to support, and the question is not determined by the fact that the decedent had or had not contributed to the support of the parent before the date of the accident. If the mother is legally entitled to support, and there is probability that she will receive it, she is a dependent. The court said (p. 546) : "It cannot be known, and it will not be presumed, that Nels Parson, if living, would be unmindful of his filial duty, with or without promise, to support his aged and dependent parent."

In the case at bar, the evidence shows that the parents were in need and were partially dependent upon their son James. There was more than the actual fact that they needed the support of James; they actually obtained support from him over a reasonable period of time prior to his death. More than a legal obligation to support existed; more than the need of support existed; actual support was shown. Obviously, the case at bar is a much stronger case than *Parson v. Murphy, supra,* and this court in the latter case held the mother was entitled to compensation, within the meaning of the act. The facts in the instant case harmonize with both decisions and are not at variance therewith.

The workmen's compensation law is highly remedial both in character and purpose. It should be liberally construed in order to accomplish its purpose, and technical refinements of interpretation will not be permitted to defeat it. *Parson v. Murphy, supra; Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.

We believe that the evidence in this case supports the award made by the compensation court in the amount of $4 a week for 325 weeks; that plaintiffs are partial dependents, within the meaning and contemplation of the workmen's compensation law.

The judgment of the district court is reversed, and the cause remanded with directions to the district court to enter an award for plaintiffs in harmony with this opinion.

REVERSED.

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WILLIAM P. WALLACE, APPELLEE, V. EDGAR PETERSON, APPELLANT.

284 N. W. 866

FILED MARCH 24, 1939. No. 30491.

1. **Judgment.** Where the record of a county court shows on its face a petition stating a cause of action, a waiver of summons and a voluntary appearance by defendant, a recital that evidence was heard and a judgment against defendant, it is sufficient to show jurisdictional facts.
2. **Homestead.** A controversy between a judgment creditor and his debtor over the claim of the latter that he has in land an undivided exempt homestead estate upon which the sheriff has levied under an execution on the judgment is not an issue for the determination of the sheriff, though notified of the claim and of objections thereto.
3. ———. A contested claim by defendant that he has an undivided exempt homestead estate in land is not a proper subject for consideration in proceedings to confirm the sheriff's sale thereof under an execution.
4. **Execution.** On motion to confirm a sheriff's sale under execution, the subjects for determination are the regularity of levy, appraisement, advertising, sale and return of the sheriff, antecedent proceedings not being disturbed.

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

*Porter & Skaggs*, for appellant.

*Sloans, Keenan & Corbitt, contra.*

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

ROSE, J.

Under an execution on a judgment against Edgar Peterson, defendant, his undivided one-sixth interest in 160 acres of land in York county was sold by the sheriff to William P. Wallace, plaintiff, for $1,750. Defendant claimed an exempt homestead interest in the land. The district court confirmed the sheriff's sale and defendant appealed from the confirmation to the supreme court.

The original action was commenced in the county court of Fillmore county to recover the amount due on a promissory note payable by defendant to Wallace & Company, bankers, a corporation, plaintiff. Attached to the petition, when filed, was a waiver of summons and a voluntary appearance by defendant. The county court entered by default a judgment in favor of plaintiff and against defendant. A transcript of the judgment was filed in the district court for Fillmore county and another transcript was filed in the district court for York county. The judgment was assigned to William P. Wallace, plaintiff herein, January 7, 1927.

Defendant and his brothers and sisters, six in all, owned the land under the will of their father, subject to the life estate of their mother. The father died in 1933 or 1934, and the mother died in February, 1937.

Following is a chronology of proceedings: June 7, 1921, judgment against the defendant in county court of Fillmore county for $918.53; May 6, 1926, transcript filed in district court for Fillmore county, execution issued and returned unsatisfied; April 12, 1928, transcript prepared by clerk of district court for Fillmore county filed in the

office of the clerk of the district court for York county; March 19, 1931, execution issued out of the district court for York county and returned unsatisfied; November 13, 1935, execution issued out of the district court for York county and returned unsatisfied; May 27, 1937, execution issued out of the district court for York county and levied by the sheriff on the undivided one-sixth interest of defendant in the land; June 24, 1937, notice to sheriff of defendant's claim for homestead exemption and demand for release of levy; June 29, 1937, denial by plaintiff of any homestead right of defendant and direction to sheriff to proceed with the sale; July 1, 1937, claim for homestead and denial thereof disregarded by sheriff and defendant's undivided one-sixth interest in the land sold to plaintiff for $1,750; July 12, 1937, motion to confirm sale filed by plaintiff; December 23, 1937, supplemental objections to confirmation filed by defendant; March 29, 1938, objections to confirmation overruled and sale confirmed; April 18, 1938, motion by defendant for vacation of confirmation and for new trial overruled.

As grounds for reversal of the judgment confirming the execution sale, the original judgment of the county court of Fillmore county and the subsequent proceedings leading to the issuance of the execution on which defendant's interest in the land was sold are all challenged as void. These numerous complaints were made and the homestead exemption interposed after the sheriff levied on defendant's interest in the land. No attempt was made to review or to directly set aside the original judgment. It was challenged as void because the voluntary appearance was undated and the signature thereon not identified as genuine. The appearance was attached to the dated petition which shows the date of the filing. For the purpose of the original judgment, which recites the hearing of evidence, the record of the county court is sufficient to show the jurisdictional facts. The record does not show on its face invalidity of the original judgment nor a void levy by the sheriff in York county.

After notice to the sheriff of defendant's claim for the exemption of a homestead estate, there was a controversy between the parties on the validity of that claim. By affidavit defendant stated he and his wife had selected his undivided share of the land or the proceeds thereof, if sold, as their exempt homestead property. Plaintiff denied the validity of such a claim and stated that the land had not been the homestead of defendant's parents or either of them since 1921; that the home of defendant was in Crawford, Dawes county; that defendant, after his marriage, never occupied the land or any part of it as his homestead. The controversy over the homestead exemption was not one for the determination of the sheriff. *Kaley v. Eselin,* 108 Neb. 544, 188 N. W. 254. Plaintiff purchased at his peril the interest which defendant claimed as exempt. The same controversy was presented to the district court on motion for confirmation of the sale and objections thereto. The law seems to be settled by former opinions. In *Best v. Zutavern,* 53 Neb. 619, 74 N. W. 81, the following rules were announced:

"The homestead right of exemption of real property under the laws of this state is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution.

"The only matter settled and adjudicated in the proceedings and order of confirmation is as to the proceedings of the sheriff and those acting under and with him in the levy, appraisment, advertising, making, and returning of said sale." See, also, to the same effect: *Kaley v. Eselin,* 108 Neb. 544, 188 N. W. 254; *Schribar v. Platt,* 19 Neb. 625, 28 N. W. 289; *Wollmer v. Wood,* 119 Neb. 248, 228 N. W. 541; *Best v. Grist,* 1 Neb. (Unof.) 812, 95 N. W. 836; *Prudential Ins. Co. v. Diefenbaugh,* 129 Neb. 59, 260 N. W. 689.

The proceedings under the writ were regular and the district court so found. The confirmation of the execution sale conformed to the law and is

AFFIRMED.

O. W. GROSC, APPELLANT, V. HENRY BREDTHAUER, APPELLEE.
284 N. W. 869

FILED MARCH 24, 1939. No. 30562.

**Process:** VENUE. Section 20-409, Comp. St. 1929, as amended by chapter 44, Laws of Nebraska for 1937, construed, and *held*, to authorize the commencement of a tort action in any court of competent jurisdiction in any county in this state wherein the cause of action arose, though neither plaintiff nor defendant were residents thereof; and also to authorize the issuance of process by such court for any defendant to the county of his residence in this state, and for the due service thereof upon him therein.

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

*Votava, McGroarty & Sklenicka*, for appellant.

*Lanigan & Lanigan* and *Young & Williams, contra.*

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

EBERLY, J.

This is an appeal from an order of the district court for Douglas county sustaining a special appearance of defendant challenging the jurisdiction of that court over his person, and the order of the court, on its own motion, dismissing the action of plaintiff.

The petition in the instant case, in apt language, set forth and charged the commission of a tort by defendant, by alleging, with necessary particularity, that plaintiff's car "on or about the 8th day of May, 1935, at about the hour of 2:30 p. m.," while being driven west on highway 30 S at a point about one and one-half miles east of Waterloo, Nebraska, was negligently struck and damaged by a truck then owned by defendant, and then operated for and under his control; and also then and there and thereby physical injuries were inflicted upon plaintiff, as in the petition set forth, whereby he was damaged in the sums alleged therein, and which pleading contained an appro-

priate prayer. Upon the filing of said petition in the district court for Douglas county on July 6, 1938, a summons was issued, directed to the sheriff of Greeley county, Nebraska, and in said county of Greeley, by that officer, served upon defendant. The defendant was a *bona fide* resident of Greeley county, and the service was thus made in the county of his residence.

The controlling question is determined, under the facts disclosed by the record, by the proper construction and application of section 20-409, Comp. St. 1929, as amended in 1937. The legislature of that year enacted chapter 44, Laws 1937, without an emergency clause, which was duly approved March 27, 1937. It was entitled, "An act to amend sections 20-406 and 20-409, Compiled Statutes of Nebraska, 1929, relating to venue of civil actions; to provide where actions for tort may be brought; and to repeal said original sections." As indicated by the quoted title, the act contained two sections, viz.: Section 1 relating to section 20-406, Comp. St. 1929, which was considered by this court in *Schwarting v. Ogram*, 123 Neb. 76, 242 N. W. 273, 81 A. L. R. 769, and, as a venue prescribing statute, duly sustained. Section 2 of this act, is as follows: "*Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants, may be summoned.* Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned." (Italics supplied.)

The italics supplied indicate the additions made by this act of 1937. The unitalicized portion indicates the section as it was prior to amendment. The clear language of the statute as amended is that a tort action "against a resident or residents of this state" must be brought, (1) in the county where the cause of action arose, or, (2) in the

county where the defendant, or some one of the defendants, resides, or, (3) in the county where the plaintiff resides and the defendant or some one of the defendants may be summoned.

No constitutional questions are presented by the record. We are limited to the single question of the proper construction of the legislative language employed.

The petition alleging that the accident took place one and one-half miles east of Waterloo, Nebraska, this court will take judicial notice of the fact that Waterloo is situated within Douglas county, and that the place of collision was within the boundaries of that county. *Green v. Paul*, 60 Neb. 7, 82 N. W. 98.

It is obvious, therefore, that the "cause of action" in the instant case arose in Douglas county, and that the terms of the amended statute quoted expressly fixed that county as a proper place of trial of that action. We are committed to the rule, viz.: "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone*, 92 Neb. 748, 139 N. W. 636.

So construing section 20-409, Comp. St. 1929, as amended, with section 20-504, Comp. St. 1929, which provides, "When the action is rightly brought in any county, according to the provisions of this Code a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request," it is clear that the instant action was properly commenced, i.e., rightly brought, in Douglas county, and the issuance of the summons for defendant in Greeley county and its service therein was strictly within, and authorized by, the statutory provisions above quoted. This conclusion is supported by the principles announced in the following cases, viz.: *Carter v. Bankers Life Ins. Co.*, 83 Neb. 810, 120 N. W. 455; *Nebraska Mutual Hail Ins. Co. v. Meyers*, 66 Neb. 657, 92 N. W. 572; *Vennum v. Huston*, 38 Neb. 293, 56 N. W. 970; *Insurance Co. v. McLimans & Coyle*, 28 Neb. 653, 44 N. W. 991; *Atchison, T. & S. F. Ry. Co. v. Drayton*, 292 Fed. 15.

The fact that the amendment of section 20-409 was enacted in 1937 does not prevent its application to a cause of action arising in 1935. It relates wholly to procedure, is remedial in its nature, is to be liberally construed, and is not restricted in its operation to causes of action thereafter arising.

The right of plaintiff to dismiss an action commenced by him in Greeley county, prior to the adoption of the amendment under consideration, may not be gainsaid. Comp. St. 1929, secs. 20-601, 20-602, and 20-603. Thereafter the proper forum for its determination was as specified by the laws existing at the time of its commencement, viz., July 6, 1938, and was in no manner limited by restriction of the laws of procedure existing at the time the cause of action arose, when such restriction had subsequently been repealed. *Lovelace v. Boatsman*, 113 Neb. 145, 202 N. W. 418; *Norris v. Tower*, 102 Neb. 434, 167 N. W. 728; *Houston & T. C. R. Co. v. Graves & Co.*, 50 Tex. 181; *In re Petition of Monaco*, 287 Ill. App. 540, 5 N. E. (2d) 755; *Kugel v. Telsey*, 250 App. Div. 638, 295 N. Y. Supp. 148; *Link v. Receivers of Seaboard Air Line Ry. Co.*, 73 Fed. (2d) 149.

It follows, therefore, that in its judgment sustaining the special appearance, the district court erred. This judgment, thus, is reversed and the cause remanded with directions to overrule the special appearance of defendant, and for further proceedings in harmony with this opinion.

REVERSED.

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STEPHEN B. MILES, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

285 N. W. 90

FILED MARCH 24, 1939. No. 30496.

1. Mortgages: FORECLOSURE: ANNUAL CROPS. Annual crops growing on the land are treated as personalty and as such do not pass to the purchaser at judicial sale.
2. ———: ———: ———. Where a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1933, is ter-

minated and the sale of the mortgaged lands confirmed by the court, the landlord's share of the annual crops then growing thereon is the property of the mortgagor in the absence of an agreement to the contrary.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

*Quintard Joyner, Clinton B. Nasby* and *Mullen & Schepman,* for appellant.

*Weaver & Weaver, contra.*

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

CARTER, J.

This is an action at law brought by Stephen B. Miles to recover a judgment against the Prudential Insurance Company of America for the conversion of an undivided two-fifths of a certain wheat crop sown in the fall of 1935 and harvested in the summer of 1936. A jury was waived and a trial had to the court, which resulted in a judgment for plaintiff for $935.43. Defendant appeals.

The record shows that on and prior to June 20, 1932, Joseph H. Miles was the owner of the land upon which the wheat in question was grown. On that date the Prudential Insurance Company, defendant herein, being the owner and holder of a real estate mortgage on the land, commenced its suit to foreclose the mortgage. A foreclosure decree was entered on October 17, 1932, in the amount of $26,879.50. A nine months' stay of execution was taken as provided by statute, and thereafter, on July 28, 1933, Joseph H. Miles filed a request for a moratory stay in accordance with section 20-21,159, Comp. St. Supp. 1933, which was granted on August 28, 1933. On August 18, 1933, Joseph H. Miles and wife conveyed the premises to their son, the plaintiff in this action. On January 6, 1936, defendant applied for a confirmation of the sale, the sale price being $24,000 which would leave a deficiency of $4,452.73. On February 10, 1936, the sale was confirmed

by the district court. Deficiency judgment was waived, but the claim of the mortgagee to any rents was expressly reserved.

In granting the moratory stay on August 28, 1933, the court appointed one Bert C. Ranz as receiver to collect the rents and profits in accordance with the provisions of the order granting the stay. On January 28, 1935, the receiver leased the premises to J. W. Dryer for a term commencing March 1, 1935, and ending February 29, 1936, which lease was duly approved by the court. On January 30, 1936, the receiver filed his report showing a balance on hand, which the court directed to be paid to "the clerk of this court for the use of plaintiff, and he is further ordered to pay to the clerk of this court all other moneys, if any there be, in this matter, for the use of the plaintiff."

At the time of the confirmation of the sale on February 10, 1936, there were sixty-five acres of growing wheat on the land. An agent of the defendant company collected $863.20 from the sale of the undivided two-fifths of the wheat, the same being the landlord's share of the crop. The question to be determined is whether plaintiff or defendant is entitled to the wheat crop, or the value thereof.

It has long been the rule in this state that annual crops growing on the land do not pass to the purchaser at judicial sale, and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty. *Aldrich v. Bank of Ohiowa*, 64 Neb. 276, 89 N. W. 772; *First State Bank v. Prudential Ins. Co.*, 131 Neb. 730, 269 N. W. 816.

It is contended by defendant that the terms of the moratory statute, section 20-21,159, Comp. St. Supp. 1933, divest the mortgagor of any claim to rents after the mortgagee invokes it for his protection. Even if true, the foregoing rule can have no application to the present case for the reason that the crop was harvested and sold long after the moratory stay had been terminated. Except for the moratory stay, it would be conceded that mortgagor would be the owner of the landlord's share of the growing crop.

The terminating of the moratory stay thereupon placed the parties in the same position as before the granting of the stay. It seems to us, therefore, that on the confirmation of the sale, the defendant became the owner of the premises subject only to the right of reentry on the part of the mortgagor to care for and harvest the annual crops growing on the land. The mortgagee received all the rents collected during the period the moratory stay was in force. That is all that the moratory law gives him in lieu of his right to an immediate sale of the premises. Whenever the land was sold, whether at the termination of a moratory stay or without the invocation of this statutory right, it would be subject to the rule as to annual crops then growing on the land.

There is no evidence of any agreement as to the ownership of the growing crops nor does the court in its decree make any disposition of them. The defendant is in no better position than a purchaser foreign to the suit, and such a purchaser certainly would take title subject to the right of the mortgagor to reenter for the purpose of caring for and harvesting his annual crops. We must necessarily conclude that the landlord's share of the crops in question was rightfully held by the trial court to belong to the plaintiff.

AFFIRMED.

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FALSTAFF BREWING CORPORATION, APPELLANT, V. FRANK E. SMITH ET AL., APPELLEES.

284 N. W. 868

FILED MARCH 24, 1939. No. 30513.

1. **Husband and Wife.** When a married woman's contract is that of a surety only, coverture is a complete defense, unless it be established that she signed it with the intention of binding her separate estate for its payment.
2. ———. The intent with which a married woman signs a contract is usually a question for the jury.
3. ———. The want of legal capacity of a married woman to contract cannot be supplied by estoppel.

APPEAL from the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

*Crofoot, Fraser, Connolly & Stryker* and *Kelsey & Kelsey*, for appellant.

*Webb Rice, contra.*

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

CARTER, J.

Plaintiff commenced this action to recover on a written guaranty signed by Frank E. Smith and Cora A. Smith. The defendant Cora A. Smith pleaded that she was a married woman and that she never intended to bind her separate estate. The jury returned a verdict in favor of Cora A. Smith, and plaintiff appeals.

It appears from the record that Frank E. Smith and Thomas McCurdy were operating a business known as the Norfolk Beverage Company. In order to establish a credit with the Falstaff Brewing Corporation, a written guaranty was executed and signed by Frank E. Smith and Cora A. Smith by which they guaranteed "the Norfolk Beverage account up to $1,000 limit." Both signers also executed a joint property statement in which the individual property of Cora A. Smith was listed. There was no statement in the guaranty to the effect that Cora A. Smith intended to bind her separate estate.

The testimony of Cora A. Smith was that her husband asked her to sign the guaranty, and that she said she would if it did not implicate her property in any way, and that his reply was that it was just a form. She testified that she knew her husband was going to use the guaranty to obtain credit for the Norfolk Beverage Company. Plaintiff claims that by giving a property statement, listing her separate estate, Cora A. Smith is estopped to deny that she intended thereby to bind her separate property.

It is the law of this state that, where a married woman's

contract is that of a surety only, coverture is a complete defense unless it be established that she signed it with the intention of binding her separate estate for its payment. *Grand Island Banking Co. v. Wright,* 53 Neb. 574, 74 N. W. 82; *First Nat. Bank v. Ernst,* 117 Neb. 34, 219 N. W. 798; *John Fletcher College v. Estate of Pailing,* 121 Neb. 847, 238 N. W. 750. Whether the contract of a married woman was so made is ordinarily a question of fact.

Where the intent of a married woman in signing a written guaranty is a direct issue, it is competent for her to testify that she had no intent to bind her separate estate, the weight of such testimony being a matter for the jury to consider. Likewise, evidence that she knew that the guaranty was going to be used to obtain credit thereon, and the fact that she gave a property statement in which she listed her separate estate, are proper for the jury to consider in determining whether she intended to bind her separate estate. The fact that she knew that the guaranty was to be used to obtain credit is not sufficient to estop her from denying an intent to bind her separate estate. Neither is the fact that she joined with her husband in executing a property statement, in which she listed her separate estate, sufficient to create an estoppel.

The common-law disability of a married woman to contract is in force in this state, except as abrogated by statute. In the absence of an intent to charge her separate estate, a married woman lacks the power to bind it. The question is one of *power* and not of *intention.* If the married woman had no power to bind her separate estate because the necessary intent was lacking, certainly no acts or representations made by her, in the absence of actual fraud, could have the effect of estopping her from denying a liability which she had no power to incur. Want of legal capacity to contract cannot be supplied by estoppel.

The intent with which Cora A. Smith signed the guaranty in the instant case was a question of fact. This question was properly submitted to the jury and we find no reason for interfering with the verdict.

AFFIRMED.

## ROBERT R. MERRITT, APPELLEE, V. ASH GROVE LIME & PORTLAND CEMENT COMPANY, APPELLANT.

285 N. W. 97

FILED MARCH 31, 1939. No. 30417.

1. **Trial.** If the pleadings set out a simple statement of the cause of action, and the defense thereto, in concise language, without repetition, and the evidence tends to support such facts, there is no prejudicial error in the trial court presenting a synopsis of such pleadings to the jury in an instruction ending with words to this effect: The foregoing instruction is merely a statement of the claims made by each of the parties to this lawsuit, and, except as to any admissions contained therein, is not to be taken by the jury as evidence in the case.
2. ———. If the court refuses a proffered instruction, and so indicates on the margin thereof, but embodies statements therefrom in one of the court's instructions, this in no way violates section 20-1112, Comp. St. 1929, and is not prejudicial.
3. **Evidence.** When, by the unlawful acts of a tort-feasor, one is prevented from taking up a profitable option, it is not error to admit in evidence competent proof that the holder of the option was ready, willing, and able to exercise his option.
4. **Vendor and Purchaser.** An option, based upon a sufficient consideration, for the purchase of real estate, which cannot be withdrawn before the expiration date, vests in the legal holder thereof a property right which courts will protect.
5. **Appeal.** Jurors should not make private inspection of the *locus in quo* during a trial, and it is prejudicial if such visit improperly influenced the verdict rendered.
6. ———. It would be an injustice to deprive an innocent party of his verdict in every case, simply because there was a casual inspection of the premises by some of the jurors who may have been compelled to pass that location, if it is clear that such inspection did not improperly influence the verdict returned.
7. **Jury.** A juror's personal knowledge of the facts of a case does not always preclude him from serving as a member of a jury, but while deliberating as a juror he must not make known any fact which was not brought out in the evidence received in court.
8. **Appeal.** When a juror visits the *locus in quo* privately during a trial, but does not discuss any of his observations with the other members of the jury, the error therein, if any, is cured if all of the members of the jury, at their request, neither litigant objecting thereto, visit the place in company with the trial judge and the sheriff.

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

*William R. Patrick* and *William H. Herdman,* for appellant.

*Waldron, Newkirk & Mathews, contra.*

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

PAINE, J.

This is an action in tort for damages to leasehold for the destruction of lakes in sandpits used in hatching rainbow trout, and for the value of fish destroyed by overflow of the Platte river near Louisville, Nebraska, caused by obstruction and damming the flow of the river by the defendant. A judgment was entered upon the verdict in the sum of $4,000. Motion for new trial overruled. Defendant appeals.

The amended petition charges that the Ash Grove Lime & Portland Cement Company, a corporation, which will hereinafter be called the defendant, has its principal place of business northeast of Louisville, Cass county, Nebraska, being engaged in mining and quarrying rock and stone, and the manufacture of lime, cement, and other products; that Robert R. Merritt, the plaintiff, has been engaged in the business of hatching and rearing fish, for which purpose he owns and manages a fish hatchery for stocking public and private streams; that on March 1, 1935, plaintiff leased from the trustees of the Lyman-Richey Sand & Gravel Company approximately 73 acres of land and lakes adjacent to the Platte river, and directly across from the mines, quarries, and plant of the defendant, which are located along the south or easterly bank of the Platte river; that the said lease was for a term of three years, and contained an option to purchase such real estate for $50 an acre. Under the lease the plaintiff had the privilege of erecting buildings and fences, constructing ponds and dikes, placing pipes for conveying water, and improving

the property generally for growing fish, and for all other purposes except the sale of sand and gravel. There were four lakes upon the premises, formed by deep dredging operations, the water therein being pure, clear, and cold, and fed by underground streams, and kept at an even temperature, thereby being particularly adapted to the rearing of trout, and said premises constituted a valuable site for the fish hatchery business, and as a private fishing resort. It is further alleged that the plaintiff made extensive and valuable improvements on the premises, including dikes, drains, pipes, flume, screens, landscaping improvements, rearing-pools for fish, tool and implement house, and a five-room residence for the plaintiff's family; that prior to the wrongful acts of the defendant corporation the premises constituted a valuable site for the fish hatchery business and a private fishing resort; that from time immemorial the Platte river had run in an ample, deep, and well-defined channel along the base of the high hills across the river from plaintiff's premises, and at no time had the waters of the Platte river overflowed said premises; that the defendant, especially during the last two years, has wilfully, wrongfully, unlawfully, and tortiously continued to dump and discharge into said channel of the river enormous quantities of earth, stone, and other heavy waste materials, which constituted a complete, permanent obstruction and barrier to the flow of the river in its natural channel; that its flow was impeded and dammed up by such obstructions dumped by the defendant; that on March 5, 1936, the dammed-up waters were diverted and turned aside to the westward, washing away the dike and railroad embankment, and rushed through, over and across the plaintiff's premises, cutting an entirely new and permanent channel across the same, and totally destroying the lakes and improvements, and rendering the premises wholly unfit for any useful purpose, to the plaintiff's loss in the sum of $18,000, later amended.

The defendant, for answer to the plaintiff's amended petition, admits that plaintiff leased the premises and

took possession thereof about March 1, 1935, but alleged that the lease was canceled March 12, 1936; admits that there were four ponds or lakes on the leased premises, with a house thereon occupied by the plaintiff, but denies all other allegations in said amended petition contained.

The trial of this case in the district court began on November 1, 1937, and lasted for two weeks, and many witnesses were called by each party, and their testimony is found in four volumes of the bill of exceptions of more than 1,100 pages. There are also 80 exhibits, consisting of plats, blueprints, maps, four aeroplane photographs, one aeroplane mosaic, together with letters and many photographs, some recent and others taken many years ago. To adequately present all of the facts in the case, and the law relating thereto, an argument of one hour on each side was allowed in this court, and the case was taken under consideration, and recently a reargument of the whole case was ordered.

The defendant charges that the evidence does not sustain any recovery whatever for the plaintiff, and that the court should have instructed a verdict for the defendant.

Defendant claims in its briefs that the south channel was never permanently or even temporarily closed, other than by temporary ice lodging downstream below said dump, and that the uncontradicted evidence of its witnesses shows that the only cause of the ice jams which backed up water into plaintiff's premises was the insufficient depth of water in said channels to carry the abnormally thick ice past the lower end of Cornish Island. Defendant charges there is no proof that water which flooded plaintiff's premises was diverted thereto by any act of defendant, for no one saw any water diverted from the south channel to or upon the plaintiff's premises. Defendant claims plaintiff misrepresented as to the location of its dump, for it is located on the south bank of a bend in the river, and causes no interference whatever with the flow or volume of water passing that way. Defendant says that the uncontradicted testimony of three eminent engineers is that

the dump exerted no influence whatever upon the water and the ice at the time of plaintiff's damage, for the very obvious reason that said dump is 1,200 feet downstream on the opposite side of a large island, and over three-quarters of a mile from where the river broke through the flimsy sand levee into plaintiff's premises.

A careful examination of the evidence of plaintiff's many witnesses tells an entirely different story, supported in some particulars by defendant's witnesses, and would support and warrant the jury in finding that there is credible evidence that the great volume of water in the Platte river for many years flowed to the south of Cornish Island and over against the south bank, where the Burlington tracks ran along the bank, and where the Burlington railroad kept its tracks well riprapped from being washed out by the deep channel which flowed along the Burlington track.

One witness for plaintiff was Joel Cornish, an Omaha attorney, who testified that he was a son of former Supreme Court Justice Cornish, and was born down there, and for many years spent his summers at a summer house they had at Meadow, near Louisville, their home being on a hill above the river, and that he was frequently at Cornish Island, and played around the river and on Cornish Island many summers, and was there regularly every summer since 1931. He testified that in the early days the main channel of the Platte river came through toward the north end of the bridge, say four or five spans out, went straight across in front of Cornish Island, and flowed over to what was called the south bank of the river; that the water between Cornish Island and the main north bank of the river was always very shallow, except in extreme flood stage rarely more than knee deep, although there might have been some places a little deeper; that from 1931 to 1936 he observed the dumping operations of the defendant company; that he has been there and seen rocks splashing into the water from the dump, and that bars were forming out in that channel down below the

dump. He testified that Cornish Island was all in Sarpy county, and that in 1936 he was down there every two or three days up to a day or so before the flood; that he was there the next day after the water broke through, and that the water was not running south of Cornish Island immediately after the flood. He testified that his family formerly owned the land in controversy in this case.

Albert Cornish testified that he lived at Meadow, about a mile and a half from the Louisville bridge, on the north side; that his family owned Cornish Island before he was born, and he is now 30 years of age; that he waded over to Cornish Island many times during the early years; that he never waded from Cornish Island over to the south bank of the river.

The testimony, which the jury must have accepted, under the instructions of the court, was to the effect that before 1929 the defendant company commenced its hydraulic stripping, and ran a flume under the Burlington track, and the waste materials were washed directly into the channel on the south side opposite Cornish Island, the flume being moved up and down the river as the released materials piled up. Then the defendant company replaced the flume under the track by an overhead flume about 1931, and this carried the hydraulic stripping in the form of mud and rocks. These deposits built up a flat bar where the channel of the Platte river had been for some distance up and down stream, continually pushing the river farther out from its south bank. Hauling by truck began about 1932 of the dry earth, shale and rock, the trucks running out on a viaduct over the Burlington track, and dumping their loads off the end of a trestle. This dumping went on continuously until the date of the flood, March 5, 1936, which caused the damage to the plaintiff. Rocks rolled down the steep incline of the sides of this dump, which had become 70 feet high. Some of the rocks taken out by truck would weigh half a ton or more. The dump increased in size until it finally reached out for 420 feet of the entire 1,050 feet of open water between the south bank and Cornish

Island. The great bars formed of this material constantly narrowed the channel of the Platte river, as well as making it more shallow, which caused the immense amount of sediment always carried to make deposit above the dump proper.

The gradual stoppage of the current on the south side of Cornish Island forced a heavy flow of water across the upper end of said island, and overburdened the channel on its north side, which had an opening of only 210 feet at the lower end of Small Island.

For many years before the defendant's dumping into the river began, the ice breaking up each spring had been carried and readily cleared down the wide watercourse to the south of Cornish Island. When the ice break came in March, 1936, ice moved through and under the bridge and downstream, and lodged and jammed across the south channel from the defendant's dump over to Cornish Island, and then along the north channels next to Cornish Island, until all the channels were blocked with ice. About noon March 5, 1936, the water rising behind this ice jam forced itself at a sharp angle to the north and through the plaintiff's earth embankment, or dike, north of the river, which dike was about 20 feet in height, and through the Missouri Pacific spur track.

Plaintiff testified that the dike which separated his fish hatchery property from the river was not a frail affair, constructed from pumpings of sand, as the defendant claims, but was made of black dirt, stripped off the top, and placed there with a dragline.

Plaintiff's testimony supports his contention that at the time of the flood there was no ice gorged at either of the bridges; that the spans of the highway bridge and the railway bridge were 60 feet long, there being about 20 spans in each of the bridges; that there was no ice between the bridges; that there was no ice jam upstream from the bridges; that the piles from old bridges did not cause a jam, for the high water was flowing 10 or 12 feet over the tops of these old piles; that the flood of water finally

broke through the embankment at about noon; that one of the two breaks was right on his property; that it took about an hour to wash right through the embankment; that the railroad embankment washed out within 60 feet of the house.

It is impossible to set out in greater detail the large amount of evidence relating to the effect of the defendant company's dumping enormous quantities of earth, rock, shale, and other waste materials into the Platte river in its stripping operations to quarry the rock to manufacture lime and cement. Evidence clearly indicates that this dumped débris constituted an obstruction over 1,100 feet in length and over 400 feet wide. Upon and against this obstruction an ice jam formed, backing the water up, and on March 5, 1936, the water, rising for some distance upstream because thereof, finally was forced at a sharp angle through a dirt embankment, or dike, and through a spur track of the railroad track, which it tore out, and then rushed through the entire length of plaintiff's property. The fish were all washed down the Platte river; his hatchery plant was destroyed; only about one-tenth of an acre of land was left, with the house and a portion of the tool-house remaining. So far as the evidence is concerned, the jury were warranted in returning a verdict for the plaintiff.

We will now consider the propositions of law relied upon by the defendant for reversal. Its first two propositions of law are: That the trial court rejected instruction No. 1 offered by the defendant, which undertook to set out very briefly the contents of the amended petition and answer, the same constituting less than a page; and, instead, gave as instruction No. 1 three pages, to which the trial court had condensed the six pages of the amended petition and answer. It is argued by the defendant that this court has frequently criticized and condemned the practice of copying pleadings into instructions, and that the error is so flagrant in the case at bar that the defendant, anticipating that such a contingency would arise, and the

fatal effect thereof, tendered its instruction No. 1, which stated the issues in conformity with the rules of this court.

Defendant cites *Murray v. Burd,* 65 Neb. 427, 91 N. W. 278, and *Murphey v. Virgin,* 47 Neb. 692, 66 N. W. 652, which hold that copying pleadings into the instructions may be ground for reversal unless the error is without prejudice.

The defendant also cites *First Nat. Bank v. Davis,* 123 Neb. 304, 242 N. W. 655, in which the practice of copying pleadings is disapproved and held to be prejudicially erroneous. In examining the transcript in that case, it appears that it involved intricate questions in regard to a guaranty, and other legal documents, signed by a number of defendants and given to the First National Bank of Hastings, and the jury rendered a verdict for $85,158.65. The court's instructions to the jury were most unusual, for they began with an "introductory statement" of the case, 19 pages long, which embodied the substance of all of the pleadings in the case, and then followed the regular instructions Nos. 1 to 9, inclusive. It is stated in the opinion that the ordinary jury could not digest the involved facts, or comprehend the issues, as set out in the 19 pages of such preliminary statement of the case, and held that the instructions did not clearly submit the theory upon which the case was tried.

This court stated in *Hutchinson v. Western Bridge & Construction Co.,* 97 Neb. 439, 150 N. W. 193, that it was reversible error to include in the instructions of the court allegations of fact found in the petition but which had not been supported by any evidence.

On the other hand, in the recent case of *Scott v. New England Mutual Life Ins. Co.,* 128 Neb. 867, 260 N. W. 377, the same question was again before this court, and our holding there was that it is not error for a trial court to incorporate in its instruction defining the issues the substance of the pleadings which set forth such issues.

It therefore appears that, if the pleadings give a simple statement of facts constituting the cause of action, and

the defense thereto, in ordinary and concise language, without repetition, as prescribed in section 20-804, Comp. St. 1929, and upon the trial the evidence tends to support such facts, then there is no harm in embodying a synopsis of such statements from the pleadings in an instruction to the jury, especially where, as in the case at bar, the trial court, at the close of instruction No. 1, which embodied the facts set out in the amended petition and answer, added this sentence: "The foregoing are merely a statement of the claims of the parties, and, except as to admissions, are not to be taken as evidence." Such an instruction, followed by this plain statement at the end, could not confuse the jury, and does not support the charge of the defendant that it was inevitably prejudicial.

In the opinion of this court, this proffered instruction No. 1 did not as fairly or adequately present all of the pertinent issues as the instruction No. 1 given by the court, and even if it be admitted that the court's summary might have been shortened somewhat, we still fail to find anything prejudicial in it.

Defendant's requested instruction No. 3 set out that, before the plaintiff could recover a verdict, he must prove by a preponderance of the evidence that his damage was caused solely by the unlawful diversion of the main channel of the stream, and by no other causes or contributing causes. The court refused to give instruction No. 3 as tendered, but gave instead instruction No. 4, which embodied practically the same language as in the first paragraph of instruction No. 3 offered by the defendant, but changed the second paragraph entirely, and added a third paragraph, reading as follows: "However, in this connection you are further instructed that if you find by a preponderance of the evidence that the act of the defendant in dumping and discharging of materials was the proximate cause of the jam or gorging of ice in the river at or near the location of such dumping and that such ice gorge obstructed the natural flow of the river so as to divert the water of the river on and across the property occupied by the plaintiff

thereby causing damage to the plaintiff, your verdict will be for the plaintiff in the amount of the damages which from the evidence and these instructions you find were sustained by him."

The defendant attacks this instruction No. 4, citing section 20-1112, Comp. St. 1929, which states generally that, if the court refuses to give a written instruction as demanded, but modifies the same, such modification shall not be by interlineation or erasure, but shall be well defined, showing the changes.

Defendant charges that this action of the court was a clear violation of the statute, because the court in no way indicated that instruction No. 4, as given by the court, was a modification of instruction No. 3 requested by the defendant, and cites *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746, 146 N. W. 986, in which it was held that the instruction as modified was prejudicial and constituted reversible error, and in *Hyndshaw v. Mills*, 108 Neb. 250, 187 N. W. 780, and *Goldman v. State*, 128 Neb. 684, 260 N. W. 373, and *Strubble v. Village of DeWitt*, 81 Neb. 504, 116 N. W. 154, it is held that, if instructions are offered which correctly state the law upon issues presented by the pleadings and supported by evidence received during the trial, it is error to refuse such instructions unless the points are fairly covered by other instructions given by the court on its own motion.

Defendant insists that the court has no right to make a proffered instruction state a different rule than the one therein given. We find that the section of the statute relied upon was adopted in the Laws of 1875, page 77, sec. 2. This was before the use of typewriters in courts, when instructions were laboriously written out in longhand, and provided that, if the court gave the instruction as submitted but with modifications, the court should clearly indicate the changes made. Even after the advent of typewriters, in the haste of a trial the presiding judge sometimes inserted in ink clauses modifying, or limiting, or expanding a statement in an instruction offered, and

clearly indicated, by his initials in the margin, or otherwise, that the instruction was rejected in the form offered, but as modified was given. Now, when judges have conveniently at hand official court reporters with typewriters, such practice is frowned upon, and judges should not modify a proffered instruction by making changes in it, but leave the instructions offered in the form in which they are tendered, so that in case of an appeal a record may be had of the exact instructions refused.

Now, in the case at bar, it is evident that the trial judge found the first paragraph of the offered instruction No. 3 was acceptable with minor changes. In the second paragraph he found suggestions which he used to some extent, but he found it necessary to add the third paragraph as set out above. In such a case, where the tendered instruction was not modified by interlineations or erasures, but the court simply adopted certain language therefrom in its own instruction, this does not in any way violate section 20-1112, Comp. St. 1929.

Defendant assigns as error the overruling of an objection to question No. 3972, as follows: "Q. Mr. Merritt, at the time you entered into this option, and referring especially to the clause in the option relating to improvements on the premises, 'By this lease party of the second part has the privilege of erecting buildings and fences, to make ponds, construct dikes, and place pipes for conveying water, and otherwise to improve the property for the purpose of growing fish, and all other purposes, excepting the production and sale of sand and gravel;' what was your intention when that provision was put in there and what were your intentions following that time with relation to going through with this option and taking this property up and paying for it? Mr. Patrick: Objected to as entirely speculative, immaterial, and self-serving in character. The Court: Overruled. Exception. A. I was intending to take up my option."

In the amended petition it was clearly set out that a covenant in the lease granted to the plaintiff the option to

purchase this real estate prior to March 1, 1938, for $50 an acre, and that the lease gave the privilege of erecting buildings, ponds, and dikes thereon for the purpose of growing fish, so that it became an issue in the case, for in the answer defendant admitted that the plaintiff took possession of the leased premises, with the four ponds or lakes situated thereon, and occupied the house thereon, but denied all other allegations relating thereto.

The defendant cites 1 Wigmore, Evidence, sec. 581, to the effect that a party should be disqualified from testifying to his own intent or motive, even where it is material to be investigated.

The plaintiff insists that the proper measure of damages, in an action in tort for injury done in making it impossible to carry out an option right, is the loss of, or damage to, the bargain which the option-holder has under his option contract, and that, in arriving at the value of such option contract which was destroyed by the unlawful acts charged against the defendant, it was not error for the court to admit in evidence competent proof that the holder of the option was ready, willing, and able to exercise his option, and but for the unlawful acts of the third person would have done so, and such evidence was given in this case by plaintiff.

In this connection, counsel for each side discuss at length the case of *Roper v. Milbourn*, 93 Neb. 809, 142 N. W. 792, in which it was held that an option to purchase a tract of land does not, before the acceptance of the option, vest in him an estate or interest in land, but that, in an action for breach of contract, damages that are fairly within the contemplation of the parties at the time they made the contract may be recovered. The same case came back to the court a second time in *Roper v. Milbourn*, 98 Neb. 466, 153 N. W. 557. Its first appearance here was from sustaining the demurrer to the petition, and the second appeal was from the trial of the main case, and it was again reversed because the jury disregarded an instruction which permitted a recovery for the loss of profits. The

court said: "The evidence is uncontradicted that plaintiff could have complied with the terms of his option and with his agreement to convey the title to defendant except for the latter's breach of contract." This court again reversed and remanded the case, upon the ground that the jury had not taken into consideration plaintiff's loss of profit. Two years later the case came to the court for the third time, and is found in 100 Neb. 739, 161 N. W. 277, and the verdict of the jury was affirmed.

In the last part of instruction No. 3 given by the court, which related to the option, it was said: "If you find from a preponderance of the evidence that the plaintiff's option to purchase this land at $50 per acre was a bargain in the sense that the fair market value of the option, as defined in these instructions, was a sum in excess of $50 per acre for the land, and if you further find from a preponderance of the evidence that the plaintiff, at the time of the flooding of this property, intended to purchase the land at $50 per acre, and was ready, willing and able, and had the financial ability to purchase it at that price, and, but for the flooding of the property by the acts of the defendant, would have purchased the land at that price, then plaintiff would be entitled to recover from the defendant any loss of, or depreciation in, the market value of his bargain, which you find he sustained at the time, and by reason of the flooding of the property. In computing depreciation in value, if any, of the plaintiff's interest as an option holder, under the rule of damages given you in these instructions, you cannot allow the plaintiff as damages any part of said option price of $50 per acre."

The plaintiff in the case at bar was granted the option to purchase at any time at the price of $50 per acre.

As stated in *Harper v. Runner,* 85 Neb. 343, 123 N. W. 313: "The option is part of the lease, and every provision in that instrument is supported by the identical consideration that vitalized all other parts thereof. * * * An option based upon a sufficient consideration for the purchase of real estate during a definite period cannot be withdrawn

before the expiration of that time, but vests the legal holder thereof with a right to acquire an interest in the land."

In 12 Am. Jur. 340, speaking of the protection afforded "property" under the Fourteenth Amendment to the Federal Constitution, it is said: "The property rights which are protected by the guaranty of due process are varied. No question arises over the more common forms of real and personal property. It is when the question arises over the less tangible forms of property that an inquiry into what is property must be made. It is a vested right which cannot be taken away except by due process of law."

In *Smith Co. v. Anderson,* 84 N. J. Eq. 681, 95 Atl. 358, the court said that an option in a lease to purchase lands is property.

As stated in *Harper v. Runner, supra*: "A subsequent purchaser who buys with knowledge that the occupant claims to have a contract for the purchase of the land is bound by the terms of that agreement, whether it is an option or an executory contract equally binding each party thereto."

In *Dengler v. Fowler,* 94 Neb. 621, 143 N. W. 944, the rights of an option-holder as against subsequent purchasers of the land are referred to as "equities."

In 84 A. L. R. 52, is a quotation from Professor Charles E. Carpenter in a note in 41 Harvard Law Review, 728, on "Interference with Contract Relations: Includes not merely the procurement of a breach of contract, but all invasion of contract relations, so that any act injuring or destroying persons or property which retards, makes more difficult, or prevents performance, or makes performance of a contract of less value to the promisee, may fall within its scope, it may be said that, the interest in a contract being a property right, a party thereto has a right of action against persons who are by their conduct substantially interfering with the performance thereof."

In 1 Restatement, Torts, 358, we are told that trespass on land is used in a broader sense than in common law;

that it includes soil, water, trees, and other growths thereon, and any structures erected thereon, or affixed thereto. And on page 381 it is said, in substance, that, if one enters land of another and destroys or removes therefrom a structure, or digs a well, or makes excavation thereon, or removes earth or some other substance therefrom, the possessor has a right for full redress.

Under the law as set out in instruction No. 3, the plaintiff was required to, and did, prove that he was ready, willing, and able to exercise his option.

If the jury found, as they did, that the defendant's wrongful acts caused the flooding and destruction of plaintiff's property, the wrong-doer should pay for the property and rights so destroyed, and we see no error in the ruling on the evidence relating to the option, or to the court's instruction.

The seventeenth assignment of error is the alleged misconduct of Juror Alfred Laschansky in visiting the *locus in quo* unofficially on Sunday, November 7, during the trial. Defendant insists that such conduct was highly prejudicial, and it was the duty of the trial judge to have granted a new trial.

It appears from the affidavit of Earl Mayfield, toll-taker on the bridge, that he saw Juror Laschansky in the vicinity of the toll-house on Sunday during the trial, and certain jurors made affidavits that Laschansky said he had visited the Ash Grove Lime & Portland Cement Company's plant and bridge on Sunday. As to whether he said this before or after the entire jury made their trip, is not shown.

We are cited to the case of *Kelley v. Adams County,* 113 Neb. 377, 203 N. W. 544, in which a verdict and judgment were reversed, and it was held that such act on the part of a juror disqualifies him as a juror. The decision was founded upon the case of *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1, 78 N. W. 359, in which case it appeared that several jurors visited the switch track where the accident occurred in Holdrege. It is said that this was a gross irregularity on the part of the jurors, and that jurors must

base their findings upon the evidence adduced at the trial, and may not make an inspection of the *locus in quo* unless a view is authorized by the trial court; that when a juror, on his own accord and without permission, visits and makes an inspection of the premises, it may be sufficient cause for vacating the verdict, but it will not have that effect if it is plain that such an examination was not influential in obtaining the verdict, and it is said that the view at the time it was taken could have been of no practical assistance in reaching a conclusion, and could not have influenced or affected the result, and the judgment was affirmed.

In *Rush v. St. Paul City Ry. Co.*, 70 Minn. 5, 72 N. W. 733, a case was reversed for this reason: In the text it is said that it would be an injustice to deprive an innocent party of his verdict simply because there was a casual inspection of the premises by some of the jurors, or because the jurors were familiar with the premises, and if verdicts were set aside for such reasons there would be no reasonable limit to litigation, especially in cities where some of the jurors in every case may pass the place where an accident occurred. Jurors should be warned at the commencement of every trial not to examine the locality except by order of the court, and it is said that courts cannot tolerate jurors going out on a private search for evidence, making an inspection on their own accord, and then discussing the matter with their fellow jurors in the box. But there is no claim made in the case at bar that the plaintiff was guilty of any misconduct in the matter of this one juror visiting the *locus in quo* on Sunday.

In *Meyer v. Omaha & C. B. Street R. Co.*, 125 Neb. 712, 251 N. W. 841, one of the jurors, for the express purpose of satisfying himself as to whether or not a witness who had testified could see all that he testified to, boarded one of the street cars of a type similar to the one involved in the accident, rode on the same for several blocks, sitting in exactly the same position as the witness testified he was sitting in, and after so doing the juror came to the con-

clusion that the witness could not have seen what he testified to, and after the jury had retired for deliberation on the case this juror stated to his fellow jurors what he had done and the conclusions he had drawn regarding this witness' testimony. This court held, in an opinion written by Judge Horth, that such conduct on the part of a juror disqualifies him as a juror, and was prejudicial, and the judgment was reversed. See, also, *Cook v. Patterson,* 129 Neb. 16, 260 N. W. 696.

In the case of *De Porte v. State Furniture Co.,* 129 Neb. 282, 261 N. W. 419, three of the jurors testified that a juror, Knott, compared the injury to plaintiff's knee with one that Knott had received in the World War, and said that if he had to choose between a normal leg and $1,000 a month he would take the normal leg. Juror Knott had gone to the records and discovered that on the former trial a verdict in favor of the plaintiff for $3,000 had been set aside by Judge Redick, and Juror Knott inferred that the verdict was not large enough, and his argument may have influenced the jury in arriving at a verdict of $4,500 in the case.

In a suit for personal injuries, where the jury had returned a verdict for $4,000, Judge Hamilton, in the United States district court for Porto Rico, stated the rule as follows: "5. The fact that one of the jurors visited the scene of the accident, and inspected the place and the arc lamp of the defendant, during the trial, is not material, inasmuch as the jury, judge, and marshal afterwards did the same thing. If this private visit was material, all question was removed by the official visit. The juror could not have seen more at one time than the other." *Root v. Porto Rico R. L. & P. Co.,* 6 P. R. Fed. 323. See 46 C. J. 143.

At an early time in England jurors were selected for the personal knowledge which they had of the facts involved in the case, and their verdict was based largely upon this knowledge, but in modern times the verdict of the jury must be based solely upon the evidence introduced in the case, and the personal knowledge of jurors must not be al-

lowed to enter into their deliberation. A juror's personal knowledge does not always preclude him from acting as a juror, but while deliberating as a juror he must not make known any fact which was not testified to in court. In Nebraska the fact that jurors have acted on their own personal knowledge constitutes prejudicial error (*Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529), but it has been said that such error will not vitiate the verdict in the absence of a showing that prejudice has followed from it (*Chicago, B. & Q. R. Co. v. Oyster, supra*), or if the verdict appears to be a just one in view of all the circumstances. 17 Standard Ency. of Procedure, 539.

After thus reviewing some of the decisions relating to the conduct of jurors as affecting the verdict, let us review the facts in the case at bar.

In the affidavit of L. R. Newkirk, plaintiff's attorney, it is stated that, after an expression in open court by the members of the jury that they would like to be permitted to view the location, he moved the court that the jury be allowed to do so, in custody of the sheriff; that a discussion was held by the court, in the presence of, but not in the hearing of, the jury, and that W. R. Patrick, attorney for defendant, stated that he wished to accompany the jury or be present when such inspection was made, to which affiant objected; that the court thereupon stated that he would accompany the jury when the inspection was made, whereupon Mr. Patrick stated that, if the court accompanied the jury on such inspection trip, he would make no objection to the jury viewing the premises in question. The court gave the jury the usual admonition that they were to refrain from discussing the case, to allow no one to discuss it with them, and not to make up their minds on the merits of the case until it had been finally submitted to them, and the trip was taken during the noon recess.

An affidavit of Will Sautter, one of the jurors, said he heard mention that Alfred Laschansky, a juror, made a visit to the location prior to the inspection by the jury as a whole, but he heard no mention or discussion, either by the

said Alfred Laschansky or any one else, as to what said juror had observed on the occasion of his visit, and that said juror, Alfred Laschansky, during the first part of the deliberations of the jury, was opposed to a verdict for the plaintiff.

The fact that thereafter all of the jurors, in company with the trial judge and sheriff, went over the location, and viewed it from vantage points, removes the prejudicial character of the conduct of this juror, especially in view of the section of the statute (Comp. St. 1929, sec. 20-853) which says that the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect, and in view of this statute this court cannot say that the action of the juror was prejudicial to the rights of the defendant.

We now come to the objections made to the amount of the verdict. Defendant states in his reply brief: "Plaintiff's claim of damage is not only imaginary, but so fantastically inflated that it deserves little consideration." This court should not allow a verdict founded upon an imaginary claim to stand. Therefore, we will examine briefly the plaintiff's evidence upon which the jury based their verdict of $4,000.

The plaintiff testified generally to the effect that all his life he had been a fish culturist; that he found this unusual layout of deep lakes, fed underground by clear water, which was ideal for the business of raising rainbow trout; that he leased the tract of land embracing these lakes, with an absolute option to buy. He then proceeded to develop a private fish hatchery and resort, where sportsmen could catch trout. He spent all of his own time, worth $1,750 a year, and $3,600 in cash, on improvements and in making runways and spillways, and developing this fish hatchery, the whole expenditure amounting to over $7,000. As a result, he had something over 5,300 large rainbow trout, averaging 15 to 18 inches long, and weighing an average of a pound and a half apiece. The males could be sold on the market at 50 cents to a dollar a pound. There were over

2,500 females which had begun to spawn, and were worth $5 to $6 apiece, as they would each spawn about 2,500 eggs, worth $2 to $2.50 a thousand on the market. The process of spawning is for the eggs to be pressed from the female during December, January and February, and placed in a small pan containing a quarter of an inch of water, and the milk from the male is taken at the same time and by the same method. The eggs from the female are flat and deflated, but after the germs enter and cause fertilization the egg is very much enlarged. They first put in 5,200 or 5,300 fingerling trout. They are counted accurately by the displacement method. Putting these small fish in a measuring tank raises the water 20 ounces for a thousand fish. These fingerlings run from six to eight inches long when they are a year old. The fish are fed a balanced ration of a mixture of meat and cereal, sometimes cooked and sometimes raw, and you see the fish as they are fed. Fishermen often caught the large trout on a line, and then paid for them at the rate of five cents an inch and took them home.

Plaintiff testified that the fair and reasonable market value of his option immediately prior to the flood in March, 1936, was $10,000 over and above the price that he had to pay for it; that immediately after the flood it was absolutely worthless.

The river had never gone through or over this railroad grade before. In less than one hour the water tore out the embankment and railroad grade, rushed the entire length of the lakes and property occupied by the plaintiff's fish hatchery, and entirely destroyed it.

It may be admitted that this case was most vigorously contested, thousands of objections being made to evidence; that there is scarcely an item in the evidence of the plaintiff which some witness of the defendant did not controvert, but these facts were all submitted to the jury, who visited the place in question, saw the situation of the dump, the island, the bridges, and must have accepted the evidence of the plaintiff's witnesses as to how the plaintiff's property was destroyed, and reached the conclusion that it was de-

stroyed by the enormous amount of material dumped into the wide channel of the Platte river between the south bank and Cornish Island by the Ash Grove Lime & Portland Cement Company, defendant.

We have examined the other assignments of error, but cannot discuss them, and find none of them prejudicial.

In the opinion of the court, a reading of this evidence fully supports the verdict of $4,000. There being no prejudicial error in the record, the judgment is hereby

AFFIRMED.

CARTER, J., dissenting.

The opinion of the majority shows that defendant dumped quantities of earth and rock into the south channel of the Platte river near its plant. It also shows that, at the time of the high water which caused the damage, there was an abnormal flow of ice. That an ice jam was formed is not disputed. The opinion recites that as a result of the ice jam the water of the river was backed up and caused to flow north of Cornish Island and through plaintiff's land, causing the damage of which complaint is made. The opinion does not show that any witness saw where the ice jam commenced to form. There is no expert testimony that the piling of the débris on the south side of the river caused the ice jam. On the contrary, three expert witnesses testified that defendant's operations had nothing to do with the flood or the damaging of plaintiff's property. The logic of the majority opinion seems to be that because débris was piled along and in the river, and subsequently an ice jam formed and a flood occurred causing plaintiff's damage, defendant's operations must have been the cause. Disregarding entirely the evidence of the experts to the contrary, I submit that the finding of liability, so far as the opinion of the majority is concerned, is based wholly on speculation and conjecture. Whether the cause of the ice jam was an abnormal flow of ice, or other obstructions in the river, or defendant's operations, has not been established by the evidence. The burden of proof was on the plaintiff to establish liability. The recitations in the majority opinion do

not show that plaintiff maintained the burden that the law casts upon him. Under our holding in *Welsh v. Platte Valley Public Power and Irrigation District,* 135 Neb. 441, 282 N. W. 385, when applied to the facts as stated in the majority opinion, plaintiff is not entitled to recover. If the facts stated in the majority opinion are sufficient to sustain a judgment, this defendant is subject to suit for all the damage done by the Platte river not only at the time in question, but every time damage is caused by an ice jam or high water at or near defendant's plant. That the law should fix such a liability by speculation, conjecture and supposition seems incredible to me. For these reasons I cannot agree with the opinion of the majority that liability has been established.

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JOHN F. CURRY, APPELLANT, V. ELMER BRUNS, APPELLEE.
285 N. W. 88

FILED MARCH 31, 1939. No. 30470.

1. **Automobiles.** A garageman who receives an automobile for the purpose of repairing it becomes a bailee of the car, and as such occupies the position of an independent contractor.
2. ———. A repairman receiving an automobile to repair is, in the absence of custom or contract, under no obligation to deliver it back at the owner's place of business or residence when the repairs are completed.
3. **Negligence.** One who drives an automobile as a mere accommodation or favor to the owner is the servant of the owner.
4. **Master and Servant.** The right of control, or the want of it, determines whether the relationship of master and servant or that of an independent contractor exists. Whether or not the right of control exists is ordinarily a question of fact for the jury, and is usually arrived at by inference from the terms of the contract, the character of the employment, and all other facts and circumstances.
5. **Trial.** When the facts pertaining to the relationship of the persons involved are in dispute, or more than one inference can be drawn therefrom, the question is for the jury.

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

*McKillip & Barth, J. J. Thomas* and *Ivan A. Blevens,* for appellant.

*Matzke & Bek* and *T. R. P. Stocker, contra.*

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

CARTER, J.

Plaintiff commenced this action to recover damages for personal injuries sustained as a result of an automobile collision alleged to have been caused by the negligence of the defendant. The jury returned a verdict for the plaintiff in the amount of $1,135. Judgment was entered on the verdict and plaintiff appeals.

The record discloses that on March 19, 1937, the plaintiff took his automobile to Jake Hartrum, a garageman, for servicing. Sometime between 4:30 and 6 o'clock that afternoon, the exact hour being in dispute, Hartrum called plaintiff on the telephone and asked if he should bring the automobile to plaintiff's place of business. On receiving an affirmative answer, Hartrum drove the automobile down the main street of Seward and stopped in front of plaintiff's store. Plaintiff walked out into the street between two parked cars, and as he was passing in front of his own car in order to take the driver's seat, defendant's car struck the rear of plaintiff's car, causing it to jump forward. The front bumper struck plaintiff's left knee, causing the injuries of which complaint is made.

The trial court instructed the jury that Jake Hartrum was the agent of plaintiff and any negligence on his part should be imputed to plaintiff, the owner of the automobile. Plaintiff contends that this constituted prejudicial error.

Jake Hartrum testified that between one and two p. m., on the day of the accident plaintiff left his automobile at the Hartrum place of business for servicing. At about 5:30 Hartrum called plaintiff on the telephone and told him that Mrs. Hartrum was at the garage, and, in order that he might take Mrs. Hartrum home because of the bad weather,

he wanted to bring the automobile over to plaintiff's store. Plaintiff told him that it would be all right. Hartrum thereupon delivered the car as previously stated. The question for determination is whether Hartrum was an independent contractor or the agent or servant of the plaintiff.

The record shows that the automobile was delivered to plaintiff by Hartrum as a result of Hartrum's request and for his convenience. The record also shows that the weather was bad and that the delivery of the automobile operated to the benefit of the plaintiff. There is no evidence in the record to indicate a previous course of dealing or custom on the part of Hartrum in dealing with the plaintiff with reference to delivering the automobile after repairs were made.

The delivery of the automobile to Hartrum for servicing created the relation of bailor and bailee, and made the garageman an independent contractor. There is no evidence of any agreement to deliver the automobile to plaintiff as a part of the service, nor is there any evidence that plaintiff was to pay for having the automobile delivered at the store. The conclusion that we draw from the evidence is that the delivery of the automobile was for the convenience of Hartrum as well as an accommodation to the plaintiff.

Under these circumstances we are unable to say, as a matter of law, that Hartrum was the agent or servant of the plaintiff. Whether he was an independent contractor, or an agent or servant, is a question of fact which must be determined after a consideration of all the evidence in the case. We conclude that the trial court was in error when it instructed the jury that Hartrum was the agent of plaintiff as a matter of law and that the negligence of Hartrum, if any, was imputable to the plaintiff. The following rules of law control the decision of the case.

A garageman who receives an automobile for the purpose of repairing it becomes a bailee of the car, and as such occupies the position of an independent contractor.

"In the absence of contract or custom, the bailee is under no obligation to make delivery to the owner, at either his

place of business or his residence, of the article left with him for repair." *Marron v. Bohannan,* 104 Conn. 467, 133 Atl. 667.

The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts.

When one has contracted with a competent and fit person, exercising an independent occupation, to do a piece of work for him according to the contractor's own methods and without his being subject to control, except as to the result of his work, the relationship is that of an independent contractor and not that of an agent or servant.

On the other hand, one who drives a car as a mere accommodation or favor to the owner of the car is the servant of the owner.

The right of control, or the want of it, is determinative of the relationship; for one who has no right of control over another ought not be required to answer for his acts, and, on the other hand, if one has such right of control he should be answerable. Whether or not the right of control exists is ordinarily a question of fact for the jury, and is usually arrived at by inference from the terms of the contract, the character of the employment, and all the relevant facts and circumstances. When the facts are in dispute, or more than one inference can be drawn therefrom, the question is for the jury. *Andres v. Cox,* 223 Mo. App. 1139, 23 S. W. (2d) 1066.

In view of the fact that the error pointed out will require a new trial of the case, it is not necessary for us to discuss the other assignments of error set out in the briefs. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

# O. G. PIERCE COMPANY, APPELLANT, V. CENTURY INDEMNITY COMPANY ET AL., APPELLEES.

285 N. W. 91

FILED MARCH 31, 1939. No. 30523.

1. **Pleading.** A general demurrer admits the truth of the allegations of an amended petition well pleaded, for the purpose of examination to determine if such amended petition states a cause of action.
2. **Statutes.** "In determining the intention of the legislature, all provisions of the statute bearing upon the point in dispute should be taken into consideration and given due weight." *City of Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280.
3. ———. "All statutes *in pari materia* must be taken together and construed as if they were one law." *Hendrix v. Rieman*, 6 Neb. 516.
4. ———. "In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed*, 3 Neb. 17.
5. ———. "In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto." *Hansen v. Dakota County*, 135 Neb. 582, 283 N. W. 217.
6. **Monopolies.** Section 59-806, Comp. St. 1929, of article 8 which is entitled "Unlawful Restraint of Trade," contemplates a cause of action on the part of a corporation against another corporation or person or persons who shall enter into any contract, combination or conspiracy, or shall give any direction or authority to do any act for the purpose of driving out of business any other corporation engaged therein.
7. ———. The word "person," as used in section 59-819, Comp. St. 1929, construed with section 59-806, Comp. St. 1929, is deemed to include corporations.
8. ———. Section 59-818, Comp. St. 1929, provides for damages to any corporation who shall be injured in its business or property by any other corporation, by reason of anything forbidden or declared to be unlawful by the article, i.e., article 8, ch. 59, Comp. St. 1929.
9. **Insurance.** Section 44-327, Comp. St. 1929, requires every insurance-soliciting agent or broker to annually procure a

license from the department of trade and commerce, and only a natural person shall be licensed as an agent or broker. This section of the statute is restricted to a soliciting agent or broker of insurance.

10. **Corporations.** A corporation in this state may carry on the business of an insurance agency through natural persons, under contract with it, duly licensed under the laws of Nebraska as soliciting agents, within the contemplation of section 44-327, Comp. St. 1929.

11. ———. An analysis of all the provisions of the statute under chapter 44, Comp. St. 1929, entitled "Insurance," bearing upon the point in dispute, considered and given due weight, taken together and construed as one law, and giving effect to all of its certain parts to discover the legislative intent from the language of the act, and given its proper effect and legislative intent, discloses that it does not prohibit a corporation from acting in the business of an insurance agency through persons employed by it, duly licensed as provided by section 44-327. Comp. St. 1929.

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

*Beghtol, Foe & Rankin,* for appellant.

*Hall, Cline & Williams, contra.*

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

MESSMORE, J.

Plaintiff brings this action to recover damages, alleging in its amended petition a conspiracy, on the part of the defendants, to drive it out of business, in violation of the provisions of article 8, chapter 59, Compiled Statutes of Nebraska for 1929, entitled "Unlawful Restraint of Trade." Defendants demurred generally to the amended petition for the reason that it did not state sufficient facts to constitute a cause of action. The demurrer was sustained by the trial court, holding, in effect, that the plaintiff, as a corporation, was prohibited from acting as an agent for insurance companies, and, therefore, any damage to its business could not be recovered, since that business, itself,

was in violation of law. Plaintiff elected not to plead further, and its petition was thereupon dismissed. Plaintiff appeals to this court, assigning as error the sustaining of the demurrer and dismissing of plaintiff's petition.

The pertinent part of the provisions of article 8, ch. 59, Comp. St. 1929, applicable to plaintiff's case, may be stated in substance as follows: Section 59-806: "Every person, corporation, joint stock company, or other association engaged in business within this state, who shall enter into any contract, combination or conspiracy, or who shall give any direction or authority to do any act for the purpose of driving out of business any other person engaged therein," etc. The word "person" appearing in said section, as defined by section 59-819, Comp. St. 1929, is deemed to include corporations. The balance of section 59-806, *supra*, is in the alternative and refers to competition and underselling, as will be readily ascertained by an examination thereof. Article 8 is entitled "Unlawful Restraint of Trade" and is patterned after the antitrust laws of the federal government, i. e., the Sherman and Clayton acts, with the exception that the Nebraska law is broader and provides protection against commerce (intrastate) as such, and in addition provides that any attempt to drive another person (corporation) out of business is unlawful. The act permits more liberality in its interpretation.

Section 59-818, Comp. St. 1929, provides for damages to any corporation who shall be injured in its business or property by any other corporation by reason of anything forbidden or declared to be unlawful by the article.

The plaintiff in its reply brief states that the validity of the Junkin act, the state act in restraint of trade, cannot be presented to this court at this time, because the matter was not argued at the time the demurrer was argued. We are not favored with the motion to strike or the ruling thereon, the same not appearing in the transcript. However, the provisions of the act are sufficient to provide a cause of action for the plaintiff, if the plaintiff, as a corporation, may bring such cause of action.

We next turn our attention to the plaintiff's amended petition, the contention of appellees (defendants), and an interpretation of the statutory provisions involved under the insurance code of this state.

The demurrer of the defendants admits the truth of the allegations of plaintiff's amended petition well pleaded. Therefore, an examination thereof becomes necessary to determine whether or not it states a cause of action.

The plaintiff's amended petition alleges that it is a corporation, organized under the laws of Nebraska, and a resident thereof; that the Century Indemnity Company is organized under the laws of Connecticut; that the defendant Herbert Lindquist is a resident of Nebraska and defendant Victor R. McDonald a resident of the state of New York; that the Aetna Insurance Company is organized under the laws of Connecticut, and the Century Indemnity Company is under and controlled by the Aetna Insurance Company, and is one of the Aetna group; that plaintiff was engaged in the business of writing insurance policies in all lines of insurance, except life, *through persons who were under contract with it duly licensed under the laws of Nebraska as soliciting agents;* that the amount of business is detailed in volume and revenue; that it was a necessary part of said business that plaintiff should be permitted to become agents for insurance companies, *to act through licensed soliciting agents,* and do any and all things customary for such insurance agent to do for its customers; that on November 16, 1932, the Century Indemnity Company presented to the plaintiff a fake and fictitious claim of indebtedness; that in November, 1933, it fixed such indebtedness at $2,613.13, when, in fact, the plaintiff was not indebted to such company and refused to pay any claim. The amended petition then details eight overt acts of alleged unlawful conspiracy on the part of the defendants, and alleges that the conspiracy was secret and an unlawful combination in the form of a trust and a conspiracy in restraint of trade and commerce in the state of Nebraska, devised and carried out jointly by the defendants. The alleged overt acts con-

stituting the conspiracy will not be here set out, for the reason that if the plaintiff is not prohibited from acting as an agent for insurance companies the amended petition states a cause of action. This brings us to the defendants' contention, which may be stated concisely as follows:

A corporation cannot be licensed as an insurance agent in the state of Nebraska, and cannot indirectly do what it is prohibited by law from doing. A party, whose sole claim for damages is based on a violation of law, has no legal right that has been infringed and cannot recover, regardless of laws alleged to have been violated by defendants.

"In the exercise of its police power the state may adopt statutes for the regulation of insurance agents, and may require that any agent doing business in the state shall have a certificate or license under state authority for the transaction of such business." *In re Carlson,* 87 Cal. App. 584, 262 Pac. 792. See, also, *La Tourette v. McMaster,* 248 U. S. 465, 39 S. Ct. 160. Many other cases indicate and uphold the right of a state to regulate insurance agents.

In Nebraska the legislature in 1913 adopted an insurance code entitled "Insurance." The pertinent part of section 44-327, Comp. St. 1929, relied upon by the defendants, follows: "Every insurance soliciting agent or broker shall annually procure a license from the department of trade and commerce which shall make and keep a record thereof. Only a natural person shall be licensed as an agent or broker."

" 'Persons also are divided by the law into either natural persons or artificial. * * * Artificial are such as are created and devised by human laws, for the purposes of society and government, which are called corporations, or bodies politic.' 1 Blackstone Commentaries, 123." *Chapman v. Brewer,* 43 Neb. 890, 898, 62 N. W. 320.

Section 44-323, Comp. St. 1929, provides: "No insurance company admitted to do business in this state shall write, place or cause to be written or placed, any policy of insurance covering risks located or residing in this state, except,

through or by a duly licensed agent of such company." The plaintiff's amended petition does not allege that plaintiff, a corporation, was ever licensed as an agent, as provided for in section 44-327, *supra*. Such petition alleges that the plaintiff employed individuals *who were duly licensed soliciting agents*. Many sections of the statute under chapter 44, entitled "Insurance," are cited, and it is entirely proper to analyze such sections to arrive at the evident intent of the legislature.

Under the rule of law requiring the court to construe statutes *in pari materia* together, so as to harmonize and give effect to their various provisions, we refer to section 44-102, Comp. St. 1929, entitled "Terms Defined." The part of this section applicable follows: " 'Agent' or 'insurance agent' is a person, copartnership, corporation, attorney, board or committee duly appointed and authorized by the insurance company, to solicit applications for insurance to be known as the soliciting agent, or to solicit applications and effect insurance in the name of the company, to be known as a recording or policy writing agent, and to discharge such other duties as may be vested in, or required of, the agent of the company." In the same section, in defining "insurance broker," reference is made to a corporation "who for compensation, not being an appointed agent for the company in which insurance or re-insurance is effected, acts or aids in any manner in negotiating contracts for insurance or re-insurance or placing risks or effecting insurance or re-insurance for a party other than himself or itself." The foregoing section of the statute clearly discloses that the legislature specifically included a corporation, as well as a natural person, within the description of an insurance agent.

Section 44-307, Comp. St. 1929, under the title " 'Agent' Defined," reads: "Any person, firm or corporation in this state who shall with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall with authority receive or

receipt for money from other persons to be transmitted to any such company or individual aforesaid for a policy or policies of insurance, or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid, shall be deemed, to all intents and purposes an 'agent' or 'agents' of such company."

Section 44-349, Comp. St. Supp. 1937 (Laws 1933, ch. 74), appearing under chapter 44, entitled "Insurance," in substance refers to sale, writing or soliciting insurance by banks, trust companies, investment companies or banks and affiliates, directed to cities of 100,000 population or over, and prohibits the sale, writing or soliciting of insurance on the part of such institutions.

"In determining the intention of the legislature, all provisions of the statute bearing upon the point in dispute should be taken into consideration and given due weight." *City of Lincoln v. Janesch,* 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762, 93 Am. St. Rep. 478; *Chilen v. Commercial Casualty Ins. Co.,* 135 Neb. 619, 283 N. W. 366.

"All statutes *in pari materia* must be taken together and construed as if they were one law." *Hendrix v. Rieman,* 6 Neb. 516; *Chilen v. Commercial Casualty Ins. Co., supra.*

"In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed,* 3 Neb. 17; *Hansen v. Dakota County,* 135 Neb. 582, 283 N. W. 217.

"In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto." *Hansen v. Dakota County, supra.*

Insurance agencies perform many functions other than

the soliciting of the business which is one factor. Other factors constitute proper coverage, adjustments of claims, assisting the insured in obtaining the lowest premium for the risk covered, the appraisal of properties for insurance purposes; the kind and nature of insurance to be had on certain coverages; the extent of the insurance, both advisory and in principle. It is obvious from a minute examination of the provisions of the statutes, as hereinbefore stated, relating to the subject of insurance, that the legislature had in mind all of such items, and made the requirement that every insurance-soliciting agent or broker should procure a license, seeking to limit the soliciting of insurance writing to a natural person. Comp. St. 1929, sec. 44-327. Such section, in and of itself, makes no other reasonable explanation of what is meant by the legislature in referring to an agent or broker, but specifically refers to a soliciting agent.

We find expression for this analysis in the case of *Rogers v. Ramey,* 198 Ky. 138, 248 S. W. 254, wherein the court stated (p. 142): "Another contention is that a corporation may not act as an insurance agent. The basis of this contention is that the provision of the statute requiring the applicant for a license to be a person of good moral character, considered in connection with other provisions of the statute, shows that the legislature intended that only natural persons should be licensed to act as insurance agents. In the case of *William Messer Co. v. Rothstein,* 129 App. Div. 215, 113 N. Y. Supp. 772, the fact that the statute required every plumber to have a certificate of competency was held not to preclude a corporation so authorized by its charter from carrying on the plumbing business through agents who had received the necessary certificates; and we see no reason why a corporation authorized to act as an insurance agent may not do so through a person who possesses the moral character and other qualifications necessary to entitle him to a license." The case of *Saufley v. Botts,* 209 Ky. 137, 272 N. W. 408, approves *Rogers v. Ramey, supra.*

In the instant case the Century Indemnity Company had

previously recognized the plaintiff by contract as an agency of said company, and one of the allegations of plaintiff's amended petition, in referring to conspiracy, alleges in substance that the defendants, by their acts, made it impossible for the plaintiff to procure contracts with insurance companies to act as agents. The competitive feature, as provided in section 59-806, Comp. St. 1929, is likewise involved, in the true sense that insurance competition exists between the plaintiff and defendants. Insurance is, in fact, commerce. *State v. American Surety Co.*, 91 Neb. 22, 135 N. W. 365.

We have read the cases cited by the defendants, but believe that under our analysis of the statute involved, together with the law applicable thereto, the Nebraska legislature made the requirement only that corporations and copartnerships, acting as insurance agents, must transact their business through licensed soliciting agents, who are natural persons. Such a construction gives force and effect to every word and phrase of the entire chapter on insurance in regard to agents. An agent, licensed as a soliciting agent, will be accountable to the department of insurance for his acts, and the benefits of that fixed responsibility will be obtained by the individual sought to be controlled by this section of the statute.

There is no doubt, under the Nebraska law, that a copartnership or corporation is recognized as a legal entity and is a valid and proper means of combining money, property and directed energy, and our courts have generally recognized that a corporation is protected under the law in its right to engage in any lawful business. The plaintiff in this case, as an insurance agency, acted by and through natural persons, duly licensed as soliciting agents. Such persons were employed by the corporation. We cannot say that the corporation was not engaged in a lawful business, would not have the right to employ agents, and would be denied the privileges and protection under the law in this state and not be permitted to engage in business under the circumstances, as stated in the amended petition.

For the reasons given in this opinion, we believe that the district court erred in sustaining the demurrer. Its decree is hereby reversed, and the cause remanded for further proceedings.

REVERSED.

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FRED DRUMMOND, APPELLEE, V. CITY OF COLUMBUS, APPELLEE: WILLIAM H. HENGGELER, INTERVENER, CROSS-APPELLANT: NORTHWESTERN PUBLIC SERVICE COMPANY, INTERVENER, APPELLANT.

285 N. W. 109

FILED APRIL 3, 1939. No. 30507.

1. **Elections.** The symbol, or phrase, "and/or" leads to uncertainty, ambiguity, and multiplicity, and is not to be recommended.
2. ———. The use of the symbol "and/or" upon the ballot confused the voters who were unable to determine definitely the effect of their votes at this special election.
3. **Municipal Corporations:** ELECTIONS. A ballot for a special election upon public utilities should clearly state the substance of the proposition submitted. If it is stated in garbled, equivocal terms, the purpose of the election is vitiated in advance.
4. ———. The voters at an election on public utilities are entitled to definite information which will enable them to consider, weigh, discuss, and vote upon the actual merits of the proposition. If unfounded facts are set out which obscure the issues, or mislead the voters on material questions of fact, the election will be held to be null and void.

APPEAL from the district court for Platte county: FREDERICK L. SPEAR, JUDGE. *Reversed.*

*Walter, Flory & Schmid,* for Northwestern Public Service Company.

*Lowell L. Walker,* for William H. Henggeler.

*Emil F. Luckey,* for Fred Drummond.

*C. J. Garlow, Charles H. Sheldon* and *Perry, Van Pelt & Marti,* for City of Columbus.

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

PAINE, J.

Fred Drummond, a resident taxpayer of the city of Columbus, brought an action to enjoin the city from issuing $250,000 of bonds under the revenue bond act. The trial court held there was no equity in the petition of plaintiff, nor in the cross-petitions of two interveners, and dismissed the action. Intervener Northwestern Public Service Company has appealed, and intervener William H. Henggeler has prosecuted a cross-appeal.

Plaintiff's petition against the city, its mayor, and the members of the city council alleged that Columbus was a city of the first class, and that on July 22, 1936, a petition for a special election was filed with the city clerk, signed by 1,198 electors, and that the city council passed a resolution calling a special election for the submission to the voters this question:

"Shall the city of Columbus, Nebraska, construct, purchase, or otherwise acquire an electric light and power distribution system, and/or transmission lines, and real and personal property needed or useful in connection therewith and pay the costs thereof by pledging and hypothecating the revenue and earnings of such distribution system and/or transmission lines to be owned by such city; and in the exercise of the authority granted by law, issue and sell revenue bonds or debentures in an amount not exceeding Two Hundred Fifty Thousand Dollars (250,000.00), for the purpose herein stated, and enter into such contracts in connection therewith as may be proper and necessary.

☐ YES
☐ NO"

On August 20, 1936, the special election was held, and the canvassing board reported that a total of 1,205 votes were cast for the issuance of such revenue bonds, and that 1,154 votes were cast against the issuance of such bonds, making the majority in favor of their issuance 51 votes.

It is further alleged that the petition to the city council was irregular in form, and signatures were illegally secured, that it was insufficient, indefinite, confusing, ambiguous, and drawn in such a manner as to leave to the determination of the city council whether a distribution system should be constructed, purchased, or otherwise acquired, and gave no authority for calling said election; that no estimate of the cost of the construction of an electric light and power plant distribution system "and/or" transmission lines was filed prior to the holding of the special election, as provided by law, and that said special election was not called or held as provided by law.

Said petition also attacks the constitutionality of said law, and charges that Senate File No. 25 (Laws 1935, ch. 38), also known as section 18-1601, Comp. St. Supp. 1935, is incomplete, unconstitutional, and void.

It is also alleged that the city threatens to issue such revenue bonds, and will unless restrained, and to let contracts for the construction of an electrical distribution system in said city, and incur substantial expense for engineering and preliminary expenses, all to the irreparable damage and injury of the plaintiff and other taxpayers of the city of Columbus, for which reasons the plaintiff prays that the election may be declared null and void; that Senate File No. 25 be declared unconstitutional; that the city be enjoined from issuing or selling said revenue bonds for the purpose mentioned, or entering into any contracts for the purchase, construction, or acquiring of a distribution system.

The city of Columbus in its answer admits in brief that plaintiff is a resident taxpayer and consumer of electricity, and admits that the plaintiff prosecutes the action in behalf of himself and of others similarly situated; admits that Columbus is a city of the first class; admits that a petition was presented to the city on July 22, 1936, signed by 1,198 qualified electors, and that said number is more than 20 per cent. of the votes cast at the last general city election; admits that the council passed a resolution calling for a

special election, which was duly held; alleges that Senate File No. 25, which is set out at length in the answer, is a valid act, in full force and effect, and that all proceedings done in connection with Senate File No. 25 are regular and legal; admits that no estimate of costs of the construction of said distribution system was made by the city prior to the special election; denies that there is no available supply of electrical energy for the use of the city; denies that the plaintiff and other taxpayers will suffer irreparable damage and injury, and prays that plaintiff's cause of action be dismissed.

On June 1, 1937, the Northwestern Public Service Company filed its petition of intervention as allowed by the court. Said petition of intervention is too long to be abstracted herein, but alleges in effect that said corporation was operating its electric generating plant and distribution system pursuant to a franchise duly approved by the voters of the city of Columbus, which became effective February 2, 1917, for a term of 15 years, which franchise provided that if said corporation should extend its transmission lines to other municipalities in the trade territory of Columbus, thereby making such plant a central plant, then such franchise should *ipso facto* extend itself for an additional period of 10 years, and that, in keeping with the spirit of the franchise, the company had extended its transmission lines to other municipalities and rural residents, and thereby said franchise did by its terms extend to February 2, 1942; that its transmission lines reach all parts of the city of Columbus and rural districts and small towns in adjacent territory; that it has constantly lowered its rates and improved its service, and that such considerable investments have been made by such corporation in reliance upon the applicable statutes of the state of Nebraska, and upon the Constitution of the state of Nebraska, and upon the Constitution of the United States, in the assurance that said corporation would at all times be protected against unlawful competition, unlawful acts, contracts, or competition not duly authorized by the laws of the state of Nebraska, which

might destroy or render useless the property and rights of the intervener corporation. Intervener further alleges that it has invested in excess of $1,250,000 in the Columbus division, of which $800,000 is allocated to the city of Columbus alone, and that if the city should construct a competing distribution system it would greatly depreciate, if not destroy, a part or all of said system.

Intervener further alleges that plaintiff's petition was not filed in good faith, but that the suit was collusively instituted, and charges that the special election was illegal and void for the reason that signatures were secured to the petition therefor by fraud and misrepresentation; that the preamble of said petition for special election contained false and misleading statements, one being that an ample supply of electrical energy will be available, whereas there was not then, and is not now, an ample supply of "firm" power from any source; that said preamble indicated that electricity would be sold at approximate cost, and at less than the present wholesale cost; that the preamble stated that the current would be available January 1, 1937, that said petition for the special election represented that a complete distribution system for the city of Columbus and urban patrons, comparable with the present system, could be constructed for the sum of $250,000, which was untrue.

The intervener prays that the election held August 20, 1936, be declared null and void; that the city be enjoined from issuing any revenue bonds, or incurring any expense, or entering into any contract for the purchase, construction, or otherwise acquiring of an electric distribution system for said city.

On June 11, 1937, William H. Henggeler, a resident taxpayer of the city of Columbus, also filed his petition of intervention, in which he charges that the plaintiff, Fred Drummond, was and is favorable to the construction of such a system, and is not contesting the same in good faith, or with the desire to prevail, and that there is collusion between the plaintiff and the city, and the same amounts to a constructive fraud upon the court and upon the city, its

taxpayers, and users of electricity in the city, and that a decision therein would not be final or determinative of the matters at issue.

Said intervener Henggeler alleges that the petition of intervention of the Northwestern Public Service Company fails to allege the foregoing deficiencies and collusive institution of the suit between the plaintiff Drummond and the city, and therefore prays that the petition of the plaintiff and the petition of intervener Northwestern Public Service Company both be denied, and that the action be dismissed.

On July 3, 1937, the city of Columbus filed an answer to the petition of intervention of William H. Henggeler, in which it admits that the intervener is an elector, and a consumer of electricity in Columbus, and that no official estimate of the cost of the construction of the distribution system or transmission lines was made prior to the special election, but alleges that an unofficial estimate was made; admits that the mayor and council appointed special counsel for the city to take steps to establish the validity of the act under which the city is proceeding, but denies all other allegations of said intervener Henggeler's petition.

On July 22, 1937, the said city filed its answer to the petition of intervener Northwestern Public Service Company, and admits that it operates an electric light and power distribution system in Columbus, and has extended its lines to outside territory, making the city of Columbus a central plant; admits that the council of the city of Columbus granted a ten-year extension of its franchise, but denies that the same is valid, and alleges that its contract with the city of Columbus for furnishing street lighting, etc., expires October 1, 1937; and denies all other allegations therein.

In the trial of the case the plaintiff did not testify, and only eight witnesses testified in the case. Joseph F. Stanzel, city clerk of Columbus, identified a large number of records for introduction as exhibits.

The intervener Henggeler called as his witness attorney Emil F. Luckey, who prepared the petition for the plaintiff.

The intervener Northwestern Public Service Company called C. J. Strike, of Huron, South Dakota, its president and general manager, who testified that it was incorporated in Delaware in 1923, and does business in Nebraska and South Dakota. He testified that the city of Columbus had never made any effort to exercise its option to purchase said plant; that his company now serves Richland, Duncan, Silver Creek, Monroe, Platte Center, and Tarnov, and also some 90 rural customers; that the Columbus division of his company has an investment of $1,250,000, and that of this $845,000 is properly chargeable to service in the city of Columbus. He also testified that the stock of the Northwestern Public Service Company was owned by the Middle West Utilities Company, with headquarters in Chicago. James L. Rich, a former city clerk, and E. K. Albert, its electrical engineer, also testified for the Northwestern Public Service Company.

The city of Columbus called only three witnesses, Dewey DeBoer, chief electrical engineer of the Loup Valley Public Power District, Fred C. Albert, supervising civil engineer of the power district, and Robert Fulton, who has been chief electrical engineer of the Sutherland project.

The trial of the case began on October 18, and when the parties rested on October 21, 1937, counsel were given time to furnish written briefs, and the matter was taken under advisement by the court until March 29, 1938, when the trial court entered its decree, finding generally in favor of the city, and finding there was no equity in the petition of plaintiff, nor in the cross-petitions of interveners, and therefore dismissed the same. Motions for new trial were filed by the two interveners, as well as by the plaintiff, which were each overruled, and from these adverse rulings appeals were taken to this court.

Our attention is first challenged to the use of the expression "and/or," which made it impossible for the voters, in reading the ballot, to determine whether they were voting to authorize the city of Columbus to construct, purchase, or otherwise acquire an electric light and power distribution

system, or, on the other hand, to construct, purchase, or otherwise acquire something entirely different, to wit, a transmission system to connect with some source of firm power. This term "and/or" left the choice for the officers to make after the dual proposition should be adopted by the voters at the election. The use of this expression seems to be increasing. "It has been said that the meaning may be clear, implying the intention either that effect shall be given to both the conjunctive 'and' and the disjunctive 'or,' or else that the one word or the other may be taken accordingly as the one or the other will best effect the purpose of the parties as gathered from the instrument taken as a whole." 3 C. J. S. 1069.

An early case (February 8, 1855) in which "and/or" appears was *Cuthbert v. Cumming*, 156 Eng. Rep. 668, involving an agreement by charterparty to load on board a vessel at Trinidad a full and complete cargo of sugar, molasses, "and/or" other lawful produce for Liverpool. The vessel was loaded with sugar in hogsheads and molasses in puncheons, but the vessel might have been able to hold additional cargo. Baron Alderson held that the "and/or" left it open in every way to fill the vessel with a complete cargo of sugar and molasses, or a complete cargo of other lawful produce.

In *Bell v. Wayne United Gas Co.*, 116 W. Va. 280, 298, 181 S. E. 609, it was said: "The involvements of the contract are accentuated by the frequent use of the baffling symbol 'and/or'—a disingenuous modernistic hybrid, inept and irritating." (Dissenting opinion of Maxwell, J.)

The American Bar Association Journal for July, 1932, published an editorial against the use of this expression, and received so many letters that in its September, 1932, issue a symposium was published, giving opinions from many lawyers, judges, decisions of courts, and references to law magazine articles, and the majority view was against its use. See, also, *Kornbrodt v. Equitable Trust Co.*, 137 Or. 386, 392, 2 Pac. (2d) 236, 3 Pac. (2d) 127.

In the "and/or" annotation in 118 A. L. R. 1367, we find

its use is condemned in statutes, ordinances, and legislative acts. Its use in pleadings and instructions to jury is also criticized. Amidst almost universal condemnation, a very few decisions and articles in two law magazines appear to uphold its use. The great majority of courts do all in their power to discourage its use, and it has been criticized by one court in this language: "It is manifest that we are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents." *Employers Mutual Liability Ins. Co. v. Tollefsen,* 219 Wis. 434, 263 N. W. 376.

The use of this symbol, "and/or," upon the ballot prepared in the case at bar led to the confusion of the voters, who were absolutely unable to determine definitely what they were voting for or against.

In the petition circulated by the Citizens' Committee, which was signed by the voters, one of the inducements offered to the voters reads as follows: "An ample supply of electrical energy will be available to said city at approximate cost upon the completion of the Hydro-electric Project of the Loup River Public Power District, of Columbus, Nebraska, about January 1, 1937." Considerable evidence was brought out as to when an ample supply of electricity would be available. It is argued in the brief that the one who drew the petition had never consulted an engineer, and that there was no ample supply of electricity available to the city, even a year later than the date mentioned in the preamble, upon which the voters relied in casting their votes, and at the time of trial it was still clear from the evidence that there would not be an ample supply of "firm" electrical energy available without stand-by steam plants.

In the ballot submitted to the voters, it provided that the cost would not exceed $250,000, and the evidence clearly

indicates that the present distribution system of the city of Columbus could not be purchased, or one like it built, for anything like $250,000, which amount was held out to the voters as the limit of the expense they were asked to authorize.

In the preamble to the petition which was circulated by the Citizens' Committee to get the signatures of the voters, it represented that electricity would be available to the city on January 1, 1937, and also that it would be furnished to the city at approximate cost. This implied to the voters that there would be a saving from the rates which they were paying under the present system, or at least that the rates would be as favorable as the then existing rates. There is, however, in the evidence no indication of what the cost of electricity will be to the users of electricity if the city purchases or constructs the utility, as authorized by the vote of the electors.

We will now take up a very few of the decisions bearing upon the points at issue in the case at bar. In *Board of Education v. Powers*, 142 Kan. 664, 51 Pac. (2d) 421, the proposition submitted to the school electors was, whether there should be issued bonds in the amount of $198,500 to erect a school building. An elector, who saw the election proclamation, read it, went to the polls and voted, had no means of knowing that it was proposed to erect a building which, when erected and equipped, would cost over $390,000, the balance of the sum to be obtained from the United States government. It was held that the proposition was obscurely stated, and the electors may have been misled, for had the electors known that a building of $390,000 was to be erected they would realize at once that there would be increased cost of maintenance, supervision, and upkeep, and that it would be a much more expensive establishment than some voters might have thought necessary or advisable, and might have voted against the issuance of the bonds for the amount that the school district was to furnish. The argument that the excess cost was to be paid through a federal agency, and would not increase the bur-

dens of the taxpayers, is not entirely true, but if it were true the taxpayer was entitled to know it when he was legally advised that there was to be an election. This decision reaffirms the old case of *City of Leavenworth v. Wilson,* 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, which held that the ballot should clearly state the substance of the proposition submitted, and if the proposition on the ballot is stated in equivocal terms the purpose of the election is vitiated in advance.

"If there be two objects, and * * * they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice." *City of Denver v. Hayes,* 28 Colo. 110, 63 Pac. 311.

In *Mann v. City of Artesia,* 42 N. M. 224, 76 Pac. (2d) 941, the notice of election provided that bonds for the construction of a municipal hospital would be payable not more than 30 years nor less than 20 years after the date of issue. In New Mexico, bonds cannot be lawfully issued by municipalities with a longer maturity than 20 years. It may have influenced some voters to support the issue because they thought the repayment of the bonds would be postponed until the next generation, and therefore the proposal as to maturities, as submitted on the ballot, was calculated to mislead the voters. The order of the trial court sustaining the demurrer was reversed.

In *Stern v. City of Fargo,* 18 N. Dak. 289, 122 N. W. 403, it is said that the object of the notice of an election is to give the voters and taxpayers such information as will enable them to consider, weigh, and discuss the merits of the proposition, and to combine several distinct and independent purposes in one proposition, without specifying the amount which is to be devoted to each, is a clear evasion of the law,

and, if permitted, would fritter away the safeguards thrown around such transactions.

In the case at bar, the ballot was designed to secure the assent of those voters who favored the purchase of the electric light and power distribution system already in use for many years, an electrical plant costing in better times around $800,000, which some of the voters may have believed could be secured for an amount not exceeding the $250,000 mentioned on the ballot, and, on the other hand, the ballot was designed to secure the favorable votes of all voters who might favor the construction of an entirely new municipal electric light and power system to compete with the one already established, and would also secure the "yes" votes of those voters who were not interested in either of these two things, but in an entirely separate proposition, the construction of a transmission line to some government hydro-project, which would furnish the city firm power at approximate cost, as stated to the voters.

These several propositions were submitted on the ballot without giving the voters a chance to vote for one as against the other. In a similar situation, it was asked by the Kansas court: "Did the electors vote to purchase or to construct transportation lines? Did some of them vote to purchase and did others vote to construct these lines? Frankly we do not know. * * * It cannot, of course, be seriously contended that the methods of acquiring distribution lines by 'purchase' and by 'building and construction,' are anything other than two separate and distinct methods of acquisition. The method of acquisition would be one or the other and not both." This Kansas action was instituted before any bonds were issued. There was no unnecessary delay. The petition stated a cause of action. The appeal was perfected immediately. The order of the trial court, sustaining the demurrer and dismissing the petition, was reversed. *Kansas Utilities Co. v. City of Paola,* 148 Kan. 267, 80 Pac. (2d) 1084. See, also, *Julson v. City of Sioux Falls,* 48 S. Dak. 452, 205 N. W. 43; *Eastern Shore Public Service Co. v. Town of Seaford,* 187 Atl. (Del. Ch.) 115.

The question of the accuracy and sufficiency of the statements made in the preamble of the petition which the voters were asked to sign, as well as the form and contents of the ballot submitted to the electors at the special election, have all been fairly raised and carefully considered. In our opinion, these instruments did not fully, clearly, and frankly disclose to the electors just what the city officials proposed to do, and action has been brought for relief in this case. In our opinion, the petition and the ballot presented statements of facts which were unfounded, and the voters relied upon these statements in casting their ballots. The propositions presented to the voters were multiple and obscure, and were not fairly and candidly stated, and voters would be confused upon the propositions submitted.

Many courts have held that a proposition may be submitted to purchase or erect a public utility, and that this may be considered as one proposition, but in the case at bar there was more than that simple question submitted to the voters, and in our opinion the special election was so defective in these particulars that it was null and void. Having reached this conclusion, it is not necessary in this action to pass upon the constitutionality of section 18-1601, Comp. St. Supp. 1937. The judgment of the trial court is

REVERSED.

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The following opinion on motion for rehearing was filed June 27, 1939. *Rehearing denied.*

**Case Distinguished.** The case of *Hurd v. City of Fairbury*, 87 Neb. 745, 128 N. W. 638, distinguished.

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

PAINE, J.

An opinion was adopted in this case which appears *ante*, p. 87, 285 N. W. 109. The case is again before us on a motion for a rehearing.

Appellees contend that this court overlooked the principle

of law involved in the case of *Hurd v. City of Fairbury*, 87 Neb. 745, 128 N. W. 638. In the *Hurd* case, the statute authorized the "purchase, erection or construction" of a public utility. The proposition was submitted to the electors in the words of the statute, and this court held that the proposition as submitted did not constitute a dual proposition, nor a proposition in the alternative, but that it amounted to a submission of a single, definite proposition. The case is clearly distinguishable from the one at bar. In the instant case, the proposition submitted was whether the city should "construct, purchase, or otherwise acquire an electric light and power distribution system, and/or transmission lines, and real and personal property needed or useful in connection therewith." In the *Hurd* case the question in effect was: Shall the city acquire an electric light plant by purchase, erection, or construction? The question submitted was single, the selection of the method being administrative only. But, in the case now before us, more than one question was submitted. The proposition in effect submitted these questions: Shall the city acquire an electric light and distribution system? Shall the city acquire transmission lines? The use of the symbol "and/or" certainly makes the proposition submitted indefinite and uncertain and leaves to the city authorities, not an administrative decision, but the absolute discretion as to whether either one or both of two separate and distinct properties shall be acquired. This deprives the electors of the right to determine for themselves the property to be acquired as contemplated by the statute and the scope of the activity in which the city was intending to engage. The proposition submitted was dual and indefinite, and, if sustained, would amount to an unwarranted extension of the rule announced in the *Hurd* case.

For the reasons stated in our former opinion, as amplified herein, we adhere to the conclusion heretofore reached and overrule appellees' motion for a rehearing.

REHEARING DENIED.

FREMONT FOUNDRY & MACHINE COMPANY ET AL., APPELLANTS, V. SAUNDERS COUNTY ET AL., APPELLEES.
285 N. W. 115

FILED APRIL 7, 1939. No. 30462.

1. **Counties.** In the absence of a statute granting special protection to materialmen and laborers who furnish materials and labor to contractors doing construction work with agencies of government of this state, such furnishers of labor and materials are general creditors of the contractor.
2. **Municipal Corporations.** The only special protection that is afforded by statute to materialmen and laborers who furnish material and labor to contractors doing construction work under contract with agencies of government of this state is that provided by the bond required by statute.

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

*Clarence T. Spier* and *Fred H. Richards, Jr.*, for appellants.

*Paul F. Good, Hendricks & Kokjer, Crofoot, Fraser, Connolly & Stryker* and *Young & Williams, contra.*

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

SIMMONS, C. J.

In this action the plaintiffs, materialmen, asked the court to declare and enforce an equitable lien upon certain indebtedness of the defendant Saunders county to the Central Bridge & Construction Company. Certain claims of the construction company had been assigned to the defendants, First National Bank, of Wahoo, Nebraska, hereinafter called the bank, and Wachob Bender & Company. Plaintiffs claim a lien superior to the assignments. The trial court held against the plaintiffs, and plaintiffs appeal.

The case arises out of the following set of facts, either admitted by, or properly determined from, the pleadings and evidence.

On May 18, 1936, the defendant Saunders county entered into an annual bridge contract with the Central Bridge

& Construction Company (hereafter called the construction company) wherein the construction company agreed to furnish all labor and material necessary to erect and complete such bridges, bridge material, and bridge work, for the unit prices set forth in the contract, as the defendant county might require.

The contract is on a standard form prepared by the state of Nebraska. It provided that from time to time the county should pay to the construction company estimates for materials furnished and labor performed, as in the judgment of the county might be right and proper. The contract had attached thereto a bond, wherein the construction company was principal, and one E. G. Risk was surety. Risk appears to have been a managing officer of the construction company. The bond in the sum of $2,000 does not meet the statutory requirement as to sureties. It is conditioned, among other things, to "pay off and settle in full with the person or persons entitled thereto all accounts and claims that may become due by reason of laborers' or mechanics' wages, or for materials furnished, or services rendered." There is no provision in the contract permitting the retention of any sums which may be due the contractor in order to pay the claims of materialmen or laborers. There is no privity of contract between the county and the plaintiffs, no statute requiring the county to pay the plaintiffs, or to act as trustee of the funds to be paid for the work, and no agreement to pay the plaintiffs if the construction company fails to do so.

The construction company performed work and furnished materials of a value in excess of $58,000. The county was unable to make payments promptly to the construction company due to a lack of funds. The construction company at various times filed claims which were approved by the county engineer, audited by the county clerk, and found correct. Notations were made thereon as to the probable time when warrants would issue.

On September 11, 1936, and November 28, 1936, the construction company assigned claims, so audited and certi-

fied, to the defendant, First National Bank, of Wahoo, and that bank paid the construction company value therefor, subject to a discount for interest. The defendant, Wachob Bender & Company, likewise purchased claims on January 11, 1937.

The three plaintiffs in this action filed claims with the county for unpaid balances due from the construction company for materials furnished. The Nebraska Bridge Supply & Lumber Company filed its claim February 20, 1937, for lumber sold and delivered to the construction company. The plaintiff, Omaha Steel Works, filed its claim February 27, 1937, for the sale price of a bridge in the sum of $1,063.21. The Fremont Foundry & Machine Company filed its claim March 6, 1937, for material furnished in the sum of $1,542.30. The construction company was declared bankrupt on March 9, 1937.

As a result of the filing of these claims by the materialmen, the defendant county refused to issue warrants for two of the assigned claims, one being to the bank in the sum of $8,004.01, and the other being to Wachob Bender & Company in the sum of $4,339.30.

The construction company had purchased materials from the three plaintiffs at different times. Charges on their records were made against the construction company, and it was not until the construction company became slow in its payments, and apparently insolvent, that the plaintiffs filed these claims with the county. The plaintiffs sold the materials to the construction company upon the faith and credit of the construction company, and not upon the credit of the county, or in reliance upon payment from the county.

Of the claim of the Fremont Foundry & Machine Company for approximately $1,540, not to exceed $963 of the materials so sold to the construction company went to the county under its annual contract, and the remainder of the materials involved in that claim appear to have been on hand as a part of the assets of the construction company at the time it went into bankruptcy.

The material furnished by the Omaha Steel Works appears to have been used by the construction company under its annual contract with the county. Of the lumber furnished by the Nebraska Bridge Supply & Lumber Company, approximately 50 per cent. of the amount claimed was for material furnished either prior to the date of the annual contract, or sold subsequently to the construction company, and not traced to any county work under the annual contract.

There was also one car-load of lumber sold by the plaintiff, Nebraska Bridge Supply & Lumber Company, to the construction company, which was in turn sold to the county, for which no claim had been filed or assignment made, and which, under the holding of the district court, is a claim that vested in the trustee in bankruptcy of the construction company.

Plaintiffs do not claim that they had a contract with the county, and do not assert a claim against the county, but rather assert an equitable lien against the funds due from the county; that their lien "attaches by operation and application of the law and rules of equity;" and that, as materialmen, they have an original and continuing equitable priority to any funds "now in or to be in the hands of the county" for payment to the contractor; and that such funds are impressed with a prior and equitable lien in their favor as unpaid materialmen.

There is no evidence in the record that the county has a fund available for the payment of the two assigned claims. Hence, the plaintiffs' claim is not a claim upon a certain existing fund, but a claim upon an indebtedness of the county to the contractor, which has been assigned to certain of the defendants.

Does the law give a lien to the materialmen upon the debt owing by the county where the law does not give a lien upon the property itself because of which the debt of the county arose?

The answer to plaintiffs' contention is found in the statutes of this state as construed by this court.

In 1871, this court in the case of *People v. Butler*, 2 Neb. 5, had before it an original application for a writ of mandamus to compel commissioners who were charged with the erection of a state building to draw a warrant upon the state treasurer for money due a subcontractor from the contractor.

The subcontractor insisted that he had a lien upon the *funds* set apart by the legislature for the construction of the building, and that the agents of the state were obliged to recognize his claim and draw a warrant therefor. This court held that the mechanics' lien law did not apply, and that "The commissioners are not bound to recognize the demands of any person *other than the one with whom the contract was made.*" (Italics ours.) This court then stated: "To adopt any other rule would be productive of infinite mischief, and lead to inextricable confusion, in the prosecution of work upon our public buildings." While the reason there given, to wit, that the state could not be brought into court without its consent, might not be applicable to the case at bar, yet the fact remains that in that action this court refused to order money paid to a subcontractor from funds set apart for the construction of a public building.

This court in 1874, in the case of *Ripley v. Gage County*, 3 Neb. 397, held that the mechanics' lien law of the state did not apply to the erection of public buildings for the use of a county, and stated: "The legislature never intended that county buildings should be subject to sale by judicial process, no matter what the character of the demand may have been upon which the judgment was rendered, and that they are necessarily as completely withdrawn from the operations of the mechanics' lien law, as if they had been expressly excepted by the most positive and unambiguous words. But should we hold otherwise, it would follow, as a necessary sequence, that in case of a recovery by a contractor under the provisions of the lien law, the building in question could be seized and sold for its satisfaction, *for it cannot be said that the lien exists unless the structure may be sold to satisfy it.*" (Italics ours.)

This court in 1882, in the case of *State v. Eberly,* 12 Neb. 616, 12 N. W. 96, held that a county is not subject to process of garnishment. Garnishment is now allowed against the state and local subdivisions of government, including counties, in cases involving wages. Comp. St. 1929, sec. 20-1012.

In *White Lake Lumber Co. v. Russell,* 22 Neb. 126, 34 N. W. 104, decided in 1887, this court said:

"In the consideration of this part of the case it must not be forgotten that the lien of mechanics and materialmen upon a building or improvement in the construction of which labor or material is used, is purely a creature of the statutes, and did not exist either at common law or *in equity* (Maxwell's Pleading and Practice, 700), and must, therefore, be considered with reference to the statute, *as well in the manner of its enforcement* as in its creation." (Italics ours.)

In *Sample v. Hale,* 34 Neb. 220, 51 N. W. 837, this court held that the state was charged with a moral duty to protect laborers and materialmen as far as possible; that the provision in a contract by which the contractor agreed to pay in full all claims for labor and materials was a proper requirement; and that the sureties were liable for the performance of that part of the contract. However, this court held that the building, being one erected by the state, was excepted from the mechanics' lien law.

Plaintiffs cite the above case in support of their proposition that they should have an equitable lien. They quote that part of the opinion which states the moral duty of the state. They omit that part which holds that a mechanics' lien cannot be had, but that suit may be had upon the bond.

The case of *Perkins v. Butler County,* 44 Neb. 110, 62 N. W. 308, involves a situation distinctly similar to the one at bar. In that case, Butler county contracted with a partnership for the erection of a courthouse. During the performance of the contract, the partnership was dissolved, and one partner continued the contract. However, it was agreed between the partners that the firm name might be used in

the completion of the work. The continuing partner borrowed $4,000 from a bank, and Perkins and Spelts, plaintiffs in the case, signed the note as joint makers.

The contract for the construction work provided for the reservation of 15 per cent. of the construction cost, to be paid the contractor at the completion of the work. The continuing partner, using the firm name, delivered to Perkins and Spelts a written instrument addressed to the board of supervisors of Butler county, directing them to pay Perkins and Spelts the reserved amount. The assignment was filed with the county clerk in December, 1890. The courthouse was completed May 28, 1891, and there was at that time a balance of $8,344 due the contractor. At the time of the completion of the work, materialmen and laborers were given orders on the county. Perkins and Spelts paid the note in July, 1891, and brought an action against Butler county, the continuing partner, and the laborers and materialmen, alleging that they were entitled to funds in the hands of the county prior to the materialmen and laborers, and praying for judgment therefor.

The county answered, set up the facts, and prayed an adjudication as to whom the money should be paid. The laborers and materialmen filed answers, claiming that the loan to the continuing partner was a personal one, and not a partnership matter, and asked that they be decreed to have liens upon the funds superior to Perkins and Spelts.

This court stated: "It is suggested in argument that the cross-petitioners are entitled to priority because their work contributed to the creation of the fund, but this view is not tenable. Our mechanic's lien law does not apply to the construction of a courthouse. *Ripley v. Gage County*, 3 Neb. 397; *Sample v. Hale*, 34 Neb. 220; *Lyman v. City of Lincoln*, 38 Neb. 794. *In the absence of a statute creating such a lien one obtains no specific lien upon a fund merely because his industry assisted in creating it.*" (Italics ours.)

The court further stated: "We, therefore, have two rules well established. The first that the assignment to the plaintiffs was one which, in equity, is valid, and would have

priority over the claims of the cross-petitioners if all the claims emanated from the same source, and upon the same account. Second—That one member of an insolvent partnership, especially after dissolution, may not dispose of partnership property to the exclusion of partnership creditors."

After having held that the materialmen did not have a lien, this court then held that the $4,000 loan to the continuing partner, which the plaintiffs paid, was an individual debt; that the materialmen and laborers had partnership debts; that the partnership assets should be applied first to the payment of the partnership indebtedness; and, on that basis, denied plaintiffs the priority prayed.

The decision in the case of *Perkins v. Butler County, supra,* was finally based upon a principle of law not involved herein, but the finding above quoted appears to have been necessary to the conclusion reached.

The case is important not only because of the holding that, in the absence of a statute, laborers and materialmen did not secure a lien upon a fund merely because their industry had assisted in the creation of the fund, but likewise, because it held that the assignment in that case gave the plaintiffs a prior right over the claims of the cross-petitioners if the claims emanated from the same source and upon the same account.

That case is in many ways a stronger case for the laborers and materialmen than is the case at bar, for there the materialmen had written orders directing their payment out of the particular fund involved. In the case at bar, the materialmen have no such orders. In the *Perkins v. Butler County* case, the materialmen and laborers were able to trace all of their labor and material into the construction of the courthouse. In the instant case, two of the plaintiffs are unable to make such a showing. In that case, the materialmen and laborers are not shown to have had any dealing whatever with the contractor other than on the courthouse, while, in the instant case, the plaintiffs are shown to have dealt generally with the contractor, to have

extended credit to the contractor, and two of the three plaintiffs claim a lien in part for materials not furnished to the defendant Saunders county under the contract.

In the case at bar, the claims emanated from the same source, to wit, the construction company, and upon the same account, to wit, the indebtedness of Saunders county to the construction company.

An examination of the record in the *Perkins v. Butler County* case reveals that there a bond was given for the payment of material and labor, and that the bondsmen were insolvent. In that regard, the *Perkins* case and the case at bar are similar.

The case of *School District v. Thomas*, 51 Neb. 740, 71 N. W. 731, arose out of the following set of facts. One Smith contracted with the school district to erect two schoolhouses. Thomas was the subcontractor doing the excavating, stone, and brick work. Smith abandoned his contract. The sureties undertook to complete the work, but did not, and the district finally completed the work. Thomas worked for the district in completing the job.

Thomas sued for the balance due for labor and materials under the original contract, for the amount due while the bondsmen of Smith were in charge of the erection of the building, and while the district had the management. During the progress of the work under the contract, estimates had been given by the architect to the contractor for services performed and material furnished by the subcontractor. One question was: Could the subcontractor maintain the portion of his demand of payment for materials and labor furnished under the original contract wherein he was a subcontractor?

This court stated: "It cannot be said that he was entitled thereto because of any contract with the district, for he had none with it. His contract was with Smith, the original contractor. By the terms of the contracts defendant in error was to receive payment for his services and materials from the contractor, and the contractor was to be paid by the school district. That a party contracts with

one to perform labor and the one employs another to do the work does not authorize the latter after performance as a matter of right to demand payment of the original party employer and on refusal maintain suit for it. Clark, Contracts, pp. 508-511. Neither can it be said that the retention of the amount of the estimates as they were made, presented, and in part paid, raised the right in the subcontractor to demand any part of such sum as his due because it had its source in labor performed or materials furnished by him; nor did the district become a trustee for the subcontractor and thus a right originate by which the subcontractor became vested with a claim against the district for such sum."

This court then held that Thomas was not entitled to recover from the district for that part of the work done under the original contract.

By the act of the legislature, passed in 1873 (General Statutes of Nebraska, 1873, p. 232, ch. 13, sec. 6), it was provided that, when a judgment was rendered against a county, an execution should not issue upon the judgment, but that the county should levy a tax and pay the judgment. While that act was repealed in 1879 (See Laws 1879, p. 393), the policy of the law declared therein, to wit, that an execution should not issue against a county, has not been changed.

Under the provisions of section 77-1809, Comp. St. 1929, the legislature has provided a method for the payment of judgments against a county, showing that the policy of this state has been that a judgment against a county or an instrumentality of the state should not be a lien against the specific property of the governmental organization.

In 1889 the legislature passed an act entitled "An Act to secure the payment of mechanics' and laborers' wages on all public buildings where the provisions of the general mechanics' lien laws do not now apply." Laws 1889, ch. 28. In 1913 (Laws 1913, ch. 170) that act was amended by the insertion therein of certain provisions to secure the payment of materialmen, who furnished material for the con-

struction of public buildings. The act as amended became section 3840, Revised Statutes of Nebraska for 1913, and now is section 52-118, Comp. St. 1929, which, as it now exists, is as follows:

"It shall be the duty of the board of public lands and buildings, county boards, the contracting board of officers of all cities, villages, and school districts and all public boards now or hereafter empowered by law to enter into a contract for the erecting and finishing, or the repairing of any public building, bridge or other public structure *or improvement; and any officer or officers so empowered by law to enter into such contract,* to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of their wages *and materialmen who furnish material for said work have no lien to secure payment for material furnished in said work,* to take from the person, persons, firm or corporation to whom the contract is awarded a bond *in a sum not less than the contract price* with at least two good and sufficient sureties, or in lieu thereof, by one surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed *and for the payment for material which is actually used* in the erecting, furnishing, or repairing of the building or in performing the contract. Such bond shall be to the board awarding the contract, and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved by said board. Such bond shall be safely kept by the board making the contract, and may be sued on by any person entitled to the benefit of this chapter. The action shall be in the name of the party claiming the benefit of this chapter."

We have italicized the above quoted statute to show the 1913 amendments which are material to the question involved here.

It was not until 1913 that the legislature of this state included materialmen within the protection of the bond provided for in this statute, and then only "for the payment

for material which is *actually* used in the erecting, furnishing, or repairing of the building or in performing the contract."

In *First Nat. Bank v. Pesha,* 99 Neb. 785, 157 N. W. 924, the court stated: "A public school building cannot be subjected to a mechanic's lien. Section 3840, Rev. St. 1913, requiring the contractor to give a bond, was doubtless enacted for the purpose of protecting mechanics and materialmen."

In *Nye-Schneider-Fowler Co. v. Roeser,* 103 Neb. 614, 173 N. W. 605, this court stated:

"Before our statute (Rev. St. 1913, sec. 3840) was enacted in 1889 (Laws 1889, ch. 28), the laborer or materialman who furnished labor or material for the erection of a public building *had no protection* except the responsibility of the contractor, and such bond as the contractor and the public officials might see fit to provide. A laborer who was in the habit of relying upon the mechanics' lien law frequently found that he had worked upon public buildings without compensation. Then the statute was enacted requiring absolutely that one who contracted to build a public building which would not be subject to mechanics' liens must give bond to pay laborers and materialmen."

(The judgment in this case was set aside by opinion found in 104 Neb. 389, 177 N. W. 750, but the reasons therefor do not relate to the statement just quoted.)

This court in *West v. Detroit Fidelity & Surety Co.,* 118 Neb. 544, 225 N. W. 673, stated: "The chapter containing the above section" (Comp. St. 1929, sec. 52-118) "includes the mechanics' lien law, and the argument is that, inasmuch as plaintiffs are not entitled to a mechanics' lien, they have no right of action upon the bond. We think the contention unsound. The very purpose of the section in question was to protect persons who were not entitled to mechanics' liens, and this purpose would be entirely defeated if this construction were adopted."

Materialmen and laborers, in order to secure liens, are required by sections 52-102 and 52-103, Comp. St. 1929,

to file their claims in a certain manner and within a limited time. To hold that these plaintiffs are entitled to a lien would be to give to parties, not entitled to a statutory lien, the advantages of a statutory lien, without the burden of any of its conditions, and would create a lien that the legislature has not provided.

"In the absence of an express contract creating it, the lien which a materialman or mechanic may become entitled to depends solely upon the statute for its existence. It is a preference which he may secure if he proceeds in a particular way and fully complies with the statutory requirements upon the subject, and not otherwise." *Volker-Scowcroft Lumber Co. v. Vance*, 32 Utah, 74, 88 Pac. 896.

The policy of this state has been to deny materialmen and laborers a lien upon public buildings and public funds, and in the case of public construction work, the policy declared by the legislature has been to require a bond for the protection of materialmen and laborers.

It is true in the case at bar that a bond with the sureties required by the statute was not given, and that at the time of trial the one bondsman was insolvent. That element is in many of the decided cases. However, that does not create a right in the plaintiff not otherwise existing.

In *Paxton & Vierling Iron Works v. Village of Naponee*, 107 Neb. 784, 186 N. W. 976, the village board failed to require a bridge contractor to give the statutory bond. The materialmen sued the city, and its four trustees individually, for damages for failure to exact the bond. This court said: "If any liability did exist, either on the part of the village or of the persons who were trustees, it could arise only where the materialmen had furnished material for the construction of the bridge, relying upon a bond for his protection, and where he had suffered damage by failure of the contractor to pay for the material furnished. The statute required the bond to be filed, and plaintiff knew, or by exercise of ordinary diligence could have known, that no bond had been taken and filed. Plaintiff was chargeable with notice that no bond had been taken, and had no

right to impose liability on the village or the members of the village board. When it knew, or could by the exercise of ordinary care have known, that no bond was given, and voluntarily furnished the material, it will be presumed that it furnished the material solely upon the credit of the contractor."

The plaintiffs herein are not entitled to a mechanics' lien; the legislature contemplated that the provision of the above quoted statute requiring a bond was for the purpose of protecting materialmen and laborers, and that is the only special protection that is afforded to materialmen and laborers, who furnish materials and labor to contractors doing public construction work under contracts with agencies of government of this state.

The following decisions from other jurisdictions support the conclusion we have reached in this case: *Guise v. Guise,* 116 N. J. Eq. 590, 174 Atl. 681; *Aetna Trust & Savings Co. v. Nackenhorst,* 188 Ind. 621, 122 N. E. 421; *Reinhart & Donovan Co. v. Board of Commissioners,* 70 Okla. 127, 173 Pac. 848; *Adamson v. Paonessa,* 180 Cal. 157, 179 Pac. 880; *Fairbanks, Morse & Co. v. Town of Cape Charles,* 144 Va. 56, 131 S. E. 437; *E. I. DuPont De Nemours & Co. v. City of Glenwood Springs,* 19 Fed. (2d) 225; *Johnson v. Flynn,* 179 Ark. 253, 15 S. W. (2d) 327.

Plaintiffs argue that the case of *First Nat. Bank v. Pesha, supra,* is controlling in this case, and in their favor. Analysis of that case reveals that the school district of Auburn entered into a contract with Pesha on March 5, 1912, for the erection of a school building; that the defendant surety company executed the bond required by statute on March 12, 1912. On January 8, 1913, or ten months later, Pesha borrowed $1,500 from the plaintiff bank, and as security for the loan gave the plaintiff bank a written order or assignment addressed to the board of education of the school district, directing them to pay the plaintiff the sum named, and to charge it against his account as contractor, when the building was finished and accepted. The order was filed with the school district. Pesha de-

faulted. The school district completed the contract. There remained payable at the date of the completion $2,906.85 as the balance of the contract price. Prior to his default, Pesha purchased materials in the sum of $4,400 from two materialmen. The defendant surety company paid those claims and took assignments thereof. (The transcript in this case reveals that the payment of the claims by, and the assignments to, the surety occurred subsequent to the bringing of the action.) The plaintiff claimed priority over the rights of the surety company.

This court held that section 3840, Rev. St. 1913, requiring the contractor to give a bond, was doubtless enacted for the purpose of protecting mechanics and materialmen, and that the bond therefore became an essential part of the contract entered into by and between Pesha and the school district. The court stated the question to be determined as follows: "Is plaintiff, by virtue of its assignment as security for money advanced to the contractor, entitled to priority over the surety who has *by the terms of its bonds* been required to pay for materials furnished for the construction of the building?" (Italics ours.)

This court there cited the case of *Prairie State Nat. Bank v. United States,* 164 U. S. 227, 17 S. Ct. 142, in which they state the question to be decided depended upon whether the surety's right of subrogation arose "from and *related back to the date* of the original contract, or whether it took its origin solely from the date of the advances by the surety."

This court further quoted from the case of *Labbe v. Bernard,* 196 Mass. 551, 82 N. E. 688, 14 L. R. A. n. s. 457, as follows: "While it is true that the rights of the sureties to the remedies of the principal do not become complete and are incapable of present enforcement until they shall have discharged their principal's obligation, yet their right becomes an inchoate one *as soon as they have entered into the relation of suretyship;* and their equitable assignment of their principal's rights and remedies, when completed by their performance of his obligation, *relates back,* as against each other and their principal, *to that earlier time.*" (Italics

ours.) The case rested upon the contractual rights and obligation of the surety company under the bond.

The basis of the decision was that the surety company had entered into its obligation prior to the date of the assignment to the plaintiff bank, and that, when the surety subsequently thereto met its obligation as surety and paid claims, its rights as against the amount due on the contract *related back* to the date of the original contract, and, hence, the rights of the surety company were superior to the subsequently acquired rights of the plaintiff bank.

Next, it was further insisted in the *Pesha* case by the plaintiff that, since the plaintiff's money was used to pay the expenses of the construction of the building, the surety company had received the benefits of such payments, and the liability on the bond was reduced to that extent. This court stated: "Plaintiff was under no obligation to advance the money, and * * * in doing so it acted voluntarily."

It is clear that the *Pesha* case is not authority for the contention of the plaintiffs in this case. Quite obviously, the plaintiffs were volunteers in selling material to the construction company, and, just as obviously, they had no contractual rights or obligations that would date back in such a way as to give them a prior claim to these funds over the assignee defendants.

We have examined the other cases upon which plaintiffs' contention is based. Plaintiffs cite a number of decisions of the United States courts, such as *United States Fidelity & Guaranty Co. v. Sweeney*, 80 Fed. (2d) 235. There the statement is made: "Laborers and materialmen, however, have an equitable right to payment from funds due a contractor on a public improvement in preference to general creditors."

A similar rule is announced in *American Surety Co. v. Westinghouse Electric Mfg. Co.*, 75 Fed. (2d) 377. However, the court in that case stated:

*"In the absence of a statute on the subject, furnishers of labor or material to a contractor have the legal status of general creditors.* Before the enactment of any federal

statute on the subject, it was not unusual for the government to recognize the existence of a moral duty to protect furnishers of labor or material for a public work against dishonest or reckless contractors by requiring the insertion in a contract for such work of a provision requiring payment by the contractor of amounts owing by him to furnishers of labor or material for the work contracted for, or entitling the government to withhold payments to the contractor if he failed to pay promptly those who furnished labor and materials. *Greenville Sav. Bank v. Lawrence* (C. C. A.) 76 Fed. 545. It appears from decisions referred to below that the government's observance of that duty in practical and effective ways was the precursor of judicial recognition of an enforceable equitable right of unpaid furnishers of labor or materials for that work in or to a part of the contract price thereof remaining in the possession of the government after the completion of that work by the contractor." (Italics ours.)

The cases cited by plaintiffs herein are among those referred to by the court in the above case.

The policy adopted by the federal government which was the precursor of judicial recognition of an equitable lien by the federal courts has not been the policy of this state, and it was not the policy of the county in the instant case; hence, there is no basis for the adoption of the federal rule in Nebraska.

Plaintiffs likewise cite *Prairie State Nat. Bank v. United States, supra.* That case, and other similar cases, was considered by the court in *Adamson v. Paonessa, supra,* and the following comment was made, which distinguishes that case, and other similar cases, from the case at bar:

"Right here also lies the difference between the present case and the line of authorities cited by appellant's counsel, beginning with *Prairie State Nat. Bank v. United States,* 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412. In those decisions the facts are essentially the same as in this, with the exception that either by statute or by the contract itself, a fund was in effect reserved for the benefit of ma-

terialmen and laborers whom the contractor might fail to pay. In other words, the materialmen and laborers had a right as against a certain fund in addition to any recovery against the contractor or his surety. Under such circumstances if the surety paid their claims he would be subrogated to their rights against such fund. Such, however, is not the case here, as there is no fund against which the materialmen and laborers have a right."

We therefore hold that the decree of the district court denying the plaintiffs the relief sought was correct, and that decree is

AFFIRMED.

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DAKOTA COUNTY, APPELLEE, V. CENTRAL BRIDGE & CONSTRUCTION COMPANY ET AL., APPELLEES: FIRST NATIONAL BANK OF WAHOO, APPELLANT: UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE.

285 N. W. 309

FILED APRIL 7, 1939. No. 30503.

1. **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." *Jensen v. Romigh*, 133 Neb. 71, 274 N. W. 199.
2. **Principal and Surety.** Where a surety company, by the terms of a bond given for the faithful performance of a public contract, has assumed obligations to make certain payments under certain conditions, when called upon to perform, its obligations and its rights relate back to the date of the giving of the bond.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed, with directions.*

*Paul F. Good* and *Hendricks & Kokjer*, for appellant.

*Malcolm R. Smith, W. P. Warner, Abbott, Dunlap & Abbott, Fred H. Richards, Jr., George W. Leamer, Young*

*& Williams, Clarence T. Spier, Crossman & Barton* and *Munger & Rhodes, contra.*

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

SIMMONS, C. J.

This is an action involving the problem as to whom Dakota county shall pay certain sums it owes for the repair and construction of bridges in that county. The dispute is between the materialmen who claim an equitable lien, the assignee of the contractor, and the contractor's surety. The trial court held that the materialmen had an equitable lien superior to that of the assignee and the bonding company. The assignee and the bonding company appeal.

The case arises out of the following set of facts. On May 26, 1936, Dakota county, hereinafter referred to as the county, entered into a contract with the Central Bridge & Construction Company, hereinafter referred to as the construction company, and one Byron O. Dorn, for such bridge work and bridge materials as the county might require during the following year. The United States Fidelity & Guaranty Company, hereinafter referred to as the surety company, gave the bond required by statute in the sum of $1,000 conditioned upon the faithful performance of the contract by the construction company. No bond was given by Dorn.

The contract is on the same form as that used in the case of *Fremont Foundry & Machine Co. v. Saunders County, ante,* p. 101, 285 N. W. 115. Reference herein will be made to that case as the Saunders county case.

Under the contract a total of about $23,000 worth of work was done, partly by Dorn, and partly by the construction company. Individual claims were filed by Dorn and by the construction company. The construction company was paid some of its claims, and those paid claims, as well as the claims of Dorn, are not involved in this litigation.

This action involves the proceeds of three claims totaling $12,657.40, filed by the construction company, for repairs

to one bridge and the construction of two new bridges. The work was completed, inspected, and accepted by the county board. Claims therefor were filed December 24, 1936, and January 6, 1937. The claims were audited and approved, but, with one exception, do not appear to have been formally allowed by the county board. The county commissioners in writing advised the construction company that these claims had been presented to the county clerk for payment, and the county clerk likewise certified to the construction company that warrants would issue as soon as funds were available. Copies of the claims, together with the statement of the county commissioners and the county clerk, were presented to the First National Bank, of Wahoo, hereinafter referred to as the bank, and on January 16, 1937, were assigned to and purchased by the bank at face value less a discount for interest.

The county clerk of Dakota county was notified of the assignments, and he asked for the filing of the original assignments. On February 11, 1937, the county clerk acknowledged receipt of the original assignments, and advised the bank that the assignments were subject to an indebtedness of the construction company to Dakota county in the sum of $500.

On February 19, 1937, a representative of the Omaha Steel Works, one of the defendants herein, advised the county of the insolvency of the construction company, and on that date the county commissioners allowed one of the claims, less the $500 deduction, and refused to issue warrants for any of the claims in view of the dispute as to the disposition of the proceeds. Subsequently, three materialmen, who had furnished material to the construction company, brought suit against the county for the price of the material sold to the construction company. The county then brought this action in the district court for Dakota county, joining as parties defendant, the construction company, the bank, the surety company, and all of the materialmen; recited that it brought this action for the purpose of having a determination of all claims or liens of all the defendants

in and to the money due on said claims filed by the construction company, so that it and its officers would be properly protected in allowing claims and signing warrants for the same. The county prayed that the court determine the rights of each of the defendants in and to the money and each and every other matter necessary for a full and complete settlement of all the matters, and make the proper orders therefor.

The bank filed an objection to the jurisdiction of the court, which objection was overruled. The bank then answered, preserving its objections, set up its claim under the assignments, and alleged that it alone was entitled to the proceeds of said claims. The bank denied that any of the defendants had claims or rights superior to it, and claimed that the contract between the county and the construction company and Dorn was several, not joint.

The surety company claimed that the contract was joint, denied liability on its bond, and asked that, if it were found to be liable, it have the right of subrogation.

Dorn answered, claiming that, after the unpaid claims were paid, he was entitled to one-half of the amount remaining.

The other defendants answered, alleging the sale and delivery of materials, oil, and gas to the construction company, and that they had not been paid; claimed that the assignments were null and void; and asked that each be decreed to have an equitable lien upon the balance due under the contract superior to the rights of the bank.

The construction company was adjudged bankrupt on March 9, 1937. Its trustee intervened in the action and prayed for judgment for the balance due after the payment of claims.

The case was tried in October, 1937, and was decided in April, 1938. The trial court found in favor of the defendants furnishing material, oil, and gas; determined the amount due from the county was $12,157.40, that materialmen had been unpaid in the sum of $6,271.51, that each of said defendants had a lien upon the balance due under the

contract prior to the claim of the bank, that there was due from the surety company $1,000 on its bond, but that, if it were required to pay said sum, it should be subrogated to that extent, and that the balance due under the contract should be paid to the bank; and so decreed.

A part of the items involved in the materialmen's claims did not enter into the construction work for which these three claims were filed, but were for materials sold to the construction company in the performance of other orders under the contract with Dakota county.

The special appearance of the bank is predicated upon the proposition that the court is without jurisdiction of the subject-matter of the action because the allowance or disallowance of claims against the county is a matter within the jurisdiction of the county board. Such is not the issue. The amount due on the claims is not in dispute. The matter which is involved is to whom the money should be paid. While the county does not specifically tender the money into court, its declared purpose in bringing the suit, as well as its prayer, is sufficiently broad to cover an avowed purpose to abide by the decree of the court as to the payment of these funds.

The procedure followed by the county in this case has been repeatedly followed under similar circumstances in this state. Without further discussion or citation of authority, we hold that the district court did not err in overruling the special appearance.

The claims of the defendant materialmen for equitable liens in this case rest on the same basis as the claims of the materialmen in the *Saunders County* case, *supra*. The legal status and the contractual provisions, so far as this question is concerned, are the same. The decision in that case is controlling of this issue in the case at bar. The materialmen do not have an equitable lien upon the debt owing by Dakota county to the construction company.

Next is the question of the right of priority to the payment of the amounts due on these claims as between the bank and the surety company.

The contract is on a printed form prepared by an agency of the state. It is signed by the construction company and by Byron O. Dorn. It contains four pages of schedules of unit prices.

The first page of the contract contains the "Proposal." While using the pronoun "we" with reference to the party making the proposal, and "you" with reference to the board of county commissioners, it provides a place for the signature of the party making the proposal with lines for the firm name, the name of the individual signing for the firm, and his title. This part of the form clearly contemplates a proposal by a single contractor, not two or more.

The contract in the printed form (both in the opening paragraph and in the lines prepared for signatures) provides for a "party of the first part" and a "*party* of the second part." The singular "party" is used in the various covenants of the contract, including the agreement to give a bond. The plural is used only when reference is made to both the party of the first part and the party of the second part. The proposal and the contract, however, are signed by both the construction company and Byron O. Dorn. Obviously, the contract form was prepared for use in the case of one contractor agreeing to do certain work for one public-contracting body.

Dorn contends that it is a joint contract, and for that reason and because he did not join in the assignments, that the assignments of the construction company to the bank are void; and that, after the materialmen are paid, he is entitled to receive one-half of the proceeds of the debts due the construction company.

The surety company contends that it is a joint contract; that it signed as surety for the construction company without knowing that it was a joint contract, and that, because it is a joint contract, their suretyship is void.

This court on a number of occasions has stated: "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." *Jensen v. Romigh,* 133 Neb. 71, 274 N. W. 199.

The reason for this rule is well explained in 12 American Jurisprudence, p. 787, as follows: "In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled them to resort to law and one of them then seeks an interpretation at variance with their practical interpretation of its provisions. Where the language of a contract is uncertain and the parties thereto, by their subsequent acts and conduct, have shown that they construed it alike and within the purview of the constructions permitted as possible by such language, the court will ordinarily follow such adopted construction as the correct one."

The contract, in and of itself, is an obligation for the period of one year on the part of the contractor to do certain work at certain unit prices as the county "may require." The county is not obligated to purchase either materials or services. Such bridges, bridge work, or bridge materials as ordered by the county were required to be furnished and completed within sixty days from the date of the order. As to its performance, it is clearly a severable contract.

Is it joint or several as to the parties? The contract itself is neither clear nor certain as to that proposition. For the answer, we must look to the construction which the parties placed upon it during the time that it was in force and before a controversy arose. The minutes of the county board for May 26, 1936, recite that a motion was made and carried "that the bid of the Central Bridge & Construction Company and Byron O. Dorn be accepted as being the best bid;" also, that "said companies were directed to file bond as required by law." The county at different times called upon Mr. Dorn to do certain work under the contract, and on those occasions Mr. Dorn alone was notified. He did the work, filed individual claims for payment, and warrants were issued to him personally. He made no accounting to, or division with, the construction company of any funds received by him in payment for work done under the contract. The same procedure was followed when at different times the construction company was called upon to perform work under the contract. Claims were filed, warrants issued, payment made to the construction company, and no accounting made by the construction company to Dorn. In all, some $10,000 worth of work was done by the construction company and by Dorn, on individual orders, individual performance, and individual payments.

The three claims, the proceeds of which are in dispute in this matter, are for work done by the construction company at the request of the county upon notice to the construction company, and with all of which Dorn had no part. That the parties themselves considered it a several contract, both as to the parties and performance, is clear from the interpretation which the parties themselves placed upon it.

This interpretation of the contract is likewise supported by the fact that all the materialmen, parties to this matter, entered into their agreements with the construction company, charged the items of their accounts to the construction company, and proved their claims in part by the construction company's employees.

That the surety company so interpreted the contract is indicated by the fact that the bond signed by the surety company recites that the construction company "has been awarded a contract by the county for yearly bridge work." No reference to Dorn is made.

We therefore hold that the contract was several as to parties and performance, and that Dorn has no interest in the proceeds of the claims in controversy in this action.

Under this interpretation of the contract, the surety company is liable to the extent of its bond because of the failure of the construction company to pay for materials furnished.

Does the surety company have a lien upon said funds superior to the rights of the bank? The bank claims to be a holder without notice of any equities or claims of the surety company. The surety company plead and proved that, to indemnify it against loss, in the application for the bond there was an assignment to it of the rights of the construction company under the contract. The bank claims that it was without knowledge of the assignment when it purchased the claims of the construction company.

We analyzed the case of *First Nat. Bank v. Pesha*, 99 Neb. 785, 157 N. W. 924, in the *Saunders County* case, *supra*. That analysis will not be repeated here. So far as the relative rights of the assignee and the surety are concerned, the *Pesha* case and the instant case are almost identical. In the *Pesha* case, this court held that the bond "became an essential part of the contract." The claims held by the bank are based upon work done under the contract. The rights of the bank necessarily rest upon the provisions of the contract, *including the bond.*

The holding in the *Pesha* case was that the surety had a prior claim on the funds because, *by the terms of its bond,* it had assumed obligation to make certain payments, that obligation related back to the date of its entering into the obligation under its bond, and the surety company had a prior obligation, and, therefore, a right prior to the assignee.

The question of the assignment in the application and of the bank's knowledge of it is immaterial to a decision of the question here.

This court in the case of *First Nat. Bank of Madison v. School District*, 77 Neb. 570, 110 N. W. 349, had before it a case similar to the one at bar, and there held that the rights of the assignee of the defaulting contractor were junior to the rights of the surety company.

The stronger equities in this case are distinctly with the surety company. The materialmen have the right to look to the bond of the surety company for payment to the extent that such bond obligates the surety company to pay for material. The surety company had undertaken to pay those materialmen to that extent. It had not undertaken to pay the bank or any other assignee of the contractor. The condition of the bond was that the construction company would pay off and settle in full all accounts and claims that "may become due for materials furnished or services rendered," and that, if it failed to do so, the surety company would perform to the extent of $1,000. That there has been a breach of the construction company of that part of the contract is obvious from the record.

The decision in the *Pesha* case is controlling in the determination of the question of the relative rights of the bank and the surety company. The surety company has the prior right to the extent of its obligation under the bond.

The decree of the trial court is reversed, and the case remanded with instructions to enter a decree:

(1) Denying the claims of the materialmen for liens upon the fund, and denying payment out of the fund to them by the county;

(2) Providing that the surety company has a lien upon the funds represented by the claims involved in this action to the amount of $1,000, but no more, and directing that the surety company shall pay said sum of $1,000 *pro rata* to the materialmen entitled thereto under the provisions of said bond, and upon the surety company's making its show-

ing to the county that it has complied with the provisions of the decree and met its obligations under the bond, that the county be ordered to issue its warrant upon the proper funds of said county for the payment of said sum of $1,000 to the said surety company;

(3) Providing for the payment of the balance of the obligation due originally to the construction company for work performed under said contract to the bank as assignee thereof, and that the defendant county be ordered to draw its warrant upon the proper funds of the county payable to the bank for said balance.

REVERSED.

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## WALTER REEHLE V. STATE OF NEBRASKA.
285 N. W. 108

FILED APRIL 7, 1939. No. 30567.

1. **Criminal Law: EVIDENCE.** Identification of visual evidence as the stolen property is one of the elements that must be shown in proving a foundation for the admission of exhibits of property found in the possession of the accused following a robbery.
2. ———: ———. The identifying evidence required depends upon the circumstances of each particular case. Here the facts proved are an insufficient basis for the admission in evidence of the articles offered.

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

*Lloyd E. Peterson,* for plaintiff in error.

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

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

SIMMONS, C. J.

The defendant was charged with the crime of burglary, tried and convicted, and, after a motion for a new trial

was made and overruled, was sentenced to prison for three years. He appeals to this court, alleging errors of the trial court.

A general merchandise store at Palmyra, in Otoe county, Nebraska, was broken into on the night of February 12-13, 1938. Mr. Haley, the proprietor, testified that the following articles were missing from his store after the burglary: Two one hundred-pound sacks of sugar, four or five forty-eight-pound sacks of flour, some coffee, four cases of eggs of thirty dozen to a case, pipes, cigars, cigarettes, several kinds of chewing and smoking tobacco, pop corn, walnuts, canned goods, overalls, shirts, etc.

The evidence against the defendant was entirely circumstantial. We mention only the evidence that applies to the admission in evidence of certain exhibits.

On the second day following the burglary, officers visited a home in the city of Lincoln, occupied by two sisters, a child, and the defendant, and were permitted to search defendant's room and other parts of the house. Defendant occupied a room on the second floor. Living quarters were on the first floor.

The articles, hereinafter referred to, as found in the house, were in that part occupied by the landlady and her sister, as well as the defendant, for living quarters.

Mr. Haley testified that on the night before the robbery he had in the store one box of Sun Tan cigars, one-half or two-fifths full; that, after the robbery, only one or two were left in the box. In a coat belonging to the defendant, the officers found four Sun Tan cigars. Mr. Haley testified that some pop corn was missing. The officers testified that they found three kernels of pop corn on the back floor of the defendant's car. Mr. Haley testified that he missed Prince Albert tobacco of the size cans that "come in fifteen cent cans and retail at fifteen cents two for a quarter." Two small cans of Prince Albert tobacco were found in the defendant's car. An opened Velvet humidor tobacco can was found in the residence. It is much larger than the Prince Albert cans. Its contents were partly gone, and it

contained cigarette papers. Mr. Haley testified that he missed horseshoe tobacco. Two small plugs of horseshoe tobacco were found in the defendant's car. Mr. Haley testified that he lost Bliss coffee. An unopened can of Bliss coffee was found in the residence. Without further identification, other than testimony of the officers that they found the articles, as above set out, and over proper objections of the defendant, the specific articles above referred to were admitted in evidence. Defendant alleges that the admission of these exhibits was prejudicial error.

With the exception of the pop corn, the only possible connection shown between the exhibits found and the burglary was the testimony that articles of the same trade-name were missing from the store after the burglary. The danger of accepting evidence based solely upon the similarity of a trade-name is well shown by the acceptance of the Velvet humidor can in evidence. Mr. Haley testified that he did not think that there were any other size cans missing of any other kind of tobacco. The Velvet humidor can was not of the size stolen, and, hence, could not have been a part of the stolen property.

The complaining witness testified that he had missed pop corn. Three kernels of *yellow* pop corn, so described, were admitted in evidence.

The articles found and received in evidence were all articles of general commerce. They are such as would ordinarily be found in the possession and in the home of any one who used smoking and chewing tobacco. There is nothing unusual about the possession of such articles. The number of articles found of this class of merchandise is insignificant in comparison with the large amount and the greater variety stolen.

Identification of visual evidence as the stolen property is one of the elements that must be shown in proving a foundation for the admission of exhibits of property found in the possession of the accused following a robbery. Underhill, Criminal Evidence (4th ed.) p. 148; 36 C. J. 897; 9 C. J. 1070, 1081. Also, see *Wright v. State,* 21 Neb. 496,

32 N. W. 576; *Harding v. State*, 122 Neb. 766, 241 N. W. 526.

"The foundation on which rests the necessity of authentication is not any general principle of evidence, but an inherent logical necessity. * * * When a claim or offer involves impliedly or expressly any element *of personal connection with a corporal* object, that connection must be made to appear, like the other elements, else the whole fails in effect." 3 Wigmore, Evidence, p. 2889. (Italics ours.)

The admission of the exhibits in evidence was error.

"There is a general mental tendency, when a corporal object is produced as proving something, to assume, on sight of the object, all else that is asserted about it. The sight of it seems to prove all the rest. * * * This tendency, illogical though it be, is deeply rooted among all persons, even the most intelligent and reflective." 3 Wigmore, Evidence, p. 2890.

The introduction of these exhibits apparently caused the defendant to attempt to establish the ownership of the articles and the sources of possession of those articles claimed by him. Questions of fact were thereby put in issue and a burden placed upon the defendant as a result of the improper admission of the exhibits. This affected the substantial rights of the defendant and was prejudicial.

The motion for a new trial should have been granted.

It is not necessary that we consider the further assignments of error. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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RUTH LEHMAN, APPELLEE, V. JOSEPH WAGNER ET AL., APPELLEES: ARTHUR WAGNER, EXECUTOR, APPELLANT.

285 N. W. 124

FILED APRIL 7, 1939. No. 30544.

1. Wills: DEVISE. Where a devise of certain realty provides that it is subject to the payment of a specific legacy, and further subject to the payment of a designated amount to the personal

representative of the deceased person and charged therewith, and devised upon condition that the payments be made, such realty is charged with such legacy and payment to the personal representative of the deceased person.

2. ———: ———. The refusal of the devisee to accept the devise will not affect the charge of the legacy or the charge of the payment of a designated sum to the personal representative of the deceased person. In equity, the land is charged, whether or not the devisee accepts the devise.
3. ———: ———. Where a parcel of land is devised subject to two charges, one a specific legacy, the other a designated amount to be paid to the personal representative of the deceased person, and the will does not designate that one of such charges is prior to the other, it is presumed that testatrix intended the two charges to be of equal priority.
4. ———: CONSTRUCTION. In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law, and in this connection circumstances relating to the will may be considered.
5. ———: ———. Will examined and construed in the light of the surrounding circumstances as required by section 76-109, Comp. St. 1929, and *held* that the intention of the testatrix was that the charges against the specific real estate in question are of equal priority, and where the land is sold to pay such charges, as in this case, the legatee entitled to the specific bequest is to receive three-fifths of the amount for which the real estate in dispute is sold, and the personal representative of the deceased person is to receive two-fifths of the proceeds thereof.
6. ———: ———. Where a will does not specify the date of payment of a specific legacy, or that such legacy will draw interest, and is admitted to probate over objection of contestants, and an appeal to the district court is taken, necessitating the appointment of a special administrator to handle the estate, within the contemplation of section 30-316, Comp. St. 1929, and subsequently the appeal is dismissed and the dismissal filed in the probate proceedings in the county court, and during the period of special administration an action is brought to set aside a deed involving the undevised land of the estate, such action did not prevail, and a transcript and bill of exceptions were ordered, but appeal to the supreme court was not perfected, and such land is subsequently sold by the executor for the payment of debts, within the contemplation of section 30-1401, Comp. St. 1929, in the absence of a showing that the executor was negligent or responsible for unreasonable delay

in settling the estate, the presumption that the testatrix intended that the legacy should be paid in the first year after the appointment of the executor under the will, and if not so paid should bear interest from that time, is a reasonable and fair presumption, under the circumstances, and prevails, and the legatee receiving the bequest is entitled to interest on her proportionate share thereof from and after such date.

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

*Fay H. Pollock,* for appellant.

*Kelsey & Kelsey, contra.*

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

MESSMORE, J.

Ruth Lehman brought this action in the district court for Stanton county February 19, 1938, to enforce the payment of a bequest made to her by the provisions of the last will and testament of her mother, Maria Wagner, who departed this life October 28, 1933. The trial court decreed and adjudged that plaintiff had a specific bequest and was entitled to a first lien upon 80 acres of land in Stanton county, and that the executor, Arthur Wagner, as such had a second lien in the amount of $2,000. The court further allowed plaintiff interest from the date of the death of testatrix, which at this time amounts to more than $900, and ordered the land sold to pay plaintiff's bequest. The executor, Arthur Wagner, appeals as such and individually.

The issue in this case is solely between Ruth Lehman, plaintiff, and Arthur Wagner, as executor and individually.

The last will and testament of Maria Wagner was admitted to probate in the county court of Madison county, Nebraska, March 7, 1934, over objections, and an appeal was taken to the district court. The appeal was dismissed April 24, 1935, and the dismissal filed in the probate proceedings April 6, 1936. Arthur Wagner, a son and legatee under the will, was appointed special administrator May 9,

1934, filed his report in October, 1937, which was allowed November 2, 1937, and was appointed executor on the same day, having been so named in the will. The time for filing and barring claims and hearing thereon expired in November, 1934. Arthur Wagner as special administrator converted the personal property into money and has collected some rents and been in possession of the land in dispute during the time of the probate proceedings in the county court. There has been no order of distribution by said court. A claim of the Norfolk National Bank in the amount of $1,753, with interest, wherein the executor was the principal obligor and the deceased was surety, was compromised in 1938, and $700 of the money belonging to the estate was used to pay this claim, to be deducted from the amount due Arthur Wagner by virtue of his legacy. There remains in the hands of the executor about $1,500, subject to the payment of costs of administration and legacies.

For a decision in this case, it is necessary that we arrive at the intent of the testatrix, as contained within the four corners of her last will and testament, in interpreting such will. We shall, therefore, set out the pertinent provisions of the will and make reference to other provisions as occasion requires.

The third paragraph of the will follows: "To my daughter, Ruth Lehman, I give and bequeath the sum of Three Thousand Dollars, the same to be paid to her by my son, Joseph Wagner, as hereinafter provided." We next refer to paragraph 7 of the will in conjunction with paragraph 3. Paragraph 7 follows: "Having already given and deeded to my son, Joseph Wagner, certain land in Stanton county, Nebraska, I hereby give and devise to my said son Joseph Wagner the following described real estate (Then follows a description of the real estate and an easement thereon).

"The above devise of real estate to my said son, Joseph Wagner, is based upon, subject to and burdened with the express requirement and condition, that he make payment of the sum of Five Thousand Dollars, of which Three Thou-

sand Dollars shall be paid to my said daughter, Ruth Lehman as hereinbefore provided, and Two Thousand Dollars shall be paid to the legal representatives of my estate."

There are three general bequests in the will: First, $1,000 to Alice McFarland, a daughter, who had previously received $4,000; second, $5,000 to Arthur Wagner, who had previously received real estate in South Dakota; and, third, $5,000 to Otto, a son, of which $3,000 was to be paid by another son, Walter, who received real estate in Madison county with the charge thereon. The thirteenth paragraph of the will provides for the priority of the general legacies: First, payment of $1,000 to Mrs. McFarland; second, payment of $5,000 to Arthur Wagner; and, third, payment of $2,000 to Otto Wagner. Then follows a residuary clause, providing for division of the balance of the money in the hands of the executor, after the sale of the property, into seven equal parts. The plaintiff is not named as a general legatee in paragraph 13 of the will, but appears in the residuary clause. Certain other specific bequests in the way of machinery and live stock are made to Walter.

It is agreed among the parties that the real estate in dispute will not be called upon to pay any of the claims against the estate. There is no residue, and the land involved is worth less than $5,000. Joseph Wagner refused to take the land under the will, subject to the charge of the bequests against it.

Appellant assigns as error, first, the judgment is not sustained by the evidence and is contrary thereto; second, the court erred in holding that plaintiff's lien for $3,000 was entitled to priority over the executor's lien for $2,000, and in awarding plaintiff interest on her bequest.

On his first proposition of law defendant states: "Charges upon real estate are created by the terms of a will which devises property conditioned upon payment of a second specific legacy, and upon payment of a certain sum of money to the executor," citing in support thereof 2 Page, Wills, 2132, sec. 1281, which in part reads: "If the devise of specific realty provides that it is subject to certain lega-

cies, charged therewith, or given upon condition that they be paid, such realty is charged with such legacies." This proposition of law is conceded by plaintiff, she agreeing that the will creates a charge on the land in her favor. When Joseph Wagner refused to accept the devise of the land, the land, itself, then became a part of the assets of the estate.

In 69 C. J. 1205, it is said: "The refusal of the devisee to accept the devise will not affect the charge of the legacy; in equity the land is charged whether or not the devisee accepts the devise."

Defendant contends: "Where a parcel of real estate is devised subject to two charges, it is presumed that the testatrix intended these charges to be with equal priority, unless the will clearly reveals an intention to give one priority over the other."

We now turn our attention to an interpretation of the will of Maria Wagner. The statute requires the court, in the construction of a will, to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law. Comp. St. 1929, sec. 76-109; *Blochowitz v. Blochowitz*, 130 Neb. 789, 266 N. W. 644. And, also, in this connection, circumstances relating to the will may be considered. *In re Estate of Hunter*, 132 Neb. 454, 272 N. W. 318.

In *Lincoln Nat. Bank & Trust Co. v. Grainger*, 129 Neb. 451, 262 N. W. 11, it was said: "Without much regard to canons of construction, the court will place itself in the position of the testator, ascertain his intent from the provisions of the will and enforce it, if lawful. *Weller v. Noffsinger*, 57 Neb. 455; *Krause v. Krause*, 113 Neb. 22; *Elliott v. Quinn*, 109 Neb. 5; *Heywood v. Heywood*, 92 Neb. 72."

Rarely, if ever, are two wills couched in precisely the same language, and the conditions surrounding one testator may be so widely different from those surrounding another that the conclusion reached in one case is of little value as compared with that reached in another. See *Straw v. Barnes*, 250 Ill. 481, 95 N. E. 471.

The will in question was made in January, 1928, when, apparently, the value of the estate was much more than it was subsequent to the date of the death of testatrix. She obviously felt that the estate was of such value that all of the bequests made by her in her will would be paid as directed, and in the priority as fixed by paragraph 13 thereof. The value of the real estate is decidedly different from its value at the time of the execution of the will, and we may say from the date of the death of testatrix. It is stated that the testatrix, as a matter of preference, placed Alice McFarland, one daughter, at the beginning of the will in the second paragraph thereof, reciting that she had previously received $4,000, and the evidence developed that the plaintiff, who was placed in the third paragraph of the will, had previously received $2,000, indicating that the intention of the testatrix was to the effect that each daughter should have $5,000. The plaintiff was not given a preference in priority as evidenced by the thirteenth paragraph of the will, but her specific bequest was chargeable against the 80 acres of land devised to Joseph Wagner, with the intention on the part of the testatrix that Joseph would take the devise and pay the amounts, totaling $5,000. The testatrix selected the heirs whom she preferred and fixed the order of priority of payment of the bequests, as evidenced by paragraph 13 of the will. She desired that Alice McFarland be paid the sum of $1,000, which was done. She then considered that Arthur Wagner was to receive the sum of $5,000 next; then Otto. Provisions had been made for the others, as hereinbefore shown. The testatrix designated the exact amount of the payments under the general bequests. We cannot say what would have been her disposition of the estate, had she known that Joseph would refuse the devise. In the absence of such expression, this court cannot place itself in the position of testatrix and divine what she would have done under such circumstances. In paragraph 7 of her will she makes the devise subject to two specific bequests, $3,000 to the plaintiff in this action, and $2,000 to the personal representative of her estate. She does not, by specific

language, designate the priority of the two liens. She does not state that Ruth Lehman is to be paid first; she mentions the amount first, but, in any event, she desired that $5,000 be paid by Joseph for this land, $2,000 of that amount to her personal representative. She wanted to be sure that any indebtedness against her estate would not affect the land charged with the bequests.

We do not believe that it was the mother's intention to favor the daughter, Ruth Lehman, to the exclusion of the son, Arthur Wagner. The testatrix believed that the estate was ample. If it is not, then, in the absence of an intention to the contrary, it is presumed that she intended each of several beneficiaries, standing in the same relation to her, to receive an equal interest with each of the others. 69 C. J. 280. The will of Maria Wagner does not express the intention that the charge in favor of the plaintiff shall have priority over the charge in favor of the executor. There is no ambiguity, and a contrary intention could not be proved by extraneous evidence. To give the plaintiff a priority in this case would amount to reading into the will a provision which is not now there.

We therefore hold that the liens chargeable against the 80 acres of land devised to Joseph Wagner are of equal priority. Therefore, of the amount received from the sale of the 80 acres, plaintiff shall receive three-fifths, and the remaining two-fifths is payable to the executor, to be applied by him, with other moneys of the estate in his possession, to payment of costs of administration of, and remaining debts owing by, the estate; and, under the thirteenth paragraph of the will, which must be read in conjunction with paragraph 4 thereof, to the next legatee designated, in point of priority, who has not received his bequest, and who, in this instance, is defendant Arthur Wagner, who shall receive such amount remaining.

The defendant contends that the court erred in allowing interest on plaintiff's specific bequest from the date of the death of testatrix. The will is silent as to the date of payment of the bequest and as to the interest, or rate thereof,

if any, payable. Plaintiff reasons: Had Joseph Wagner accepted the devise he would have been entitled to possession and income of the property from the date of his mother's death, and would have been required to pay Mrs. Lehman's legacy with interest thereon from such date. Upon his refusal to so take the devise, the land is an asset of the estate and charged to the same extent as Joseph's liability.

The exception cited by plaintiff is stated in 69 C. J. 1269 as follows: "Where the possession of the land devised and the payment of the legacy charged on it are both postponed until the determination of some intervening estate in the land, in which case interest runs from the date when the devisee has the right to enter into possession of the land or receive its profits." In the instant case, there is no intervening estate.

We have analyzed several sections of the statute relating to the probate of wills and applicable to this case, and it would unnecessarily lengthen this opinion to set out all of such provisions. We here set forth some of the statutory provisions pertinent to the issue involved.

Section 30-303, Comp. St. 1929, in substance provides for the bond of the executor before receiving letters testamentary, conditioned that he make the return, within three months, of a true inventory of all the goods, chattels, rights, credits and estate which come into his possession or knowledge; pay all just charges, debts, legacies, etc., as may be ordered and decreed by the county court, and "*render a true and just account of his administration to the probate court within one year, and at any other time when required by such court*; and to perform all orders and decrees of the county court by the executor to be performed in the premises." (Italics ours.)

Section 30-603, Comp. St. 1929, designates the time allowed creditors for presentment of claims, which shall not, in the first instance, exceed 18 months or be less than three months, and section 30-604, Comp. St. 1929, provides for extension of time for allowance of claims.

Therefore, it is evident that the executor takes full and

complete charge of all of the assets of the estate under the direction and control of the county court, and has a year in which to settle the estate, and, for good cause shown, may have the time extended. We are cognizant of the specific legacy to Ruth Lehman and recognize that such legacy may be governed by sections 30-232, 30-233, 30-234, and 30-235, Comp. St. 1929. In any event, a careful reading of such sections shows a specific legacy to be obligated at all times for the indebtedness of the estate and to pay its proportionate share of indebtedness, even though it may be apparent that the specific legacy may be turned over to the legatee when other property is presumably ample and sufficient to pay the indebtedness.

All of the foregoing sections of the statute sufficiently emphasize the reason for the holdings in Nebraska, hereinafter set out, respecting the payment of interest on specific legacies when the will is silent on the subject.

This court, in *Lewis v. Barkley*, 91 Neb. 127, 135 N. W. 379, held: "Whether interest is to be allowed upon a specific legacy of money depends upon the intention of the testator. If that intention cannot be otherwise determined from the language of the will itself, it will be presumed that the testator intended that the legacy should be paid during the first year after the appointment of the executor under the will, and, if not so paid, should bear interest from that time."

In cases where the intention of the testator is doubtful, assistance may be derived from the provisions of the statute in regard to the settlement of estates which are heretofore briefly set out. The testator being aware of the statute in reference to estates, it has in most cases been regarded that there is a presumption that the testator intended the legacies should bear interest from that time. In many cases this has been regarded as determining the matter, when the intention of the testator cannot be otherwise determined from the will. See *Smullin v. Wharton*, 83 Neb. 328, 119 N. W. 773.

The question generally involved under our law is whether

or not the executor was negligent in causing unnecessary delay in the settlement of the estate. The law grants him one year in which to settle the estate, and for good cause shown the time may be extended. Obviously, there was no negligence on the part of the special administrator or of the executor. The interest is not a penalty on the executor, but is an incident of the legacy itself. The plaintiff's argument that the interest is due her because the executor does not handle the money and because it is payable direct by the devisee is not conclusive, in view of our holding that, when the devisee refuses to take the land, it then becomes an asset of the estate and must, by necessity, be handled by the executor. In any event, it is still subject to the payment of debts, costs of administration, expenses of the last illness and funeral expenses, and cannot be enforced until these matters have been determined.

The will was contested; the county court decided adversely to the contestants, and an appeal was taken by them to the district court, thereby necessitating the appointment of a special administrator in the county court, as provided by section 30-316, Comp. St. 1929, until the will is admitted to probate or disallowed, and a proper representative of the deceased appointed to handle the estate. Subsequently, the appeal was dismissed in the district court, and, during the period of the special administration, an action was brought by the widow of a deceased son in another county to set aside a deed which had been given by her in payment of a 7,000-dollar mortgage, running to the testatrix, and which involved undevised realty. She did not prevail. A transcript and bill of exceptions were ordered for the purpose of appealing to the supreme court, but the appeal was not perfected, and this undevised land was sold February 28, 1928, pursuant to a license from the district court for Madison county for payment of debts of the estate, within the contemplation of section 30-1401, Comp. St. 1929, netting the estate the sum of $2,408.

Following the rule as announced in Nebraska, the presumption that the testatrix intended that the legacy should

be paid in the first year after the appointment of the executor under the will, and, if not so paid, should bear interest from that time, is a reasonable presumption, in harmony with the view expressed by this court on the subject of interest in such class of cases. See *In re Estate of Kierstead*, 128 Neb. 654, 259 N. W. 740; *Smullin v. Wharton*, *supra*; *Goodman v. Palmer*, 137 Tenn. 556, 195 S. W. 165; *In re Doty's Estate*, 231 Mich. 115, 203 N. W. 865.

We hold that the plaintiff is entitled to interest on the amount to be received by her in payment of her specific legacy, which is three-fifths of the amount realized from the sale of the 80 acres of land in Stanton county charged with the payment of the legacy, one year after the appointment of the executor, which would be November 2, 1938, at the legal rate as provided by law, and until such time as plaintiff may finally be paid.

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

REVERSED.

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CHARLES D. TULLIS, APPELLEE, V. ELOF E. BLIXT ET AL., APPELLANTS.
285 N. W. 307

FILED APRIL 14, 1939. No. 30508.

Appeal. "Where in a law action a jury is waived and trial is had to the court, and an examination of the entire record discloses no prejudicial error, the judgment will be affirmed." *State of New Mexico v. First Nat. Bank*, 111 Neb. 477, 196 N. W. 711.

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

*Allan F. Black*, *Frank Kelly* and *J. Ernest Deming*, for appellants.

*Edwin F. Myers*, *Kenneth L. Myers* and *Edwin J. F. Myers*, *contra.*

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

SIMMONS, C. J.

In this action plaintiff sued for damages, alleging that the defendants operated an automobile on a public highway in a negligent manner, striking him, and causing personal injuries. The defendant Blixt was the owner of, and riding in, the car. The defendant Stone was driving. Plaintiff alleged that the defendants were engaged in a joint enterprise. Defendants pleaded that the plaintiff's injuries were caused by his own negligence. Trial was had to the court without a jury. Judgment was rendered for the plaintiff against both defendants. The defendants appeal, assigning generally that the judgment of the trial court is not sustained by, and is contrary to, the evidence, and is contrary to law.

About 11:00 or 11:30 o'clock on the night of March 27, 1937, plaintiff, with two companions, was driving south of the city of Broken Bow, in Custer county, Nebraska, when his car tipped over in the ditch along the east side of the road. Plaintiff, assisted by others, righted his car so that it was standing on the east side of the road, facing in a northerly direction, with the left front wheel upon the traveled portion of the highway. A second car was immediately behind his car in a position to push his car onto the traveled portion of the highway. On the west side of the highway, and off of the traveled portion, were one or more cars. One car (later mentioned herein) was 50 to 75 feet south of, and across the road west of, the plaintiff's car. Lights were burning on all of the cars, and a number of people were on the highway in and about the cars, either viewing the accident or assisting the plaintiff. At the plaintiff's suggestion, one of the men who was with him had gone down the highway to a point 200 feet south of the point of the accident in order to warn approaching cars. The highway was straight and level from a quarter of a mile south to the point of the accident. The night was clear, and the visibility was good.

With that situation existing, the defendants approached the scene of the accident, coming from the south and going toward the north. There is a dispute as to the speed with which the defendants were traveling. Defendants fix their speed at 35 miles an hour when they rounded a curve and entered the straight portion of the highway. Plaintiff's witnesses fixed that speed at from 40 to 45 miles an hour with an increase of speed when the flagman attempted to stop them. One of the plaintiff's witnesses testified that, when he saw the defendants' car approaching, he blinked his lights. Defendants denied seeing the flagman; admitted seeing the lights of the cars for some distance and the people upon the highway; and fixed their rate of speed at from 15 to 20 miles an hour as they came up to the standing cars. Immediately before the accident, from which plaintiff's injuries resulted, plaintiff's witnesses testified that he was standing within a foot of and leaning over the left front fender of his car, attempting to fasten the hood of his car.

Defendants testified that as they approached the cars and the people on the highway they turned their car to the left to avoid hitting some one on the highway, and hit the fender of the car which was on the west side of the road, 50 to 75 feet south of the plaintiff's car. Defendants' car then swung to the right, diagonally across the highway, hit two people, one of whom was standing with his foot on the running board of plaintiff's car, knocked down and ran over the plaintiff, dragging his body for a distance fixed by plaintiff's witnesses at from 15 to 20 feet, and going on down the highway, before stopping, a distance fixed by plaintiff's witnesses at from 100 to 150 feet. Defendants deny those distances, but do not fix any definite distance traveled after hitting the plaintiff. Defendants' answer alleges that after the impact they applied "full brake," and stopped in not to exceed 50 feet. If defendants had stopped within 50 feet after hitting the first car, the injuries to plaintiff probably would not have occurred.

The defendants' witnesses testified that the plaintiff was

intoxicated and staggered out upon the highway in front of and backward into defendants' car, and that his negligence contributed to and caused the accident resulting in his injuries. Plaintiff's witnesses, although admitting his use of intoxicants earlier in the evening, denied that he was intoxicated and denied the factual situation testified to by defendants' witnesses.

An able and experienced trial court heard the witnesses, visited the scene of the accident, found that the defendants were engaged in a joint enterprise, that the defendants were negligent, and that the plaintiff was not guilty of contributory negligence. The main traveled portion of the highway was free of obstruction. A careful, prudent driver would have had no difficulty in passing the cars and people then on the highway. The trial court found that the speed with which the defendants admitted that they were traveling, "having regard for the traffic and use of the road and the condition of the road, was excessive, imprudent, unreasonable, and such as to endanger the life and limb of persons, and constituted negligence on the part of the defendants."

Judgment was rendered for the plaintiff for $207, medical, dental, hospital, and other items of expense, and $600 for compensation for injuries received. It is not contended that the amount of the award is excessive.

We have read the record in this case. In many respects, the testimony of the defendants sustain the plaintiff's evidence as to the accident, its cause, and his injury. The findings of fact made by the trial court are fully sustained by the evidence.

It is the established rule of this court that, "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; *In re Estate of Wotke*, 133 Neb. 739, 277 N. W. 45.

"A motorist driving at such speed that he cannot stop or turn aside in time to avoid an obstruction discern-

ible within the range of his vision is usually negligent." *Hardung v. Sheldon,* 133 Neb. 427, 275 N. W. 586.

"Where in a law action a jury is waived and trial is had to the court, and an examination of the entire record discloses no prejudicial error, the judgment will be affirmed." *State of New Mexico v. First Nat. Bank,* 111 Neb. 477, 196 N. W. 711.

The judgment of the trial court is

AFFIRMED.

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MAY L. ENYEART, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

285 N. W. 314

FILED APRIL 14, 1939. No. 30449.

1. **Municipal Corporations**: DEFECTIVE WALKS: NOTICE. Where the injuries in suit were occasioned by defects in a public sidewalk created by the positive misfeasance on part of the defendant corporation, its officers or servants, or by others under its authority, the service of the notice prescribed by section 38 of the Lincoln home rule charter is not a prerequisite to maintaining an action therefor.
2. ———. The city of Lincoln, by the annexation of the city of University Place, as to rights, obligations, liabilities, and duties imposed upon or possessed by the latter, whether actual or contingent, tortious or on contract, whether already accrued or thereafter to accrue, became, in all respects, the successor of the latter, and subject to the same and identical conditions that were binding upon the city of University Place.
3. ———: DEFECTIVE WALKS: CONTRIBUTORY NEGLIGENCE. Contributory negligence is not imputable to one as a matter of law from the mere fact that he attempts to pass over a walk that is obstructed or otherwise out of repair, provided that the obstruction or other defect is such that a person of ordinary intelligence would reasonably believe that, with proper care and caution, he could pass with safety notwithstanding the defect.
4. **Evidence** examined, and *held* ample to support the verdict and judgment.

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

*Ralph P. Wilson, Clarence G. Miles* and *Frederick H. Wagener,* for appellant.

*Sterling F. Mutz* and *Robert S. Stauffer, contra.*

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

EBERLY, J.

This is an action in tort for damages sustained by plaintiff occasioned by a sidewalk alleged to be defectively constructed and maintained by the municipality wherein the same was situated. There was a verdict and judgment for plaintiff in the sum of $3,500, and from the order of the trial court overruling its motion for a new trial, the defendant city appeals.

The proof shows that plaintiff, on December 7, 1935, at 7:15 p. m., while in the exercise of proper care, stepped upon, slipped and fell on the steps leading from the public sidewalk which was above the level of Forty-fifth street, as she was descending to that street at the southwest corner of the intersection of Forty-fifth and St. Paul streets in the defendant city. As a result of the fall plaintiff's right wrist was broken, and she sustained injuries also to her back and hip. Evidence in the record, if believed, fairly establishes that prior to its annexation by the city of Lincoln, on September 27, 1926, the proper municipal authorities of the then city of University Place had negligently and defectively constructed the sidewalk, including the steps, in question, without providing a proper and sufficient foundation therefor and with width alleged to be too narrow for the use intended. The steps in question were constructed 18¼ inches above the curb, though by the ordinance then in force of the city of University Place such constructions were limited to not more than 6 inches above the curb. For a considerable distance from the place of the accident, "quite a length of the sidewalk" extending to the west had been constructed without "expansion joints." As explained by witnesses for plaintiff, when expansion joints are not employed in such a construction, in time "you have

a bulge in the walk * * * due to extreme heat." The evidence as an entirety sustains the conclusion in the present case that the dangerous condition of the steps occasioning the accident in suit was due to the improper construction of the sidewalk of which they formed a part, and also the insufficient foundation on which they rested. The original responsibility for this condition was properly chargeable to the city of University Place, the original constructor thereof. On September 27, 1926, the city of University Place was annexed by the city of Lincoln, defendant herein. Thereafter repeated notices were given to the proper officials of the city of Lincoln of the situation existing at the intersection of Forty-fifth and St. Paul streets, and this municipality is properly chargeable with knowledge thereof received after the completion of the annexation and long prior to the occurrence of the accident here in suit.

Appellant's first challenge to the correctness of the judgment is based upon the terms of section 38 of its "Home Rule Charter," which provides, viz.:

"The city shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof within the city, unless actual notice in writing of such defect shall have been filed with the city clerk at least five days before the occurrence of such injury or damage," etc.

It may be conceded that, while the record contains ample proof to charge the city of Lincoln with actual knowledge of the situation, the giving of the technical notice prescribed was not established by the proof.

But, where the ground of the action is positive misfeasance on the part of the corporation, its officers or servants, or by others under its authority, in doing acts which cause the streets or sidewalks to be unsafe or out of repair, no other notice to the corporation of the condition of the street is essential to its liability and section 38 of the home rule charter appears inapplicable.

Thus, in *Updike v. City of Omaha*, 87 Neb. 228, 127 N. W. 229, where a substantially identical clause was before this

court for construction, we held that the requirement of a written notice of "defective public ways or sidewalks thereof" to be filed with the (city) clerk five days before the occurrence of the injury complained of has no application to defects caused by the city itself in negligently constructing the defective work complained of. See, also, *Tewksbury v. City of Lincoln,* 84 Neb. 571, 121 N. W. 994; *McMasters v. City of Lincoln,* 101 Neb. 278, 163 N. W. 319.

It must be conceded that, under the facts in the instant case, the statutory five days' notice requirement would be wholly inapplicable so far as the city of University Place was concerned, and would afford it no defense.

Section 1, article I of the Lincoln home rule charter, provides:

"The municipal corporation now existing and known as the City of Lincoln shall remain and continue a body politic and corporate, by name the City of Lincoln, and as such shall have perpetual succession."

Section 3, article I of this home rule charter, provides:

"The City of Lincoln shall remain vested with and continue to have, hold and enjoy all property, rights of property and rights of action of every nature and description now pertaining to this municipality, and is hereby declared to be the successor of the same. It shall be subject to all the liabilities that now exist against this municipality."

Section 15-113, Comp. St. 1929, provides, in part, that, upon consolidation of another municipality with a city of the first class, "such city of the first class shall succeed to all property and property rights of every kind, contracts, obligations and choses in action of every kind held by or belonging to the city or village consolidated with it and such city of the first class shall be liable for and assume and carry out all valid contracts, obligations, franchises and licenses of any such city or village so consolidated with it," etc.

Section 15-117, Comp. St. 1929, provides, in part, that, upon consolidation, "all rights of action existing against any city of the second class or village consolidated with

such city of the first class at the time of such consolidation, or accruing thereafter on account of any transaction had with or under any law or ordinance of such city of the second class or village, may be prosecuted against such city of the first class as consolidated."

To arrive at the legislative intent thereby expressed, these various products of legislative action should be read and considered in the light of the following canons of construction, viz.:

The legislative intent is the cardinal rule in the construction of statutes. *Hubbell Bank v. Bryan,* 124 Neb. 51, 245 N. W. 20; *Peterson v. School District,* 124 Neb. 352, 246 N. W. 723; *Smith v. State,* 124 Neb. 587, 247 N. W. 421; *McQuiston v. Griffith,* 128 Neb. 260, 258 N. W. 553.

All statutes relating to the same subject are considered as parts of homogeneous system and later statutes are considered as supplementary to preceding enactments. So, also, statutes relating to the same subject, although enacted at different times, are *in pari materia* and should be construed together. *Morrill County v. Bliss,* 125 Neb. 97, 249 N. W. 98; *McQuiston v. Griffith,* 128 Neb. 260, 258 N. W. 553; *Jones v. York County,* 26 Fed. (2d) 623.

"A clause, paragraph or provision in a section should be construed in connection with all other clauses, paragraphs and provisions in the same and other sections of the statute connected therewith or relating thereto." *State v. Thomas,* 127 Neb. 891, 257 N. W. 265.

"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. The meaning must be ascertained from a consideration of all that is said in the act upon the same subject-matter, and later expressions will usually control the language used in preceding portions of the statute." *State v. Ure,* 91 Neb. 31, 135 N. W. 224.

In consideration of questions similar to what is here presented, Judge Dillon has well stated, viz.:

"It has been well observed that in the infinite diversity of subjects which arise for judicial determination, 'judgment in most cases consists less in the application of a precise text, than in a combination of several texts, which lead to a decision rather than contain it.' Such decision and judgment are the result of the interpretation of various clauses and texts, with the definite purpose of ascertaining the intention and will of the legislature, in respect of a matter where it is not in terms expressed one way or the other, but is necessarily left to be collected from a consideration of all of the enactments bearing upon it." 4 Dillon, Municipal Corporations (5th ed.) sec. 1715.

It is obvious that the legislative intent evidenced by section 1, article I of the home rule charter, above quoted, was not the creation of new, distinct and separate corporate entity. The statutory municipal corporation previously created by the statutes relating to "all cities having more than forty thousand and less than one hundred thousand inhabitants" (Comp. St. 1929, sec. 15-101) was, under the new charter, merely to "remain and continue a body politic and corporate," with nature and attributes wholly unimpaired.

It would seem to follow that powers, rights, and liabilities which the statutory municipal corporation previously possessed under the statute of its creation, because of its inherent nature, were necessarily continued, except in so far as expressly or by necessary implication modified by the terms of the home rule charter later adopted by the city of Lincoln, of which section 1, article I, quoted above, constitutes a part. While the state Constitution provides that the municipal charter adopted under section 2, article XI of the Constitution, shall "become the charter of said city, and supersede any existing charter and all amendments thereof," such succession, in so far as the newly adopted charter expressed the public intent that what previously existed should continue, would involve no change as to rights, duties, or liabilities so referred to either expressly or by necessary implication.

This conclusion is quite in harmony with the limitation that the home rule charter, so adopted, must be "consistent with and subject to the Constitution and Laws of this state." Const. art. XI, sec. 2.

Again, section 3, article I of the Lincoln home rule charter, clearly evinces a legislative intent to which the proposition as stated is indeed conformable. In this connection, the words, "It shall be subject to all liabilities that now exist against this municipality," are significant. "Liability" is a broad term, one of large and most comprehensive significance. In a broad sense, it includes the condition of being actually or potentially subject to an obligation. *Coulter Dry Goods Co. v. Wentworth,* 171 Cal. 500, 153 Pac. 939; *State v. Sheets,* 26 Utah, 105, 72 Pac. 334; *United Cigarette Machine Co. v. Winston Cigarette Machine Co.,* 194 Fed. 947, 960, 114 C. C. A. 583.

Further, "liability" includes the condition of being responsible for a possible or actual loss, penalty, evil, expense or burden. *Wentz v. State,* 108 Neb. 597, 188 N. W. 467; *Reynolds v. City of Waterville,* 92 Me. 292, 319, 42 Atl. 553; *White v. Greene,* 70 N. W. (Ia.) 182; *Feil v. City of Coeur D'Alene,* 23 Idaho, 32, 129 Pac. 643.

Also, it includes the condition of one being charged with a duty which may be judicially enforced. *Wood v. Currey,* 57 Cal. 208.

So, too, a "liability" may be absolute or contingent. *Cochran v. United States,* 157 U. S. 286, 296, 15 S. Ct. 628, 39 L. Ed. 704; *East Islip First Nat. Bank v. National Surety Co.,* 228 N. Y. 469, 127 N. E. 479; *Daniels v. Goff,* 192 Ky. 15, 232 S. W. 66; *Hunt v. Ward,* 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87.

"Liability" is not restricted to such as are absolute or exclude the idea of contingency. *Wentz v. State,* 108 Neb. 597, 188 N. W. 467. In fact, it is more frequently used in the latter sense than in the former. *Cochran v. United States,* 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704; *Albert v. Gibson,* 141 Mich. 698, 105 N. W. 19.

In the light of these authorities, and when we recur to

the provisions of sections 15-113 and 15-117, Comp. St. 1929, we find nothing in the home rule charter of the city of Lincoln inconsistent with the legislative intent that the provisions thereof shall continue in full force and effect.

It follows that, upon a consolidation with another municipality, the city of Lincoln became liable for, assumed, and was required to carry out all valid contracts and obligations of such city so consolidated with it.

Now, when the term "obligation" is used in a statute, its significance must be gathered from, and governed by, the purpose and context of the enactment. It may be said to be a generic word, derived from the Latin substantive "obligatio," having many, wide, and varied meanings, according to the context in which it is used. It has two well-defined legal meanings, one of which includes liability arising from tortious conduct. Where, in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from actionable tortious conduct. See *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449; *Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391.

In the light of the foregoing authorities, the legislative purpose evidenced by section 15-117, Comp. St. 1929, providing that "all rights of action existing against any city of the second class * * * consolidated with such city of the first class at the time of such consolidation, or *accruing thereafter on account of any transaction had with or under any law or ordinance of such city* of the second class *may be prosecuted against such city of the first class* as consolidated" (italics supplied), is clear and obvious.

Applying the canons of construction to the texts we have quoted, and construing them in the light of the principles and purposes they clearly evidence, leads to the conclusion that the city of Lincoln, by the annexation of the city of University Place, as to rights, obligations, and duties imposed upon and possessed by the latter, whether actual or contingent, tortious or on contract, became the successor of the latter, and subject to the same and identical conditions that were binding upon the city of University Place.

In other words, it succeeded in full measure to the duty to keep and maintain the streets of what was the city of University Place (which include the sidewalks thereof) in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and where defects existed therein due to the negligence of the city of University Place, amounting to positive misfeasance therein on part of the annexed corporation, its officers and servants, or by others under its authority or direction, the civil liability therefor imposed upon the latter by the fact of annexation became the liability of the former, and it must respond accordingly in damages.

It follows that, under the facts of this case, the failure of the plaintiff to file the statutory five days' notice with the city clerk of Lincoln afforded the city of Lincoln no defense.

Further, appellant challenges the right to recover in the instant case, asserting that, viz.: "Where a person voluntarily elects to use a sidewalk which he knows to be unsafe or dangerous, with knowledge of another safe and convenient way, he thereby assumes the risk of the traveled way and if injured is guilty of contributory negligence in a degree more than slight, which precludes his recovery." And it cites the case of *Hupfer v. City of North Platte,* 134 Neb. 585, 279 N. W. 168.

However, a consideration of the evidence in the instant case, we believe, clearly brings it within the doctrine announced in *Pinches v. Village of Dickens,* 127 Neb. 239, 254 N. W. 877, and *City of Beatrice v. Forbes,* 74 Neb. 125, 103 N. W. 1069. In the latter case, the rule is stated as follows, viz.: "Contributory negligence is not imputable to him as a matter of law from the mere fact that he attempts to pass over a walk that is obstructed or otherwise out of repair, provided that the obstruction or other defect is such that a man of ordinary intelligence would reasonably believe that, with proper care and caution, he could pass with safety notwithstanding the defect."

Neither may the city's challenge to the verdict as ex-

cessive be sustained. The accident caused a comminuted fracture of the radius and ulna of the right arm just above the wrist. There is now a widening of the wrist which of course interferes with the normal movements of the wrist in all directions. When more than the amount of motion with which plaintiff can use the hand freely is attempted, she suffers pain. She has about a 50 per cent. use of the second and third fingers. The ordinary use of the right hand is impaired. These conditions are permanent. She testifies that as a result of the accident her right hip and leg were severely bruised and her back injured. Her back still remains weak, and she still continued to be bothered by the broken arm at the time she testified at the trial. Her hospital bills to date of trial were $164.10. Prior to her injury she had been a dressmaker, and in that vocation had an average earning of $15 a week. Since her accident, wholly due to her present physical condition, she has been unable to earn more than $4 a week. She has been subjected to pain and suffering. Her expectancy of life, as shown by the Carlisle table, is 12.81 years. It is deemed that, in view of the nature and extent of the injuries suffered, the amount of the judgment recovered is not excessive.

The challenge to instructions and complaints of admission and rejection of evidence have received our due consideration, and in view of the issues, the basis of recovery allowed, and the record as an entirety, we do not deem the matters complained of as prejudicial to the rights of defendant city.

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

AFFIRMED.

# IN RE ESTATE OF FRIEDRICH BOSE.
## FRED BOSE, APPELLANT, V. MRS. C. F. KNUTZEN ET AL., APPELLEES.

285 N. W. 319

FILED APRIL 14, 1939. No. 30486.

1. Wills. No right of a citizen is more valued, and more assured by law, than the power to dispose of his property by will. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to the restrictions which are imposed by statute. Where a man has sufficient memory to make a will, and such instrument is not the result of undue influence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality.
2. ———. "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities." *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) *148.
3. ———. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument.
4. ———: COMPETENCY. Any one, who at the time of the execution of his will understands the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will.
5. ———: ———. "A testator, who is not generally insane, but who suffers from insane delusions, is competent to make a valid will, provided the insane delusions from which he is suffering do not control or influence his action in making the will." *In re Estate of Ayer*, 114 Neb. 849, 211 N. W. 205.
6. ———: ———. As respects the capacity to make a will, it is not medical soundness of mind that governs, but testamentary capacity as defined in law at the time of the execution of the testamentary instrument, and a high degree of mentality is not required if the will is free from undue influence.
7. ———: ———. Senile dementia, as a result of old age, does not necessarily result in mental incapacity to make a will, but there must be such a failure of mind as will deprive the

testator of intelligent action. This must be determined not alone by the nature and tendency of the disease, but by its effect in the particular case.

8. ———: ———. A person possessing the requisites of testamentary capacity is not incapacitated from making a will by old age, although his advanced years be accompanied by infirmity of mind and body. Nor is he necessarily incapacitated by failing memory, vacillating judgment, childishness, slovenliness in dress, eccentricities or peculiarities in habit or speech, and even delusions or hallucinations if they do not control or influence his testamentary action.

9. ———: ———. In determining the question of whether at the time of the execution of the testamentary instrument the testator was of sound mind and had sufficient capacity to make a will, the terms and provisions of the will itself may be considered, as to whether the same are just or unjust, reasonable or unreasonable, in connection with contemporaneous circumstances and conditions, and the history of the events leading up to the execution thereof.

10. ———: ———. "A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator (and grantor) had a constant and abiding scheme for the distribution of his property." *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586.

11. Evidence. Courts are supposed to know and take cognizance of the general social, political, and economic conditions prevailing in their own jurisdictions; of facts that may be regarded as forming part of the knowledge of every person of ordinary understanding and intelligence, and of the due enactment of federal statutes and executive proclamations made pursuant thereto.

12. Wills: BURDEN OF PROOF. "The burden is upon the proponent of a will, both in the county court and in the district court on appeal, to prove, not only the execution of the will, but the capacity of the testator." *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650.

13. ———. In Nebraska there is no statutory requirement that a will be read to the testator or to the witnesses thereto prior to its execution. It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by him. A will correctly written in the presence

of the testator, according to his dictation, and then executed by him according to the statute, is valid though not read to or by him.

14. Jury. Where evidence relating to mental capacity to make a will is conflicting, the issues of fact are questions for the jury to determine. And a jury trial thereof is guaranteed by section 6, article I of our state Constitution.

15. Trial. A constitutional trial by jury may be waived by motions for directed verdict, or for judgment, which are coexistent and conterminous, and made by all parties unconditionally and without reservation.

16. ———. Record examined, and *held* not to disclose the necessary proceedings that evidence the waiver of a trial by jury on part of the proponent.

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

*Kingsbury & Kingsbury, Sidney T. Frum* and *William P. Warner,* for appellant.

*P. F. Verzani* and *W. D. McCarthy, contra.*

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

EBERLY, J.

This is a will contest in which the validity of an instrument purporting to be the last will of Friedrich Bose, deceased, and a codicil thereto are involved. The petition for probate is in the usual form. Objections to probate were filed by Mrs. C. F. Knutzen, a daughter, and Ernest, Herman, William, Albert and Fredrick Rieth, grandsons, challenge the validity of the instrument in suit, on the grounds that the same is not executed as required by law, or properly attested; that the testator at the time of the execution of said instrument, "by reason of old age and general mental inability," was not possessed of sufficient mental capacity to make a will; that the execution of this instrument was secured by, and due to, improper and undue influence exerted upon the deceased by Fred Bose, Jr., a son of deceased, and Rosina Bose, wife of said son, and that said instrument had been revoked by implication.

These issues were tried to a jury, and, after the evidence in chief of proponent had been received and the testimony in behalf of the objectors had been adduced, the trial court sustained a motion of the objectors for a directed verdict in their behalf, denied the application of proponent to introduce further evidence, and, after overruling proponent's motion for a new trial, entered a judgment in conformity with the motion sustained. By the terms of this judgment, "the Last Will and Testament and the Codocil thereto of the said Friedrich Bose, deceased," was "vacated, annulled, set aside and held for naught" and probate thereof denied, "for the reason that on the day of the execution of said Will, to wit, July 21, 1933, and of the Codicil, June 30, 1934, the alleged Testator, Friedrich Bose, deceased, was not possessed of testamentary capacity; and was on said dates incompetent to execute a last will and testament. And for the further reason that said deceased was unable to understand the English language; and the evidence shows that said instruments were not interpreted to him." The proponent appeals.

The following facts appear, either as admitted in the record or established without any substantial dispute, viz.: Friedrich Bose, the person executing the instrument presented for probate, died at the home of his son, Fred Bose, Jr., on January 26, 1937, and at the time of his death had attained the age of 100 years and 26 days. He was a native of Germany and migrated to this country and first settled at Cincinnati, Ohio, about 1866 or 1867. He there followed his trade of blacksmith for about two years. He then, with his family, removed to Saunders county, Nebraska, and settled on a farm, but continued blacksmithing in connection with his farm work. In 1892 the family home was removed from Saunders county, Nebraska, to Dixon county, Nebraska, where he had purchased a farm near Concord. He subsequently added to the original purchase, and owned a half section when he died, which appears to be unencumbered. His wife died in 1902. They had six children, four of whom preceded him in death. The eldest son, Fred

Bose, Jr., proponent herein, and his daughter, Mrs. C. F. Knutzen, an objector, were the sole members of his immediate family who survived his death. The record furnishes no basis for the conclusion that he brought any substantial amount of money with him at the time of his migration from Germany to the United States, or that any substantial inheritance was thereafter received by him from the land of his nativity. Such evidence as we have before us clearly indicates that the accumulations he possessed at the time of his decease were the result of the hard work, frugal and industrious habits, and good judgment of the deceased, aided by the assistance of the members of the immediate family so long as they continued to reside with him. His descendants also multiplied so that, at the time of his death, 33 grandchildren, 67 great grandchildren, and at least 2 great, great, grandchildren survived him. Fred Bose, Jr., the eldest son, married shortly after the death of his mother. The father then came to live with Fred Bose, Jr., and his bride, and thereafter made his home with them until in 1906 when the father went to Germany, where he remained for about 20 years, returning to this country in 1926, and again making his home with Fred Bose, Jr., proponent herein, and his family on the farm near Concord. Here he resided until his death in January, 1937. While his father was in Germany, Fred Bose, Jr., acted as his father's representative, as to the latter's property. Fred himself farmed 160 acres of the land, the home place, where he had lived continuously since he was nine years old. Another brother, John, farmed the remainder of the half section. Rents including his (Fred's) own were collected and remitted to Germany to the father while the latter continued to sojourn in that country.

The record indicates that, prior to his departure for Germany in 1906, Friedrich Bose had executed a will. As to the terms of this first will, the record is silent. In 1927, in company with Gottlieb Rieth, a son-in-law, and father of five of the contestants in the instant case, and Reverend Hildebrans, the then minister of a German church of which

Friedrich Bose was then a member and a regular attendant, the present testator appeared at the office of C. A. Kingsbury, an attorney at law, and employed the latter to draft his will. It appears that Rieth was a German, familiar with the German language, and that he understood both "high" and "low" German. Aided by the German minister, and Rieth, there is no question but that Friedrich Bose's desires were properly interpreted and communicated to the attorney, and the will of 1927 then drafted by him truly expressed the will of the testator. To Fredrick Bose, his son (by the terms of this instrument), was given the home farm, viz.: The southeast quarter of section 15, and also the east half of the northeast quarter of the northeast quarter of section 15, all in township 28, range 4, east of the 6th P. M., in Dixon county, Nebraska. To John Bose, his son, was given the other 140 acres of his half section, and John was also to receive certain buildings situated on the lands devised to Fredrick Bose. John was charged with the payment of $3,000 and Fredrick Bose, Jr., was charged with the payment of $4,000, to be made for the benefit of Charles Bose and the three sisters, who were to receive the sum of $2,000 each. Charles Bose, having already received, by loan or otherwise, from the father the sum of $1,000, was to receive but $1,000. After the execution of the 1927 will, the will executed by the testator prior to his departure for Germany in 1906 was destroyed. On July 21, 1933, Friedrich Bose requested his son Fredrick to take him to Ponca, Nebraska, to the office of C. A. Kingsbury, the attorney who had drawn for him the will of 1927. The evidence adduced by proponent is that, in the absence of the son Fredrick, the testator, Friedrich Bose, dictated his desires to Mr. Kingsbury, the attorney, locating the lands he desired to devise from a map, and that in accordance with his direction the will of 1933 was drawn, read over to him, approved, executed by him, and then and there published as his last will, in the presence of two competent witnesses who, in compliance with his request, signed their respective names thereto as witnesses, in the presence of

the testator and in the presence of each other. In addition, the testamentary clause, to which these signatures of these witnesses were appended, was in regular form, and the recitals thereof evidence the proper execution of the will in suit.

By the terms of the 1933 will, testator's children, Thresa Knutzen, Hulda Koch, Augusta Rieth, and the children of his deceased son, John Bose (per stirpes), and the children of his deceased son, Charles Bose (per stirpes), were devised the 140 acres of land given to John Bose by the terms of the will of 1927.

To "Fredrick Bose, with whom I have made my home for years past," was devised by the testator the identical land given him by the will of 1927. Both of the tracts of land were devised and the respective devises thereof were relieved of the payment of any sums of money whatever, and the devise to Fredrick Bose also included "all improvements thereon," and further recited, "which land this day is conveyed by deed by me to my said son, Fredrick Bose."

Thereafter, a grandson, Alfred Bose, becoming indebted for rent to Friedrich Bose, and being unable to pay, on June 30, 1934, Friedrich Bose caused a codicil to be drawn and executed by him in due and proper form, making the amount of the claimed indebtedness, $565, a charge against the distributive share of Alfred Bose which that grandson would receive in his estate under the will of 1933.

Preliminary to a consideration of the conflicting evidence in this case, it is to be observed that, as stated by this court in *Isaac v. Halderman*, 76 Neb. 823, 107 N. W. 1016:

"Courts and juries are not warranted in setting aside last wills and testaments, and substituting in lieu thereof their own notions as to what a testator should do with his property, except upon satisfactory evidence. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of

either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. In this country a man's prejudices form a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality."

The foregoing observations were quoted substantially, and approved, by Sedgwick, J., in *In re Estate of Johnson,* 100 Neb. 791, 161 N. W. 429.

Nor, indeed, is it the policy of our law to deem the aged to be deprived of these valued rights by the mere lapse of passing time. Our tribunals guard jealously the rights of all people including the aged when not imposed upon to make wills. We might adopt in this regard the language of Chancellor Kent found in *Van Alst v. Hunter,* 5 Johns. Ch. (N. Y.) *148, viz.:

"It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities."

In *Banks v. Goodfellow,* 22 Law Times Rep. n. s. (Eng.) 813, Lord Cockburn, C. J., of the Queen's Bench, quoted with approval the principle thus announced by Chancellor Kent, and continues, viz.:

"For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, and there

can be no doubt that it operates as a useful incentive of industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it."

See, also, *McCrocklin's Admr. v. Lee*, 247 Ky. 31, 56 S. W. (2d) 564; *In re Will of John Ashley*, N. F. Rep. 1884-1896, p. 447; *Aggas v. Munnell*, 302 Pa. St. 78, 152 Atl. 840; *Will of Grosse*, 208 Wis. 473, 243 N. W. 465.

Not only are the principles above referred to in harmony with the development of our doctrine in this state, but we have expressly declared, viz.:

"A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will." *In re Estate of Frazier*, 131 Neb. 61, 267 N. W. 181.

The evidence of proponent is uncontradicted in the record that the substance of the will of 1933 was dictated by the testator to his attorney, at the latter's office, and taken down by him in the form of a memorandum. From this memorandum the will was dictated, in the presence of Friedrich Bose, to the office stenographer who typed the same. It was thereupon read to the testator in the English language, and he then declared the same to be his will, and in the execution thereof all the statutory formalities were complied with. The same is true with reference to the execution of the codicil. The will and codicil are witnessed by the same persons and their testimony clearly tends to establish the competency of the person executing them.

Further, proponent's evidence, given by witnesses who were actually present and observed the testator on the days mentioned, is that on the day of the execution of the will, July 21, 1933, and the codicil, June 30, 1934, the testator's general health was good. There is also evidence in the record that, generally, during the period of time which included both the execution of the will and the codicil, the following were included in the testator's ordinary activities, viz.: He "split wood with a ten-pound sledge hammer and a wedge, and piled up brush; raked brush and burned

that; fed the chickens; carried water to the hogs; carried wood to the house, and walked around the land," and over the farm where he lives "more or less." It appears that, unaided, the old man ascended 25 or 30 steps of a stairway leading to the lawyer's office on the day the testamentary instrument in suit was drawn, and declined assistance in going to or returning from the same; that his mental condition then was as usual and no change in the same occurred, so far as his mentality was concerned, until 1936 or 1937.

Miss Wendte, the law-office stenographer who was one of the witnesses to both will and codicil, testified, with reference to Friedrich Bose, as follows: "Q. Did you on his various visits there to the office talk with Mr. Bose at different times? A. Yes. Q. You speak German, do you not? A. Not very fluently. Q. Did you talk to him in English or German? A. In English. Q. And he could understand English, could he? * * * A. Yes. Q. Could you understand his English? A. Yes. Q. You had no difficulty conversing with him? A. No, sir. Q. Or in understanding him? A. No, sir. Q. I think I asked you whether his ruggedness for one of his years was noticeable? A. Yes. Q. Was his ruggedness for one of his years noticeable? A. Yes; it was." On cross-examination this same witness testified as follows: "Q. Do you talk high or low German? A. I understand high German. Q. But not low German? A. Not very well. Q. And talk very little high German? A. That is right."

The proof of contestants discloses that Friedrich Bose could speak and understand both high and low German; and it is the claim of their witnesses that, although during the early years of his residence in his adopted country he had acquired sufficient knowledge and use of the English language to carry on the business connected with his blacksmith shop with English speaking people, yet during the 20 years spent in Germany he had wholly lost the faculty or ability of using the language with which at one time he was crudely familiar.

Also, contestants' evidence covered the period after his

return from Germany in 1926, until his death in January, 1937. If we exclude the Lutheran minister, and two unimportant witnesses, it was given exclusively by the contestants and witnesses related to them by blood or marriage. It was sought to establish as a fact that the testator was foolish, weak-minded, and incompetent; that he lacked testamentary capacity and was a sufferer from senile dementia. For this purpose a great mass of testimony appears in the record, of which the following may be deemed typical, viz.:

That he was obsessed with the idea that the "Freemasons killed people" who talked "out of school;" that almost everybody was stealing from him; that at times he could see cattle running about the place, "whole yards of them," when none were actually there; that Alfred Bose was living in the chicken house on the home place, and he saw lights therein long after Alfred Bose had left the farm, and no lights therein actually existed; that he at times heard voices when there were none to be heard; that he failed to recognize his own daughters, and his daughters' husbands, and repeatedly failed to recognize his other relatives and granddaughters; that he was obsessed with the thought that persons were attempting to poison him; that he attempted to kiss two of his granddaughters who were about 15 or 16 years old; that he rubbed his little great grandchildren's chubby faces with his beard and scared them thereby and made them cry; that he presented candy to his grandchildren unsanitarily wrapped in dirty newspapers; that he became very deaf and found it very hard to make himself understood; that he had no realization of values, and lost power to carry on a continued conversation in German, and refused or found it impossible to engage in conversation in the English language; that he dressed in winter garments during the summer season. It is to be noted, however, that Mrs. Thresa Knutzen, one of the contestants, testified, viz.: "My father was not—I don't call him crazy at all. He was childish and weak-minded."

Further, the contestants, to sustain their objections, rely

exclusively on the testimony of lay witnesses, but in whose testimony the time of occurrence of the incidents and conduct testified to are not fixed with any degree of particularity. The weight of this class of evidence is necessarily determined in part by their relation in point of time to the execution of the challenged will and codicil, and in part by the particular acts and conduct of the testator personally observed by the witness upon which his testimony of mental unsoundness is based. *Carter v. Gahagan,* 102 Neb. 404, 167 N. W. 412.

In general, there is no serious attack made upon the testamentary capacity of Friedrich Bose as it existed at the time of his return from Germany in 1926 and for some period thereafter. One of the contestants' witnesses, a grandson, who lived on an adjoining farm, saw the testator frequently and often visited with him during the latter years of this aged patriarch, testifies that before 1930 mentally he was "all right." There appears to be no substantial dispute of this statement in the entire record.

The record contains no sufficient proof to establish undue influence or fraud, as alleged by contestants, and the district court based its conclusion wholly upon testamentary capacity and failure to interpret to testator, in the German language, the will and codicil executed by him.

We quite agree with contestants that "The burden is upon the proponent of a will, both in the county court and in the district court on appeal, to prove, not only the execution of the will, but the capacity of the testator." *Seebrock v. Fedawa,* 30 Neb. 424, 46 N. W. 650. See, also, *Murry v. Hennessey,* 48 Neb. 608, 67 N. W. 470; *In re Estate of Sweeney,* 94 Neb. 834, 144 N. W. 902.

The record in this case establishes beyond question the due formal execution of the will and the codicil in full compliance with the statutory requirements. *Holyoke v. Sipp,* 77 Neb. 394, 109 N. W. 506; *In re Estate of Aden,* 134 Neb. 810, 279 N. W. 794.

At the threshhold of our consideration of the question of testamentary capacity, we are met with the contention of

contestants, in substance, that the testator, at the time of the execution of the will and codicil in suit, was suffering from senile dementia; that in senile dementia there are no lucid intervals, and soundness of mind and testamentary capacity cease to exist. That senile dementia may progress to a degree that would justify this contention is true, but that its mere presence justifies contestants' assumption is not supported by the authorities generally, and besides, in this case, we do not have the assistance of expert testimony on this subject.

As stated in 68 C. J. 442, "Senile dementia, often a result from old age, does not necessarily result in mental incapacity to make a will, but there must be such a failure of mind as will deprive the testator of intelligent action. The disease is progressive in nature, and it must be determined whether its progress has so impaired the faculties of the testator that they fall below the mark of legal capacity. This must be determined not alone by the nature and tendency of the disease, but by its effect in the particular case."

On the other hand, the authorities generally sustain this conclusion, viz.: "A person possessing the requisites of testamentary capacity is not incapacitated from making a will by old age, although his advanced years be accompanied by infirmity of mind and body. Nor is he incapacitated by failing memory, vacillating judgment, childishness, slovenliness in dress, eccentricities or peculiarities in habit or speech, and even delusions or hallucinations if they do not affect the execution of the will, and he is not limited to conventional methods of disposition." 68 C. J. 440.

We appear committed to the view that, when the testamentary capacity of a testator is challenged on grounds of alleged senile dementia, this fact shall be determined according to the rules applicable to other forms of insanity. *In re Estate of Winch,* 84 Neb. 251, 121 N. W. 116. See, also, *Stull v. Stull,* 1 Neb. (Unof.) 389, 96 N. W. 196. The accepted view is, viz.: "The mental capacity of a testator is tested by the state of his mind at the time he executed his

will." *In re Estate of Laflin,* 108 Neb. 298, 187 N. W. 885.

In the instant case, the application of this test to testator's condition as it existed on the 21st day of July, 1933, when he made his will, and on the 30th day of June, 1934, when he executed the codicil thereto, is decided by ascertaining whether Friedrich Bose then and there understood the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty. The result of that test necessarily determines the validity of these testamentary instruments in suit, so far as concerns questions of mental capacity. *In re Estate of Kajewski,* 134 Neb. 485, 279 N. W. 185; *In re Estate of Frazier,* 131 Neb. 61, 267 N. W. 181; *In re Estate of Ayer,* 114 Neb. 849, 211 N. W. 205; *In re Estate of Nelson,* 75 Neb. 298, 106 N. W. 326; *In re Estate of Kerr,* 117 Neb. 630, 222 N. W. 63.

It is to be remembered that, in respect to capacity to make a will, it is not medical soundness of mind that governs, but testamentary capacity as defined in law, and a high degree of mentality is not required. *In re Estate of Frazier,* 131 Neb. 61, 267 N. W. 181.

Conceding that at times the testator in the instant case was subject to delusions, it must be granted under the authorities cited above that this was insufficient to destroy testamentary capacity, unless "such delusions controlled his action and rendered him insensible to the ties of blood and kindred." *In re Estate of Kerr,* 117 Neb. 630, 222 N. W. 63. If the testator was of (legally) sound and disposing mind and memory, and acted voluntarily, at the time he executed the will in controversy, it is immaterial what the condition of his mind was before and after that time. *In re Estate of Jensen,* 185 Minn. 284, 240 N. W. 656.

In determining the question of whether at the time of the execution of the testamentary instruments in suit the testator was of sound mind and had sufficient capacity to make a will, we may consider the terms and provisions of the will itself, whether same are just or unjust and reasonable or unreasonable, in connection with contemporaneous

circumstances and conditions, and the history of the events leading up to the execution thereof. *In re Estate of Gunderman*, 102 Neb. 590, 168 N. W. 359; *In re Estate of Kerr*, 117 Neb. 630, 636, 222 N. W. 63; *In re Estate of Alexander*, 128 Neb. 334, 258 N. W. 655.

So, too, prior wills executed, as to which there are no substantial claims of testamentary incapacity, in a similar manner may likewise be considered. *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586.

From the witnesses vouched for by the contestants, we find (as hereinbefore set out at length) that in 1927 the testator, accompanied by the then minister of the German Lutheran Church, of which he was a member, and by his son-in-law, both of whom were Germans and versed in their native tongue, proceeded to the office of C. A. Kingsbury, an attorney, to secure the preparation of his will. The testator's desires and intentions were communicated to the attorney by aid of the interpretations of his accompanying friends. From the directions so communicated, the will was drafted by the attorney, and then carefully read over by the scrivener to the testator and his accompanying friends. The testator received assurance in the German language that the will as written conformed to his intentions, and then duly executed and published the same. The substance of this will of 1927, heretofore set out in this opinion, will not be here repeated. The fundamental plan on which the will of 1927 was based was clear and distinct. To the eldest son, Fredrick Bose, was given the home place increased to 180 acres of land, subject to a charge of $4,000. To John Bose was given 140 acres of land and certain buildings, subject to a charge of $3,000. The two sons were to pay to their remaining brothers and sisters the sum of $7,000, which was made a charge against their respective devises, to which sum $1,000 received previously by the son Charles Bose from the father was to be added, thus giving to each child the sum of $2,000 as a legacy from their father's estate.

It is obvious that Fredrick Bose and John Bose were the favored children by the terms of the will of 1927. Fredrick received more in proportion than did John. However, the matter of the relative claims of his children to their father's bounty was a matter strictly for the father's determination. The competency of the father at the time of making this will in 1927 is substantially unchallenged. It had been carefully explained to him in his own language and he knew the will he executed. It clearly evidenced his lawful intent.

On July 21, 1933, Friedrich Bose again repairs to the law office of C. A. Kingsbury, who had drawn the will of 1927 for him, and alone, personally and unaided, secured the drafting of the will of 1933. The clear weight of all the evidence is that this was done on his own initiative. There is no affirmative evidence in the record that it was done upon the advice, solicitation or prompting of any one but himself. The new will again expressed his intention that his favorite son, Fredrick Bose, should receive the "home farm" of 180 acres, which the testator at all times planned this son should receive. But the 140 acres of land, which by the will of 1927 had been devised to John Bose, his favored son, was now equally divided among his five children, exclusive of Fredrick Bose, and all lands devised were relieved from the payment of definite amounts as prescribed in the will of 1927. In addition, contemporaneously with the execution and publication of the will of 1933, the testator had prepared a deed of general warranty, containing the usual covenants of warranty, and which he duly executed, and which for a recited consideration "of the sum of One Dollar, Love and Affection, and other valuable consideration, in hand paid," purported to convey unto "Fred Bose" the 180 acres of land devised to the latter by the terms of the will of 1927. This warranty deed, the uncontradicted evidence in the record establishes, was by the grantor publicly and unconditionally delivered to the grantee named therein, subsequent to the execution and the due publication of the will of 1933. The validity of these instru-

ments and the mental capacity of the maker to execute the same, we must now determine from all the evidence in the record, including the consideration, the terms and provisions of the instruments themselves as to whether just or unjust, reasonable or unreasonable, in connection with the contemporaneous circumstances and conditions and the history of the events leading up to the execution thereof. Certain contemporaneous circumstances and conditions as they existed generally on the 21st day of July, 1933, are matters of which courts take judicial notice. *Blaisdell v. Home Bldg. & Loan Ass'n,* 189 Minn. 422, 249 N. W. 334; *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481; Laws 1933, ch. 65; Laws 1933, ch. 78; Laws 1933, ch. 17; *First Trust Co. v. Smith,* 134 Neb. 84, 277 N. W. 762.

We are thus justified in taking judicial notice of the then existence of a world-wide business and commercial crisis which had attained such proportions as to substantially interrupt and effectually destroy the ordinary and usual course of business and finance. On the preceding March 4, 1933, all banks throughout the nation had been closed pursuant to executive order. By act of congress of May 12, 1933, devaluation of our national currency had been authorized to the extent of not more than 50 per cent. and not less than 40 per cent., the exact percentage determinable by presidential proclamation. Legislative moratoria had been provided not only throughout the nation, but also in Nebraska. The emergencies growing out of the then economic crisis, world-wide in scope, were such as particularly affected "the value of all commodities produced in Nebraska, and thereby causing a collapse in the value of all real estate in the state of Nebraska." Laws 1933, ch. 65, sec. 5.

It is obvious that under these new developments the plan adopted by the testator, pursuant to which the will of 1927 was drawn, necessarily no longer expressed the testator's intentions. Under conditions prevailing during the Spring and Summer of 1933, the provisions of the will of 1927

had become not only uncertain in their application, in so far as to secure the result intended by the testator when framed by him, but potentially dangerous to all concerned. The values of the land out of which the legacies were payable had utterly collapsed; the value of the medium of exchange in which the legacies were defined had been at least potentially devalued not more than 50 per cent., nor less than 40 per cent. by congressional enactment. One of his favorite sons, John, had departed this life. Under these conditions the new will of 1933 was drawn and the warranty deed executed. It is to be noted that in the new provisions for the distribution of his estate, contained in the will of 1933, the plan of ultimate division of his property, as evidenced by the will of 1927, was substantially retained, modified only by the death of his son John, and the necessary changes which the presence of an existing commercial, business and farm crisis compelled. Fredrick Bose received the "home place," the 180-acre farm, which the facts of the situation indicate was at all times intended for him. In lieu of monetary legacies, the other children (and their representatives where the immediate children had departed this life) received undivided shares in the 140-acre farm. The reason for the preference intended for his son John vanished with the death of the latter. This modification of the original plan secured to the intended recipients of his bounty a certainty of division of the corpus of this estate, wholly unattainable where such a division depended on the changing values of a medium of exchange and the then undeterminable values of real estate, and rendered certain the proportionate part of the real estate each devisee should receive. Indeed, the will of 1927, and the will and deed of 1933, are so related as to render applicable the principle announced by this court in *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586, in the following language, viz.:

"A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the

instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator (and grantor) had a constant and abiding scheme for the distribution of his property."

The fact that this old man, who certain witnesses in this case regard as incompetent, had accumulated, by his own efforts, a competence, and, notwithstanding he was compelled to pass through the panics of 1873, 1893, 1906, and 1933, was enabled to conserve it until he had attained more than 96 years, and then was enabled to divide between his children, in 1933, a half section of Nebraska land of good quality, and wholly unencumbered, in such a manner that each of his beneficiaries secured the exact portion he intended for him, definite and certain notwithstanding the surrounding conditions, is a fact that challenges our attention as persuasive evidence of his then mental competency, and leads to our conclusion that in the management of his business affairs, including the making of the last disposition of his estate, he was uncontrolled and uninfluenced by insane delusions, if such he ever had. Certainly the evidence in the record as an entirety, in the light of the surrounding circumstances, would be ample to sustain a verdict for the proponent of this will, so far as affects the questions of testamentary capacity on the part of the testator and alleged undue influence exercised upon him.

We quite agree that it is essential to the validity of a will that the testator know and understand the contents thereof. The knowledge must be possessed at the time of its execution. In the instant case, the proof is without contradiction that Friedrich Bose on July 21, 1933, personally gave his directions to his attorney who in his presence reduced them to a memorandum. The attorney then in the presence of the testator dictated the terms of the will and the warranty deed to a stenographer. The stenographer in turn typed the instruments. The will and deed were then again read over to the testator, in the English language, and both duly executed by him. There is no affirmative

evidence of mistake in this transaction; there is not a suspicion of fraud. The requirement that testator must know and understand the contents of the will does not mean that the testator must be able to correctly interpret the will in a legal sense. It has been held not to be essential to the validity of a will that the testator should understand the meaning of all the technical terms and legal phraseology therein employed; that it is sufficient that he understands the meaning and effect of the instrument as a whole, if the same truly expressed his testamentary intention as to the disposition of his estate.

"It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms." *Banks v. Goodfellow,* 22 Law Times Rep. n. s. (Eng.) 813.

In Nebraska there is no statutory requirement that a will be read to the testator or to the witnesses thereto prior to its execution. It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by him. Where a will, written in the presence of the testator according to his dictation, is executed according to the statute, it is valid though not read to or by him. *Hess' Appeal,* 43 Pa. St. 73, 82 Am. Dec. 551.

The doctrine as stated by the English cases on this point is illuminating, viz.:

"If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, 'I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.'" *Parker v. Felgate* (1882-1883) 8 Prob. Div. L. R. (Eng.) 171. This doctrine was expressly approved in *Perera v. Perera* (1901) App. Cas. (Eng.) 354.

And the supreme court of Pennsylvania has made this observation: "When the testator trusts his scrivener, why should we distrust him, when there is no word or act that impeaches his honesty?" *Hess' Appeal,* 43 Pa. St. 73, 82 Am. Dec. 551.

Then, too, in the instant case, the will of 1933 was but a modification of the will of 1927, the contents of which latter will were fully made known to Friedrich Bose. *In re Mather's Will,* 76 Vt. 209, 56 Atl. 982.

It follows, therefore, that, in view of the facts and circumstances surrounding the execution of the will of 1933, the failure to read the will to the testator in translation in no manner affects its validity. This conclusion is equally applicable to the codicil executed the following year.

The last question for consideration is the action of the trial court in sustaining the motion of the contestants, made after plaintiff's evidence in chief had been received and after the evidence adduced by the contestants had been concluded, for a directed verdict in their favor, and denying the application of the proponent for permission to introduce further evidence in support of his petition, and thereupon entering a judgment in favor of the contestants.

The record contains the following facts pertinent to our present consideration, viz.: Plaintiff presented certain evidence as his case in chief. At the close of same, as the last line thereof, appears the following, made in open court, viz.: "Mr. Kingsbury: Plaintiff rests, reserving right to call" The sentence was not completed in the transcript of the reporter's notes; the usual punctuation terminating the sentence is omitted. Nevertheless, the statement, so far as set forth in the bill of exceptions, though incomplete, must receive a reasonable construction, and be given its natural import and meaning. It amounts to a "rest with reservations." A careful consideration of the bill of exceptions as an entirety discloses no waiver of the reservation thus indicated. It remained thereafter throughout the trial a "conditional rest."

At the close of contestants' evidence, on January 27,

1938, and after they had formally rested, the proponent presented an oral motion containing four paragraphs. The first paragraph of this motion was wholly directed to securing the withdrawal of paragraph 3 of the will in suit from further consideration by the jury. This paragraph 3 of this will contained the bequest of the 180-acre farm to Fredrick Bose and nothing else. The motion of proponent was based upon the fact that the uncontradicted evidence of the record disclosed that, after the will of 1933 had been executed and published, the testator had conveyed the premises devised to his son Fredrick Bose by deed of general warranty. The remaining three paragraphs of this oral motion sought a directed verdict in behalf of proponent.

It will be remembered that under the issues in this case, and the evidence, the devises contained in this will, being separate, distinct, and wholly unrelated, were therefore to be considered as severable. *In re Estate of Koller,* 116 Neb. 764, 219 N. W. 4; *In re Estate of Mooney,* 131 Neb. 52, 267 N. W. 196.

Also, "In any event, a conveyance by the testator, subsequent to the execution of his will, of property devised therein, may, in a proper case, operate in effect as a revocation of the will to the extent of the property conveyed." 68 C. J. 843. See, also, *Baacke v. Baacke,* 50 Neb. 18, 69 N. W. 303.

This oral motion of proponent was argued by the parties and by the court taken under advisement on January 27, 1938. On January 28, 1938, after court had reconvened, the contestants filed and presented a written motion for a directed verdict, in four paragraphs, which we may briefly summarize as based upon the insufficiency of the evidence to sustain the proponent's contention. There was argument upon contestants' motion, at the close of which the court announced: "The motion of the contestants is sustained." The bill of exceptions further recites, viz.: Mr. Kingsbury: "Comes now the proponent and his attorney, and at this time before the ruling of the court on motion of proponent for a directed verdict, does withdraw said motion and

each part thereof consisting of paragraphs one, two, three and four, and all parts of said motion," and leave to offer further evidence was then requested. "Court: The motion will have to be overruled. It comes after the ruling of the court."

On this record the contestants contend that in a civil jury trial, when both sides move the court to instruct a verdict in their behalf, neither party can predicate error on the court's action in failing to submit the case to the jury. Conceding that the principle thus contended for is correct in a proper case, is such a case presented in the instant record? Our constitutional provision is, viz.: "The right of trial by jury shall remain inviolate." Const. art. I, sec. 6. In the instant case, to sustain the action of the trial court both parties must either expressly or by necessary implication have waived the benefits of this provision. In the case of *Knies v. Lang*, 116 Neb. 387, 217 N. W. 615, cited by appellees, the defendant having made a motion for an instructed verdict in his behalf, plaintiff formally joined with him and asked the court to direct the jury to return a verdict for the same reason in favor of plaintiff. Thus, the waiver was expressly made. In *Adler v. Royal Neighbors of America*, 90 Neb. 56, 132 N. W. 716, and *Segear v. Westcott*, 83 Neb. 515, 120 N. W. 170, also cited by the appellees, the motions of the respective parties as passed upon by the court were coexistent and conterminous, and made without reservation, and thus by necessary implication clearly evidenced the intent to waive the constitutional benefits. Under the practice that prevails in this jurisdiction, a request by both parties for direction of a verdict amounts to a waiver of a jury, and submission of the whole case to the court, if there is not other action on the part of one or both parties inconsistent with the theory of waiver.

In the case of *Adams v. City of Omaha*, 119 Neb. 753, 230 N. W. 680, this court, in effect, determined that motions for a directed verdict must be made without reservation. Judge Good, in the *Adams* case, in discussing the situation that there prevailed, says, in part, viz.:

"In the instant case, each party moved for a directed verdict without any reservation, and thereby each party invited the court to discharge the jury and decide the case upon the record then made. Not until after the court had discharged the jury and indicated that its holding would be for the plaintiff did the defendant make a request to introduce evidence. It was then too late for it to demand this as a matter of right."

In the instant case the particular and definite language of the first paragraph of proponent's motion, in effect, was not for a favorable judgment as to the third paragraph of the decedent's will, but sought to remove paragraph 3 from further consideration for any purpose. The terms of the motion presented by proponent contained no express waiver of the reservation originally stipulated for when proponent rested at the close of the evidence in chief. In addition, the jury had not been discharged when application to submit further evidence was made by the proponent. Under the circumstances of this case, as disclosed by the record before us, it cannot be said that the motions passed upon by the trial court were coexistent and conterminous, and made by both parties without reservation. The record as an entirety fairly presents a question to be determined by a jury and also discloses that the constitutional right of jury trial had not been waived either expressly or by necessary implication by the proponent.

It follows that the district court erred both in sustaining the contestants' motion for a directed verdict, and in denying the proponent the right to introduce further evidence.

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

REVERSED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. HENRY M. BOSTROM ET AL., APPELLANTS.
285 N. W. 490

FILED APRIL 21, 1939. No. 30492.

**Mortgages.** "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." *Equitable Trust Co. v. Groves*, 133 Neb. 177, 274 N. W. 457.

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

*E. E. Richards*, for appellants.

*Franklin L. Pierce, Philip M. Wellman, R. L. Smith* and *William W. Graham, contra.*

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

EBERLY, J.

This is an appeal from an order confirming a judicial sale. Defendants challenge the sufficiency of the sale price. The record discloses that, in an action to foreclose a real estate mortgage commenced on April 24, 1936, because of defaults in the payment of interest therein stipulated on March 1, 1935, September 1, 1935, and March 1, 1936, a decree of foreclosure was duly entered in said cause on June 17, 1936. As part of said decree, on stipulation of the parties, a stay of further proceedings was granted until June 14, 1937. It appears that the order of sale upon this decree was issued on February 28, 1938. On April 5, 1938, after due notice, a sale of the mortgaged premises was had, in the manner provided by law, to the Federal Farm Mortgage Corporation, for the sum of $2,037. On April 5, 1938, the owner of the equity of redemption filed objections to the confirmation of such sale. The only charge therein contained that merits careful consideration under the rec-

ord is "that said sale did not bring a just, fair and reasonable amount under the circumstances and conditions of said sale, and that said sale price was so low and inadequate as to shock the conscience of the court and amounted to a fraud upon defendant and upon the court, and that another and subsequent sale would realize a substantially larger sum."

To sustain their contentions, defendants introduced in evidence the affidavit of defendant Henry M. Bostrom and the affidavits of several corroborating witnesses. The valuation of the half section of land involved was stated in these affidavits at varying prices from $65 an acre to $40 an acre. The opinions were also expressed therein that a resale would secure an enhanced sum, but no probable purchaser was named, nor was the amount of the enhanced price indicated.

Two witnesses were produced by the plaintiff, who testified in open court, and were cross-examined by the defendants' attorney. They fixed the value of the half section involved at from $15 to $20 an acre, and the evidence of one of these witnesses, a real estate agent, was that it would now be impossible to find a purchaser for the premises at $20 an acre, and it was very doubtful if one could then be produced at $15 an acre.

The defendants then introduced certain testimony bearing on the value of the land, in explanation of plaintiff's evidence.

Also, it was stipulated by the parties that the taxes for the years 1934, 1935, 1936, and 1937 were not paid by the defendant mortgagors; that there is an unpaid first mortgage on the premises of $4,000, upon which the accrued interest is long in default; that the approximate total indebtedness against the mortgaged property, including the amount due the plaintiff and due on liens senior thereto, was then the sum of $7,243.80.

At the close of the evidence the purchaser, in open court, raised its bid in the sum of $200, and the district court thereupon confirmed the sale, the total price being $2,237.

The trial judge personally heard and observed the wit-

nesses who testified for the plaintiff. While this court tries the case *de novo* and reaches its own conclusion without regard to the judgment entered by the trial court, still the fact remains that the trial judge accepted the testimony introduced by the plaintiff, which he personally heard, and rejected the conflicting evidence, mainly in the form of affidavits, offered by defendants. We are inclined to the view that the evidence as an entirety fairly sustains the action of the trial court, and does not reasonably establish that a substantially higher bid would be forthcoming in the event of a resale. Under the facts as detailed in this record, the case is controlled by the rule announced by this court in *Equitable Trust Co. v. Groves*, 133 Neb. 177, 274 N. W. 457, viz.:

"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."

Error in the proceedings and judgment of the district court has not been found, and the same are approved, with leave granted to defendants to redeem prior to the issuance of the mandate herein.

AFFIRMED.

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TUKEY MORTGAGE COMPANY, APPELLANT, V. FRANK E. PARKINS ET AL., APPELLEES.

285 N. W. 492

FILED APRIL 21, 1939. No. 30543.

Mortgages. An assignee of a mortgagee, who releases the mortgage to a grantee of the mortgagor without the latter's consent, cannot hold mortgagor personally liable for the debt when the value of the land released exceeds the indebtedness secured by such mortgage.

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

*Edward F. Leary*, for appellant.

*James J. Fitzgerald, contra.*

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

PAINE, J.

The plaintiff brought suit upon a promissory note, after releasing without consideration the second mortgage which secured the note. At the close of all the testimony, the plaintiff moved for a directed verdict, which was denied. The court then on its own motion discharged the jury and dismissed the plaintiff's petition. Plaintiff appeals.

On May 1, 1926, the defendants purchased a home in the exclusive Country Club district in Omaha from Theodore W. Metcalfe for $9,250. On May 5 defendants executed a first mortgage thereon to the Occidental Building & Loan Association for $6,250, and, as a part of the same consideration, executed a note to Theodore W. Metcalfe on the same day for $500, and secured the same by a second mortgage upon the same property. On September 8, 1926, Metcalfe sold and assigned said note to the plaintiff company without recourse, the note with interest amounting on that date to $513, and the plaintiff paying Metcalfe $384.75 in full settlement thereof. On the same day Metcalfe gave plaintiff an assignment of his $500 second mortgage in consideration of the sum of $1 and other valuable considerations, which assignment was duly recorded on September 16, 1926.

For some five years the defendants made payments to the plaintiff upon said note of $500, the note itself providing for monthly payments of $5 each, the last payment on said note being made on September 19, 1932, of $5.20 on principal and $4.80 on interest, total $10, according to the ledger page of plaintiff company, being exhibit No. 2, and thereafter the defendants were in default of payments upon the $500 note and mortgage. Defendants were also in default upon the payments of the first mortgage to the Occi-

dental Building & Loan Association, and after some negotiations on February 4, 1933, the defendants executed a deed of the home property to Gertrude McLaughlin, which deed was executed to her presumably as she was an employee of the Occidental Building & Loan Association, and in consideration of said deed being executed by the defendants they were given an option to buy back the property for the sum of $5,308.79, then due, subject to all unpaid taxes and the plaintiff's mortgage of $500.

On July 20, 1933, the plaintiff, Tukey Mortgage Company, by H. A. Tukey, its president, executed a marginal release, on the record in the office of the register of deeds, of the $500 mortgage, reciting that it was in consideration of full payment of the within mortgage.

On June 13, 1933, the Home Owners Loan Act of 1933 (United States Code, Vol. 12, p. 989) became effective, and subdivision (g), section 4, of this act provided relief in the way of refinancing by a home owners loan, as follows: "To redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed of trust or under power of attorney, or by voluntary surrender to the mortgagee," within three years of such exchange or advance.

Under this section of the U. S. Code, the Occidental Building & Loan Association, or the defendants herein, made an application to the HOLC, and on October 28, 1933, the property was refinanced. The HOLC took a first mortgage for $5,540, and the Occidental Building & Loan Association released its mortgage upon payment of $5,250, and on November 1, 1933, to carry out the refinancing by the HOLC, Gertrude McLaughlin, on behalf of her employer, Occidental Building & Loan Association, executed a deed to the property to the defendants, Frank E. Parkins and Ruth W. Parkins, who continued to occupy the property until March 1, 1937, when it was sold for $6,000.

On August 19, 1937, the Tukey Mortgage Company filed its transcript on appeal from the municipal court, and on August 24, 1937, filed its petition in the district court for Douglas county, bringing suit in the case at bar on the $500

note originally given to Theodore W. Metcalfe, and by him sold and assigned without recourse to the Tukey Mortgage Company, plaintiff. Said petition alleged that there was a balance due and owing on said note in the sum of $427.17, with interest at 7.2 per cent. per annum from January 1, 1936.

To this the defendants filed an answer June 2, 1938, admitting the execution, delivery, and assignment of the note, further alleging that a second mortgage for $500 was given as security for the payment of said note, and that the plaintiff released, canceled, and discharged said note for a valuable consideration, and that said release of the mortgage securing said note operated as a release and discharge of the promissory note.

Defendants further allege that the plaintiff released said mortgage without the mortgagor's knowledge or consent, at a time when the value of the lands released exceeded the amount of all debts and liens against said lands; that because of said action on the part of the plaintiff, plaintiff waived its right to hold the defendants personally liable on said note; that defendants have been damaged by the depreciation in the real estate value of the property described because of the conduct of the plaintiff in releasing said second mortgage, and pray that the plaintiff's petition be dismissed and they recover their costs expended.

After a trial to the jury, plaintiff moved the court to direct the jury to return a verdict in favor of the plaintiff. Said motion was overruled. The court then directed that, as there was no question for the jury to determine, said jury be discharged and the cause of action be dismissed at the costs of plaintiff. From such findings the plaintiff appealed.

There is no conflict in the evidence, and the only proposition for determination is a legal question: "Can a mortgagee who releases a mortgage as to all lands therein described to a grantee of the mortgagor and without the latter's consent, hold such mortgagor personally liable for the debt secured when the actual value of the lands so released ex-

ceeds or equals the indebtedness secured by such mortgage?" (Brief of appellees.)

In the argument in the district court, and also in this court, the defendants rely upon the case of *Petters v. Storm,* 132 Neb. 542, 272 N. W. 409, in which this question was answered in the negative, and on which decision Judge Yeager relied when he dismissed the plaintiff's petition.

The plaintiff insists that the value of the property is immaterial; that Tukey believed the property was worth no more than the Occidental mortgage against it. The plaintiff also denies that Parkins ever made an actual sale of the property back to the Occidental, and yet the defendants gave a deed to an employee of the Occidental, and took back a legal option to repurchase it, and then, on the strength of the option to repurchase, successfully refinanced it through the HOLC. It is argued by the plaintiff that the Occidental could not take a deed on property which bore a second mortgage without assuming the second mortgage, and for this reason Tukey was asked to release his second mortgage, and assuming that the second mortgage had no value he released it, for plaintiff claims second mortgages were valueless in 1933, and that the release of the $500 mortgage was immaterial because the defendants were, therefore, not damaged by the release. It was also argued by the plaintiff that the case of *Petters v. Storm, supra,* is not based upon the same set of facts.

The defendants call attention to the fact that the plaintiff only paid $384.75 to Metcalfe for the second mortgage note, and that plaintiff has collected in small payments $369, thereby losing only some $15 on the transaction, although they claim a balance still due from the defendants of $427.17, and argue that the plaintiff decided to accept this small loss for the sake of accommodating another finance company, and that plaintiff made no effort to notify or contact the defendants, and made no claim for payment of the note until just before the statute of limitations had run upon the note.

It has long been held to be the law that a mortgagee who

releases the mortgage to a grantee of the mortgagor, without the latter's consent, cannot hold such mortgagor personally liable for the debt when the value of the land released exceeds the indebtedness. 41 C. J. 719; *Insley v. Webb*, 122 Wash. 98, 209 Pac. 1093, 41 A. L. R. 274. More recent annotations on this subject will be found in 72 A. L. R. 389, 81 A. L. R. 1016, and the general rule is again stated in an annotation in 112 A. L. R. 1326, as follows: "Recent authorities support the well-settled rule that subsequent dealings between the mortgagee and a grantee of the mortgaged property, entered into without the consent of the mortgagor, may discharge the latter from personal liability to the mortgagee, wholly or at least *pro tanto*." This is supported by many decisions from 25 states, and from Nebraska is cited the case of *Petters v. Storm, supra*, the syllabus of which reads as follows: "A mortgagee who releases a mortgage, as to all lands therein described, to a grantee of the mortgagor without the latter's consent, cannot hold such mortgagor personally liable for the debt secured when the actual value of the lands so released exceeds or equals the indebtedness secured by such mortgage." See, also, *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180, 95 N. W. 61; *Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178.

We believe the legal question in the case at bar is identical with the one in *Petters v. Storm, supra*, and we follow the holding there announced.

The action of the trial court in dismissing plaintiff's petition is correct, and the same is hereby

AFFIRMED.

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HERMAN JOHNK, ADMINISTRATOR, APPELLEE, V. CORNELIUS SCANLON, APPELLANT.

285 N. W. 488

FILED APRIL 21, 1939. No. 30524.

1. **Automobiles: GROSS NEGLIGENCE.** The failure of a motorist to negotiate a turn onto a bridge constructed on an angle and to

the right of the general line of the highway does not, under the circumstances recited in the opinion, constitute gross negligence within the purview of the Nebraska guest statute.

2. ———. When evidence in a guest case is resolved most favorably toward the existence of gross negligence, and a fixed state of facts thus obtained, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law.

APPEAL from the district court for Colfax county: FREDERICK L. SPEAR, JUDGE. *Reversed.*

*Chambers, Holland & Locke* and *T. J. Kiesselbach,* for appellant.

*Cook & Cook* and *Walter B. Sadilek, contra.*

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

CARTER, J.

This is an action brought by the administrator of the estate of Dorothy Johnk, deceased, to recover damages for her alleged wrongful death which occurred while she was riding in an automobile as the guest of the defendant. The verdict and judgment were for the plaintiff and the defendant appeals.

The evidence discloses that the defendant was driving home after attending a dance at Howells, accompanied by Mildred Poole, Mildred Krepel, and the deceased, Dorothy Johnk. The deceased was riding in the front seat with the driver, and the other two girls were riding in the rear seat. The girls in the rear seat were asleep at the time of the accident, which occurred between 1:30 and 2 o'clock a. m., on the morning of October 13, 1937. The accident took place at a bridge located at a sharp angle to the general line of the road at the bottom of a hill. The evidence shows two skid marks commencing at a point 125 feet north of the bridge and running to the point where the automobile collided with the bridge. The iron railing extending out from the east side of the north end of the bridge was dam-

aged, and there is evidence that the span of the bridge itself was struck a forceful blow at that point. The car went through the railing and fell to the bottom of the creek below. The car was badly damaged. The deceased apparently went through the windshield and was instantly killed. The defendant suffered serious injuries and the two girls in the rear seat were badly shaken up. It is upon these facts that plaintiff relies for a recovery under the guest statute.

Defendant testifies that as he came to the top of the hill he was traveling from 40 to 45 miles an hour. As he started down the hill, he testifies that he reduced his speed to 30 or 35 miles an hour. His testimony is that he did not see the bridge constructed on the angle with the general line of the road until he was within 125 feet of the north end of it. He testifies that he applied his brakes and used every means at his disposal to negotiate the turn onto the bridge, but failed to make it. He says that he was driving with both hands on the wheel and his eyes on the road. He states, however, that he failed to see a "slow" sign located 1,056 feet north of the north end of the bridge.

The two girls testified that defendant traveled the same road in going to Howells. One of them related that defendant remarked that this was a dangerous bridge as they crossed it the first time. The defendant's testimony is that he had no recollection of having previously crossed the bridge. Defendant was not familiar with the road, his evidence being that he had never been over it before. There is also evidence in the record that the gravel was heavier at the bottom of the hill due to its washing down. Defendant testifies that the loose gravel contributed to the skidding of his car.

The defendant contends that this evidence is not sufficient to sustain a finding of gross negligence and that the trial court should have directed a verdict for the defendant.

In order for a guest to recover under the automobile guest law, section 39-1129, Comp. St. Supp. 1935, he must allege and prove that his host was guilty of gross negli-

gence in the operation of the automobile, or was under the influence of intoxicating liquor. The existence of gross negligence must be determined from the facts and circumstances of each case. Ordinarily, the question of negligence, whether slight or gross, is one of fact, and in case of conflict the verdict of the jury is controlling. But there must be evidence of gross negligence sufficient to sustain a verdict. Evidence of ordinary negligence, even if conclusively established, will not support a judgment under the guest law, and if the only construction that can be placed upon it is that it is ordinary negligence only, the trial court should instruct a verdict for the host.

The evidence of the plaintiff in the case at bar is purely circumstantial. The skid marks of the car, the damage to the bridge, and the condition of the car after the accident are relied upon as proof of gross negligence. It is true that skid marks were found on the road for 125 feet north of the bridge. That they were caused by the application of the brakes of defendant's car and contributed to by the gravel on the road is quite apparent from the record. There is no testimony, expert or otherwise, as to the rate of speed defendant was traveling as he approached the bridge, except his own statement that he was proceeding at a rate of 30 or 35 miles an hour. The bridge in question was constructed across the creek at a very bad angle and to the right of the general line of the road. That it is a dangerous bridge is very evident from the photographs in the record. The contention is advanced that defendant failed to keep a proper lookout for objects in the road and plaintiff invokes the rule set forth in *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340, wherein the court said: "It is the duty of an automobile driver, in driving a car in the night-time, to keep such an outlook ahead that he will see an obstruction as soon as it is illuminated by his lights, and it is his duty to have his car under such control that he can stop to avoid a collision with an object within the area lighted by his lamps." It must be borne in mind, however, that a bridge on a highway is not ordinarily an obstruction or object of

danger. It is, in fact, a safety device constructed to permit a safe passage across a stream or depression. It certainly cannot be said that a driver of a car at night must comply with the foregoing rule when the bridge is first illuminated by his lights. It seems to us that the duty referred to would be cast upon the driver under such circumstances when he first saw, or ought to have seen, the dangerous character of the bridge. It is evident from the physical facts as well as the evidence of the defendant that he did not discover the danger until he was within 125 feet of the bridge. There is no evidence in the record that he ought to have discovered it sooner. This court has said: "Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature." *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96. In a case somewhat similar where the driver failed to negotiate a curve on the highway, the supreme court of Michigan said: "Defendant may have been negligent in driving too fast and in not applying the brakes in time. This lack of care on the part of defendant was at most but ordinary negligence." *Mater v. Becraft,* 261 Mich. 477, 246 N. W. 191.

There is no satisfactory evidence in the record that defendant had knowledge of the situation existing at the bridge. There is no evidence of a continued course of conduct in driving his car that would tend to establish negligence. It is not contended that any objection had been previously made to his manner of driving. That the bridge in question was dangerous and a menace to safe travel is established. That defendant saw the dangerous character of the bridge when he was more than 125 feet from it is conclusively established by the evidence of both the defendant and plaintiff. The defendant testified that he supposed that the road went straight through, a very natural supposition. There is no evidence of a single act on the part of the defendant which could be construed, in the

present state of the record, as gross negligence. The record does not establish such speed as would amount to gross negligence under the circumstances. The most that could be said is that defendant was guilty of ordinary negligence.

This court has consistently held that the intent of the legislature in adopting the guest statute was that evidence of some act amounting to more than ordinary negligence should be required before a guest could recover from his host. In the absence of any evidence of such an act, directed verdicts for the hosts have been approved by this court. Several sessions of the legislature have gone by since this interpretation was placed upon the guest statute without any further legislative action with reference to it. Under these circumstances we feel obliged to abide by the established interpretation until the legislature sees fit to assert its legislative powers on the subject.

There is not sufficient evidence of any act of gross negligence in the record to warrant the submission of this case to the jury. In view of the fact that such evidence may be supplied, the case will be remanded for a new trial.

REVERSED.

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## IN RE GUARDIANSHIP OF BLANCHE V. PROTSMAN. BLANCHE V. PROTSMAN, APPELLANT, V. MARCUS S. ANDERSEN, APPELLEE.

285 N. W. 494

FILED APRIL 21, 1939. No. 30566.

1. **Judgment.** The county courts of this state have exclusive original jurisdiction of guardianship proceedings, and in matters within such jurisdiction their judgments are as conclusive as those of any other court of record.
2. **Guardian and Ward.** An order of a county court approving a final settlement between a guardian and his ward can only be vacated on such proof of fraud as would justify the setting aside of any other judgment.
3. ———. Evidence that a guardian reported certain securities of the ward "in foreclosure" when they were in fact deeded to a trustee for the benefit of bondholders is not of itself sufficient

evidence of fraud to warrant the vacation of an order approving the final account of the guardian.

4. ———. In such a case it must be shown that the facts on which the petition was based were unknown to the petitioner until after the decree approving the final settlement, and a mere allegation of ignorance coupled with an admission of facts sufficient to put petitioner on inquiry will not suffice.

5. ———. Where a ward becomes competent to handle his own affairs and makes a settlement with his guardian which is approved by the court, and where the ward retains the assets so transferred to him with knowledge of their insecure character for more than three years without objection, he is guilty of such laches as would bar affirmative relief.

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

*Hubka & Hubka,* for appellant.

*Sackett & Brewster* and *Dean R. Sackett, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Gage county denying and dismissing the petition of Blanche V. Protsman, praying that the decree of final settlement and discharge of the guardian of Blanche V. Protsman, a spendthrift, be set aside and vacated, and to require the former guardian to make an accounting.

It appears from the record that Marcus S. Andersen was appointed guardian of Blanche V. Protsman, a spendthrift, in the county court of Gage county on September 30, 1921. On August 21, 1933, an order and decree was entered by the county court, approving the final account of the guardian, and ordering the release and discharge of the guardian upon his filing the receipt of Blanche V. Protsman for all of the trust property. No appeal was taken from this order. On August 24, 1933, the guardian delivered all of the securities to Blanche V. Protsman and accepted her receipt therefor. On October 21, 1936, the petition was filed in the instant case, praying that the order

approving the final settlement and discharging the guardian be vacated, and that the guardian be subjected to a further accounting.

The evidence discloses that the guardian, during the period of his stewardship, invested the moneys of the ward in certain securities without obtaining the approval of the county court for so doing. Four of the investments made by the guardian are charged by the petitioner to have resulted in losses for which the guardian is liable under the holdings in *Hendrix v. Richards*, 57 Neb. 794, 78 N. W. 378; *In re Estate of O'Brien*, 80 Neb. 125, 113 N. W. 1001; *Wilkins v. Deal*, 128 Neb. 78, 257 N. W. 486, which provide that a guardian is liable for losses sustained on investments not approved by the court.

The investments in question were as follows: $3,000 in bonds secured by a mortgage on the Beeson-Quein ranch in western Nebraska which were shown in the accounting as "in foreclosure," when in fact a deed had been accepted for the benefit of the bondholders; $300 of mortgage bonds signed by J. L. Schiek, shown in the accounting as "in foreclosure," in which title was in fact taken for the benefit of bondholders, the property sold and $153.13 paid to Blanche V. Protsman as a final settlement; $200 in mortgage bonds signed by Julius Gilbert shown in the accounting as "in foreclosure," in which a deed had in fact been taken and the property resold, resulting in a net return of $182.37 to the ward; a $100 mortgage bond signed by Charles C. Pyle, shown by the accounting as "in foreclosure," when in fact a deed had been taken by the trustee for bondholders who were still holding the trust property.

The record is clear that the guardian delivered the securities in question to Blanche V. Protsman at a time when she was accompanied by her own personally selected attorney. The securities were checked over one by one and a receipt given upon her attorney's advice. The securities in question were shown to be in default and were accepted with this knowledge. For more than three years Blanche V. Protsman has retained possession of these securities and

attempted to collect them, without any objection being made. It is clear that Blanche V. Protsman knew that these bonds were in default when she accepted them, and should have known their exact situation very shortly after their receipt. The evidence does not show fraud in the procurement of the final settlement and the discharge of the guardian. Even if the actions of the guardian should be construed as evidence of fraud and misrepresentation, the petitioner is barred by laches from maintaining her suit. The case is governed by the following rules of law:

An order of a probate court approving a final settlement between a guardian and his ward is a judgment of a court which becomes *res adjudicata,* and can only be reopened on such proof of fraud or mistake as would justify opening any other judgment. *In re Estate of Ramp,* 113 Neb. 3, 201 N. W. 676.

If the object of a petition is to set aside an order approving a final account between a guardian and his ward for fraud, it must allege some distinct and specific act of fraud from which petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part. *Kielian v. Kent & Burke Co.,* 131 Neb. 308, 268 N. W. 79.

In such a case it must be alleged that the facts on which the petition is based were unknown to the petitioner until after the decree approving the final settlement, and a mere allegation of ignorance coupled with an admission of facts sufficient to put petitioner on inquiry will not suffice.

The report of the guardian in the instant case was sufficient to warn the ward and her attorney of the unsoundness of the investments of which complaint is made. The negligence of the ward in waiting more than three years from the time she knew, or ought to have known, of the alleged fraud in the procurement of the order, before commencing action to have it vacated, is such laches as would bar the granting of the relief prayed for. The trial court arrived at the proper conclusion and the judgment is

AFFIRMED.

## EGBERT GEMBLER V. CITY OF SEWARD.*

285 N. W. 542

FILED APRIL 28, 1939. NO. 30471.

1. **Municipal Corporations**: ORDINANCES: TITLE. "It (the controlling statutory language) is intended to prevent the practice of joining in the same ordinance incongruous subjects, having no relation or connection with each other, and foreign to the subject embraced in the title. Matters germane to the general subject expressed in its title may be united. * * * The title need not be an index to the act; nor need it state a catalogue of all the powers intended to be bestowed. 'An abstract of the law is not required in the title;' nor need the title state the mode in which the subject is treated, nor the means by which the end sought by the enactment is to be reached." McQuillin, Municipal Ordinances, sec. 141.
2. ———: ———: ———. Where the title indicates the subject of the proposed ordinance, the essential requirements of the statutory language have been met, even though more appropriate language might have been employed therein.
3. ———: AUTOMOBILES. Certain statutes, including chapter 110, Laws 1931, construed, and *held* in no manner to interfere with or limit the statutory power of municipalities to define and punish by ordinance the offense of unlawful operation of a motor vehicle by a driver while intoxicated, on the streets of such municipalities.
4. **Statutes**: CODIFICATION. In codifying or revising statutes, a mere rearrangement of the sections or parts of a statute, or the placing of portions of what was originally a single section in separate sections, does not change the purpose, operation and effect thereof.
5. ———: ———. Stating it broadly, a compiler is not a lawmaker, and codification is not legislation. Further, a statute neither gains nor loses force by the place it occupies in the collection of laws; its sanction depends upon its own terms, and would be the same if it had been printed anywhere else in the Code.
6. ———: CONSTRUCTION. "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone*, 92 Neb. 748, 139 N. W. 636.
7. **Automobiles**. Under the facts in this case, the jurisdiction of the district court, on trial *de novo* of a complaint under a city ordinance charging the commission of an offense on May 2,

*Modified on rehearing. See p. 916, *post*.

1937, by operating a motor vehicle on the streets of the city concerned, by the accused while intoxicated, extends, upon due conviction of accused, to forfeiture or suspension of his driver's license for a period certain, within the limits prescribed by the ordinance and statutes applicable.

8. **Criminal Law.** "In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony." *Brown v. State*, 125 Neb. 287, 250 N. W. 67.

ERROR to the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed.*

*McKillip & Barth* and *Ivan A. Blevens*, for plaintiff in error.

*Paul H. Bek, contra.*

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

EBERLY, J.

The defendant prosecutes error to this court from a conviction for violating an ordinance of the city of Seward, Nebraska. In the complaint it is charged that defendant, within the city of Seward on May 2, 1937, did "wilfully and unlawfully operate a motor vehicle on the streets of the city of Seward," while he was intoxicated. This complaint was filed on May 3, 1937, before the police magistrate of the city of Seward, and from an adverse judgment the defendant sought a review in the district court for Seward county, where, after a trial, on March 11, 1938, he was adjudged guilty as charged in the complaint. Thereupon the defendant was fined in the sum of $50 and costs of suit, and it was further adjudged that the said defendant do not drive a motor vehicle within the state of Nebraska for a period of one year from date of conviction. From the order of the trial court overruling his motion for a new trial, and also denying defendant's application for a parole and a suspended sentence, the defendant prosecutes error to this court, as above stated.

Defendant's first contention is, that the title of Ordinance

No. 503 of the city of Seward, enacted and approved November 6, 1936, under which this prosecution was had, is defective, in that the scope of the same is not broad enough to include the provision of section 12 of the ordinance, providing that "It shall be unlawful for any person to drive any motor vehicle on the streets of such city while in a state of intoxication," and providing a penalty and relief therefor. The title is, in part, "An ordinance relating to alcoholic liquors; * * * making drunkenness a misdemeanor." The words of the controlling statutory provision are: "Ordinances shall contain no subject which shall not be clearly expressed in its (their) titles." Comp. St. 1929, sec. 17-520.

The provisions of section 14, article III of the state Constitution, have no application to city ordinances, nor the adoption thereof, and decisions thereunder are valuable only as analogies. The statutory provision above quoted being a restriction, it should be liberally construed. 25 R. C. L. 850, sec. 96; 856, sec. 101; 858, sec. 104.

In the construction of similar language it has been said: "It is intended to prevent the practice of joining in the same ordinance incongruous subjects, having no relation or connection with each other, and foreign to the subject embraced in the title. Matters germane to the general subject expressed in its title may be united. * * * The title need not be an index to the act; nor need it state a catalogue of all the powers intended to be bestowed. 'An abstract of the law is not required in the title;' nor need the title state the mode in which the subject is treated, nor the means by which the end sought by the enactment is to be reached." McQuillin, Municipal Ordinances, sec. 141. See, also, 43 C. J. 523.

Where the title indicates the subject of the proposed ordinance, the essential requirements of the statutory language quoted have been met, even though more appropriate language might have been employed therein. *Nebraska Loan & Bldg. Ass'n v. Perkins,* 61 Neb. 254, 85 N. W. 67.

Therefore, the conclusion is that section 12 of the ordi-

nance here involved is not vulnerable to the attack thus made thereon.

Defendant further contends that the inherent nature of the matters included in this ordinance is not within the legislative powers conferred on municipalities; that the state has appropriated the field so far as the subject of intoxicated drivers of motor cars is concerned, and the ordinance, so far as related to that subject, is forbidden by the state, both expressly and by necessary implication.

However, it is thought that the history of our legislation on, and related to, this precise subject, as well as the express terms of our existing law governing the same, support the contrary conclusion.

The intent of the legislature properly expressed is controlling in the disposition of the proposition thus presented.

It will be remembered that by the terms of its charter the city of Seward is empowered, by ordinance, "to prevent intoxication * * * and all disorderly conduct" (Comp. St. 1929, sec. 17-131); "to regulate traffic * * * upon the streets, sidewalks and public places" (Comp. St. 1929, sec. 17-141); "shall have the care, supervision and control of all public highways * * * streets, alleys, public squares and commons within the city * * * and shall cause the same to be kept open * * * and free from nuisances" (Comp. St. 1929, sec. 17-507). And, in addition, the city of Seward is vested with general powers "to make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the laws of the state, as may be expedient, in addition to the special powers in this chapter granted, for maintaining the peace, good government and welfare of the corporation, and its trade, commerce and manufactories, and to enforce all ordinances by inflicting fines or penalties for the breach thereof," etc. (Comp. St. 1929, sec. 17-428).

The first legislation on the subject here for consideration was chapter 129, Laws 1905. It was, "An Act requiring registration of motor vehicles and regulating their use or operation upon the highways or streets." It contained twelve sections, but no provisions relative to intoxicated

drivers. Section 11 thereof provided: "Cities and towns shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license or permit to use the public highway or exclude or prohibit any motor vehicle whose owner has complied with * * * this act from the free use of such highways, and all such ordinances, rules or regulations now in force, are hereby declared to be of no validity or effect."

Had section 11 been continued, it would of course have furnished support for defendant's contention. But in 1911 there was enacted chapter 115 of the session laws of that year. The title of the act included, "An Act defining motor vehicles, * * * regulating their use and operation upon the highways and streets," and providing for the repeal of previous legislation. It contained 13 sections. Section 6 thereof declared the operation of a motor vehicle by an intoxicated person by permission of the owner thereof to be unlawful. Section 10 provided penalties for the violation of its provisions. Section 11 provided: "(Local Ordinances.) Nothing in this act shall be construed in limiting the power of local authorities to make, enforce and maintain any ordinance, rule or regulation, in addition to the provisions of this act affecting motor vehicles."

By section 13 of this 1911 act, chapter 129, Laws 1905, as an entirety, was expressly repealed. Thus, the public policy of the state to in no manner interfere with municipal authorities in the due exercise of their charter powers over the subject here for consideration was definitely and clearly thereby established and declared.

The course of subsequent legislation evidences a like intent.

Sections 6, 10, and 11 of the act of 1911, we find as sections 3048, 3052, and 3053, of the Revised Statutes of 1913 of Nebraska. In 1919 they were reenacted as sections 27, 32, and 26 of title VII, article IV of chapter 190, Laws 1919, our Civil Code. They likewise appear in the Compiled Statutes of 1922 as sections 8391, 8396, and 8390. They are

also found in the Compiled Statutes of 1929 as sections 39-1101, 39-1106, and 60-326.

In 1931, by chapter 104 of the session laws of that year, section 39-1101, Comp. St. 1929, was amended by an act entitled, "An Act to amend sections 39-1101 and 60-405, Compiled Statutes of Nebraska, 1929," etc., and the respective scopes of the two last named sections were broadened. And again, in 1935, sections 39-1101 and 39-1106, Comp. St. Supp. 1933, were amended by chapter 134 of the session laws of that year to achieve a similar result. In 1937, by the terms of chapter 140, Laws 1937, under a title which included, "An Act to amend section 39-1106, Comp. St. Supp. 1933, as amended by section 2, chapter 134, session laws of Nebraska, 1935," such section was again amended to provide for punishment of intoxicated drivers, which is the legislation now in force on that subject. But the language of section 11 of chapter 115, Laws 1911, has continued wholly unchanged and now exists in the exact form of its original passage.

In 1926, in *Omaha & C. B. Street R. Co. v. City of Omaha*, 114 Neb. 483, 208 N. W. 123, such section 11, ch. 115, Laws 1911, was cited in support of the proposition that the ordinance there in question was not vulnerable to the objection that the provisions thereof were in excess of the powers then possessed by cities of the metropolitan class.

In the consideration of this course of legislation thus outlined, two principles of statutory construction should be kept in mind, viz.:

(1) In codifying or revising statutes, a mere rearrangement of the sections or parts of a statute, or the placing of portions of what was originally a single section in separate sections, does not change the purpose, operation and effect thereof.

(2) Stating it broadly, a compiler is not a lawmaker, and codification is not legislation. Further, a statute neither gains nor loses force by the place it occupies in the collection of laws; its sanction depends upon its own terms, and would be the same if it had been printed anywhere else in

the code. *Paulson v. Hurlburt,* 93 Or. 419, 183 Pac. 937.

"An act of the legislature, the sole purpose of which is stated in the title to be to amend a specified section of a complete and comprehensive act, makes the section so amended a part of the original act, which must, if possible, be so construed as to give it a meaning consistent with the whole act." *State v. Coupe,* 91 Neb. 463, 136 N. W. 41.

"The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone,* 92 Neb. 748, 139 N. W. 636.

It will be noted that section 39-1106, Comp. St. 1929, originally was section 10, ch. 115, Laws 1911, as subsequently amended. It still remains and must be construed as a part of the act of 1911, in connection with the surviving sections thereof as still continued in our Compiled Statutes. It must be construed precisely as though it had been originally enacted in its amended form. It must be given a meaning consistent with the whole act of which it remains an essential part. It cannot be construed as a part of our Uniform Motor Vehicle Act of 1931 from which it was not derived. It therefore clearly appears that in view of the course of legislation, and the express terms of section 60-326, Comp. St. 1929, the provisions of section 12 of Ordinance No. 503 of the city of Seward are not void as being inconsistent with, or repugnant to, the terms of the state statutes, and are not beyond or in excess of the city's legislative powers conferred upon it by law. *Christensen v. Tate,* 87 Neb. 848, 128 N. W. 622; *Bodkin v. State,* 132 Neb. 535, 272 N. W. 547.

Nor are we, in this connection, in any manner concerned as to the provisions of chapter 141, Laws 1937. This chapter was passed without an emergency clause, and approved May 11, 1937. We take judicial notice of the final adjournment of that legislature, and that this act of 1937 did not take effect until three calendar months after the adjournment of the session at which it was passed. The misdemeanor with which the defendant was charged was com-

mitted on May 2, 1937. Prosecution had been properly instituted on May 3, 1937. This statute, approved May 11, 1937, and taking effect thereafter, in view of its terms, in no manner affected pending actions by operating to repeal the legislation, expressly or by implication, upon which the instant prosecution is based. Comp. St. 1929, sec. 49-301. See, also, *Lower v. State,* 109 Neb. 590, 191 N. W. 674.

But, plaintiff in error also contends that in 1931 Nebraska "passed the Uniform Act Regulating the Operation of Vehicles on Highways;" that, when this general statute was adopted, the municipality lost its police power in this field because the state had spoken; that therefore the Seward ordinance under consideration, as applied to the facts involved in this case, had ceased to be a lawful, effective enactment. The case of *Bainter v. Appel,* 124 Neb. 40, 245 N. W. 16, is cited in support of this contention. In such *Bainter* case it will be noted that this court determined only that the legislative action referred to therein amounted to a "substantial adoption" of the Uniform Act regulating the operation of vehicles on highways. It did not amount to a complete adoption of the recommendations made.

We note that in section 2, Title II of the act, as recommended by the commissioners on uniform laws, it is provided, viz.:

"It shall be unlawful and punishable as provided in section 63 of this act for any person whether licensed or not who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon any highway within this state." Handbook of the National Conference of Commissioners (1926) p. 532.

By chapter 110, Laws 1931, under a title which included the provision, "to make uniform the law relating to the subject-matter of this act," certain portions of this uniform act regulating the operation of vehicles on the highways, thus recommended, were adopted by our legislature, but section 2, Title II of the recommended measure, above quoted, was stricken out and not adopted, and the terms

of the act as actually adopted neither expressly repealed, modified, nor amended sections 39-1101, 39-1106, and 60-326, Comp. St. 1929.

Such chapter 110, Laws 1931, contained 63 sections, in none of which is the offense of driving a vehicle upon any highway while under the influence of intoxicating liquor defined and punished. The law of this state, therefore, on this subject remained as it had existed prior to the adoption of this act, and was wholly unaffected thereby.

In this connection, it will be remembered that repeals by implication are not favored. *City of Central City v. Marquis,* 75 Neb. 233, 106 N. W. 221; *Beha v. State,* 67 Neb. 27, 93 N. W. 155; *Albert v. Twohig,* 35 Neb. 563, 53 N. W. 582.

Nor do we find that the order of the district court directing that the defendant should not drive a motor vehicle within the state for a period of one year amounts to an unlawful impairment of defendant's rights. It is sustained by the terms of the ordinance. It is consistent with the terms of chapter 140, Laws 1937, which contemplate, and are indeed authority for, the proposition that a similar order may be made, "Upon conviction (of the defendant) in any court within this state of any violation of any law of this state pertaining to the operation of motor vehicles or any city or village ordinance relating to the operation of a motor vehicle in a manner to endanger life, limb or property," etc. Laws 1937, ch. 140, sec. 2.

It may be said, under the circumstances here presented, that the revocation or suspension of the driver's license upon his conviction is not a punishment for the offense, but a mere incidental consequence of the violation of the ordinance. *State v. Parks,* 199 Minn. 622, 273 N. W. 233.

It constitutes no part of the technical penalty prescribed, but is a mere police regulation intended for the benefit of the public, and follows as an incident of a legal conviction. *Smith v. State,* 124 Neb. 587, 247 N. W. 421.

Complaint is also made of the ruling of the trial court permitting the introduction of a certain bottle of liquor by

the prosecution upon rebuttal. This item of evidence had not been introduced as part of the evidence in chief.

The following appears in the evidence offered in behalf of the defense, viz.: Mr. Gembler testifying in his own behalf. "Q. Was there any liquor in your car? The officer testified that he found—they didn't produce it I notice, but they said they found some alcohol and a bottle of coca cola in your car. A. I didn't know it if there was." Defendant's attorney: "I would ask the city attorney to please produce it if he has it."

The rule governing this subject appears to be, viz.:

"As a rule, the party holding the affirmative will not be permitted to prove again in rebuttal facts shown in making out his case in chief; but it is within the discretion of the court to permit the introduction, in closing, of evidence not strictly rebutting." *Murphey v. State*, 43 Neb. 34, 61 N. W. 491.

In *Brown v. State*, 125 Neb. 287, 250 N. W. 67, wherein a somewhat similar question was presented, the rule was announced, viz.:

"In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony."

It is obvious that, in the instant case, there was no abuse of discretion by the trial court in the admission of the evidence complained of.

A careful examination of the entire record is quite convincing that the substantial rights of the defendant have received complete protection, and the judgment of conviction and sentence imposed thereunder is, in all respects,

AFFIRMED.

CHARLOTTE JONES, ADMINISTRATRIX, APPELLEE, V. MARSHALL H. MCCULLY: DELMA GAGNE, APPELLANT.
285 N. W. 551

FILED APRIL 28, 1939. No. 30505.

Evidence that the plaintiff in an automobile damage case carries liability insurance should be dealt with by the court in the same manner as is any other inadmissible testimony.

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

*S. E. Torgeson, L. Verne Holcomb* and *Rosewater, Mecham, Shackelford & Stoehr,* for appellant.

*Roland V. Rodman, Barnard & Barnard* and *John H. Kuns, contra.*

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

PAINE, J.

This is an action brought against Marshall H. McCully and Delma Gagne by Charlotte Jones, administratrix of the estate of Adrienne Jones, deceased, to recover damages suffered by the next of kin on account of the death of Adrienne Jones in an automobile accident. The jury returned a verdict for medical and funeral expenses of $1,050, and for other damages, $3,822, making a total recovery of $4,872, for which amount judgment was entered. Motion for new trial was overruled. Defendants appeal.

The evidence discloses that Adrienne Jones, the deceased, was driving her automobile west on State Highway No. 30 about 12 miles east of Kimball, Nebraska, and Marshall H. McCully, of Los Angeles, was driving an automobile owned and being ridden in by Delma Gagne, each of said cars being a Chevrolet Tudor sedan, the Jones car being a 1937 model, the Gagne car being a 1936 model; that on June 30, 1937, at about 10:30 a. m., the collision occurred. U. S. Highway No. 30 at this point is paved with oil mat, and was in very good condition, with a broad white stripe

painted down the middle of the road. At the same time the Jones car came over a rise of ground, the Gagne car came over another rise of land about 1,100 feet directly west of them, and both cars were driven at a high rate of speed. The road sloped to the center, where the cement sides of a culvert projected at each side of the paving. There was not a curve, no obstruction of any kind, and a perfectly clear road. It was a cloudless day. Near the bottom of the decline the cars sideswiped each other, and the driver of the Jones car was either thrown or jumped from the car as it turned over several times, and died within a few minutes. No one else was injured in the wreck.

A state engineer testified that the road was about 23 feet wide. Dilys Jones, aged 17, testified that she was riding with her sister, who was killed, on this trip to California, and, in addition, a friend, Mrs. Hazlitt, accompanied them. Mrs. Hazlitt testified that they had stopped at Sidney for a lunch, and that she had taken the back seat, with a magazine to read, and did not have her eyes on the road, and did not know anything about it until they were hit and the car started to swerving from side to side and turned over. She climbed out through a front window and saw Adrienne Jones lying up in the road, with her sister standing over her, and immediately other cars stopped and people gathered around them.

The testimony of Dilys Jones was that they left Central City about 4 o'clock that morning, when it was dark. She said she was watching the Gagne car as it came towards them down the hill; that her sister was driving on the north side of the center line. Pictures introduced in evidence show that the Jones car was a wreck, with the fenders and top crushed in, and the glass broken, but all of the pictures in evidence show that the bumper on the Jones car appeared undamaged, indicating that they were sideswiped back of the bumper, the Gagne car probably first striking them at about the hub-cap on the left front wheel. The Gagne car was going at such a speed that it was not stopped by Mr. McCully until he had gone several hundred feet

down the road. The hub-caps were broken off, and the running-board and fenders on the left-hand side of the Gagne car were injured to the extent that it cost $35 to repair them at Sidney. He testified that they walked back to the scene of the accident, and found that the other car in overturning had headed back east; that there were 12 or 15 people there at the scene of the accident, and he only remained about five minutes, and then they drove to Sidney, where they had the car repaired at the Chevrolet garage. While it was being repaired they went to a picture show, where Sheriff Forsling, of Kimball county, found them, and they returned with him to Kimball. None of plaintiff's witnesses saw the defendants at the place of the accident, and this is one of the disputed questions of fact.

Mrs. Lydia Jones, the mother of Adrienne Jones, deceased, testified that the family moved to Chicago eight years ago from Cardiff, Wales, where her seven children were born; that the husband works two or three days a week as steel inspector; that the deceased daughter, Adrienne, was 26 years old, and at first she worked as a dress model at Carson, Pirie, Scott & Company and at Blum's Vogue on Michigan avenue, and in other exclusive shops in Chicago, where she earned around $40 a week, and gave $20 a week to her mother for household expenses. She said in 1936 Adrienne went to Hollywood and secured employment as a dress model in fashion shows, and in photography, and in the movies; that she was in "Styles of Hollywood" with Kay Frances, and was to be in "Fashions of 1938" if she had lived, and that she sent her mother $20 a week from Hollywood, with $50 extra at Thanksgiving. Exhibit No. 17 shows Adrienne posing in sports clothes, in a full-page picture in the April, 1937, number of the magazine, "Town and Country."

Marshall H. McCully was 57 years of age, and a resident of Los Angeles. He said that Delma Gagne was a friend of his, and they were driving from Los Angeles to Minneapolis, where they both had friends. As to the accident, he testified it occurred as follows: "Well, the car was coming down

at a pretty good speed, and I saw it coming from my direction, and I tried to get away from the car, but it crossed the line—it was utterly impossible. We were both coming pretty fast, and that car hit me like this (Indicating). It took my front wheel, the cap off my front wheel, and I pulled away from it and it slid along my running board and took the cap off my rear wheel, and so I put my brakes on my car and I let the car slide along and come to a stop."

Delma Gagne testified that she was the owner of the car driven by Mr. McCully, and that she resided at Glendale, California, with her mother, who was 85 years of age, and was present in the courtroom during the trial.

So far as the element of speed is concerned, considering the testimony of the witnesses and the great distance that each car ran after the collision, which was approximately 300 feet, it would be a fair conclusion that each of the cars was running at from 50 to 60 miles an hour at the time the accident occurred. At that speed, only five or six seconds would elapse from the time they first came in sight of each other, a thousand feet apart, and the moment of the collision near the culvert midway between the hills.

The defendants set out several propositions of law upon which they base their grounds for reversal. First, it is insisted there can be no recovery if the plaintiff's theory of how the accident occurred is contradicted by undisputed physical facts. In support of this proposition, they state that the evidence shows that the left front wheel of the Jones car was locked in such a manner that it did not turn after the Gagne car hit it, and that it was going at such a rate of speed as carried it, skidding from side to side, about 246 feet, with the front wheel locked, then it rolled over two or three times, and finally landed at the side of the road. An amateur photographer took pictures of these skid-marks within a few minutes after the collision, and it shows that the skid-marks made by the Jones car began at a point at least one foot north of the white line painted in the center of the road, and crossed the white line twice as it swerved back and forth.

The defendants argue that the reaction of the Jones car when the left front wheel locked would have been to take a course to the north, away from the center line, rather than over the center line, and because the car skidded over the center line defendants insist the only possible explanation is that the Jones car was proceeding diagonally towards the white line at the time of the collision, and that it struck the Gagne car. The plaintiff met this argument by showing that the photographs of the Jones car show that its bumper was not bent; that the jury examined the car itself, and that this question was clearly a question of fact for the jury to determine. In the opinion of this court, the evidence warranted the jury in reaching the conclusion that the McCully car, coming from the west, crossed the center line and struck the Jones car, locking the front left wheel, and damaging it in many other ways. There appears to be better grounds for claiming that, when a car going straight ahead is struck in the left front wheel, causing it to lock and slide, the car will be more apt to be drawn over to the left rather than to the right.

Defendants' next proposition of law is that, admitting that the Gagne car came over the middle line of the highway, this fact would not justify the driver of the Jones car in failing to use all reasonable care to avoid a collision, and that failure to use such reasonable care under the circumstances constituted more than slight contributory negligence, and would defeat a recovery. This was presented to the court in proffered instruction No. 4, which closed with the sentence: "In the event you do find Adrienne Jones could have avoided the collision in the exercise of due care or caution in view of all the circumstances surrounding the collision, then you shall find for the defendants, and each of them."

In support of this proposition, we are cited to the case of *Andrews v. Clapper,* 133 Neb. 110, 274 N. W. 209, which stated, in substance, that one having the right of way may not, on that account, proceed serenely unconscious of the surrounding circumstances; and that if, to a reasonably

prudent person, there appears to be a probability of a collision should he continue on his way, it would be his duty to waive his right of way if reasonably necessary to avoid that event.

In *Frish v. Swift & Co.*, 97 Neb. 707, 151 N. W. 165, it was said that the question in such case is not what a careful person would do under the circumstances, but that the question what he would be likely to do, or might reasonably be expected to do, in the presence of such peril is one of fact for the jury to determine.

If the driver of the Jones car had a ditch, and the cement upright of a culvert projecting at the side of the road, and a car coming diagonally across the road towards her from the other side, she may not have made the most judicious choice between the hazards presented to her in a fraction of a second of time, but to speculate that had she chosen differently she might not have been killed does not make her guilty of such negligence as defeats recovery by her estate. In our opinion, the court completely covered the point in dispute in his instructions.

Another proposition of law presented by the defendants is an attack upon instruction No. 3 given by the court on his own motion. It is claimed that the first sentence is abstruse and wholly unintelligible to a jury of laymen. Defendants say of it: "A lawyer, trained and skilled in breaking down and analyzing complex phraseology, might, and probably could, by resorting to the old-fashioned method of 'diagraming,' figure out what the court was trying to say in the first sentence," which reads as follows: "The burden of proof in this action, so far as such burden relates to the proof that the defendant Marshall H. McCully was guilty of negligence, if he was, in some one of the ways or manners alleged by the plaintiff and so far as such burden relates to proof that such negligence on the part of said defendant was the proximate cause of said collision and injury to and death of said Adrienne Jones and so far as such burden relates to proof of the extent of the damages

suffered by the next of kin of said Adrienne Jones, is upon the plaintiff."

We admit the above paragraph is not as clear as one would desire. Yet, this paragraph was followed in the same instruction No. 3 by short, definite, and clear paragraphs, in which the court submitted to the jury all of the separate acts of negligence charged by the plaintiff, and then explained each act of negligence, and then said: "If you find that each and all of the four above enumerated propositions have been so established as true by a preponderance of all of the evidence, and if you also believe that the plaintiff is not prevented from recovery on account of contributory negligence, if any, on the part of said Adrienne Jones under rules relating to contributory negligence hereinafter given to you, then you will find for the plaintiff as against both defendants." We are not upholding the first sentence of this instruction as a model of accurate diction, to be followed by other courts, but we do believe that, taking this long opening sentence in connection with the following ten numbered and lettered paragraphs in the same instruction, the whole of instruction No. 3 clearly stated to the jury the proper law upon the subject.

The defendants argued at considerable length, orally and also in the brief, that the introduction of the subject of insurance into the evidence was prejudicial to the defendants, and that on that ground alone this court must grant a new trial.

An examination of the bill of exceptions shows that John Manning, a mechanic for the Gibson Motor Company, of Kimball, Nebraska, testified that he had been directed by the sheriff to get the wrecked Jones car, and that he brought it back to their place of business. On direct examination by the plaintiff's attorney, he was asked these two questions and made these two answers, which are set out in both briefs: "Q. Do you make an examination to determine what is needed? A. Yes; in fact every wrecked car if the car is injured. The adjuster comes to adjust the loss with us and to find out what the total cost would be. Q. Did you

personally make an examination of the car that was involved in this accident? A. Yes; the adjuster for the insurance company came from Scottsbluff and he asked to see whether it was practicable to repair it or not, or whether it would be salvage."

The attorneys seem to agree that the word "injured" in his first answer is a mistake of the court reporter, for he is speaking of a wrecked car, which naturally would be damaged. Doubtless the witness used the word "insured" instead of "injured," and it is known by all familiar with Gregg shorthand that the words "insured" and "injured," if written rapidly, are written practically the same in that system. The defendants made no objections to these two questions, and made no motion to strike out the answers, which were given on the afternoon of the first day of the trial, but when court reconvened on the following day the defendants filed a motion with the clerk of the court for a mistrial on the ground of irregularity, accident, and surprise, which occurred, as they state, when one of plaintiff's witnesses testified upon direct examination that an insurance adjuster had examined one of the cars involved in the accident; that the defendants' attorneys could not have anticipated the answer which was given, and therefore no objection was interposed, but that said answer is prejudicial to the defendants, and moved that the jury be discharged and a new trial granted. This motion was overruled by the court.

In the case at bar, the witness Manning was referring to the plaintiff's car when he made the answers that injected the matter of insurance. No reference was made to the fact that defendant Delma Gagne had insurance on her car. Clearly, the defendants were not prejudiced by statements in evidence indicating that the plaintiff's car was insured. The applicable rule is that, where the defendants seek no affirmative relief against the plaintiff in an automobile damage case, evidence that plaintiff carries liability insurance should be dealt with by the court in the same manner as is any other inadmissible testimony.

We have carefully examined the entire record in this case, and all errors set out for reversal, but we do not feel warranted in extending this opinion to a greater length, and therefore conclude by saying that we find no prejudicial error, and the judgment of the trial court is hereby

AFFIRMED.

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PEARL MUNSELL, APPELLEE, V. TRACY H. GARDNER ET AL., APPELLANTS.
285 N. W. 555

FILED APRIL 28, 1939. No. 30527.

**Automobiles: LIABILITY TO GUEST: GROSS NEGLIGENCE.** "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1933, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Heesacker v. Bosted*, 131 Neb. 42, 267 N. W. 177.

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

*Loren H. Laughlin*, for appellants.

*J. A. Brown* and *W. O. Brown, contra.*

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

PAINE, J.

This is an action for personal injuries, brought by a guest against the driver of an automobile and her husband, who was the owner thereof. The action was begun in the municipal court of the city of Lincoln. The jury returned a verdict for $200 in the district court, and defendants appeal.

The evidence discloses that the defendants now live on a farm near Stanton, Nebraska, but at the time of the accident lived in Lincoln. Mrs. Ruby Gardner was then the president of the S. O. S. (Send Out Sunshine) Club, of Lincoln, of about 12 members, whose only purpose was to

go out and cheer up people who were sick and helpless, and their work was largely with children who were in such condition. They would go out one afternoon in every two weeks and conduct a religious service, reading the Scripture and singing, and then share a lunch, which they would take along, with the shut-ins. On this afternoon, October 6, 1937, they were going out on such a mission, and all of the ladies in the car were members of this Send Out Sunshine Club except the plaintiff, Mrs. Pearl Munsell, who was invited to go along as the guest of Mrs. Bessie Mehlig, one of the members.

The automobile Mrs. Gardner, defendant, was driving was a 1931 Chevrolet four-door sedan, but her husband was a plumber and an excellent mechanic, and kept the car in good shape so far as it was mechanically concerned. Mrs. Gardner went around and picked up each of these ladies. Mrs. Ouderkirk was a cripple, and sat in the front seat. Mrs. Munsell was a guest, and she got in the back seat, and sat in the middle of that seat, and on the day in question they went out to a home in College View, and had a religious service for three crippled boys; then they had ice cream and cake, and started back for Lincoln. They went north on Fortieth street, which was unpaved, and were to turn west on Everett street. There is very little dispute about what happened. The defendant drove a little past the center of this intersection, at a speed of 20 to 30 miles an hour, as all testify except one deaf lady, who testified that the speed was 30 to 35 miles an hour, saying it was about 5 o'clock in the afternoon and they were all housewives and anxious to get home; that they were not going so very slowly, not extra fast. However, they were all talking, and the driver had run a very few feet too far to make the turn properly, and then attempted it rather suddenly, without putting on the brake.

Fortieth street is a rather narrow dirt road, being an old section-line road. Everett street does not go east of Fortieth street, and is only 24 feet wide, and paved. There was a round, metal stop-box, connected with the water sys-

tem, which projected up five or six inches in height six feet inside of the curb on the north side of Everett street, and there was also a stump of a tree there with some sprouts on it, and west of this, about 70 feet from the center of Fortieth street, was a tree about five or six feet north of the curb line. The driver swung to the left to make this turn, and they went straight west into the tree. It was claimed that, in striking some object, a cut or blow-out of the right rear tire occurred in which "you could stick two fingers," and this sudden deflation of that tire tended to assist in throwing the car out of the driver's control.

The plaintiff's counsel argues that the defendant, Mrs. Gardner, who was driving the car, testified that she did not remove her foot from the gas feed, that she did not slow down. She said: "All I know is that I lost control of the car and I got so I could not hold the car in the track." Plaintiff's counsel insists that, when the driver of a car continues to pump gas into it, and attempts to make a turn without applying the brake and the car runs wild, it is certainly gross negligence. He insists that, if she had taken her foot off the feed and had put it on the brake, it might have been different, and the accident would not have happened.

As assignments of error, the defendants charged that the court erred in overruling defendants' motion for a directed verdict in their favor, made at the close of the plaintiff's evidence and again at the close of all the evidence in the case; that the court erred in refusing to grant a new trial, and urge that the verdict and judgment are not sustained by the evidence, and insist that the evidence does not sustain a finding of "gross negligence" on the part of defendant driver, Mrs. Ruby Gardner.

The applicable section of the statute reads as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or

because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor." Comp. St. Supp. 1937, sec. 39-1129.

We have set out the facts in the case to show the mission the parties were engaged in, and that intoxicating liquor was not connected with this case, as it is with many cases of gross negligence.

As the only question in issue in the case at bar is whether the acts of the driver of the car constituted gross negligence, we may glance at some of the recent definitions of that term.

Mere failure of one to think of a possible result of his act, while possibly evidence of negligence, is not evidence of gross negligence, since it does not constitute or indicate conscious indifference. *Texas Pacific Coal & Oil Co. v. Robertson,* 125 Tex. 4, 79 S. W. (2d) 830, 98 A. L. R. 262.

"Gross negligence or wilful and wanton misconduct on the part of the driver of an automobile, so as to render him liable under a guest statute for injury to one riding with him as a guest, cannot be predicated upon the facts that he drove the car on a concrete pavement, knowing that one of the front tires was in a weakened condition by reason of being worn through the tread and part of the fabric lining, and that the injury was due to a 'blow-out' of the tire, resulting in loss of control of the car and a collision. * * * A guest in an automobile accepts the means of conveyance in the condition in which it is maintained by the owner, and cannot predicate an action for gross negligence or wanton and wilful misconduct under a guest statute, upon failure of the owner to inspect the car and keep it in such repair as to avoid the possibility of an accident." 96 A. L. R. 1477 (*Gifford v. Dice,* 269 Mich. 293, 257 N. W. 830).

"The question, what amounts to gross negligence for which a carrier will be liable to a free passenger, must be decided by the particular circumstances of each case, since

the law furnishes no adequate definition of the term 'gross negligence' beyond such generalities as that 'gross negligence is the want of slight diligence' and the like. Indeed, it has been said by the supreme court of the United States that 'if the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.' *The New World v. King* (1853) 16 How. (U. S.) 469, 14 L. Ed. 1019, 10 Am. Neg. Cas. 614." 7 A. L. R. 852, Ann.

"In a comparatively few cases it has been held that the host of a car that skidded might, under the particular circumstances, be chargeable with gross negligence, heedlessness, or recklessness, wilful and wanton misconduct, or some similar default toward a guest, amounting to more than mere negligence." 113 A. L. R. 1044, Ann. See, also, *Logan v. Reardon,* 274 Mass. 83, 174 N. E. 264; *Slobodnjak v. Coyne,* 116 Conn. 545, 165 Atl. 681; *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96.

"Gross negligence, within the meaning of a statute providing that the owner or operator of a motor vehicle shall not be liable to a guest except for gross or wilful negligence of the operator, is materially more want of care than constitutes simple inadvertence, is equivalent to the failure to exercise even a slight degree of care, and is a heedless and palpable violation of legal duty respecting the rights of others; but falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong." *Shaw v. Moore,* 104 Vt. 529, 162 Atl. 373, 86 A. L. R. 1139.

The Wisconsin court has further qualified the rule to include not only the assumption of the risk arising from the condition of the car and the skill of the driver, but also whatever risks arise from the ordinary habits of the driver.

*Olson v. Hermansen,* 196 Wis. 614, 220 N. W. 203; 12 Neb. Law Bulletin, 203.

In Nebraska we have said the term "gross negligence" as used in the statute means "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); and that the existence of gross negligence must be determined by the facts and circumstances in each case (*Covey v. Anderson,* 130 Neb. 702, 266 N. W. 595); and that, where reasonable minds might draw different conclusions from the evidence, the question of gross negligence is for the jury (*Morris v. Erskine, supra*). In 15 Neb. Law Bulletin, 318, many Nebraska cases are reviewed and discussed helpfully.

In an increasing number of decisions, this court has held that the driver of an automobile should not suffer a judgment for gross negligence at the hands of his guest when the facts fail to warrant gross negligence.

An administrator of the father's estate secured a judgment against a daughter driving her car and losing control when a spike caused a blow-out, and the father was killed. The judgment was reversed. *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160.

In *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689, defendant driver was going about 45 miles an hour on a paved road when another car forced it to turn onto a dirt shoulder, and in attempting to return to the road slipped into the ditch. It was held that it was error for the trial court to overrule the defendant's motion for an instructed verdict.

In *Thurston v. Carrigan,* 127 Neb. 625, 256 N. W. 39, the driver was taking a load of high school students on a treasure hunt, going south on Tenth street in Omaha at 50 miles an hour, in violation of city ordinances. The driver did not observe a sharp drop-off on rough pavement, and caught the automobile on the street car track, tipping it over, injuring guest in the rumble seat. Judge Redick directed verdict for defendant, which was sustained.

This court held that driving a car at 40 to 60 miles an hour over a railroad crossing known to be bad, and immediately after a warning to that effect, was not gross negligence under all the circumstances, and a judgment was reversed and the action dismissed. *Gosnell v. Montgomery*, 133 Neb. 871, 277 N. W. 429.

In *Black v. Neill*, 134 Neb. 764, 279 N. W. 471, a sudden stop to avoid hitting a police car threw plaintiff into the windshield, but the driver was held to be free of gross negligence.

In *Clarke v. Weatherly*, 131 Neb. 816, 270 N. W. 316, the driver drove on the Omaha municipal airport field at about 20 to 25 miles an hour at night, and made a rather sudden turn and ran into a fire hydrant not disclosed by his lights. A directed verdict for defendant driver was sustained as against his guest. This court said: "It is to be remembered that, in passing on the question of gross negligence, it is the province of this court to take a series of facts and circumstances, conceded or proved, and to declare what are the rights of the parties arising out of them. * * * Applying this principle to the facts disclosed by the present record, we are unanimously of the opinion that gross negligence was not proved, and the action of the trial court in directing a verdict for defendant was, in all respects, correct."

We will now briefly summarize the evidence of the defendant, Mrs. Ruby Gardner, who was driving the car in the case at bar. She testified that she came up Fortieth street at 25 or 30 miles an hour, and she made the turn in the center of the intersection, on the north side of Everett street; that she was then going about 20 miles an hour; that she had slowed down to make the turn, not by putting on the brake, but by lifting her foot off the gas, but not entirely off, still giving a little gas. She said the car went over the parking and landed up against a tree; that she had lost control of it. Two witnesses testify that she did not slow down.

The plaintiff testified on cross-examination that, at the very next meeting of the Send Out Sunshine Club, just

two weeks after the date of the accident, she again went to the meeting as the guest passenger of the same driver, and sat in the middle of the back seat, as before.

"Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1933, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Heesacker v. Bosted*, 131 Neb. 42, 267 N. W. 177.

It is the duty of the trial court to direct a verdict for the defendant under the Nebraska automobile guest law (Comp. St. Supp. 1937, sec. 39-1129), when there is not sufficient proof of either gross negligence or intoxication on the part of the driver of the car.

In our opinion, the facts do not warrant a finding of gross negligence under the guest law of Nebraska (Comp. St. Supp. 1937, sec. 39-1129), and the trial court should have directed a verdict for the defendants. Judgment reversed and the action dismissed.

REVERSED AND DISMISSED.

SIMMONS, C. J., dissenting.

In 1931, the legislature provided that the owner or operator of a motor vehicle should not be liable for damages to a guest unless the damage was caused by the gross negligence of the owner or operator. Comp. St. Supp. 1937, sec. 39-1129.

This legislature did not define gross negligence. This court in *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96, defined the term and outlined the function of courts and juries in the following language:

"We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature.

"What amounts to gross negligence in any given case

must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine. Where a question of fact has been submitted to a jury upon conflicting evidence, this court, ordinarily, will assume the truth of the evidence tending to sustain the finding of the jury."

This court has repeatedly affirmed that holding, and since that decision, the legislature has neither defined gross negligence, nor changed the degree of negligence required to establish liability of the host for injuries received by a guest. That judicial definition of the legislative term "gross negligence" should stand the law of this state until such time as the legislature acts thereon.

In *Morris v. Erskine, supra,* this court stated that it would ordinarily assume the truth of the evidence tending to sustain the finding of the jury.

In *Covey v. Anderson,* 130 Neb. 702, 266 N. W. 595, this court stated:

" 'If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as *conclusively established* every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon.' *Bainter v. Appel,* 124 Neb. 40, 245 N. W. 16, and cases cited." (Italics ours.)

The facts established by the finding of the jury are: The defendant had driven the reverse trip earlier in the afternoon, and was returning along the same route in order to

return her guests to their homes; she *intended* to make the turn from Fortieth street to Everett street; Fortieth street is a dirt road with a high center, and at its intersection with Everett street is considerably higher than Everett street, causing a slope downhill in the highway where the turn was made; the defendant approached the turn at a rate of speed fixed as high as 30 to 35 miles an hour; she did not slow down, put on her brakes, or take her foot off the gas-feed accelerator; she went to the center of the street before attempting to turn; there was a distance of twelve feet (about a car's length) in which to turn and go west on Everett street. The defendant was an experienced, licensed driver. With full knowledge of every factor of speed, road conditions, etc., she attempted to make the turn, failed, drove the car onto the parking, and traveled over 70 feet without shutting off the gas or putting on the brakes. The car hit a tree when it was going 15 to 20 miles an hour, and the plaintiff was injured.

The accident and resulting damage was caused by the action of the defendant in making a turn at a high rate of speed, and under conditions where any driver should have known that accident and serious injury, if not death, would follow.

The majority opinion states: "It was claimed that, in striking some object, a cut or blow-out of the right rear tire occurred in which 'you could stick two fingers,' and this sudden deflation of that tire tended to assist in throwing the car out of the driver's control." It is true that the defendants in their answer plead that the accident was "due entirely to the deflation or blowing out of the right tire on said automobile and the loss of control thereof." It is also true that the evidence, *even of the defendants,* does not support that contention. The making of such a claim does not establish it to be a fact, nor does the assertion establish a defense. After the accident, there was a cut of two or three inches in the casing on the right rear wheel. The cause of the cut is not shown. The

condition of the tube is not shown. The tire was flat ten or fifteen minutes after the accident. Its condition as to deflation prior thereto is not shown. The defendant car owner testified that he examined the tracks after the accident, and they did not show the tire to have been flat. There is no testimony that the tire was flat before the car hit the tree.

The majority opinion recites the testimony of the defendant that, "All I know is that I lost control of the car and I got so I could not hold the car in the track." The testimony is correctly quoted. However, the clear inference of the quotation, as contained in the majority opinion, is that the defendant suddenly lost control of her car, causing the accident; that the loss of control was caused by the condition of the tire, and, hence, that it would not constitute gross negligence. The quoted statement was made in answer to this question, "What occurred *as you made the turn?*" On cross-examination, she was asked if she noticed anything in the operation of the car as she attempted to make the turn that would indicate that she had a flat tire. She answered that just as she attempted to make the turn the car went into this "funny operation" and that she could not control it. She was then asked: "That is, you were attempting to swing it back into Everett street and could not do so? A. Yes, sir." She further testified that she did not notice any swaying of the car as if it had a soft tire and did not hear a report as if there had been a blow-out.

It is clear from defendant's testimony that the loss of control came *after* she had made the turn, and after the car was traveling in the parking, for she could not "swing it back into Everett street." The cut in the casing is not shown to have been a contributing factor to the accident. The accident was caused by defendant's act *in making the turn;* the other things that happened thereafter were the result of that act.

The majority opinion recites that plaintiff went riding with the defendant again two weeks after the accident.

What difference does it make if she did? That fact does not negative gross negligence. The rights of the plaintiff and the liability of the defendant were fixed when the accident and the injury occurred. The later trip could not have any effect on that right and liability. It establishes nothing except the mental attitude of the plaintiff toward the defendant after the accident.

This court has held that gross negligence is "negligence of a very high degree that includes *but does not necessarily* extend to wanton, wilful or intentional disregard of the guest's safety." *Gosnell v. Montgomery,* 133 Neb. 871, 277 N. W. 429. (Italics ours.)

The majority opinion, as authority for its holding that the act of the defendant did not constitute gross negligence, cites a series of cases from other jurisdictions in which the elements of "conscious indifference," "wanton and wilful misconduct," "heedlessness," and "wilful negligence" were present.

Proof of those elements is not necessary in order to establish gross negligence as defined by this court, and, accordingly, those cases should not be accepted as yardsticks to determine whether or not gross negligence existed in this case. The effect of this decision, based upon these citations, is to restrict further the right of injured guests to recover. It puts new elements into the heretofore accepted definition of gross negligence and wraps the cloak of legal immunity from liability still more closely about those who disregard rules of safety in the driving of motor vehicles.

The majority opinion also cites cases of this court and of other jurisdictions which involved a blow-out, skidding, acts done by the driver to avoid accidents, unexpected and unobserved conditions or obstructions in the highway, the putting on of brakes suddenly after warning by a guest, a sudden stop to avoid hitting some one, an undisclosed danger in the course of travel. Those elements do not exist in this case, and, hence, those cases should not be taken as controlling of the decision herein.

As I see it, the majority opinion is erroneous in at least three particulars: First, it does not assume the truth of the evidence "tending to sustain the finding of the jury." Second, it relies upon decided cases from this and other jurisdictions that contain controlling elements that are not in this case. Third, it does not apply the rules adopted in *Morris v. Erskine, supra,* as to what constitutes gross negligence, and, in particular, does not follow the rule that the "question of negligence, whether slight or gross, is one of fact," and that, where the evidence is "such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine."

This court has repeatedly stated, as it did in *Morris v. Erskine, supra,* that "what amounts to gross negligence in any given case must depend upon the facts and circumstances" *of each case.*

There is ample evidence in this record to support the finding of the jury that the defendant was grossly negligent under the facts and circumstances of this case. This court should not substitute its conclusions of fact for the finding of the jury. It accordingly follows that plaintiff should be permitted to recover and that the judgment of the trial court should be affirmed.

The majority opinion not only reverses the case, but dismisses it. This also, in my opinion, is erroneous. If the case is to be reversed, it should be remanded for further proceedings in the trial court as the parties and the trial court might determine. We should not assume that additional evidence cannot be secured.

IN RE ESTATE OF ROBERT TAYLOR.
GEORGE R. DESOE, APPELLEE, V. FRANK TAYLOR, EXECUTOR, ET AL., APPELLANTS.

IN RE ESTATE OF MINERVA TAYLOR.
GEORGE R. DESOE, APPELLEE, V. FRANK TAYLOR, ADMINISTRATOR, ET AL., APPELLANTS.
285 N. W. 538

FILED APRIL 28, 1939. NOS. 30568, 30569.

**Adoption.** The legislative intent was to vest in legally adopted children all the rights and privileges which, by the laws of property and descent, have been conferred upon children born in lawful wedlock, unless they were clearly precluded therefrom by the terms and conditions of the proceedings by which they were adopted.

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

*Beatty, Maupin, Murphy & Derry,* for appellants.

*William P. Mullen, Harold A. Prince* and *E. E. Richards, contra.*

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

PAINE, J.

The parents of an adopted son having died, he claimed to be an heir and distributee in the estates of his adoptive mother's parents. The county court rejected his claim against each of said estates. He appealed to the district court, and there filed amended petitions setting up his rights. General demurrers filed by other heirs were overruled. The demurrants electing to stand upon their demurrers, and refusing to answer, or to plead further, the district court entered judgments in both cases in favor of the plaintiff, decreeing that said plaintiff was an heir of his adoptive grandparents, and entitled to the same share in their intestate estates as his deceased adoptive mother

would have taken therein had she survived her said parents. Defendants appeal.

The only issue presented in these cases in the court below was one of law, to wit: Whether an adopted child will inherit the same as a natural child from the ancestors of his adopted parent, where the death of such adopted parent occurred prior to the death of such ancestors.

George R. DeSoe, the plaintiff herein, was given the name of Richard Coffee at birth. His natural mother left him at a hospital in Kansas City, Missouri, and instructed the superintendent to find a home for him.

On January 18, 1910, James A. DeSoe and his wife, Maude B. Taylor DeSoe, applied to the juvenile court of Jackson county, Missouri, to adopt the plaintiff herein, who was then about eight months of age. On January 31, 1910, the said juvenile court entered an order, finding that the plaintiff was a neglected child, and on March 21, 1910, committed him to their care and custody.

The Revised Statutes of Missouri 1909, art. I, ch. 20, sec. 1671, then in force, provided that adoption should be by deed duly executed and acknowledged by the person adopting a child, and section 1672 provided that a married woman may join in said deed with her husband. In strict accordance with said statute then in force, James A. DeSoe and his wife, Maude B. Taylor DeSoe, executed and acknowledged such deed of adoption, with the intention of adopting said child, the plaintiff herein, as their own, under the name they then selected for him, to wit, George R. DeSoe. and thereupon took him to their home in Cairo, Hall county, Nebraska, where he grew up as their son. His adoptive mother, Maude B. Taylor DeSoe, died when he was about five years of age, leaving no other child than this adopted son. Some years thereafter his adoptive father, James A. DeSoe, also died, and he brought action for a share in such estate. This action was brought to this court, and in an opinion by Chief Justice Goss, released April 1, 1938, it was held that the plaintiff herein would share as a son in his adoptive father's estate. Other and additional facts

may be found set out in the record and in that opinion, entitled *In re Estate of DeSoe,* 134 Neb. 371, 278 N. W. 852. It may be accepted that this opinion settled the question that George R. DeSoe, the plaintiff herein, was the legally adopted son of Maude B. Taylor DeSoe, for in the trial on the objections to the final report of the administrator in the district court the case was treated as an equity case, with a jury to find the facts. Judge Kroger submitted to the jury the one question, and the verdict determined that there was a deed of adoption, as provided by the laws of Missouri, duly executed and acknowledged by James A. DeSoe and Maude B. Taylor DeSoe, with the intention thereby to adopt Richard Coffee, the claimant, who is now known as George R. DeSoe. This verdict and the decision of our court settled this question definitely.

Section 43-109, Comp. St. 1929, adopted in 1897, reads as follows: "Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock, of parent and child, and shall have all the right and be subject to all the duties of that relation, and the parents of such adopted child shall thereafter stand relieved of all parental duties toward, and all responsibility for, said minor child and shall have no right over it."

In the opinion on rehearing in *Ferguson v. Herr,* 64 Neb. 649, 659, 90 N. W. 625, 94 N. W. 542, Commissioner Kirkpatrick said: "The other question suggested relates to the spirit that should govern in the adjudication of controversies arising under the provisions of adoption statutes, whether they shall be construed strictly, as in derogation of the common law, or liberally, as being laws humane and beneficent in their intendments and provisions, intimately involving the interests of those who by nature are helpless. and unable by reason of inherent limitations to see to the strict observance of every detail of the statutory

procedure. * * * Adoption statutes are peculiarly beneficent and altruistic. Their purpose is wholly humane. By reason of their enactment, much misery, otherwise inevitable, has been prevented, and the happiness, of a most permanent and lofty character, thereby engendered is practically incalculable. Childless parents have been provided with objects upon which to bestow their affections, and orphans have been snugly entrenched in homes of comfort and even of luxury, brought thereby under the most valuable of influences, and, perchance, saved from swelling the ranks of the vicious and criminal."

While it is always difficult to find a case exactly in point, we have found several which throw light upon the questions involved in the case at bar. *Alexander v. Samuels*, 177 Okla. 323, 58 Pac. (2d) 878, involved property originally allotted to Nancy Alexander, a full-blood citizen of the Creek Nation. It was held that her adoption was, in fact, made and the papers lost; that said adoption might be proved by parol evidence. It is said that ordinarily a child is the result of the union of a man and woman, but this is by no means exclusive nor universal when viewed from the purely legal aspect; that from the earliest times among ancient barbarians, also among Jews, and especially among the Romans, the rights of adopted children were respected; that with the rise of feudalism those rights were restricted, but that the pendulum has now swung to a more liberal attitude, until today statutes of adoption create the relation of parent and child, very similar in its legal aspect to the natural relationship.

As set out in section 1712, Okla. St. 1931, it purports to confer upon an adopted child, in so far as his adoptive parents are concerned, all of the rights that he could have had under the law had he been born to them as the result of a marriage union, and the court concludes that a child adopted pursuant to the statute of Oklahoma is to be considered as born in lawful wedlock to such adoptive parents, with exceptions contained in another section, and it is held that, unless intentionally omitted, grandchildren will inherit as provided in said law.

In *Brooks Bank & Trust Co. v. Rorabacher*, 118 Conn. 202, 171 Atl. 655, in the adoption agreement it was provided that the said child shall have the same rights as to property and inheritance that he would have if he were a legitimate child. In this case it is said that the right to inherit from collateral kin of adoptive parent is not to be readily implied from the relation, and is to be recognized only if expressly conferred. It says that there is no ground for any different rule as to application of statutes clearly conferring rights of inheritance from the relatives of the parents of such adopted child, and that grandchildren of person adopted in Connecticut in 1870 are held entitled to inherit estate of the adoptive parent's sister, who died in Connecticut in 1930.

In Rhode Island, Gen. Laws 1923, ch. 288, sec. 6, provides generally that an adopted child shall be deemed, for the purposes of inheritance by such child, the same as if he had been born to them in lawful wedlock, except that he cannot take property expressly limited to the heirs of the body. The adoption, being under the statute of Massachusetts, which was similar to the statute of Rhode Island, both being in derogation of the common law, held to be strictly construed. It was held in *Smith v. Bradford*, 51 R. I. 289, 154 Atl. 272, that, as nothing appears in the will to limit the legal import of the word "issue," the word thus used included all descendants, and as the statute of adoption gives to an adopted child the status of a descendant, the adopted child was entitled to the fund.

The case of *In re Walworth's Estate*, 85 Vt. 322, 82 Atl. 7, 37 L. R. A. n. s. 849, Ann. Cas. 1914C, 1223, tells us that under the civil law in Rome all the property of the adopted son belonged to the adoptive father, and Lord Mackenise, in his work on the Roman Law, p. 131, says: "Augustus did not adopt Tiberius, who succeeded him in the Empire, till Tiberius had adopted his nephew Germanicus; and the effect of this was that Tiberius became the son and Germanicus the grandson of Augustus at the same time." It is said that where there is a legal child there is a

legal father, and cites the case of *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, in which the court said it was not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent.

*In re Book*, 90 N. J. Eq. 549, 107 Atl. 435, it was said: "Applying this rule, we are of opinion that the legislative intent to be gathered from a reading of all these statutes was to vest in adopted children all the rights and privileges which, by the act concerning wills, the statute of descents, and the statute of distribution, had been conferred upon children born in wedlock. * * * To give this legislative purpose its full significance, the meaning of the words 'child,' 'children,' and 'issue,' wherever appearing in the various statutes comprising the legislative system embodied therein, when used with relation to the testator or intestate, must be considered to have been enlarged so as to include adopted as well as natural-born children within their scope."

In the case of *Cave's Estate*, 326 Pa. St. 358, 192 Atl. 460, it is said that the right of adopted children to inherit from kindred of adoptive parents is entirely statutory, and because the call of the blood is a firmly rooted instinct courts tend to strictly construe such legislation. After reviewing many of the decisions, it was held by the Pennsylvania court that, in spite of the somewhat confused state of judicial expression in regard to this subject, the court has no hesitancy now in deciding that the intestate act of 1917 permits of no reasonable construction other than that by its terms an adopted child has the same right of inheritance from the collateral kindred of his adoptive parents as a natural child of such parents would have. "It is urged that a person should not be permitted, through the expedient of adopting a child, to attach a stranger to the family tree, so as to enable that stranger to share in the estate of the adoptive parent's collateral relatives. The answer to this argument is that if a decedent does not wish such a 'stranger' to share in his estate, he can make a will accordingly. Be this as it may, it is not our function

to approve or disapprove the policy embodied in legislative enactments, but merely to interpret their meaning, and, in the present case, when we examine the successive statutes historically and analytically, steadily broadening as they do the status of adopted children, it is clear, in our opinion, that the rights of such children now include that of inheritance from the estates of collateral kindred of their adoptive parents."

Our attention is called in the brief of appellants to the case of *Estate of Bradley,* 185 Wis. 393, 201 N. W. 973, 38 A. L. R. 1, in which the deceased died intestate, leaving an estate in excess of $4,000,000. He had never married, and the only heirs left surviving him were a surviving daughter of one of his brothers and an adopted son of another deceased brother, and the Wisconsin court held that the adopted son of his brother could not inherit any part of this estate, saying that the appellant is not related to him in any manner, neither by ties of blood nor by contractual relations, for the adopted child is not constituted an heir of collateral kindred of adoptive parents. In this case it is held that a statute which interferes with the rule that property of an intestate should descend to kindred of his blood, or interrupts the natural course of descent, should be strictly construed, and that the legislature must use explicit and unmistakable language in such a case. It is clear that the Wisconsin court, as well as the South Dakota court in the case of *In re Eddins' Estate,* 279 N. W. 244, are both governed by a rule of strict construction of the statute, and therefore these cases cannot govern the holding of this court, where the tendency of all of our decisions has been towards a very liberal construction of the law in all cases of adoption. The thought back of the Nebraska decisions has been to give exactly the same rights and privileges to an adopted child which a natural child has. One of the rights of a natural child is to inherit from a grandparent through his parent. If the adopted child does not have that right, then it has been denied a right or privilege which the natural child has. *In re Masterson's Estate,* 108 Wash.

307, 183 Pac. 93; *In re Waddell's Estate,* 131 Wash. 566, 230 Pac. 822.

The Nebraska case of *In re Estate of Enyart,* 116 Neb. 450, 218 N. W. 89, exhaustively goes into all questions relating to the rights of adopted children in the state of Nebraska. The adopted son, Logan Enyart, died intestate and unmarried, leaving land and personal property. The question arose, did the adoption proceedings deprive his natural father of the right to inherit from this son? and for the first time in this state the question arose whether Katherine Enyart, who had adopted him in 1903, would inherit his property, or his parents, who had relinquished all rights to custody and control of him at the time of his adoption. It is said that the law governing adoption varies in each state, and Judge Good said that he had found no statute of any other state that is precisely like the laws in Nebraska, and therefore the decisions of other courts could not be taken as a safe guide to a decision here. He says that, if there are no restrictions or limitations or conditions in the adoption, then our statute of adoption creates the legal relation of parent and child, and gives to the adoptive parent and the adopted child all of the rights that pertain to that relation by virtue of the statute of descent, and that his natural father, by his voluntary act in surrendering all rights to the child, transferred from himself to Katherine Enyart, the adoptive mother, the right to inherit from the adopted child, Logan Enyart.

In the case of *In re Estate of Grinnell,* 117 Neb. 332, 220 N. W. 583, it was held that adopted children have the right to inherit from their adoptive parents, unless they were precluded therefrom by the terms and conditions of the proceedings by which they were adopted. In this opinion it is shown that the law of 1897 provided more liberally as to inheritance than had theretofore been the rule, because it provided that, unless there was a restriction in the adoption proceedings, the adopted child should inherit, whereas under the prior law in Nebraska it was provided that he should not inherit unless it was expressly provided in the adoption proceedings.

If a grandparent or an uncle, for instance, does not want the child thus adopted to share in his property, it is the easiest thing in the world to cut the child out by a paragraph in his last will. But if such a relative has not availed himself of the opportunity to cut out such person from his estate, it will be understood that the adopted child has the right of representation in exactly the same manner and to exactly the same extent as if such child had been begotten in lawful wedlock. *Denton v. Miller,* 110 Kan. 292, 203 Pac. 693; *In re Cadwell's Estate,* 26 Wyo. 412, 186 Pac. 499.

We hold that the Nebraska statutes, as construed by our decisions, intend that an adopted child shall have the same rights to inherit property that a natural child has; that all the rights and privileges of an adopted child shall be identical with those of a natural child. If our legislature had intended to place any limits upon such rights and privileges, it could easily have inserted them in the law of descent of property (Comp. St. 1929, sec. 30-101), and not having done so, we find no prejudicial error in the record, and the judgment of the trial court is

AFFIRMED.

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FRED E. BEAUMONT, APPELLANT, V. WILLARD M. FOLSOM, ET AL., APPELLEES.
285 N. W. 547

FILED APRIL 28, 1939. No. 30482.

1. **Corporations:** DIRECTORS. While the dealings of a director with respect to corporate property will be given most careful scrutiny, he is not prohibited from purchasing, in good faith, an outstanding lien on such property, with the knowledge of the other stockholders, to protect his own investment, where the corporation is without financial ability to take up the lien and the other stockholders have refused to join in a contribution for this purpose.
2. ———: ———. He is permitted, also, in protecting the interest thus acquired, to bring foreclosure on the lien in regular course, and openly and fairly to purchase the property at ju-

dicial sale, particularly where he has given the other stockholders notice of each stage of the proceedings.

3. ———: ———. In such a situation, where each stockholder has had notice of the sale and an opportunity to bid; where none has seen fit to make objection to confirmation; where no fraud or overreaching in connection with the sale is charged, and where no other controlling circumstances are present, the confirmation of the sale may ordinarily be accepted as sufficiently establishing that the property was purchased for its full value under all the conditions.

4. ———: ———. Under such circumstances, where the title acquired is subsequently sought to be avoided, the facts that the director has earnestly endeavored to get the stockholders to join in a contribution to relieve the financial distress of the corporation and to prevent a judicial sale, which they have refused to do, and that, on taking over the property, he has offered them the opportunity to participate in organizing a new corporation, on the same proportional basis as in the old, by payment of their share of the money expended, are rather strongly persuasive on the issue of good faith and fidelity to duty as a director.

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

*Beghtol, Foe & Rankin* and *W. E. Nolte,* for appellant.

*Field, Ricketts & Ricketts, contra.*

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

JOHNSEN, J.

This is an action by a stockholder against the directors of a dissolved corporation, for an accounting and distribution of assets. Plaintiff has appealed from the dismissal of his petition.

The corporation was dissolved by action of its stockholders in 1933. It had owned two buildings on the southeast corner of Fifteenth and "O" streets, in the city of Lincoln, purchased in the boom period for $91,500, on which the rents, grossing $19,000 a year at their peak, had paid the upkeep and reduced the mortgage from $60,000 to $25,000. From 1928 on, however, the rents were insufficient

to carry the property, and the usual story of the depression followed. An extension was obtained on the mortgage. Tax sale certificates were issued against the property. The mortgagee complained of the tax defaults. Defendants Willard M. Folsom, Homer K. Burket and Harry J. Hall, the directors and majority stockholders, tried to get the other shareholders to join in a contribution sufficient to redeem from the tax sales, but all of them refused. Finally, in 1932, defendants Folsom, Burket and Helen E. Hall, daughter of Harry J. Hall, purchased the tax sale certificates from the holder and took an assignment in their own names, with an agreement that their lien was to be subordinate to the mortgage. The other stockholders, including plaintiff, were informed of what had been done and were invited to participate, but none of them would contribute.

In 1933, foreclosure was commenced on the tax sale certificates, and cross-petition was filed on the mortgage, which was then in default. Decree was entered for $26,279.87 on the mortgage and for $7,530.07 on the tax lien. The mortgagee offered to trade its decree for Beatrice Creamery Company stock, on a par value basis. Such stock, in an amount necessary to effect the trade, was then purchasable on the market for $15,000. The corporation was not in a position to take over the decree and pay the tax liens. In order to fortify their tax lien investment, defendants Folsom, Burket and Helen E. Hall purchased the necessary Beatrice Creamery Company stock and took an assignment of the mortgage decree. At sheriff's sale they bid in the property and had deed issued to them, which was duly recorded on July 23, 1933. All the stockholders, including plaintiff, were notified of the foreclosure, of the purchase of the mortgage decree, and of the sheriff's sale.

On August 8, 1933, a special meeting of the stockholders was held, and all appeared in person or by proxy. Plaintiff was represented by his son and by an attorney. Every stockholder, except plaintiff, voted to dissolve the corporation. Defendants Folsom, Burket and Hall advised of their

intention to form a new corporation and to convey title to it, and offered each stockholder the privilege of participating, on payment of his proportional share of the expenditures made. Neither plaintiff nor any other minority stockholder availed himself of the privilege. The stock in the new corporation was accordingly issued to defendants Folsom, Burket and Harry J. Hall. Conveyance was made to it of the property on September 11, 1933, and it has since owned and operated the building, with some further financial assistance from the shareholders in 1934.

This action was brought on September 7, 1937, against defendants Folsom, Burket, Harry J. Hall, his daughter Helen E. Hall, and the new corporation. Plaintiff contends that, in taking an assignment of the tax sale certificates, in instituting foreclosure upon them, in effecting a compromise with the mortgagee and taking an assignment of its decree, and in acquiring title to the property at sheriff's sale, the directors were trustees *ex maleficio* for the old corporation, and, on its dissolution, they became trustees of its assets for the benefit of plaintiff and the other stockholders, under sections 24-107 and 24-110, Comp. St. 1929. These sections constitute the directors of a dissolved corporation as trustees to liquidate its assets, pay its outstanding debts, and make distribution of any surplus among stockholders. The petition seeks to have the conveyance to the new corporation declared void on the ground that it took title with knowledge of the trust capacity of the directors; to obtain an accounting of the rents and profits from defendants Folsom, Burket and Hall; and to have the property liquidated and the assets distributed among the stockholders.

The trial court held that defendants Folsom, Burket and Hall had acted purely to protect their individual interests and investments, to the knowledge of plaintiff and the other stockholders, and only after the latter had refused to join in a contribution to assist the corporation; that, in taking an assignment of the tax sale certificates, bringing foreclosure thereon, obtaining an assignment of the mort-

gagee's decree, and becoming purchasers at the sheriff's sale, they had acted fairly, openly, in good faith, and without fraud or deceit; that under the circumstances they were entitled to purchase the property and take title thereto, notwithstanding that they were at the time directors of the corporation; and that no trust, therefore, arose, either expressly or by implication of law, in favor of the old corporation or its stockholders. Plaintiff's action was thereupon dismissed. Defendants' answer had offered plaintiff the privilege of still participating in the new corporation and acquiring his proportional share of stock, upon payment of its book value, computed on the actual cost to defendants. Pursuant thereto, the trial court found that the advances made by defendants equaled $53.80 per share as of January 26, 1938, and plaintiff was allowed the privilege of acquiring stock at this price, plus interest, for a sixty-day period after the decree.

On the merits of the case, this was the only decree that could fairly have been rendered.

Directors occupy, of course, a fiduciary relation to the corporation and its stockholders. *Howell v. Poff*, 122 Neb. 793, 241 N. W. 548. They must exercise the utmost good faith in any transaction touching their duties to the corporation and its property. 3 Fletcher, Cyclopedia Corporations (Perm. Ed.) sec. 850. Conduct tinged with any breach of faith or inconsistent with any duty will be readily condemned. *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N. W. 839. Dealings with respect to corporate property will be given most careful scrutiny. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548, 54 N. W. 830. Any title acquired by a director may be set aside on even slight grounds. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

This does not mean, however, that a court of equity will avoid every transaction involving corporate property to which a director is a party. A director is not prohibited from purchasing in good faith, an outstanding lien on corporate property, with the knowledge of the other stockholders, to protect his own investment, where the corpora-

tion is without financial ability to take up the lien, and the other stockholders have refused to join in a contribution for this purpose. *Steinbeck v. Bon Homme Mining Co.*, 152 Fed. 333, 81 C. C. A. 441. He is permitted also, in protecting the interest thus acquired, to bring foreclosure on the lien in regular course, and openly and fairly to purchase the property at judicial sale, particularly where he has given the other stockholders notice of each stage of the proceedings. *Horbach v. Marsh*, 37 Neb. 22, 55 N. W. 286; *Nipp v. Puritan Mfg. & Supply Co.*, 128 Neb. 459, 259 N. W. 53; 3 Fletcher, Cyclopedia Corporations (Perm. Ed.) sec. 875; 13 Am. Jur. sec. 1009. Under such circumstances, where his title is subsequently sought to be avoided, the facts that he has earnestly endeavored to get the stockholders to join in a contribution to relieve the financial distress of the corporation and to prevent a judicial sale, which they have refused to do, and that, on taking over the property, he has offered them the opportunity to participate in organizing a new corporation, on the same proportional basis as in the old, by payment of their share of the money expended, are rather strongly persuasive on the issue of good faith and fidelity to duty as a director. *Schrader v. Heinzelman Bros.*, 51 Ill. App. 31; *Appeal of Lusk*, 108 Pa. St. 152.

Tested by these principles, the evidence in this case does not justify a charge of unfairness or breach of trust on the part of the directors. They did not act hostilely to the other stockholders. On the contrary, they had sought, on repeated occasions, to get the stockholders to act concertedly to protect the property of the corporation. When the other stockholders refused to incur further financial risk, they were not obliged to sacrifice their own previous investment, but were justified in protecting it in the manner they did. After they had taken over the property, they offered to share any future advantage that might come out of their purchase, through participation in the new corporation. Four and a half years later, they still offered plaintiff the privilege of acquiring his share of the capital

stock. More could hardly be exacted of them without callousing the conscience of an equity court.

Plaintiff makes various contentions and interpretations of some of the circumstances and actions of defendants, with which we are unable to agree. He argues, for example, that defendants did not acquire title in protection of their tax liens because bid was made under the mortgage decree, and that, when sheriff's deed was issued, the tax liens were discharged and the right to protection or reimbursement in connection therewith was lost. Clearly, defendants took title to protect all the expenditures which they had made. They did not intend to donate the amount of the tax liens, either to the corporation or the other stockholders, and they did nothing which would permit plaintiff to stumble into any such position of inequitable advantage.

We deem it necessary to discuss only one other contention of plaintiff, and that is that defendants failed to sustain the burden resting on them as directors to prove that they had paid full value for the property. In a situation such as this, where the stockholder has had notice of the sale and an opportunity to bid; where he has not seen fit to make objection to confirmation; where no fraud or overreaching in connection with the sale is charged, and where no other controlling circumstances are present, the confirmation of the sale may be accepted as sufficiently establishing that the property was purchased for its full value under all the conditions. *Grunden v. German,* 110 Wash. 237, 188 Pac. 491.

We have chosen to dispose of the case on its merits and so need not consider the defenses of laches and the statute of limitations.

Defendants did not acquire or hold title as trustees for the stockholders of the old corporation, and plaintiff's petition is accordingly without equity.

AFFIRMED.

STATE, EX. REL. WALTER R. JOHNSON, ATTORNEY GENERAL, ET AL., RELATORS, V. BEN A. GOBLE, SHERIFF OF GAGE COUNTY, NEBRASKA, RESPONDENT.
285 N. W. 569

FILED MAY 5, 1939. No. 30687.

1. **Arrest.** Where a person charged with a felony in a court of this state is at liberty on bail pending trial, and where such person is legally charged before a court of competent jurisdiction in another county of this state with having committed another separate and distinct felony therein, and a warrant commanding his arrest is issued based thereon, such a person is not immune from arrest on the warrant issued on the second charge.
2. ———. Under such circumstances, it is the duty of the officer to whom the warrant is issued directing the arrest of the accused to go at once into any county of the state where the accused may be found to there arrest the accused and forthwith remove him to the county where the alleged crime may be said to have been committed to be there dealt with as the law provides.
3. ———. It is the duty of the courts and of the peace officers within and for the county where the accused may be so found to give proper assistance to the arresting officer in the performance of that duty.

Original application for a writ of mandamus. *Writ allowed.*

*Walter R. Johnson, Attorney General, Rush C. Clarke* and *Arnold J. Van Borkum,* for relators.

*Wear, Boland & Nye, amici curiæ.*

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

SIMMONS, C. J.

This is an original application in this court for a peremptory writ of mandamus, directing the sheriff of Gage county to arrest one George M. Hauser and one Leo S. Holmes, hereinafter referred to as the defendants, pursuant to a warrant issued out of the county court of Gage county.

The application alleges that, prior to March 10, 1939,

complaint was filed in the municipal court of the city of Omaha, Douglas county, Nebraska, charging the defendants with the commission of a felony, and the defendants were arrested by warrants issued thereon.

On March 10, 1939, a complaint was filed in the county court of Gage county by the county attorney, charging the defendants with the commission of a felony in that county, and a warrant was issued, commanding the respondent to arrest said defendants and bring them before said court. Said warrant is still in full force and effect.

The charges in the two counties are based upon alleged violations of different provisions of the statutes.

The relators allege that the defendants had fled from justice in Gage county and were in Douglas county when the Gage county warrant was issued.

A preliminary hearing on the Douglas county complaints was had on March 20, 1939. The defendants were held to trial in the district court for that county, and were committed to jail. The action is now pending in the district court for Douglas county. No date of trial has been fixed. The trial of the action will not take place until June, and probably not until October, 1939.

The defendants filed motions in the Douglas county actions, reciting that it had been stated that complaints would be filed against them in other counties; that the complaint had been filed in Gage county; that the sheriff of Gage county had stated he would arrest them and transfer them to jail in Gage county; that the offense is bailable; that the threatened action would preclude them from obtaining bail; that the Douglas county courts have assumed jurisdiction over them, and that, by reason thereof, they are not subject to arrest under complaint issued in any other court so long as the Douglas county actions are pending. The defendants prayed for an order, which was granted by the district court on March 21, 1939, enjoining the sheriff of Douglas county, his deputies or agents, and the police force from arresting, or aiding in the arrest of, the defendants for the purpose of, or preliminary to,

their removal to any other county to answer criminal complaints during the pendency of the Douglas county cause; and ordering that the defendants be not removed from the jurisdiction of the district court for Douglas county, during the pendency of the action there, by any sheriff or peace officer, who, with knowledge of the order, might come into the county for that purpose. The district court for Douglas county admitted the defendants to bail, and they are now at liberty thereunder. The district court for Douglas county further ordered that its order of March 21, 1939, should remain in force "during the pendency of this cause of action and until same is finally disposed of if the defendants are at liberty under bail approved by this court to the same effect as if they remained in jail in the custody of the sheriff of Douglas county."

This court issued an alternative writ. The respondent answered, setting out generally the facts recited herein; that respondent desires to act lawfully and perform his duties in a proper manner; that he is willing and able to arrest the defendants; and that he is uncertain as to his powers and duties.

The relators moved for judgment on the pleadings.

Brief of *amici curiæ* was filed herein "at the suggestion of Honorable Willis G. Sears, presiding judge of the district court of Douglas county." This court permitted oral argument by the *amici curiæ*.

The primary contention of the *amici curiæ*, in support of the order of the district court, is that a court which has a person charged with crime in its custody has exclusive custody and jurisdiction over such person until his guilt or innocence is determined, and when accused persons are at liberty under bail, the dominion of the sureties is a continuance of the original imprisonment.

This case does not present a question of a conflict in the jurisdictions of two sovereignties. Only one sovereignty is involved—that of the state of Nebraska. A situation where two prosecutions are pending in different courts of concurrent jurisdiction for the commission of a single

offense is not involved. Here separate offenses against the laws of the same sovereignty are charged in different counties.

The defendants are not being tried at this time in Douglas county, and it is apparent that they will not be tried for several months. In the meantime, their presence in court in Douglas county is not required for any purpose in connection with their trial for the offenses with which they there stand charged.

The effect of the order of the district court for Douglas county is to grant to the defendants immunity from prosecution for any and all offenses against the laws of this state heretofore or hereafter committed anywhere in Nebraska outside of Douglas county, until the final determination of the charges there pending.

If the contention of *amici curiæ* is sound, then the enforcement of the criminal law in 92 of Nebraska's 93 counties would be suspended and not a step could be taken toward the effective prosecution of the defendants in counties other than Douglas, even though they were charged with the violation of every law of this state.

Persons who commit acts, in one or more of the several counties in this state, subjecting themselves to charges and arrest under the criminal statutes, must anticipate that charges, arrest, and, where probable cause is shown, trial will follow. Persons so accused have the right, which the courts will protect, to a full and fair trial according to the law of the sovereignty where tried. Persons so accused do not have the right to use the power of the courts to avoid arrest and trial, nor to hinder and delay the enforcement of the laws. Courts should assist, not obstruct, officers of the law in the performance of their duties. Defendants cannot, of course, be tried in two places at the same time. The courts will protect their right to prepare their defense fully, and to be present at every stage of their trial. This order of the district court for Douglas county does not protect rights; it grants immunities.

With the exception of certain crimes, prosecution is

barred by statute (Comp. St. 1929, sec. 29-110) unless brought within the time limited by the act. It is possible that the present prosecution of the defendants in Douglas county might not become final until the time fixed as a limit for prosecution in other counties on other charges has passed.

Delay is often an effective defense in criminal trials. The assurance of prompt trial and punishment, where guilt is established, is a deterrent to crime. Knowledge that trial and punishment for crime will be delayed, if not escaped, encourages the commission of offenses. Prompt trial and sure punishment for crime is the policy of the law. Courts should act to aid the realization of that policy.

There are few adjudicated cases dealing with the precise question here presented. The realtors cite *Ex parte Vogler*, 110 Tex. Cr. Rep. 579, 9 S. W. (2d) 733, 62 A. L. R. 456, where a person released on bond, pending hearing on habeas corpus, was held not immune from arrest and prosecution for another offense. The court in that case stated:

"The fact that Jackie Miller was taken in custody upon a warrant from the health department, and was on application for writ of habeas corpus released by the district judge upon bail, pending hearing of the application and decision therein as to whether she was an infected person and a menace to public health, did not render her immune from arrest and prosecution for an offense against the penal law of the state, and the fact of the arrest did not *per se* render the arresting officer in contempt of court. * * * There was no attempt by the arrest to withdraw her from control of the district court, or to interfere with the hearing to be held on the writ of habeas corpus. The proceeding in the district court was in no manner impeded or delayed. * * *

"We have examined the authorities cited in the motion as well as others, and have found none on facts such as those before us, or on facts demanding the application of any

analogous principle, which hold that one on bond in a pending habeas corpus case, who has theretofore or does thereafter violate the law in such manner as that the question of the violation *vel non* is not involved in, or connected with, or affected by the matters at issue in the pending habeas corpus hearing, may not be properly arrested by an officer merely because he knows of the pending proceeding. Such holding, in our opinion, would be little short of monstrous. To hold that one merely detained by health officers, and who may be at large on bail pending a habeas corpus hearing set weeks later, is thereby privileged from arrest for murders committed, thefts perpetrated, ravishments done, or any other violation of law, merely because the arresting officer had knowledge of such pending habeas corpus proceedings would make for incredible confusion and disorder. If the contention thus made be sustained, then habeas corpus writs might be sued out, and that fact published, so that all officers would have knowledge thereof, and the hearing thereon might be purposely delayed, and bond made so that forsooth the parties might thereafter commit wholesale crime, extending over a period of time, and be privileged from arrest."

In *In re Popejoy,* 26 Colo. 32, 55 Pac. 1083, Popejoy was committed to the county jail of Arapahoe county for contempt by reason of his failure to pay a judgment against him for his wife's separate manitenance. Popejoy was arrested by the sheriff of Arapahoe county in El Paso county under the warrant of commitment. Popejoy applied for a writ of habeas corpus, and among other facts recited that, at the time of his arrest under the warrant of commitment, he was under bond to appear before a justice of the peace of El Paso county, to answer a criminal charge, and that therefore he could not be arrested under warrant issued by the district court for Arapahoe county. On that proposition, the court said:

"At the time of the arrest of petitioner under the commitment issued by the district court, he had not then been committed to any prison, nor was he in the custody of any

officer or other person, upon any criminal or supposed criminal matter. On the contrary, he was out on bail, conditioned for his appearance before a justice of the peace of El Paso county, to answer to a criminal charge there pending; but that did not exempt him from arrest or removal by virtue of the commitment under which he is now held, and from which he seeks to be released, and the provisions of section 2115, Mills' Ann. St., which provide that a person being committed to prison or in custody of an officer upon a criminal charge, shall not be removed from such prison or custody into any other prison or custody, unless it be by habeas corpus or some other legal writ, are not applicable, because, being out on bail, petitioner was not committed to prison, or in the custody of any officer."

*Amici curiæ* cite *In re Beavers*, 125 Fed. 988. In that case, Beavers was at liberty on bail subject to answer an indictment in the federal courts of New York. He was arrested under a warrant issued upon the indictment of a District of Columbia court. It was held that: "A court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined, and, if he is found guilty, until the period of imprisonment has expired." The opinion rests upon citations to *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287. In that case the court stated:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

In the annotation to *Ex parte Vogler, supra*, reference is made to *In re Beavers, supra*, and this statement made: "It is to be noted that here the second arrest was not

made on an indictment issued in the same jurisdiction as the first arrest, which probably accounts for the difference in the holdings in these two cases."

See, also, *Ponzi v. Fessenden,* 258 U. S. 254, 42 S. Ct. 309.

In *Peckham v. Henkel,* 216 U. S. 483, 30 S. Ct. 255, Peckham was indicted in the District of Columbia in 1905. A warrant was issued in the northern district of New York upon a complaint filed with the commissioner for his removal to the District of Columbia for trial. Peckham applied for a writ of habeas corpus, alleging that his detention was illegal. The trial court denied the writ, an appeal was taken, and pending the appeal, the order of removal was stayed. In 1908, Peckham was again indicted in the District of Columbia for similar, but not the same, offenses. Proceedings were brought for his removal to answer the 1908 charges, the stay order on the 1905 indictment being still in force. It was contended that, while the 1905 removal proceedings were pending, Peckham could not be removed under the 1908 proceedings without disregarding the jurisdiction which had attached by virtue of the 1905 effort to remove him. The court stated:

"That Peckham is under bond to appear and comply with the order of removal made by Judge Ray, and, therefore, constructively in the custody of his sureties, must be conceded. But if the performance of the condition of that bail bond is rendered impossible by his removal in these subsequent proceedings, at the instance of the United States, the effect may be to exonerate his sureties. *Taylor v. Taintor,* 16 Wall. 366, 371; *Beavers v. Haubert,* 198 U. S. 77, 85. But it is said that removal to the District of Columbia is forbidden under Judge Ray's order of January 10, 1906, and that a removal under the order made by the commissioner in the proceedings now under review will invalidate the order of Judge Ray.

"This is a fanciful claim. He will not be removed under or in pursuance of the original order of removal, execution of which has been stayed, but under an order made in an

altogether distinct and subsequent proceeding to answer distinct offenses.

"Finally, it is said that the jurisdiction of the court for the northern district of New York, having attached to the person of appellant, must be respected as exclusive until its jurisdiction is exhausted.

"The rule is one of comity only, and has a wide application in civil cases, but a limited one in criminal cases. See *In re Johnson*, 167 U. S. 120, 125, and *Beavers v. Haubert*, 198 U. S. 77, 84. But when, as here, the subsequent proceedings for the removal of appellant are to answer indictments later found for other and distinct offenses, the question is quite a different one, for the 'cases' are not the same. That they are 'cases' against the same offender is not of itself sufficient to constitute the second proceedings void as an unlawful interference with the jurisdiction of the district court for the northern district of New York."

In *Morse v. United States*, 267 U. S. 80, 45 S. Ct. 209, Morse and another were on bail to answer indictments in the District of Columbia. On the day before their case was to be tried, they were passing through New York on their way to Washington for trial. They were arrested and taken from the train in New York on a warrant issued on federal indictments found in New York. Their arrest prevented their appearance at the time their trial was set in the District of Columbia. Writs of habeas corpus were denied, the court stating:

"It is contended that the arrest of appellants in New York, while en route to Washington for trial, under the circumstances stated, was arbitrary, unauthorized and illegal, and constituted a violation of the due process of law clause of the Fifth Amendment. The contention is plainly without merit. The principle that when the jurisdiction of a court has attached, it must be respected as exclusive until exhausted, is a rule of comity, having a wide application in civil cases but a limited one in criminal cases. *Peckham v. Henkel*, 216 U. S. 483, 486. The mutual forbearance which two federal courts having coordinate juris-

diction should exercise to prevent conflicts by avoiding interferences with the process of each other, has 'perhaps no higher sanction than the utility which comes from concord.' *Covell v. Heyman,* 111 U. S. 176, 182. But this aside, if there be a violation of the rule of comity here, it primarily concerns only the courts or the sovereignty which is their common superior, and cannot avail the appellants indicted for crimes in the different jurisdictions."

If as a result of the Gage county charges, the defendants are held for trial there, the question of where and when the defendants shall be tried is a matter to be determined by the trial courts involved. We assume that the courts will have no difficulty in that determination. Should difficulty arise, upon a proper showing therefor, the rule-making power of this court may be exercised in the matter.

Section 29-205, Comp. St. 1929, provides that, where a person accused of a crime absconds or removes from the county where the crime is charged, "it shall be lawful" for any sheriff to apprehend the accused and remove him to the county where the crime is charged.

Section 29-1702, Comp. St. 1929, provides that, where an accused party resides out of the county where the charges are brought, warrant may issue directed to the sheriff of the county where the accused resides, or may be found, and "it shall be the duty of such officer to arrest the accused and convey him to the county from which such writ was issued."

*Amici curiæ* argue that section 29-1702, *supra,* is mandatory, that section 29-205, *supra,* is permissive, and, hence, that it is not the mandatory duty of the sheriff of Gage county to go into Douglas county and make the arrest, and that a writ of mandamus should not issue.

The argument is without merit. To so construe that, or other sections of the statutes relative to the arrest of persons accused of crime, would be to leave the matter of obeying an order for the arrest of accused persons entirely within the whim and caprice of the many officers of the courts of this state.

Section 29-404, Comp. St. 1929, makes it the duty of a magistrate to issue a warrant for the arrest of an accused person, if he shall have reasonable grounds to believe the offense charged has been committed. Can it be the duty of the magistrate to issue the warrant and not be the duty of the sheriff or other officer to serve it?

Section 26-1410, Comp. St. 1929, provides: "It shall be the duty of the sheriff * * * to apprehend and arrest all criminals * * * and to perform all other duties pertaining to the office of sheriff or enjoined upon him by law."

Section 26-1401, Comp. St. 1929, provides that it shall be "the duty of the sheriff to serve or otherwise execute, according to law, and return, writs or other legal process issued by lawful authority, and to him directed or committed."

Section 26-1402, Comp. St. 1929, provides: "His disobedience of the command of any such process is a contempt of the court from which it was issued, and may be punished by the same accordingly."

Sections 28-720 and 28-722, Comp. St. 1929, provide that any warrant legally issued shall be served immediately, and, subject to the provisions of the statute, the officer who neglects or delays serving a warrant is subject to fine, imprisonment and removal from office.

"It is the general rule that an officer to whom a lawful warrant for the apprehension of one accused of an offense has been directed must proceed with reasonable diligence and do all in his power faithfully to execute the warrant." 5 C. J. 390. See 6 C. J. S. 575; *Malone v. Carey*, 17 Cal. App. (2d) 505, 62 Pac. (2d) 166.

"The writ of mandamus may be issued * * * to compel the performance of an act which the law specifically enjoins as a duty." Comp. St. 1929, sec. 20-2156.

In *State v. Anderson*, 122 Neb. 738, 241 N. W. 545, this court stated: " 'To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.' *State v. Barstler, ante*, p. 167."

In this case, the duty to make the arrest, as commanded in the warrant, is imposed upon the respondent by law; it existed at the time the writ of mandamus was applied for, and the duty of the respondent to act is clear. It is the duty of the respondent to make the arrest as commanded by the warrant. It is the duty of the district court for Douglas county and the peace officers within and for said county to give him every proper assistance in the performance of that duty.

The peremptory writ prayed for is granted.

WRIT ALLOWED.

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RHEES R. ROBINSON, APPELLEE, V. MARY E. WILLIAMS ET AL., APPELLANTS.
285 N. W. 574

FILED MAY 5, 1939. No. 30515.

1. **Parties.** The court may determine any controversy between the parties, when it can be done without prejudice to the rights of others. Comp. St. 1929, sec. 20-323.
2. **Appeal.** "In equity actions involving questions of fact where there is an irreconcilable conflict in the evidence, in determining the weight of evidence this court will consider the fact that the trial court observed the witnesses and their manner of testifying." *Hole v. Hamp*, 134 Neb. 259, 278 N. W. 480.
3. **Fraudulent Conveyances.** Fraudulent intent may be established by proof of facts and circumstances from which such inference may be reasonably drawn.
4. **Evidence** in the record examined, and *held* to sustain the judgment of the trial court.

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

*Frank A. Dutton* and *Samuel D. Killen*, for appellants.

*Mockett & Finkelstein* and *Fulton Jack, contra.*

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

EBERLY, J.

This is an action in the nature of a creditor's bill wherein Rhees R. Robinson is plaintiff, and Mary E. Williams, George H. Zimmerman, in his own behalf and as executor, and others, are defendants. The prayer of the petition was for the annulment of a certain warranty deed, dated January 28, 1935, executed by George H. Zimmerman, and purporting to convey to defendant Mary E. Williams, in consideration of $1,500 received, a certain residence property in Beatrice, Nebraska, which is described in the record as No. 423 North Sixth street; and also decreeing as void a certain assignment, also executed by such Zimmerman, purporting to convey to Joseph P. Zimmerman, "all my right, title and interest which I may have or might have in an undivided one-ninth interest in the estate of my deceased father, Philip Joseph Zimmerman, now being probated in the county court of Gage county, Nebraska," which was first filed for record on March 26, 1937; and plaintiff also prayed therein for injunctive relief.

To the plaintiff's petition in the district court defendants limited themselves to a general denial. The trial of these issues resulted in a judgment for plaintiff, substantially as prayed, and from the order of the trial court overruling their motion for a new trial, the defendants severally appeal.

In view of the issues made by the pleadings, the single controlling question now presented is the sufficiency of the evidence to sustain the judgment.

Our statute provides, viz.: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights." Comp. St. 1929, sec. 20-323. See, also, Comp. St. 1929, sec. 20-808.

The record discloses without question that, preceding the commencement of the present action, a judgment was entered on the 15th day of February, 1935, in the district court for Gage county in favor of plaintiff and against defendant upon a promissory note, dated December 18,

1929, for the sum of $2,450.01, together with costs taxed at $15.41; that on March 2, 1935, execution was issued thereon to the sheriff of Gage county, who thereupon returned the same unsatisfied, "for the reason that after a diligent search I was unable to find any property on which to levy."

The undisputed evidence is that in December, 1934, the defendant George H. Zimmerman tendered the plaintiff the sum of $100 in complete settlement of his claim, and in connection therewith stated: "If you do not accept the $100, I will see you don't get anything. I will transfer everything I got and see you don't get a dime, if you don't accept $100." It is equally apparent that when the two transactions, challenged by plaintiff in this proceeding, had been completed, the defendant Zimmerman had divested himself of all property he had theretofore owned, and was a bankrupt. This defendant, in his testimony, stated that loans made to him by defendant Williams constituted the consideration for the deed of conveyance here in suit. However, he had neither recollection nor record of the times when made, nor the amounts of the respective loans advanced to him. Nor does he inform us of the aggregate of the amount thus received from Williams, except when under examination of his own attorney he testifies, as follows: "Q. How much was you indebted to Mary E. Williams? A. I wouldn't have any way of knowing the exact amount, but I did borrow money from her. Q. Give us the exact amount, Mr. Zimmerman. A. $1,500."

The testimony of defendant Williams is equally unsatisfactory. It appears that she came to the house of defendant Zimmerman's father, Philip J. Zimmerman, in 1924. The father then was the owner of No. 423 North Sixth street, which constituted his home. Soon after her arrival, Mrs. Williams became the housekeeper and in charge of the premises for the owner. She continued in that capacity until Philip J. Zimmerman's death in 1929. By direction of the senior Zimmerman she was given the use of the

home without charge for the period of one year, which terminated in 1931. George H. Zimmerman succeeded to the title of his father, and at the termination of the "free year" he rented No. 423 North Sixth street to Mrs. Williams. George H. Zimmerman had made his home at No. 423 North Sixth street ever since prior to the arrival of Mrs. Williams. He retained the use of one room for himself under the terms of their rental agreement. The evidence of the defendants is that this rental arrangement continued until these premises were conveyed to Mrs. Williams by the warranty deed of January 28, 1935. But even after the delivery of the deed the premises therein continued to be his home. Mrs. Williams' evidence is found to be very indefinite. As to when the remainder of the $1,500 was advanced to George H. Zimmerman, she has no recollection, and neither does she remember dates and amounts, nor the total advancements made. There is no evidence as to when repayment was contemplated by the parties. True, Mrs. Williams' claim is that prior to the date of the deed she advanced as loans to George H. Zimmerman "approximately $1,500, perhaps more." Seven checks totaling $710 are introduced in evidence, drawn by Mrs. Williams and payable to George H. Zimmerman, of various dates. These, she testifies, constituted a part of the moneys so advanced. Two of these checks, however, bear date prior to July 31, 1931; and on the last-named date she verified as plaintiff, under oath, a petition for divorce in which it was alleged: "Plaintiff does not have any money or property, either real or personal, * * * with which to support and maintain herself."

Mrs. Williams produced no records on the subject of the advancements made. One time she testified she made no records on that subject; at another time she says she had a record thereof, which was lost. Her testimony, as set forth in the record, is as follows: "Q. Did you loan any money to Mr. Zimmerman prior to 1931? A. I don't know. Q. By that you mean you don't remember? A. I don't remember. Q. Do you remember loaning him

money after 1931? A. I loaned him money, but the dates I can't tell you. Q. Nor the amounts, you can't tell them? A. No, sir."

It also appears that her deposition was taken on April 27, 1937, in which she testified as follows: "Q. Have you paid Mr. George Zimmerman any rent the last few months? A. The last few months? Q. Yes. A. No. Q. Do you owe him that? A. Yes. Q. How much do you owe Mr. Zimmerman for rent? A. $60." And, on cross-examination, she testified, viz.: "Q. What months do you owe rent for? A. I don't owe rents, but I owe the payments is what I mean. Q. What payments? A. The payments to the Home Owners Loan, I owe that. Q. You pay that? A. Yes. Q. How many months are you behind on that? A. Since September. Q. Of last year? A. Yes. Q. How much do you pay to the Home Owners Loan? A. $27.56 a month."

Mrs. Williams also testifies that she did not know the market value of No. 423 North Sixth street on the date the premises were conveyed to her; she says she knew there was a mortgage then upon the premises, but she did not then know the amount of this mortgage, or the amount unpaid thereon. And she also testified at the time of taking her deposition that she did not know who had the mortgage. She does not testify that she ever made a demand upon defendant Zimmerman for the repayment of the advancements claimed to have been made by her to him, or for any part thereof. And it also appears that during the continuance of these alleged loans Mrs. Williams paid Zimmerman approximately $1,000 on rents accruing to him, without any request to have the rents applied on his indebtedness to her. There is no evidence in the record from either of these parties as to the actual conversation or circumstances that caused the deed of conveyance to Mrs. Williams to be made, at the time when its existence would at least forestall the plaintiff herein in the collection of his judgment. The record wholly fails to establish the usual facts and circumstances that surround and evidence a *bona fide* transaction. It is obvious that the facts estab-

lished by the record, in view of the necessary inference which they sustain, amply support the judgment of the trial court as to the invalidity of the deed here in suit.

As to the adjudged invalidity of the written assignment as to the parties to this record: This involves the consideration of testimony given in open court in the presence of the trial court. This is an equity case and is here tried *de novo*.

"In equity actions involving questions of fact where there is an irreconcilable conflict in the evidence, in determining the weight of evidence this court will consider the fact that the trial court observed the witnesses and their manner of testifying." *Hole v. Hamp*, 134 Neb. 259, 278 N. W. 480.

Fraudulent intent may be established by proof of facts and circumstances from which such inference may be reasonably drawn. *Riggs v. Hroch*, 133 Neb. 260, 274 N. W. 598.

From a careful consideration of the entire record, we find the evidence therein contained ample to sustain the judgment of the trial court as an entirety, and the same is

AFFIRMED.

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CY HAGADONE ET AL., APPELLEES, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT.
285 N. W. 600

FILED MAY 5, 1939. No. 30565.

1. Waters: DAMAGES: LIABILITY. Where all defendants are materially interested, although concert is lacking, and separate and independent acts of negligence combine to produce injury, each defendant so involved is responsible therefor.
2. ———: EASEMENT. An easement for the drainage of waste waters from an irrigation ditch, into a creek flowing through the land of another, which greatly raises the natural level of said creek, cannot be acquired until it has been freely exercised without material change under a claim of right for the full period of ten years.

3. Injunction: TRESPASS. The owner of real estate has the legal right to use and operate such land free from repeated acts of trespass, and an injunction will issue to restrain such acts, especially where committed under a claim which indicates that the trespass will be continued.
4. Waters: IRRIGATION: LIABILITY. A natural stream may be used under certain conditions to conduct irrigation water, but where the water so conducted contributes to an overflow which causes damage, liability therefor attaches to such use. Comp. St. 1929, sec. 46-608.

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

*Cook & Cook*, for appellant.

*Elbert H. Smith, contra.*

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

PAINE, J.

This is an action in equity for an injunction to prevent the diversion of water into, and the increase of the flow of, a natural stream, and for damages already sustained by such acts. The trial court found for the plaintiff, and assessed the damages at the sum of $400, and permanently enjoined the defendants from overflowing water into the creek on plaintiff's land. Supersedeas bond was fixed at $1,000, and one of the defendants, the Dawson County Irrigation Company, brings appeal to this court.

The appealing defendant assigns as errors that the judgment of the court is not sustained by sufficient evidence; that the court erred in adjudging the appealing defendant jointly liable with the other defendant, the Platte Valley Public Power and Irrigation District; that the court erred in arbitrarily dividing the damages accruing from the water diverted in July and August, 1936, and the damages accruing in October, November, and December, 1936, alleging that there is no evidence upon which to base such division; complains that the amount of the damages allowed is excessive, and charges that the court erred in enjoining

the appealing defendant from wasting irrigation water into Strever creek.

Cy Hagadone and his wife, Annie, own a quarter-section of land some 11 miles northwest of Lexington, which he purchased in 1913. On the land there are 35 acres of alfalfa, 60 acres of pasture, and other land is tillable. Across his farm meandered Strever creek, a small creek, usually flowing water about five or six inches deep and 18 to 20 inches wide, and even in the rainy seasons the creek would not be over four or five feet wide, and farm teams with wagons, or mowing machines, or other farm equipment, could be driven across the creek to work on the other side, and live stock could go to pasturage anywhere along its banks.

Loella Strever is the owner of the land above Hagadone's, and Strever creek flows from her land onto and across the Hagadone land. Leland Strever is the tenant on Loella Strever's land, and they were made parties defendant, but at the close of the trial the court dismissed the cause of action as to both of them.

The Dawson County Irrigation Company's ditch crosses over Strever creek on the land of the defendant Loella Strever, and during July, August, and September, 1933, said irrigation company caused a large amount of water to be diverted into Strever creek from its ditch, and this flowed in Strever creek from the Strever land onto the Hagadone land, and caused considerable damage. The evidence shows that since said time the defendants have caused said creek to overflow from waters discharged into said creek at some time during the irrigation season of each succeeding year; that in July and August, 1936, the defendants, Dawson County Irrigation Company and Platte Valley Public Power and Irrigation District, through their dump-box, by direction of Richard Nosky, engineer of said irrigation district, raised and lowered a check in said canal where it crossed the land of Charles Knauss, approximately one-half mile east of said dump-box on said canal, and caused the waters to escape, and after said waters had

been caused to escape into Strever creek and pass through plaintiff's land, they were further down delivered to the defendant Elm Creek Ditch Company; that this large amount of water put into it caused Strever creek to be of a depth of four feet nine inches at times, and 40 feet in width, and so diverted said water into Strever creek for a period of 24 days, and as said water overflowed along the Hagadone land it caused considerable damage, destroyed fences, damaged his pasture, washed out the banks of said creek, and washed down trees that were growing on said banks; that again in October, November, and December the defendants caused water to flow as before, and caused much additional damage, all as set out in the pleadings.

The evidence disclosed that water was diverted in this way for a total of some 84 days, and that the amount diverted amounted to over 2,000 acre feet of water, or enough to cover three sections of land one foot deep, and that the high water got up over the Hagadone farm bridge on his place. The evidence was that the water was taken down through Strever creek, and ten or twelve miles below, what was left of it went into Batty lateral, which was not constructed until 1930.

It is disclosed that in the summer of 1936 the irrigation district had accumulated water in its Sutherland reservoir, and contracted to deliver water to its irrigators; that the Platte river was practically dry, and if they had put this water back in the Platte river it would simply dry up and not run down the river; that an arrangement was made that the Sutherland project would bring it to the Dawson County Irrigation Company, which simply permitted the use of its canal to the waste point on the Strever land and then the water was carried down the Strever creek, which method would eventually deliver it to a point near the headgate of the Elm Creek Ditch Company, and Mr. Stuckey, the president of the company, gave the use of his canal as a matter of convenience. The evidence further shows that an employee of the Sutherland district

kept a record of the flow of water, and the engineer, Mr. Nosky, was there in charge of the whole thing; that it was agreed that the best way to take it to the Elm Creek canal ditch was through this plan. The defendants claim that it was done with the consent of the state department of roads and irrigation.

It is argued that the court erred in lumping the damages of the two floods together, for they are separate torts, and that the Dawson County Irrigation Company had no responsibility whatever for the damage done by the first flood in July and August, and that the Platte Valley Irrigation District had nothing to do with the flooding in October, November, and December, and that these independent torts cannot be combined into one claim; that they were clearly independent tort-feasors.

Section 20-808, Comp. St. 1929, provides that, in the case of misjoinder of parties, if no objection is taken by demurrer or answer, the defendant shall be deemed to have waived the same, and in this case no demurrer or motion was filed, and nothing set out in the answer raising the question of misjoinder, and it appears to be raised in this court for the first time.

It was held in *Johnson v. Platte Valley Public Power and Irrigation District,* 133 Neb. 97, 274 N. W. 386, that "When a defect of misjoinder of parties appears on the face of the petition, it must be raised by special demurrer."

Roy F. Stuckey has been at all times president of the Dawson County Irrigation Company, and is also a director in the Platte Valley Public Power and Irrigation Disrict, and water which went down through the Strever creek was taken down the Batty lateral and sold to irrigators, and Hagadone complained to Mr. Stuckey in his bank of the damages being done by the overflow of Strever creek, and Mr. Nosky, the engineer of the irrigation district, came in and they all talked it over, and the facts are little in dispute.

In this case the amended petition set out separate causes of action, and asked damages in a very large sum because of the overflowing of Strever creek. Over 400 pages of

evidence and a large number of exhibits appear in the bill of exceptions. At the close of the evidence it was the joint request of all parties that Judge Tewell go to the farm of plaintiffs, accompanied by the counsel for all parties, and carefully examine into all the facts on the ground, which he did. After taking the case under advisement, the trial court found that Loella Strever and Leland Strever did not join in, or take any part in, the acts alleged; that the Platte Valley Public Power and Irrigation District did not contribute to or cause the overflowing of water on plaintiff's land after the first day of October, 1936.

The court finds that all of the damages resulting from the several torts of defendants amounted to a total sum of but $400, and that the Dawson County Irrigation Company is liable for said entire sum, and further finds that the damage done from July 19, 1936, to August 7, 1936, amounted to only $100; and for this $100 the Platte Valley Public Power and Irrigation District is liable jointly with the Dawson County Irrigation Company, and granted an injunction against further diversion of water into this creek, and found that they did not have the right to divert into the creek any more water than would have been carried off by the original banks of this Strever creek. In such a case, where all the overflow and flooding came directly through the overflow from the ditch of one company, but part of the water was furnished by another company for a few days, it appears to the court that the cause of action would be joint and several, and that Judge Tewell was right in finding that the recovery could be had, as set out in his journal entry.

In 17 C. J. 758, it is said: "Where there is evidence as to damage from various causes, as to a portion of which defendant cannot be held responsible, and no evidence as to the portion of the damage resulting from the separate causes, the proof is too uncertain to permit the jury arbitrarily to apportion a part or all of the proved damages to the acts for which defendant is responsible. But on the other hand, it has been held that where the evidence clearly shows some subsantial damages to which plaintiff is entitled, he

is not confined to a recovery of mere nominal damages by a failure to show as to all of the items of damage that defendant was responsible therefor; and in the case of concurrent torts by several the difficulty of ascertaining with exactness the proportion of damage caused by each tort-feasor is not a ground for denying the right to recover a substantial sum, where the best evidence of which the case is susceptible, reasonably tending to show the relative proportion, is adduced." See, also, *Rogers v. Brown*, 129 Neb. 9, 260 N. W. 794; *O'Neill v. Rovatsos*, 114 Neb. 142, 206 N. W. 752; *Robertson v. Chicago, B. & Q. R. Co.*, 108 Neb. 569, 188 N. W. 190.

It is claimed that an easement for the drainage of waste waters into a creek through the land of another may be acquired by prescription, *Dunn v. Thomas*, 69 Neb. 683, 96 N. W. 142, in which case it was held that, if a ditch had been maintained over another's land without material change in location for the full period of ten years, an easement might be acquired, but it was denied on the ground that the ditch was run in different places at different times over the land, and not always in the same place. This citation of authority by the defendant does not control in the case at bar, for the evidence in this case does not show a continuous flooding of this land for ten years, but shows only an overflowing of plaintiff's land in not to exceed three or four years out of the last ten, and the evidence is not sufficient to establish any easement for a right to continue this overflowing which caused the damage in this case.

The amount of the damages finally awarded by the trial court was very small in comparison to the large amount of damages claimed by plaintiff. By his going upon this land and following this creek, and seeing the damage and the reason therefor, the trial court had a better understanding of the evidence given by the many witnesses than this court can have, even though a large number of pictures of the meandering Strever creek were put in evidence.

In *Harris v. Steele*, 110 Neb. 213, 193 N. W. 268, the court said: "Defendants urge that they are financially

responsible, and offer to pay any damages which the plaintiffs have sustained by reason of flowing the waters through the land; and that an injunction was not a proper remedy. We are unable to agree with this contention. The plaintiffs have the legal right to own and operate their lands free from the interference of others, in such manner as suits their own convenience or whims; and this right cannot be interfered with except in the manner provided by law."

Again, in *Meyers v. Schmidt*, 103 Neb. 475, 172 N. W. 352, this court said: "The rule seems to be that, where the nature and frequency of the trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted."

"Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuous and constant repetition of it." *Hackney v. McIninch*, 79 Neb. 128, 112 N. W. 296. See, also, *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 239 N. W. 467; 27 R. C. L. 1294, sec. 206.

Section 46-608, Comp. St. 1929, provides generally for using a natural stream to conduct irrigation waters, but specifically holds one responsible for liability for all damage resulting from the overflow of such stream where the water so conducted contributed to such overflow.

We have examined this record with considerable care, and while there are several propositions of law presented to us, we cannot find that any prejudicial errors were committed by the trial court, and are inclined to the view that he made a very careful study of the facts and the law, and it is therefore ordered that the decree of the trial court be affirmed.

AFFIRMED.

ANNA VLAZNY, APPELLANT, V. FRANZ DITTRICH, APPELLEE.
285 N. W. 697

FILED MAY 5, 1939. No. 30649.

**Mortgages:** DEFICIENCY JUDGMENTS. The general saving clause (Comp. St. 1929, sec. 49-301) preserves the right to a deficiency judgment in the foreclosure of a mortgage obligation created prior to its enactment.

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

*Moyer & Moyer*, for appellant.

*James Nichols, contra.*

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

PAINE, J.

This action was for the foreclosure of a mortgage in Madison county, and for a deficiency judgment against the makers of the note secured by such mortgage, both instruments being dated March 28, 1932. The sale of the real estate left a deficiency in the sum of $499.87. Sale confirmed. Motion for deficiency judgment overruled and denied. Plaintiff appeals.

The errors relied upon for reversal set out that the denial of the deficiency judgment is contrary to the pleadings and the evidence, as well as contrary to law; that such action of the trial court constituted an abuse of discretion.

There is really only one question involved in this appeal: Was the plaintiff wrongly deprived of a deficiency judgment, to which she was entitled under the law?

Section 20-2141, Comp. St. 1929, provided that, if any balance of a mortgage debt remained unsatisfied after the sale of the mortgaged premises, the court should have power to enter judgment for such deficiency in cases in which such balance would be recoverable at law, and to issue execution as in other cases against other property of the mortgagor.

House Roll No. 10, being chapter 41, Laws 1933, was an

act to divest courts of the power to enter a deficency judgment in the foreclosure of real estate mortgages, and amended section 20-2141, Comp. St. 1929, in accordance therewith. There being an emergency clause in this act, it took effect on April 26, 1933, and did not contain a saving clause. However, the general saving clause is found in section 49-301, Comp. St. 1929, and reads: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

The petition in the case at bar was filed May 1, 1937, and it was therefore a cause of action not in suit at the time the amendment took effect on April 26, 1933, repealing the deficiency judgment law.

In reference to the effect of the general saving clause in such a case, we can quote Chief Justice Sullivan, who said: "There is, so far as we can discover, no reason at all why the legislature, in enacting the general saving statute, should make a distinction between contracts upon which an action may be maintained at once and those not yet due." *Burrows v. Vanderbergh*, 69 Neb. 43, 95 N. W. 57.

The general saving statute (Comp. St. 1929, sec. 49-301) preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, repealed the law which permitted such judgment. *Filley v. Mancuso*, 135 Neb. 403, 281 N. W. 850; *First Trust Co. v. Eastridge Club*, 134 Neb. 785, 279 N. W. 720.

The judgment of the trial court, denying motion for deficiency judgment, is hereby reversed and remanded to enter judgment in accordance herewith.

REVERSED.

ANNA VLAZNY, APPELLANT, V. FRANZ DITTRICH, APPELLEE.
285 N. W. 698

FILED MAY 5, 1939. No. 30650.

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

*Moyer & Moyer,* for appellant.

*James Nichols, contra.*

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

PAINE, J.

Foreclosure action was brought upon a mortgage securing a note of $10,000. Sale was confirmed August 15, 1938, leaving a deficiency of $1,507.89. On December 23, 1938, motion was filed for a deficiency judgment against Franz Dittrich only. No objections were filed to said motion, but the trial court denied the same, and plaintiff appeals, her motion for new trial being overruled.

This action involved the same question as was discussed somewhat at length in the companion case of *Vlazny v. Dittrich, ante,* p. 266, 285 N. W. 697. It appears that the mortgage and note were executed at least a year prior to the repeal of the deficiency judgment law, and under our several decisions on this same question the plaintiff was clearly entitled to a deficiency judgment. *Helfrich v. Baxter,* 128 Neb. 281, 258 N. W. 532; *Arnold v. Hawley,* 128 Neb. 766, 260 N. W. 284; *Stowers v. Stuck,* 131 Neb. 409, 268 N. W. 310; *First Trust Co. v. Eastridge Club,* 134 Neb. 785, 279 N. W. 720; *Filley v. Mancuso,* 135 Neb. 403, 281 N. W. 850.

The judgment of the trial court, denying motion for deficiency judgment, is hereby reversed, and remanded to enter judgment in accordance herewith.

REVERSED.

JAMES L. DENNEHY, APPELLEE, V. LINCOLN STEEL WORKS ET AL., APPELLANTS.
285 N. W. 590

FILED MAY 5, 1939. No. 30659.

1. **Workmen's Compensation: BURDEN OF PROOF.** Awards for compensation cannot be based upon speculative or conjectural evidence, but must be based on sufficient evidence showing that the disability was the result of an accident arising out of and in the course of the employment.
2. ———. An award for temporary partial disability is authorized by subdivision 2 of section 48-121, Comp. St. 1929. This is true even if the case be one where permanent partial disability must be computed under subdivision 3 of said section.
3. ———. Where an employee suffers injury to his arm, and is not thereby totally disabled, he is entitled to an award of 66⅔ *per centum* of the difference between the wages received at the time of the injury and his earning power thereafter, where it appears that he is temporarily partially disabled.

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

*Chambers, Holland & Locke,* for appellants.

*Max Kier, contra.*

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

CARTER, J.

This is an appeal from an award of disability benefits under the workmen's compensation act.

The evidence shows that plaintiff suffered an accident on October 25, 1937, while in the employ of the Lincoln Steel Works and engaged in the operation of a rivet heater. It appears that a small explosion occurred which caused burning oil to be thrown on plaintiff. As a result, plaintiff's right arm, shoulder, neck and ear were burned. Plaintiff made a good recovery except that a keloid scar remained on the upper part of the right arm. This scar tissue is in no manner attached to the underlying muscles or ligaments. It is, however, a source of constant annoyance because of

stiffness. There is evidence in the record that the condition of the arm can be much improved by proper medical treatment. There is medical evidence in the record sufficient to support a finding that plaintiff's right arm is temporarily disabled to the extent of 50 *per centum*. We are of the opinion that plaintiff's right arm is still in the healing stage, and that the employer should be required to provide medical treatments until the permanent disability to the arm, if any, can be determined. During this period plaintiff is entitled to temporary partial disability benefits.

The more serious issue in the case is the claim of the plaintiff that he has suffered disability to his eyes as a result of this accident. It is the testimony of Dr. D. D. Sanderson, an eye specialist called by the plaintiff, that a toxic condition existed as a result of the burns, which affected plaintiff's eyes, and either caused a disease of the eye known as glaucoma, or contributed to a condition which resulted in this disease. This disease causes the eyeballs to become hard, due to intraocular pressure. Dr. Sanderson testifies that this condition exists. That a toxic condition was found immediately following the accident is not disputed.

The defendant called Dr. John C. Thompson, who testified that the plaintiff was suffering from diabetes insipidus or pituitary polyuria. This disease is the result of a disturbance of the function of the pituitary gland, and is not a common ailment. One of the symptoms of this disease is that the patient drinks large quantities of water, and likewise passes large quantities of urine of low specific gravity. The history given by the patient, as well as the actual examination and observation of the plaintiff, revealed that these symptoms were present. Dr. Thompson also states that no toxic condition existed at the time he examined the plaintiff. The hospital records also show no toxic condition after the fifth day plaintiff was in the hospital.

Plaintiff met this evidence with the testimony of Dr. I. C. Munger, who was positive that plaintiff did not have

diabetes insipidus or pituitary polyuria for the reason that the drinking and voiding of large quantities of water was not a sufficient basis for such a diagnosis. Dr. Munger testified that no toxic condition existed, either from the burns or from any other source, and was unable to account for the cause of plaintiff's partial loss of vision.

Defendant also called Dr. J. J. Hompes, an eye specialist, who testified that plaintiff had an impairment of vision in both eyes, principally in the peripheral field. His examination revealed that plaintiff's eyeballs had a subnormal intraocular tension, instead of hard eyeballs as testified to by Dr. Sanderson. His testimony was that pituitary polyuria would cause this condition to exist, and if plaintiff had this ailment it was undoubtedly the cause of the impairment of vision.

The experts differ as to whether plaintiff was afflicted with pituitary polyuria. The issue can be determined, however, without a finding on this point. The evidence is clear that the burns suffered by the plaintiff could affect the eyes only as a result of a toxic condition emanating therefrom, and that a removal of the toxic condition would restore complete vision. All the medical experts agree, with the possible exception of Dr. Sanderson, that no toxic condition was found when the patient was examined after he left the hospital. This evidence, coupled with the history and circumstances of the case, convinces us that a finding that the burns suffered in the accident caused the impaired condition of plaintiff's eyes is very speculative. In fact, the evidence preponderates in favor of defendant on this point. The burden of proof is upon the plaintiff to prove that his impaired vision was due to the accident. An award cannot be sustained if based on conjectural or speculative evidence. *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N. W. 425. We necessarily conclude that plaintiff has not sustained the burden of showing that the impairment of his vision was due to the accident.

The determination of the amount of the temporary partial disability award during the healing period is one of

difficulty in this case. The evidence most favorable to plaintiff fixes his disability at 50 *per centum* of the right arm. This, however, ought not to be, and is not the sole basis for determining the amount of a temporary partial disability award. All the experts agree that plaintiff's arm can be improved by giving it X-ray treatments. Plaintiff claims that he has a weakness in his arm, which makes it impossible to do the kind of work he did before. He worked for the Lincoln Steel Works from January 21, 1938, until August 27, 1938, at light work and received full wages for so doing. He has not been employed since he was discharged by the Lincoln Steel Works. The fact that treatments will be required during the healing period undoubtedly reduces his earning power to some extent during that period.

The applicable section of the statute provides: "(2) For disability partial in character (except the particular cases mentioned in subdivision 3 of this section), the compensation shall be sixty-six and two-thirds *per centum* of the difference between the wages received at the time of the injury and the earning power of the employee thereafter." Comp. St. 1929, sec. 48-121.

The injuries complained of in the instant case pertain only to the right arm. In determining any permanent partial disability, we must look to subdivision 3 of section 48-121, Comp. St. 1929, which provides: "For the loss of an arm, sixty-six and two-thirds *per centum* of daily wages during two hundred twenty-five weeks. * * * In all cases involving a permanent partial loss of the use or function of any of the members mentioned in subdivision 3 of section 3662 (48-121) the compensation shall bear such relation to the amounts named in said subdivision 3 of section 3662 as the disabilities bear to those produced by the injuries named therein."

It is clear, however, that an award for temporary partial disability is authorized by subdivision 2 of section 48-121, Comp. St. 1929. This is true even though permanent partial disability must be computed under subdivision 3. The

evidence in this case will not support a finding of temporary total disability. On the other hand, the record is just as clear that plaintiff is partially disabled and that proper medical care will reduce the disability materially. The fact that an employee has a 50 *per centum* arm disability does not mean that he has a 50 *per centum* temporary partial disability under the compensation law, nor does it mean that he is limited to a recovery of an award for 50 *per centum* temporary partial disability. All of the factors which tend to throw light upon the earning power of the employee, subsequent to his injury, ought to be considered in computing a proper award. Until medical treatments have been completed and the condition of the employee has reached the point that the permanent partial disability, if any, can be determined, the employee is entitled to an award of "sixty-six and two-thirds *per centum* of the difference between the wages received at the time of the injury and the earning power of the employee thereafter," as provided by subdivision 2 of section 48-121, Comp. St. 1929.

While there is evidence in the record as to the amount of disability to plaintiff's right arm, the evidence as to his loss of earning power after the accident and during the period for which temporary partial disability is claimed is very meager. In fact, the evidence is of such a character that we are unable to determine the temporary partial disability of the plaintiff during the period for which claim is made. The award of the district court will be set aside and the cause remanded, with directions to take evidence to determine the temporary partial disability of plaintiff from August 27, 1938, until such time as the permanent partial disability, if any there be, can be determined, and that a new award be entered thereon in accordance with the views expressed in this opinion.

REVERSED.

FRED BARTELS, APPELLANT, V. CARL MEYER ET AL., APPELLEES.
285 N. W. 698

FILED MAY 5, 1939. No. 30557.

1. **Mortgages:** DEFICIENCY JUDGMENTS. Chapter 41, Laws 1933 (Comp. St. Supp. 1937, sec. 20-2141), depriving an equity court of jurisdiction to render a deficiency judgment in a mortgage foreclosure suit, has no application to mortgage obligations created prior to its enactment.
2. ———: ———. A deficiency judgment may be entered in such cases, on motion, at any time within five years from the confirmation of sale.
3. ———: ———. An agreement to release the right to a deficiency judgment, if the mortgagor performs certain conditions by a fixed date, does not bar the right to make application for a deficiency judgment after such date, where the agreement is not operative by reason of the conditions never having been performed.
4. **Judgment:** VACATING DURING TERM. The district court has discretionary power, in furtherance of justice, to vacate a decree at the same term, for the purpose of allowing additional evidence to be introduced, and error cannot ordinarily be predicated upon its ruling.

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

*Russell W. Bartels,* for appellant.

*C. H. Hendrickson* and *Burr R. Davis, contra.*

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

JOHNSEN, J.

This is an appeal from an order denying plaintiff's motion for a deficiency judgment in a foreclosure suit.

The note and mortgage were dated February 24, 1930. Default occurred March 1, 1934, and foreclosure was instituted on August 23, 1934. Decree for $15,540 and interest was entered on March 19, 1935. Sale was held on January 27, 1936, and plaintiff bid in the property for $14,000. Confirmation was duly had on March 12, 1937,

and sheriff's deed was issued. On May 23, 1938, plaintiff filed a motion for a deficiency judgment.

It does not appear from the record on what theory the trial court denied plaintiff's motion.

It could not properly be denied on the basis of chapter 41, Laws 1933 (Comp. St. Supp. 1937, sec. 20-2141), depriving an equity court of jurisdiction to render a deficiency judgment in a mortgage foreclosure suit, because that statute has been held, a number of times, to have no application to mortgage obligations created prior to its enactment. The latest expression is in *Vlazny v. Dittrich, ante*, p. 266, 285 N. W. 697.

The fact that the application was made more than a year after confirmation also would be no sound reason for its denial. A deficiency judgment may be entered at any time within five years from the confirmation of sale. *Pochin v. Conley*, 74 Neb. 429, 104 N. W. 878; *Durkee v. Koehler*, 73 Neb. 833, 103 N. W. 767.

Defendant contends that, unless a deficiency judgment is rendered at the time of confirmation, it cannot thereafter be done, except by the institution of an independent action. The practice of entering a deficiency judgment, however, on motion, in the original foreclosure suit, at any time within the limitation period, has long been recognized in this state. *Durkee v. Koehler, supra.*

It is further contended that the right to a deficiency judgment in this case was barred by a stipulation made at the time of confirmation. Defendant was indebted to plaintiff's brother, an attorney, for fees, in the sum of $160, and it was agreed that, if he would make payment thereof by March 1, 1938, plaintiff would, "at the time such payment is made, release and dismiss any claim that he might have for a deficiency judgment." This was not a release of the right to a deficiency judgment, but merely an agreement to release such right if the $160 were paid to plaintiff's brother by March 1, 1938. The sum was never paid or tendered, and the agreement did not bar the right to have a deficiency judgment entered, after March 1, 1938, in the regular manner.

Defendant raises one other point. He contends that the appeal was not perfected within three months from the date of the trial court's order, and that this court therefore is without jurisdiction. The record shows that the trial court originally entered an order denying the motion for a deficiency on June 8, 1938. Plaintiff thereafter filed a motion to vacate the order and for leave to offer additional evidence. On August 25, 1938, which was during the same term, the court sustained plaintiff's motion, vacated its previous order, and permitted plaintiff to offer further evidence. At the close of the hearing, however, it entered an order, again denying the deficiency judgment.

Defendant argues that an appeal to this court was required to be perfected within three months from June 8, 1938, and that the order of August 25, 1938, could not operate to extend the time. He relies on the proposition that the trial court may not extend the time for an appeal by vacating and reentering the same judgment, and cites *Dimmel v. State*, 128 Neb. 191, 258 N. W. 271. That rule is not applicable here. The motion to vacate and the order entered thereon were not made for purposes of subterfuge, but to permit plaintiff, in good faith, to offer additional evidence, bearing on the right to a deficiency judgment. The district court has discretionary power, in furtherance of justice, to vacate a decree at the same term, for the purpose of allowing additional evidence to be introduced, and error cannot ordinarily be predicated upon its ruling. *Enyart v. Moran*, 64 Neb. 401, 89 N. W. 1045.

The order of the district court is reversed and the cause remanded, with directions to enter a deficiency judgment, in accordance with plaintiff's motion.

REVERSED.

TAXPAYERS LEAGUE OF WAYNE COUNTY ET AL., APPELLANTS, V. WALTER BENTHACK ET AL., APPELLEES.
285 N. W. 577

FILED MAY 5, 1939. No. 30639.

1. **Schools and School Districts.** Offer by federal government to contribute part of cost of public improvements is not a violation of section 22, art. I of the Constitution of the state of Nebraska.
2. ———. Record examined and found to contain no evidence of bribery or fraud.
3. **Courts.** Where constitutionality of legislative act has been passed upon by this court, and for years has been accepted and acted upon as valid, its validity is no longer open to question.

APPEAL from the district court for Wayne county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

*C. H. Hendrickson,* for appellants.

*Fred S. Berry, contra.*

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

KROGER, District Judge.

Plaintiffs filed their petition in the district court for Wayne county seeking to enjoin the execution and sale of a $48,000 bond issue by the school district of the city of Wayne. From a judgment of the district court for Wayne county, sitting *en banc,* in favor of the defendants, the plaintiffs appeal.

The record discloses that the city of Wayne, Nebraska, has a population of approximately 2,500 inhabitants and that the territory of the school district of such city is embraced within the corporate limits thereof. The defendants in this action are members of the board of education of said district. A special election was called by said board for the purpose of voting upon the proposition of the school district issuing and selling its bonds in the sum of $48,000 "for the purpose of repairing, remodeling and enlarging the schoolhouse of said school district." Proper notice was

given and at said election 56.3 per cent. of the ballots cast were in favor of issuing the bonds.

Plaintiffs attack the validity of the election upon two grounds, the first being that the election was void because of bribery and fraud, and, second, that if the election was valid, the bonds failed to carry by the required majority.

The contention that there was bribery and fraud which voided the election is based upon the proposition that the federal government had offered to contribute $39,150 towards the cost of the improvement of the school facilities in the city of Wayne, provided the city would contribute the balance amounting to $48,000, and it is argued that this offer by the federal government was an inducement to the voters to favor said bond issue, and that fraud was committed upon the voters because there is no legal way to compel the federal government to live up to its offer.

In support of their position, plaintiffs cite *Herman v. Edson*, 9 Neb. 152, 2 N. W. 368, and *Ayres v. Moan*, 34 Neb. 210, 51 N. W. 830, and section 22, art. I of our state Constitution. An examination of these authorities clearly discloses that they are not in point, and we fail to find from the record in this case where the contention of plaintiffs that there was bribery and fraud is in any manner sustained.

In fact, there was no evidence of bribery or fraud, except a showing that the federal government had adopted a policy of assisting in the construction of public improvements and that the board of education of the Wayne school district, the defendants herein, expected to obtain such assistance in their building program and would not have called the special election if they had not expected to obtain such federal assistance.

The policy of the federal government to assist public bodies in their building programs has, as its object, the public good and welfare, and is available to all communities on an equal basis. Its purpose is lawful. While there might be a reasonable difference of opinion as to the wisdom of such a policy, there can be no question as to its

legality, and the courts are only concerned with the latter. Neither does it violate section 22, art. I of the Constitution of Nebraska. By no stretch of the imagination can it be said that such a policy prevents a free election or hinders or impedes the right of any qualified voter to exercise the elective franchise.

Plaintiffs' second contention that the bonds failed to carry by the required majority is based upon the contention that section 11-902, Comp. St. 1929, is the only valid legislation under which such bonds could be issued and that said section requires that the bonds must carry by a favorable vote of three-fifths of all votes cast.

It is further argued that section 79-2523, Comp. St. 1929, and amendment of 1937, under which defendants in this case assumed to act, is unconstitutional. An extended argument and analysis of the history of section 79-2523 is presented. We feel that no good purpose would be served in entering upon a long discussion of this section and its history. Suffice to say that the same arguments here presented were presented to this court in the case of *State v. Barton*, 91 Neb. 357, 136 N. W. 22, and after careful consideration and extended separate opinions by Justices Hamer and Sedgwick the statute was held constitutional.

Again, in the case of *McCord v. Marsh*, 108 Neb. 723, 189 N. W. 386, the constitutionality of this statute was before the court and it was upheld.

This section, in substantially its present form, has been on the statute books since 1893. Its validity has been sustained by this court in a number of decisions. Legislatures and boards of education have for years dealt with this section on the theory that it was constitutional and we conclude that its validity is now no longer open to question.

The judgment of the lower court was correct and is

AFFIRMED.

## LINCOLN C. APPLEGATE, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

285 N. W. 585

FILED MAY 12, 1939. No. 30516.

1. **Nuisance**: DAMAGES. "As a general rule, if a nuisance is permanent in character, is intended to remain in the condition in which it was erected until destroyed by the elements, and the damages are to the land itself, especially where the erection is for a public or semi-public purpose, the damage is treated as original, to be recovered in one action, and not continuous in character." *Irvine v. City of Oelwein*, 170 Ia. 653, 150 N. W. 674.
2. **Waters**: INJURY TO LAND: MEASURE OF DAMAGES. The measure of damages for the injury to the land is the difference in value before and after the dam was erected, taking into consideration the uses to which the land was put and for which it was reasonably suitable. To determine any such loss, the present condition of the soil proximately caused by the damming of the water and all effects up to the present time would be relevant to determine its value.

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

*Beeler, Crosby & Baskins* and *Robert B. Crosby*, for appellant.

*Wells C. Jones, contra.*

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

SIMMONS, C. J.

This is a suit for damage to plaintiff's land and leasehold, caused by seepage from the intake canal and reservoir of the defendant. Judgment was for the plaintiff. Defendant appeals.

The plaintiff owns and is in possession of 312 acres of land along the South Platte river in Lincoln county. He also is the tenant of land adjacent to his fee title land. This land has a good top soil over sand and gravel, is subirrigated by the natural waters that flow under the land, and in its natural state produced abundant crops.

The defendant is a district organized under the provisions of Senate File No. 310, Laws 1933, ch. 86, now (as amended) sections 70-701 to 70-717, Comp. St. Supp. 1937. The function of the defendant is generally that of the storage and sale of water to irrigation districts and the development and sale of electrical power.

Defendant's reservoir covers an area of about 2,500 acres, and is so constructed that it will hold at full capacity 175,000 acre-feet of water. In the construction of the reservoir, it was necessary to use large quantities of earth in building two dams. Top soil was removed to a depth of twelve feet in many places from about ninety acres inside the reservoir. There was exposed thereby an underlying strata of very sandy porous soil. The lands of the plaintiff lie between the defendant's reservoir and the river. The bottom of the reservoir is about sixty feet above the level of plaintiff's land. The defendant started to store water in its reservoir in December, 1935, and at one time had in storage approximately 70,000 acre-feet of water.

Within approximately sixty days after the defendant started to store water in its reservoir, seepage appeared on plaintiff's lands. In 1936 the defendant agreed with the plaintiff to construct and maintain a drainage ditch to remove the seep water and maintain the normal water level. A drainage ditch was constructed that year.

In 1937 there was a major break in defendant's canal. The flood water overflowed large areas of plaintiff's lands, further saturating them. When this flood water receded, the drainage ditch was found to be washed deeper than it had been constructed, and, as a result, certain areas of plaintiff's subirrigated land became dry, and plaintiff was compelled to irrigate those portions by pump irrigation.

The seepage continued on other parts of plaintiff's land. Defendant attempted to relieve the seeped condition of the land of the plaintiff and others by an extension of its drainage system. This had some effect, but as a result of the seepage in 1936 and 1937 a large area of plaintiff's lands became water-logged, alkali deposits were left upon the

surface soil, alfalfa and valuable native grasses were killed, and annual crops were destroyed or damaged.

Plaintiff sued, alleging these facts. The first cause of action was for damages to his lands owned in fee and for loss of crops thereon. The second cause of action was for damages for loss of the value of the alfalfa during the years 1936 and 1937 on the leasehold.

Defendant's answer admits its corporate capacity, the construction and maintenance of the storage reservoir for use in supplementing water of the Platte river for irrigation purposes and development of electrical energy, and generally denied the other allegations of plaintiff's petition.

Plaintiff's witnesses testified as to the facts herein recited. Plaintiff's witnesses, over objection of the defendant, by reference to a chart setting out by areas the seeped, alkalied and other damaged parts of plaintiff's lands, testified as to the value of the land in 1935, and the value of the land at the time of the trial in 1938, based upon its then condition and productivity. The computed depreciation in value of the lands fixed by one witness was $7,051; by another witness, at from $5,339 to $6,657.50; and by a third, at from $4,158 to $5,807.50.

Defendant's witnesses did not testify as to the amount of the damages. They frequently admitted that the damage to plaintiff's lands was due to seepage from the reservoir. They testified that, *if* and as damage from seepage occurred, it was their purpose to drain the lands; that they had partially constructed a drainage system; *and* that *if* their contemplated drainage system was completed, and *if* it was maintained, and *if* it operated as they contemplated it should operate, they would be able to abate the seepage and the damage resulting therefrom.

Defendant admitted that it was speculative as to what effect this drainage system would have on the plaintiff's lands. Its witnesses stated that there was no way of knowing positively that it would relieve the damage from seepage; that the partially completed system had been effective in relieving excess waters, and that the completed system

would "operate to improve," "materially drain," and "lower perceptibly" the seeped condition; that they could not say it would be 100 per cent. perfect, nor how many years it would take to effect that improvement; that it was too much to expect that the drainage system would restore all lands to their previous condition; that "if the drainage ditch was maintained, *and assuming relative amount of seepage is the same,*" it would be beneficial; and that maintenance work on the drains at least once a year or oftener would be necessary.

The evidence shows that alkali deposits are in the subsoils in that area; that the seep water brings the alkali to the top soil; that, upon evaporation, the alkali is left in the top soil; also, that, if the water level is lowered permanently, additional alkali deposits will not accrue, and by the normal processes of rainfall, clean water coming onto the top soils would carry the alkali back into the lower soils and eventually remove it so far as its damaging qualities are concerned.

Evidence was admitted both as to the value of the use of the land and the depreciation in value of the land itself.

In rebuttal, plaintiff's expert witness testified that the drainage system, as constructed, and as contemplated, will not entirely relieve the seeped condition of plaintiff's lands. This witness agreed with the defendant's witnesses that as time goes on there will be a material deposit of soils in the bottom of the reservoir, and a considerable sealing will take place by that process, with the result that there will be a stoppage in the quantity of the leakage *from that source.* He further testified that the action of the water on the shallower portions of the reservoir will take therefrom the top soils and continuously expose graveled portions of the soil, where leakage will occur constantly; that this situation can never be cured; and that seepage will continue so long as water is maintained in the reservoir.

The reservoir never has been filled to capacity. At the time of the trial, it contained a small amount of water. Plaintiff's rebuttal witness testified that, when the reser-

voir is filled to capacity, there will be an additional quantity of water for seepage; that the leakage has a drop of forty feet to the mile; that the water will be under pressure, which will increase the leakage and increase, and not decrease, the seeped conditions of plaintiff's lands.

The jury viewed the premises. The jury awarded the plaintiff $6,500 on his first cause of action, and $600 on his second cause of action. Defendant does not complain about the latter award.

Defendant on appeal admits that plaintiff has suffered damage as a result of seepage from its reservoir. It contends that it constructed the reservoir with knowledge that seepage would occur; that, upon the first appearance of seepage, it had proceeded with plans for, and the construction and operation of, a system of drainage canals to relieve that condition and reclaim the lands; that damage must first accrue before it can be abated and eliminated; that such damage is incidental to the public improvement; that the seepage presents a temporary problem and is not a permanent injury to the lands; that the plaintiff has adequate protection under the rule of temporary damages, and is entitled to recover *recurrently* each year for damages which he suffers *until the land is reclaimed by drainage,* and that plaintiff should not be entitled to recovery for "permanent damage and also a damage for loss of crop on some of the same lands, which constitute a double damage, and then, under the condition of the record in this case, be allowed to bring further suits for loss of future crops or be allowed to benefit from the use of his lands returned to full production by drainage and reclamation."

Therefore, the defense is based upon the proposition that a landowner, under these circumstances, must be content to sue each year for the damage that has occurred as the result of the seepage during that year, based upon a loss of use, and that he has no other present remedy. In the court below the defendant did not offer to pay temporary damages. By its answer, defendant denied those damages.

The cause of the damage to plaintiff's land is the per-

manent construction and proposed permanent operation of the reservoir. Defendant does not propose to abate that cause. Defendant proposes to abate the result of the storage of the water (the seepage), and this proposal depends upon (1) a willingness and ability of the defendant in the future to build and maintain a drainage system; (2) the proper maintenance of that system; (3) the assumption that the drainage system contemplated, if constructed and maintained, will relieve the damage. Defendant's contentions, therefore, are in the nature of an affirmative defense to an admitted cause of action. The question of this defense being within the issues made by the pleadings is not presented, and not decided.

On the first and second propositions, there is no showing of any action taken by the defendant's board of directors, or other responsible officials, declaring an intention, or making it a binding obligation of the defendant, to construct and properly maintain a drainage system. The "defendant is financed solely by public money in the nature of federal loans and federal grants." There is no showing that the defendant is financially able to or can secure funds with which to build and maintain an adequate drainage system.

On the third proposition, as is pointed out herein, there is a dispute as to whether or not the drainage system, if constructed, will effectively relieve the damage to plaintiff's lands.

No new act of the defendant is required to produce the continuance of the injury except the use of its reservoir for the purpose for which it was constructed. New and continuing acts of the defendant and the expenditure of indefinite amounts of money for an indefinite time in the future, depending upon the contingencies hereinbefore discussed, are necessary to abate that injury, if it can be abated.

A temporary injury is defined in 32 C. J. 521, as "An injury that may be abated or discontinued *at any time*, either by the act of the wrong-doer, or by the injured party." (Italics ours.)

"A permanent injury to real property, as distinguished from a temporary or continuing injury, is one of such a character and existing under such circumstances, that *it will be presumed to continue indefinitely.*" (Italics ours.) *Worden v. Bielenberg*, 119 Minn. 330, 138 N. W. 314.

The cause of the damage to plaintiff's land is permanent. *Meister v. Krotter*, 131 Neb. 35, 267 N. W. 161. The question raised by the evidence is the question of the extent of the possible abatement of those damages in the future.

Could the plaintiff sell his land for its full value under the rule advanced by the defendant? Would a purchaser pay full value, knowing that he must continually litigate the right to receive annual returns from his property? Would a purchaser pay full value for this land even conceding the completion and present effective operation of the drainage system, knowing that, if the defendant failed to continue its operation, or if the system in the future failed to work, his land would be damaged in value, either temporarily or permanently, and that he would have controversy and possible litigation with the defendant to recover therefor? Obviously not, and, if not, it follows clearly that there has been permanent damage to plaintiff's land, for which, on defendant's theory, the law would either deny him compensation, or would delay the granting thereof.

The Constitution of this state provides: "All courts shall be open, and every person, for any injury done him *in his lands*, goods, person, or reputation, shall have a remedy by due course of law, and justice administered *without denial or delay.*" Const. art. I, sec. 13. "The property of no person shall be taken *or damaged* for public use without just compensation therefor." (Italics ours.) Const. art. I, sec. 21. See *Gledhill v. State*, 123 Neb. 726, 243 N. W. 909.

Section 70-707, Comp. St. Supp. 1937, provides: "Any district organized under the provisions of this act shall be liable for all breaks, overflow and seepage damage. *Damages*

*from seepage* shall be recoverable when and if it accrues." (Italics ours.)

Defendant concedes that it is "liable for damages accruing from breakage, overflow and seepage, regardless of whether any negligence is chargeable or proved in connection with the construction of its works," but contends that "the only fair interpretation of the statute is that it contemplates temporary recurrent instances of seepage damage and provides a recovery for such damage by the landowner affected."

The legislature did not so limit the defendant's liability. One illustration is sufficient to answer that contention. Suppose in this case that the defendant made no effort to abate the damage to plaintiff's lands. Could it be argued that the legislature intended that the plaintiff would be limited to a recovery from year to year for a loss of use of his lands, and that he never could recover for permanent damage although that permanent damage had accrued? The legislature stated that damages from seepage shall be recoverable when and if it accrues. The language is clear. It places no limitation upon either the right of, or the remedy for, recovery.

Section 70-707, Comp. St. Supp. 1937, grants to defendant certain powers of eminent domain and refers, in the sentence immediately preceding the one under discussion, to section 46-617, Comp. St. 1929. That section provides (among other things) that the owner of a storage reservoir "shall be liable for *all* damages arising from leakage or overflow of the water therefrom." (Italics ours.)

Defendant cites no provision of the statute which would compel it to maintain an adequate drainage system. The legislature evidently contemplated the payment for, and not the abatement of, damage from seepage.

"As a general rule, if a nuisance is permanent in character, is intended to remain in the condition in which it was erected until destroyed by the elements, and the damages are to the land itself, especially where the erection is for a public or semi-public purpose, the damage is treated as

original, to be recovered in one action, and not continuous in character." *Irvine v. City of Oelwein,* 170 Ia. 653, 150 N. W. 674.

The measure of damages for the injury to the land is the difference in value before and after the dam was erected, taking into consideration the uses to which the land was put and for which it was reasonably suitable. To determine any such loss, the present condition of the soil proximately caused by the damming of the water and all effects up to the present time would be relevant to determine its value. *Meister v. Krotter, supra;* 3 Kinney, Irrigation and Water Rights (2d ed.) sec. 1697; *Gledhill v. State, supra.*

Defendant complains that the jury were instructed on the theory of permanent damage to the land and also instructed that they could allow temporary damage for loss of use.

An instruction allowing plaintiff to recover for the loss of crops in 1936 and 1937 and for the depreciation in the value of his land as of the time of trial in 1938 was proper. *Fremont E. & M. V. R. Co. v. Harlin,* 50 Neb. 698, 70 N. W. 263.

It is obvious by their verdict that the jury correctly understood the instructions, that they considered the damages to plaintiff's lands to be permanent, and that they accepted the plaintiff's evidence as to the permanent depreciation in value.

Defendant offered no evidence as to the value of the property if the damage was partially abated, so the jury were furnished no basis upon which they could calculate an abatement of the damage on defendant's theory.

We do not recommend these instructions as models of exact statement to be followed hereafter. However, "under our analysis of the evidence and the measure of damages in this case, the instructions, considered as a whole, properly state the law, and we believe there is no prejudicial error therein, and no prejudice resulted to the substantial rights of the defendants by the giving of such instructions." *Meister v. Krotter,* 134 Neb. 293, 304, 278 N. W. 483.

We do not decide the question of the sufficiency of this defense as a matter of law. It is sufficient for the decision here that the question of whether the proposed drainage would be effective, and to what extent, was a disputed question of fact which the jury resolved against the defendant.

Defendant's contention that the affirmance of this judgment will permit the plaintiff to sue again for either crop losses or further claimed permanent damage to his lands is not a matter presented by this record, and is one which can and will be met should that contingency occur.

AFFIRMED.

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WALLACE C. RICHTER, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

285 N. W. 593

FILED MAY 12, 1939. No. 30518.

1. **Pleading**: DEMURRER. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law.
2. **Licenses**. That part of subdivision 1, sec. 2, art. II of the Lincoln home rule charter, empowering that city to levy an occupation tax upon public service property or corporations in such amounts as may be proper and necessary, construed, and *held* to be a remedial act and to be applied as such, having in view the subject-matter to which it relates.
3. **Statutes**: CONSTRUCTION. "Where the general intent of the legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful or uncertain, the courts may have recourse to historical facts or general information, in order to aid them in interpreting its provisions." *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 175 N. W. 531.

4. ———: ———. "A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the later act to operate only outside of the scope of the former." *Plattsmouth Bridge Co. v. Turner*, 128 Neb. 738, 260 N. W. 562.
5. **Licenses.** "Public service" is defined as "The business of supplying some commodity (as gas, electricity, power, water) to any or all members of a community, or of providing some service (as transportation, as by railroad or bus or by pipe line; communication, as by telegraph or telephone; elevating grain; maintaining stock yards) where exercise of the calling involves some legal privilege or a natural or virtual monopoly." Webster's New International Dictionary, Unabridged (2d ed.).
6. **Automobiles.** "Public service property," as used in the Lincoln home rule charter, includes taxable property employed in "public service" as above defined.
7. ———. A "taxicab" is "a motor vehicle, fitted with a taximeter which indicates the fare for the distance covered, used within or without the corporate limits of any city or village as a common carrier for the transportation of passengers for hire," etc. Comp. St. 1929, sec. 60-201.
8. ———. As disclosed by the petition, the taxicabs taxed are wholly engaged in the services so defined by statute as common carriers. They thus constitute "public service property," the use of which is subject to the levy of an occupation tax under the provisions of subdivision 1, sec. 2, art. II of the Lincoln home rule charter, and are clearly within the scope of valid provisions of the Municipal Code of the city of Lincoln imposing the occupation tax in suit.
9. **Licenses.** The word "or" as employed in subdivision 10, sec. 2, art. II of the Lincoln home rule charter, construed as "and."
10. **Constitutional Law.** Ordinance in suit examined, and *held* not vulnerable to the objection that it is unjust and discriminatory in its classification and denies to the persons within its scope the equal protection of the laws in violation of the state Constitution and in violation of the federal Constitution.

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

*Ralph P. Wilson, Clarence G. Miles* and *Frederick H. Wagener*, for appellant.

*Lloyd E. Chapman, contra.*

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

EBERLY, J.

This is an action at law to recover certain sums paid to the city of Lincoln as and for occupation tax on certain taxicabs operated as such during the period for which such tax was assessed. The essential allegations of the petition herein include the following: That plaintiff, and fourteen others named therein, duly licensed taxicab owners and operators under the ordinances of the city of Lincoln, Nebraska, and the statutes of the state of Nebraska, associated together and carrying on their joint business in the manner described in such petition, severally operate their respective taxicabs as such, under the trade-name of the "Checker Cab Company," but are not incorporated; that on or about the 1st day of June, 1937, plaintiff and his fourteen associates, under the provisions of sections 22-209 and 22-210 of art. II, ch. 22 of the Lincoln Municipal Code for 1936, were, as owners, each compelled to pay, and did pay under protest in writing, an annual license fee for 1937 of $1, and an annual driver's license fee for 1937 of $1, and also an annual occupation tax in the sum of $15 for each cab licensed. The reason set forth in each of these protests in writing is that the ordinance is invalid because it is discriminatory and denies taxicab owners of the city equal protection of the laws; that thereafter, within 30 days, a claim in writing for refund was duly presented to the proper authorities of the city of Lincoln and disallowed; that thereupon each of plaintiff's associates duly assigned their respective claims for refund of the $15 so paid to plaintiff herein, who prosecutes this action for the recovery of all the amounts thus paid. The substantial basis of the recovery thus sought is the claim that the $15 thus levied and collected from plaintiff and his assignors on their respective taxicabs was levied without power and authority, under section 22-210 of the Lincoln Municipal Code for 1936, the terms of which were unauthorized by the provisions of the city's charter, and is discriminatory, and in effect denies to plaintiff and his assignors as taxicab owners the equal protection of the

laws, both under the state and the federal Constitutions. In support of the allegations thus made, six distinct reasons were alleged which will be later discussed herein.

To this petition the defendant demurred generally, "for the reason that said petition does not state or allege facts sufficient to constitute a cause of action."

Upon a hearing, the demurrer was overruled, and the city electing to stand upon its demurrer and plead no further, judgment was entered as prayed in favor of plaintiff. The trial court found specifically "that the allegations of plaintiff's petition are true," and "that the annual occupation tax for the year 1937 in the amount of fifteen dollars levied and collected by defendant from the plaintiff and each of his assignors herein, upon each of their fifteen taxicabs in the total amount of $225 was erroneously and illegally levied and collected by the defendant without power or authority under its home rule charter, or the law, so to do, and was discriminatory, and denied the plaintiff and his assignors of the equal protection of the laws" under the Constitution of the state and under the federal Constitution.

"A demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded. * * * 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. * * * It does not admit allegations contrary to facts of which judicial notice is taken, or which are contrary to law." 6 Standard Ency. of Procedure, 943-952. See, also, *Salsbury v. City of Lincoln,* 117 Neb. 465, 220 N. W. 827; *Markey v. School District,* 58 Neb. 479, 78 N. W. 932.

We are quite of the opinion that the issues properly raised by the demurrer in this case are to be restricted to

those determined by the district court in its special findings hereinbefore set forth.

Appellee contends that the only specific authority in Lincoln's home rule charter for levying a license fee and an occupation tax on any business is subdivision 10, sec. 2, art. II thereof, which reads as follows:

"To raise revenue by levying and collecting a license *or* occupation tax on any person, partnership, corporation or business, within the limits of the city, and regulate the same, except as otherwise in this charter provided. All such taxes shall be uniform in respect to the class upon which they are imposed." (Italics supplied.)

He also insists that the word "or," used in the above provision, is a disjunctive particle that marks an alternative and is never construed to mean "and." Therefore, while the city is empowered under the provision quoted to levy and collect a license tax *"or"* to levy and collect an occupation tax, it cannot do both with respect to any particular subject of taxation. And the inference would seem to follow the contention thus made that, in the event of an attempt to exercise both powers by the city, the taxpayer would possess the power of election as to which to pay.

Under the facts and circumstances of this case, appellee's contention may not be sustained for two reasons.

The language quoted above, which is relied upon to sustain appellee's position, in its present form first became a part of Lincoln's statutory charter in 1905. Comp. St. 1905, sec. 1223. It was in express terms later incorporated into and reenacted as a part of the "Home Rule Charter" of that city, and as such still remains unchanged. But, by virtue of section 12, ch. 9, Laws 1907, approved with an emergency clause on April 6, 1907, the following language became a part of, and was incorporated into, the then statutory charter of the city of Lincoln, viz.: "To levy an occupation tax on public service property or corporations in such amounts as may be proper and necessary, in the judgment of the mayor and council, for purposes of revenue; said occupation tax may be based upon a certain percentage

of the gross receipts of such public service corporation or upon such other basis as may be determined upon by the mayor and council."

This provision above quoted was also incorporated in and remained as subdivision 1, sec. 2, art. II of Lincoln's home rule charter. While there has been a slight change in the verbiage employed in the incorporation of the above enactment in the home rule charter, the legal import of the same still remains unchanged and unmodified. The historical situation surrounding the original adoption of the amendment last above referred to may be gleaned from the records of this court. In *Nebraska Telephone Co. v. City of Lincoln,* 82 Neb. 59, 117 N. W. 284, this court sustained the legality of ordinance No. 448 passed by the city of Lincoln in 1907, providing that all telephone companies doing business in the city should pay an occupation tax equal to 2 per cent. of the gross receipts from exchange rentals, etc. And from the files in the records of the case last above cited, we learn that the mayor and council "have levied an occupation tax, not upon the appellant herein only, but upon street railways, gas and electric lighting companies and other public service corporations, and not only the appellant herein is contesting the validity of such tax, but the same with a few exceptions is being contested by all the corporations against which such taxes are levied, on the ground that the ordinances levying the same are technically invalid, and for the reason that the city is primarily without authority to levy such taxes," and that this question was then of great interest to the public.

Historically it thus appears that the language herein quoted from subdivision 1, sec. 2, art. II, which was employed to cope with a public emergency, as well as the form and terms thereof, discloses that it is a remedial act and entitled to be construed as such, having in view, however, the subject-matter to which it relates.

"Where the general intent of the legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful or uncertain, the courts may

have recourse to historical facts or general information, in order to aid them in interpreting its provisions." *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93, 175 N. W. 531. See, also, *State v. Fremont, E. & M. V. R. Co.,* 22 Neb. 313, 35 N. W. 118; *Becker & Degen v. Brown,* 65 Neb. 264, 91 N. W. 178.

Then, too, the provision under consideration applies only to "public service property" and "public service corporations." It is in fact a limited or special statute. *Mancuso v. State,* 123 Neb. 204, 242 N. W. 430; *Dawson County v. Whaley,* 134 Neb. 509, 279 N. W. 164.

It thus comes within the full scope of the rule of construction whereby "A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the later act to operate only outside of the scope of the former." *Plattsmouth Bridge Co. v. Turner,* 128 Neb. 738, 260 N. W. 562. See, also, *Dawson County v. Whaley, supra.*

Therefore, it would follow that an occupation tax ordinance based on, passed pursuant to, and within the limits prescribed by, the special provision of subdivision 1, sec. 2, art. II of the home rule charter, would not, as to rights of taxation created therein, and thereby, be controlled, affected or limited by the general provisions contained in subdivision 10, sec. 2 thereof, but would, within the scope of its basic charter provision, be given full force and effect wholly unmodified by the general terms of the latter or any implied limitation which the text of the latter might create or sustain.

Therefore, conceding arguendo the contention of appellee as to the force and effect of the word "or" in subdivision 10, sec. 2, art. II, it would in no manner affect the exercise of legislative powers under subdivision 1, sec. 2, art. II of the home rule charter.

Recurring to the provisions of such subdivision 1, sec. 2, art. II, we note this special provision, so far as the field of taxation is concerned, is limited to two subjects, viz.: To

"public service property" and "public service corporations."

Webster's New International Dictionary, Unabridged (2d ed.), defines "public service," as "The business of supplying some commodity (as gas, electricity, power, water) to any or all members of a community, or of providing some service (as transportation, as by railroad or bus or by pipe line; communication, as by telegraph or telephone; elevating grain; maintaining stock yards) where exercise of the calling involves some legal privilege or a natural or virtual monopoly."

Public service corporations would therefore mean taxable corporations engaged in the business as public service is defined, and public service property would include only taxable property employed in public service as thus defined. This is in harmony with the use of the terms as employed in other provisions of the Lincoln home rule charter, and for the purpose of this opinion is accepted as a workable definition of the same.

Section 22-210 of the Lincoln Municipal Code for 1936, assesses the occupation tax in suit in the following language, viz.: "There shall be paid to the city treasurer an annual occupation tax, in the sum of Fifteen Dollars ($15) for each taxicab licensed." From the petition we glean that the taxicabs in suit have complied with the state law on that subject, and are indeed common carriers of passengers over the streets of the city of Lincoln. Subject to certain exceptions not essential to the consideration of the question now considered, "taxicab" is defined as "A motor vehicle, fitted with a taximeter which indicates the fare for the distance covered, used within or without the corporate limits of any city or village as a common carrier for the transportation of passengers for hire," etc. Comp. St. 1929, sec. 60-201.

So far as disclosed by the petition, the taxicabs taxed are wholly engaged in the services defined by this statute as common carriers. They thus constitute "public service property," the use of which is subject to the levy of an occupation tax as such under the provisions of subsection 1,

sec. 2, art. II. They are therefore not subject to the claimed implied limitation created by the use of the word "or," as used in subdivision 10, sec. 2, art. II of such municipal charter, from which no authority is necessarily derived.

And as a second reason for sustaining the occupation tax here in suit, we are unable to approve the contention of the appellee as to the proper construction and effect of the word *"or,"* as embodied and employed in subsection 10, sec. 2, art. II of the home rule charter. It is conceded that this provision, which we have hereinbefore quoted, as an entirety, vests the municipality with police power to regulate through a license, and with taxing power to levy a proper occupation tax. We have held the inherent nature of the power to license and the power to tax in this manner were in no respect inconsistent, and that both might be exercised with reference to the same business. *McCarter v. City of Lexington,* 80 Neb. 714, 115 N. W. 303; *Morgan v. State,* 64 Neb. 369, 90 N. W. 108. Both powers are highly important in the support of local government and the proper maintenance of order and well-being of the inhabitants thereof in the inherent nature of things. No reason exists why the exercise of either power by the municipality should preclude the exercise of the other. No possible reason can exist for the fact, if such it is, that if the municipality maintains the safety and good order of its inhabitants through the power to license, thus conferred, it shall be inevitably debarred of the right to receive the tax necessary for its support. It is obvious that such a construction should not be accepted unless such legislative intent evidenced by the provision in question is clear and obvious. However, in this connection, it will be noted that in the present instance nothing in the context in which it is found, save and except the word "or" itself, tends to sustain appellee's contention. It will also be remembered that "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious,

their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context. In *People v. Rice*, 138 N. Y. 151, 156, 33 N. E. 846, it is said that the words 'and' and 'or' when used in a statute are convertible as the sense may require. The word 'or' in a statute may have the meaning of 'that is to say,' 'to wit,' etc." 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 397.

So, "or" may be construed as "and" to avoid absurd or unreasonable results. Thus, in *Manson v. Dayton*, 153 Fed. 258, we find this language, viz.:

"Among the rules of construction to prevent incongruities and absurdities is that the word 'and' may be read 'or' and *vice versa*, as 'these words are said to be convertible with each other as the sense of the enactment (or contract) and the necessity of harmonizing its provisions may require.' Endlich on Interpretation of Statutes, sec. 303. This rule is predicated on the assumption that it could not have been intended to produce absurd and unreasonable results; 'and consequently, when such effects would follow a literal construction of the statute, the conjunctive particle may be read as disjunctive, or *vice versa*, on the theory that the word to be corrected was inserted by inadvertence or clerical error.' See, also, *Thomas v. Grand Junction*, 13 Colo. App. 80, 84, 85, 56 Pac. 665; *Kitchen v. Southern Railway Company*, 68 S. Car. 554, 48 S. E. 4."

So, if it be conceded that even if the ordinance here in question must be sustained as being authorized by subdivision 10, sec. 2, art. II alone, it is obvious that, in view of the nature of the two powers under consideration, the construction contended for by appellee would be manifestly unreasonable and absurd, and the cause of good government would not be promoted thereby. The conclusion follows that, under the authorities cited, the legislative intent actually expressed is that the word "or," involved in the instant case, must be construed as "and," and thus the validity of the ordinance here challenged is sustainable as being within the powers granted to the city of Lincoln.

In reference to appellee's contention that the effect of the ordinance is unjust and discriminatory in its classification and denies to the person it touches the equal protection of the laws under the Constitutions of the state and of the nation, the majority opinion of the supreme court of the United States in *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 48 S. Ct. 553, says, in part:

"The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

There seems to be no similarity between the taxicab business and the several employments which are untaxed by city authorities, relied upon by appellee, save and except that all make use of the streets. That alone is insufficient. The appellee and his associates as the "Checker Cab Company" are not in any manner, as common carriers of passengers, subject to competition in their business by the individual firms or corporations, the omission of which by the terms of the ordinance he alleges, and of whom he complains. There can be no complaint of the city of Lincoln's classification of "taxicabs" as the subject of imposition of an occupation tax. The classification is not arbitrary and has a reasonable relation to the subject of the particular legislation. It necessarily embraces all that are engaged in the business now taxed. The only constitutional requirement applicable to the situation is that all taxes shall be uniform in respect to the class upon which they are imposed. The facts alleged in plaintiff's petition below wholly fail to effectually challenge the propriety and legality of the classification by the mayor and council, upon which the ordinance in suit is based. The undoubted controlling principles invoked by the present situation are, viz.:

"All occupations need not be taxed. One or more may be taxed and others not taxed. * * * Considerations of

general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by Constitution. Constitutional provisions requiring equality and uniformity of taxation do not apply to this kind of taxes, and there need be no uniformity as between different occupations." 4 Cooley, Taxation (4th ed.) 3393, sec. 1685.

It follows that the trial court erred in overruling the demurrer in this action and in the judgment entered therein.

The judgment of the district court is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

PAINE, J., dissenting.

I respectfully dissent from the opinion adopted in this case, and specifically from that part of it which construes the word "or" to mean "and."

Subdivision 10, sec. 2, art. II, home rule charter of Lincoln, reads as follows: "To raise revenue by levying and collecting a license *or* occupation tax on any person, partnership, corporation or business, within the limits of the city, and regulate the same, except as otherwise in this charter provided. All such taxes shall be uniform in respect to the class upon which they are imposed."

It is my idea that "or," as used in this section, is a disjunctive particle, and gives an election to do one of two things; that is, to levy either a license fee *or* an occupation tax, because that is exactly what the people intended, as I view it, when they adopted the home rule charter.

"The word 'or,' used in a statute, is a disjunctive particle." *Ohio Fuel Supply Co. v. Paxton,* 1 Fed. (2d) 662.

In *Georgia Paper Stock Co. v. State Tax Board,* 174 Ga. 816, 164 S. E. 197, the court said: " 'Or' is never construed to mean 'and' when the evident intent * * * would be thereby defeated."

In *Pompano Horse Club v. State,* 93 Fla. 415, 111 So. 801, 52 A. L. R. 51, the second syllabus paragraph in 52 A. L. R. 51, reads: "In its elementary sense, the word 'or' is a disjunctive particle indicating an alternative. It often

connects a series of words or propositions, presenting a choice of either." And in the text it is stated: "In statutes of this nature, however, the word 'or' is usually, if not always, construed judicially as a disjunctive unless it becomes necessary in order to conform to the clear intention of the Legislature to construe it conjunctively as meaning 'and.' "

As stated in the petition: "11. That when section 22-210 of the Lincoln Municipal Code for 1936, was originally enacted, the taxicab ordinance, of which it was a part, provided that licensed taxicabs shall have taxicab stands in the congested area of the city for their exclusive use, and such occupation tax was considered a tax for that exclusive right and privilege, by the city council of the city of Lincoln; that thereafter and prior to the year 1937, the defendant, city of Lincoln, Nebraska, abolished taxicab stands and enacted section 22-219 of article 2, chapter 22, of the Lincoln Municipal Code for 1936, which was in force at all the times herein mentioned, and which" forbids parking taxicabs in the down-town section, and forces them to get their own parking lot. Any observant person, in trying to park a car in the congested down-town district of Lincoln, will see the truth of the allegations of the petition that taxicabs are not allowed to park there only when hired on an hourly basis.

It is set out in paragraph 13 of said petition that trucks transporting freight are not required to pay an occupation tax, although they make the same use of the streets to make money as taxicabs do, yet the city provides such trucks with adequate loading zones reserved for such trucks alone in every block, but taxicabs are not given any such rights, and are clearly discriminated against in this regard.

In my opinion, a city ordinance that is as unjust and discriminatory in its classification as the Lincoln ordinance denies to taxicab owners equal protection to which they are entitled under the Constitution and laws of Nebraska.

In *Ernesti v. City of Grand Island,* 125 Neb. 688, 251 N. W. 899, this court held: "A city ordinance, affecting

barber shops and barbers, but expressly exempting from the provision beauty shops and operators therein, though doing similar work, is arbitrary and discriminatory; the classification not resting upon any reason of public policy or upon any substantial difference of situation or circumstances, the ordinance is unconstitutional and void."

In *State v. Wiggenjost,* 130 Neb. 450, 265 N. W. 422, the Lincoln sign ordinance was involved, and this court said: "Before hanging a single sign defendant was required by the sign ordinance, in addition to a permit costing one dollar, to pay a 10-dollar license fee for an entire year. This license burden seems better calculated to increase the mournful numbers already on public relief than to promote public peace, public health or public safety." The court concluded: "The vocation of painting and hanging advertising signs does not imply any sinister influence on the public, calling for municipal surveillance in the form of a license in addition to an inspector's regulatory permit and a fee for each sign."

In *Gray v. City of Omaha,* 80 Neb. 526, 114 N. W. 600, it was held unlawful to require a person desiring to make artificial stone to procure a license and pay a fee of $10 a year.

Judge Shepherd, an experienced trial judge, decided this matter in the district court against the contentions of the city, and found specifically, as set out in the main opinion: That the allegations of plaintiff's petition are true; that the annual occupation tax, in the amount of $15, levied and collected from the plaintiff, was erroneously and illegally levied and collected by the city without power or authority under its home rule charter, or the law, so to do, and was discriminatory; that it denied the plaintiff and his assignors equal protection of the laws, under the Constitution of the state and the Constitution of the United States, and held that the plaintiff was entitled to recover judgment from the defendant in the sum of $225.

In my humble opinion, this disposition of the case by the trial court was right, and should have been affirmed.

CHARLES SVITAK, APPELLEE, V. SUN INDEMNITY COMPANY, APPELLANT.
285 N. W. 604

FILED MAY 12, 1939. No. 30553.

1. **Insurance.** When, under the terms of a policy covering liability for automobile accidents, the insured is required to cooperate with the company, he is under no obligation to permit a sham defense to be set up in his name, or to verify an answer which he does not believe to be true, yet he cannot unreasonably decline to assist in making a legitimate defense.
2. **Automobiles.** Whether the plaintiff was, at the time of the automobile collision in which he was injured, the employee or the guest of the driver of the car is a question for the jury to determine under all the facts and circumstances in evidence in the case, and guided by the court's instructions.

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

*Cook & Cook* and *Walter, Flory & Schmid,* for appellant.

*Wagner, Wagner & Albert, contra.*

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

PAINE, J.

Charles Svitak brought suit against Earl V. Hardy for injuries under the guest law. A jury was waived, and judgment entered by the court, and an execution issued on said judgment was returned unsatisfied, and thereupon said Svitak brought the suit at bar against the Sun Indemnity Company of New York, defendant, and secured verdict in the sum of $2,639.48, for which judgment was entered. The Sun Indemnity Company defended on the ground that Svitak was not, at the time of the injuries, a guest of Hardy, but was an employee, and any recovery must be had under the workmen's compensation law. From an adverse judgment, the Sun Indemnity Company appealed.

The facts may be briefly stated as follows: Svitak was an employee of Hardy, who operated a filling station at Columbus, Nebraska, under lease from the Continental Oil

Company, which company was giving a sales meeting for its dealers and their salesmen at the Paxton Hotel in Omaha, ostensibly to promote the sale of a new lubricant.

Svitak's hours of employment would terminate for the day at 6:00 p. m., but at 4:00 p. m. on April 5, 1937, Hardy told him he was through for the day, and invited him to go along to Omaha for the meeting. They arrived at the hotel in Hardy's Oldsmobile about 6:00 p. m., and joined the group, where they had lunch, including drinks, and remained until the meeting was over, around 11:00 p. m. They then started for Columbus, but stopped at a night club and drank liquor; then, resuming their trip to Columbus, they arrived at a second night club, where they found congenial friends returning from the same meeting, and they drank liquor and were entertained at this night club for several hours. They then resumed their return trip to Columbus, and at about 6:30 in the morning of April 6, in the eastern outskirts of Columbus, while traveling on Highway No. 30, Hardy drove his car on the wrong side of the road and directly into a truck. As a result of the injuries sustained, both Hardy and Svitak were confined in a hospital. Svitak's injuries proved the more serious, his jaw being broken in several places, seven teeth knocked out, and two of the teeth of his lower jaw driven up into the roof of his mouth.

Immediately upon learning of the accident, the Sun Indemnity Company, in which Hardy carried liability insurance upon his automobile, sent two young attorneys from Fremont to Columbus, where they arrived shortly after the accident, and interviewed the injured parties at the Lutheran Hospital, and succeeded in getting them to sign statements in regard to the details of the accident.

Morris D. Cook, one of these men, testified that he told Mr. Hardy that he was a member of the law firm of Cook & Cook, of Fremont, representing the insurance company, and that he had with him a portable typewriter, which he arranged close to the bed, and asked them to give all the facts of the accident. He testified that he would ask Mr.

Hardy a question, that Hardy would confer with Svitak, and then he would write it down; that Svitak had difficulty in talking, with his teeth out and jaw injured; that it required from 45 minutes to an hour to secure this statement at the hospital; that they reached the hospital about 11:00 a. m.; that they also secured a statement from Mr. Collins, the driver of the truck which was run into by Hardy.

Later on they supplemented their first statements by additional statements, taken on April 24, in which statements Svitak said that attendance at this meeting was not required of him, but Hardy had received an invitation, and they went; that at the meeting they each had a glass and a half of beer; that they stopped at two night clubs on the way home, and Svitak said in the statement that he had a whisky and soda at one club and a Scotch and soda at the other; that the first night club they attended was called "Showboat;" that they finally left Omaha between 3:00 and 3:30 a. m., and that Svitak went to sleep, and does not recall a thing that happened from the time he went to sleep until he woke up in the Lutheran Hospital in Columbus about 7:00 a. m., and had no recollection of walking into the hospital; that he had not notified the compensation commissioner of the accident or of his injury.

Hardy said that, on the way back, before he got to Fremont he felt sleepy, and got out and walked around the car, and that he felt sleepy again just before the accident, and really remembered little or nothing after he passed through Richland, some nine miles east of Columbus.

In the first action, which was brought by Svitak against Hardy, there was no defense, Hardy testifying for Svitak. Hardy refused to verify an answer which the insurance company had prepared for him, setting out as the defense that the injuries received would come under the workmen's compensation law of Nebraska, and not under its liability policy, and as Hardy refused to verify this answer, the insurance company refused to defend the suit.

We find a rather acceptable statement of the law in this

matter set out in *Royal Indemnity Co. v. Morris*, 37 Fed. (2d) 90, where it is said: "It may be added that the duty of the insured in respect of permitting a defense in his name is not susceptible to precise general definition. He is not to be a mere puppet in the hands of the insurer; he is under no obligation to permit a sham defense to be set up in his name, nor can he be expected to verify an answer which he does not believe to be true; he cannot evade personal responsibility, and hence is not bound to yield to any demand which would entail violation of any law or ethical principle; but he cannot arbitrarily or unreasonably decline to assist in making any fair and legitimate defense."

The insurance company contends that, after the statement had been given on April 24, Hardy discovered for the first time that his policy did not cover compensation liability, and that thereupon a conspiracy was entered into between Hardy and Svitak to prove that the relationship of host and guest existed at the time of the accident, and not that of employer and employee; that when their depositions were taken before the trial they admitted the truth of the written statements they had made as to the relation of employer and employee, and only objected to some immaterial matters in the statement they had signed.

In this case we cannot agree with the defendant that Hardy and the plaintiff concocted a deliberate, fraudulent plan to beat the defendant company. The statements taken a few hours after the accident were taken at a time when neither man was in possession of all his faculties. If a later statement made by Hardy and his testimony on the witness-stand were not all the defendant expected, they may be partly accounted for by the fact that Hardy testifies that the answer the insurance company asked him to sign "had several terms in there that I absolutely didn't believe and I refused to sign," and he doubtless felt aggrieved at their conduct.

The insurance policy he had purchased of the company required in "Insuring Agreements," par. 2(a), that it defend a suit against him, "even if such suit is groundless,

false or fraudulent," and this they failed to do. It does not appear that Hardy testified falsely on the trial, and his testimony gives a version of the accident which the jury accepted. We do not believe that Hardy's alleged "lack of cooperation" is sufficient to relieve the defendant from the judgment obtained by Svitak. *Guerin v. Indemnity Ins. Co.*, 107 Conn. 649, 142 Atl. 268; *Marley v. Bankers Indemnity Ins. Co.*, 53 R. I. 289, 166 Atl. 350.

However, this matter of lack of cooperation was set out at length in instruction No. 1, offered by defendant and given by the court, stating definitely that, if it was the duty of Hardy to have signed and verified the answer prepared by the insurance company, and he refused to do it, then he breached the terms of his policy, and plaintiff cannot recover. It was a jury question, submitted under the defendant's very strong instruction, and the jury found adversely to the contentions of the defendant.

Special emphasis is placed upon the giving of instruction No. 8 by the court, the first paragraph of which instruction was taken from instruction No. 8 offered by the defendant and refused, and reading as follows. "The jury is instructed that if you find that Hardy invited or requested plaintiff to attend said meeting at Omaha to enable plaintiff to receive instructions in handling the products of Hardy then the relationship of employer and employee existed even if you find that the plaintiff was under no compulsion to attend said meeting." The court then added on its own motion the last paragraph: "If on the other hand you find that Hardy invited the plaintiff to attend said meeting for the purpose of pleasure and so that he could enjoy his companionship on the trip and that the meeting in Omaha was a mere pretext or excuse for making the trip and not the real purpose thereof and that the attendance at said meeting was a mere incident of the trip and that it was not the purpose of the trip for plaintiff to receive instructions in handling the products of Hardy, then and in such case you would be justified in finding that plaintiff was the guest of Hardy on said trip and not his employee on said trip."

This instruction No. 8 goes directly to the heart of the case, the defendant claiming that the sole and only purpose of attending this meeting was for the benefit to be received from the instructions in the handling of the new products, and that Hardy as the employer took Svitak, his employee, along to qualify him to better sell these goods; that it was a purely business trip, on which the relationship of employer and employee continued until the time of the accident. Svitak insists it was just a pleasure trip; that the two men were friendly, and enjoyed such excursions, and that he went along for the entertainment, as the guest of Hardy.

The counsel for plaintiff insists that the dealers were given a party at the Paxton Hotel; that it was an entertainment, a drinking party; that it was given several times a year; that the defendant's lawyers, the same morning after the accident, went into the sick-room, without getting the consent of a doctor, and took statements while the injured men were under opiates, with high temperature, and did not know what was going on, and that such conduct was very objectionable.

Hardy testified that it was not a business trip in any sense; that Svitak was not required to go with him, but that he told him he was driving in and would be glad to have him go along. Hardy was asked on cross-examination whether the instructions at such a meeting would not promote sales in handling products, and his answer was: "No; I went down a lot for the trip—to get away from the business, to relieve the monotony;" and he always maintained that it was purely a pleasure trip. He said that Svitak's duties ended at 4:00 o'clock, when they left, because he told him he could take the time off.

In *Flynn v. Lewis*, 231 Mass. 550, 121 N. E. 493, 2 A. L. R. 896, it was held that no relation of master and servant existed, but that the plaintiff when injured was being transported by the defendant for their mutual companionship and enjoyment. Whether the plaintiff was in the service of the defendant when injured, or was a guest, were facts for the jury to determine, and a verdict directed for the defendant was held to be error.

In the case of *McKnight v. General Casualty Ins. Co.* (1931) 44 B. C. 1, 3 Dom. Law Rep. 476, it was held that an insured may sue the insurer under the indemnity clause of the policy, notwithstanding the insured has not paid the judgment recovered against him.

In *Labatte v. Lavallee,* 258 Mass. 527, 155 N. E. 433, plaintiff testified that just before the store closed, in which she was an employee, the proprietor requested her to go with her to see a woman whom her proprietor wanted to consult concerning business, and she wished the plaintiff to overhear what was said. Arriving there, the conversation was a private interview, which plaintiff did not hear, and she had no interest in the conversation. Defendant, in returning plaintiff to Lowell, ran into a telegraph pole and injured plaintiff. The parties were not engaged in a common enterprise. The plaintiff a moment before the accident said: "Don't go so fast, May, be careful, we have a post just as we go around the curve." But defendant did not slacken her speed, and drove head-on into the pole, and plaintiff was injured. The trial court in this action in tort directed a verdict for defendant. The supreme judicial court of Massachusetts said that, as the questions of due care of plaintiff and negligence of defendant, and whether plaintiff was in the service of the defendant when injured, were facts for the jury to decide, a verdict for the defendant could not rightly have been directed. In the case at bar, this jury question was submitted to the jury under very complete instructions.

From a reading of the evidence and an examination of the authorities, it appears that Svitak was invited by Hardy to attend a "pep" meeting at the Paxton Hotel, where representatives of the Continental Oil Company described a new kind of grease being put on the market; that there were also food and drinks. The meeting broke up about 11:00 p. m., and if they had immediately driven home they would have arrived about 1:00 a. m.

But that is not what happened in the case at bar, for the facts clearly show that, in the place of promptly returning

home from this trip, it was interrupted by the wish of Hardy to visit two night clubs, in which it would appear four hours or more were taken up in drinking, conviviality, and entertainment, all enjoyed in the company of friends, and upon leaving the last of these night clubs Svitak dropped down in the seat and promptly went to sleep, and appears to remember nothing until he woke up in the hospital after the accident. Hardy was more or less intoxicated, he could scarcely keep awake, and at one time stopped the car and walked around to wake up, and was doubtless in somewhat of a dazed condition when he ran head-on into the truck on the wrong side of the road. The visiting of the night clubs by these two men, and enjoying the entertainment provided therein, is important.

In any event, the question of whether the relation of host and guest, or employer and employee, existed at the time of the accident was a question of fact, which was properly submitted to the jury under the instructions, and under the disputed facts in the case a court would not have been justified in taking the case from the jury and instructing a verdict for the defendant.

We cannot extend this opinion to discuss all of the errors of law alleged to have been prejudicial to the defendant in the trial of this case, but from an examination of the entire record we have reached the conclusion that the jury were warranted in finding that the plaintiff was entitled to recover a judgment against the defendant on the ground that the plaintiff was the guest of Hardy at the time of the accident, and the judgment is

AFFIRMED.

WAYNE COUNTY ET AL., APPELLANTS, V. AMELIA LESSMAN, APPELLEE.
285 N. W. 579

FILED MAY 12, 1939. No. 30644.

1. **Workmen's Compensation:** BURDEN OF PROOF. In a suit under the workmen's compensation law, a claimant has the burden of establishing by a preponderance of the evidence a right to compensation. It cannot be left to surmise or conjecture, but must be established in the legal way, and not by guess or speculation.
2. ———: ———. Because an accidental injury may possibly, or even probably, be the cause of an ailment does not justify the court in so finding. Proof must be made by substantial evidence leading to the direct conclusion, or a legitimate inference, that such is the fact.
3. ———: ———. A claimant must show with reasonable certainty that the alleged injury occurred, and that it was caused by an accident.
4. ———. If an employee claimed to have been accidentally thrown from a tractor in the morning hours, but his injuries were so slight that he immediately climbed back on the tractor, unaided, and worked steadily for the remainder of that day, and the next day, and uninterruptedly for months thereafter, and made no complaint of injury to fellow workmen, or his employer, for about six months thereafter, it is *held* that, in the fall from the tractor, he could not have injured his pancreas so seriously as to produce a cancer therein, from which he died.

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

*Burr R. Davis* and *Votava, McGroarty & Sklenicka,* for appellants.

*C. H. Hendrickson, contra.*

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

PAINE, J.

This is an appeal in a compensation case from an award entered by the full compensation court and affirmed on an examination of that evidence by the district court. The defense is that deceased died of cancer, and that this disease

was not caused or aggravated by any accident sustained by the deceased in his employment.

The record discloses that George H. Lessman, the deceased employee, filed a petition with the Nebraska workmen's compensation court on November 2, 1937, alleging that, while operating a road grader for the defendant, Wayne county, on September 22, 1936, he received personal injuries, consisting of broken ribs, chest crushed, and internal injuries; that the delay in filing his petition for compensation for about one year, one month and eleven days from the date of the alleged injury was caused by the chairman of the board of county commissioners, who advised delay to ascertain the extent of the injuries; that the injury was at first thought temporary, and now seems permanent; that his employer had knowledge of the injury from the date it occurred; that his attending physician was Dr. L. W. Jamison, of Wayne, Nebraska.

An additional petition was filed by the widow of said George H. Lessman, alleging that her late husband, who filed the petition on November 2, 1937, died December 24, 1937, and she asked for an award.

In the answer filed February 17, 1938, Wayne county denied that an accident arose out of the employment; denied that any disability which Lessman suffered was caused by any injury arising out of or in the course of his employment; denied that any notice was ever given or claim filed as provided by law, and alleged that the claim was barred by the statute of limitations.

On April 4, 1938, a hearing was had on the claim before Judge Welch, a member of the compensation court, at Wayne. After hearing and argument, Judge Welch entered an order of dismissal on April 13, 1938, finding that the death of George H. Lessman was the result of a cancer of the pancreas, which was not caused, directly or indirectly, by the accident which deceased sustained prior to his death.

On April 26, 1938, petition for a rehearing before the entire compensation court was filed by the widow, and such

rehearing was held, beginning on July 8, 1938, before the three members of the court. An award was not entered until September 12, 1938, which award set aside the dismissal entered by Judge Welch, and entered an award for $150 funeral benefits, and directed payment of $15 a week for 325 weeks from December 24, 1937, and allowed medical bills of $109.

The defendants' many assignments of error include the following: That the findings of fact made by the district court are not conclusively supported by the evidence, and entitled the defendants to a trial *de novo* upon the record; findings of fact sustaining the award of the compensation court are based upon speculation and conjecture in finding that the plaintiff's disease and resulting death were due to an accident arising out of and in the course of his employment. Defendants insist that the claimant's cause of action was outlawed by the statute of limitation.

The evidence in regard to the occurrence of the accident may be briefly summarized as follows: Walter Henkel is the sole witness to the alleged accident; he testified that he was a dump boss on W. P. A. project No. 1800, which was the construction of a farm-to-market road, which ran in an easterly direction four miles south of Wayne, Nebraska, and was about six miles in length. Henkel testified that he worked part time as a dump boss and at other times drove a caterpillar tractor which pulled the grader. The deceased claimant, George H. Lessman, was a timekeeper on this job, and ran the grader part of the time, and Leon Hanson, the boss, ran it when Lessman was busy keeping time.

Henkel testified that about September, 1936, when he was driving a caterpillar tractor, the blade of the grader struck a hidden post and Lessman fell off the grader, but climbed right back on, and continued his work; that it did not kill the engine, but "kind of slowed it down;" that Lessman did not complain of any hurt at all; that it happened in the morning, and that Lessman finished out the day's work, and said nothing whatever about being hurt; that he con-

tinued to work from day to day, and never complained about the injury.

On cross-examination he said he had no idea as to the date when it happened, and no idea whatever where it happened; that it could have happened anywhere in the five and a half miles of the road graded.

This was the sworn testimony of Henkel before the compensation court. Witness Henkel admitted that he had signed the statement, dated May 6, 1937, containing the following: "George H. Lessman at no time while he was working with me was injured to my knowledge. I have no knowledge whatever of the tractor or grader striking any obstacle or telephone line anchor and I know of no such occurrence while I was on the job. George H. Lessman while working on the job with me at times complained about a pain in his back but he did not at any time say this was caused from an injury he received while working for Wayne county. George H. Lessman never at any time told me that he received an injury while working for Wayne county. * * * While we were working late in the winter Lessman had a severe cold in the chest and complained about the cold but said nothing about being injured in the chest or ribs and he never at any time told me that he received an injury to his chest or ribs."

This statement of May 6, 1937, was signed by Walter Henkel in the presence of W. J. Doran. He recalled signing this statement at the garage, and said that it was not given under any pressure, but that the evidence of an entirely different state of facts which he had just given on the witness-stand (in July, 1938) was the truth, and made no explanation whatever of the two contrary stories he had given.

Plaintiff's exhibit No. 2 was a statement signed by Frank Erxleben, the chairman of the county board, dated March 30, 1937, which he said was the first date that Lessman had complained to him of an accident, and that he immediately told Lessman to fill out the long report blank and bring it to him and he would sign it and send it in to

the insurance company. This printed form, with blank spaces filled in, was prepared by Lessman, and sets out that, at 10:00 a. m. on September 22, 1936, while running a road grader five miles south and nine miles east of Wayne, he had hit an unused telephone line anchor with the blade, which threw him off the grader; that the steering wheel hit him in the chest, and another lever in the hip and thigh. He gave as the witness of the accident Walter Henkel. It is stated in this report that his chest was hurt and three ribs fractured and his hip dislocated; that the injury has caused a loss of nine weeks' time, beginning on January 15, 1937. The report stated that he was first treated by Dr. Jamison about ten days after the accident on October 1, 1936. When this report was sent to the insurance company, an agent came out to investigate, and took the written statements of many persons, including the one hereinbefore referred to of Walter Henkel, dated May 6, 1937, and also one of the claimant himself.

The claimant's statement, exhibit No. 3, which was read into the record by Leon Hanson, the foreman, read in part as follows: "My name is George H. Lessman and I am 52 years old. I have worked on and off for Wayne county since 1923. * * * On September 21, 1936, about 10:30 a. m., I was operating the grader. Harold Westlund was working, who was working on the W. P. A. was running the tractor. Henkel at this time was acting as dump boss. * * * I was operating the grader and the grader blade struck a telephone line anchor. This threw the grader about as the blade was cutting a hill. The tilting crank struck me * * * in the chest in the middle right above the stomach. I did not pay any attention to the matter at the time, although my hip and chest hurt me. I continued working and did not report the injury to any county official or foreman as I did not think the matter amounted to anything. * * * During the last part of February or first part of March, 1936 (1937), I went up to see Dr. L. W. Jamison. * * * At this time I had a cold, but I told Dr. Jamison that I had been hit by the steering crank on the grader, in my

chest, and I wanted a thorough examination. * * * He did not take any X-ray, but said I had two or three fractured ribs and a fractured breast bone and a dislocated hip. He made this diagnosis without taking an X-ray. He taped my chest and treated my hip by twisting and manipulating it. It was my right hip."

The claimant's widow, Amelia Lessman, testified before the compensation commission generally that when he came home he had a skinned and cut place over the right knee; that he stooped over and bandaged it himself; that he also complained of his hip; that after he went to bed he complained of his chest; that there was a bruised mark on the chest in the vicinity of his right nipple; that he went to work the next morning, and continued to work every day the project lasted until in November.

Plaintiff called as a witness in the case Dr. L. W. Jamison, who testified that he was an osteopath surgeon; that he saw Lessman during the fall, because Lessman would occasionally bring in some of the children to see him. They had scarlet fever that fall, and the youngest boy had sore throat, and Lessman brought him to the office once or twice, but that the first time that Lessman had complained to him about having suffered an accident was in March, 1937, when he had a pain in his chest, and Dr. Jamison thought he had pleurisy, and that he also strapped up his hip or lower pelvis at that time.

Plaintiff also called as a witness Dr. A. Texley, who had practiced in Wayne since 1900, and was a graduate of the Kansas City University Medical School. Lessman came in to see him in the fall of 1937, and gave him a history of an injury, and complained of pain in his abdomen. He testified that this was shortly after Thanksgiving day in 1937, which was five or six weeks after the first time he came in; that Lessman was jaundiced, and he gave him an ordinary prescription for that twice, and made a charge of $7, and then when Lessman came back from the University Hospital he gave him sedatives to relieve the pain.

On rebuttal Dr. Jamison testified that when Lessman

became jaundiced he started to talk with him about going down to the University Hospital at Omaha, and they finally accepted him as a patient, but did not open him up.

The defendant called Dr. Walter Benthack, a physician and surgeon, who operates a hospital at Wayne, Nebraska. He was the attending physician of the claimant from November 28, 1937, until his death, December 24, 1937. He performed the autopsy, and found a gall-bladder, which usually held an ounce or two, distended until it held a pint. He found no injury to the liver or abdominal wall, but by inserting his finger in the head of the pancreas he found a hard mass about an inch and a half in diameter, which was a cancer. He removed and sent to Dr. H. E. Eggers, professor of pathology at the University of Nebraska Medical College at Omaha, the gallbladder, the end of the stomach, and the pancreas. He diagnosed the cause of death as a cancer at the head of the pancreas. Dr. Benthack testified that the pancreas is about five inches long, lies directly in front of the first and second lumbar vertebræ, that it is covered in front by the stomach and the outlet of the stomach, the duodenum, and that the liver is also in front of the head of the pancreas. He was asked whether he believed that a bruise would cause a cancer, and he testified: "In the first place, there is grave doubt whether a cancer—whether trauma has any influence on the development of cancer. However, that is for an expert to pass on." He added: "Because of the location of the cancer, it is extremely difficult for trauma to reach the pancreas." He testified that it was possible to drive the abdominal wall back so far that it might reach the pancreas, but it would be a very severe blow, and that such a blow would be much more liable to injure other organs, such as the liver or stomach. He said that such a severe blow would give the person receiving it a shock, for the solar plexus is just behind the head of the pancreas, and would knock the wind out of a man, the blood pressure would be affected, and it would cause a collapse; that a man who received a blow sufficient to injure the pancreas would not be able to get right up off

the ground and get on a grader and continue with his work.

The defendant also called as its expert witness Dr. H. E. Eggers, 56 years of age. He graduated from medical college and received his master's degree at the University of Wisconsin, spent 19 months in the army during the war, was in Harvard Medical School one year, on a leave of absence, and for four years was professor of pathology in Hearst Medical School, Chicago, and has been for years the head of the department of pathology at the University of Nebraska Medical School in Omaha. He testified that since 1920 he has given all of his research time to work on cancer and its cause; that the first instalment of his treatise on that subject was published in 1929, and the last one in 1932, and that this text he has written gives a general review of the subject of cancer; that carcinoma is the general term for cancer; that sarcoma is a highly malignant growth which starts as a carcinoma, and another form of carcinoma is a brain tumor; that he examined the specimens sent down by Dr. Benthack from the autopsy on George H. Lessman, and had them out in his automobile; that the pancreas is formed of epithelial cells, and that carcinoma is simply a peculiar form of overgrowth of epithelial cells, when such cells no longer obey the laws of their regular growth, and that this form of overgrowth of such cells infiltrates and destroys any tissue with which it comes in contact. He testified that an injury to the pancreas is very rare, although he had seen a number of them, but all of them were caused by puncturing wounds. He states as his opinion that he is not entirely convinced whether a blow or trauma will cause cancer.

Dr. Eggers said about the cause of cancer: "In my opinion, cancer is a common type of reaction to a number of causes. We actually know quite a number of causes of cancer. I could enumerate fifteen or twenty offhand." But he testified that nobody knows what causes this particular kind of cancer that he found in Lessman's pancreas. He testified that in some cancers acute trauma appeared to play a causative part occasionally. He referred to inves-

tigations of cancer of the breast by Ziegler, and that Ziegler reported that trauma had played a causative role in 35 out of 328 cases of carcinoma of the breast. He testified that in all of his experience as a doctor he had never seen a case of cancer develop from traumatism. Dr. Eggers testified that his fee for testifying in this case would be $100. He testified that the solar plexus lies immediately between the pancreas and the spinal column, and that if a person received a blow of sufficient severity to injure the pancreas the result of the shock due to the pancreas injury would be like having the breath knocked out, accompanied by severe, intense pain, and rigidity of the muscles, and nausea and vomiting.

Defendant's exhibit No. 1 was a photostatic copy of a page from a standard medical atlas, showing a horizontal cross-section of a man as if it were sawed through a frozen cadaver near the upper surface of the first lumbar vertebra. It shows the spleen on the left side of the abdomen, the liver on the right side, and reaching across two-thirds of the front of the abdomen, the stomach occupying the other third of the front. In front of the left kidney and the spinal column lies the narrow, elongated pancreas, with the spleen between it and the left wall of the abdomen, and the stomach and the lobe of the liver in front of it.

In Vol. 6 of Industrial Medicine, pages 86-89, published in February, 1937, Dr. Herbert H. Davis reaches the following conclusions:

"A single injury to previously healthy tissue has never been definitely proved to cause cancer.

"The occasional production of cancer in this manner cannot be absolutely disproved. * * *

"No one has succeeded in experimentally producing a series of malignant tumors by trauma.

"Trauma reveals more malignant tumors than it causes."

An article in the American Journal of Surgery for February, 1936, by Dr. James Ewing, a recognized authority on cancer, gives these postulates:

"The statutes of most European countries and the best

American practice require that the following conditions be proved before trauma can be accepted as the cause of tumor:

"1. The authenticity and sufficient severity of the trauma. * * *

"2. Previous integrity of the wounded part. * * *

"3. The identity of the injured area with that giving origin to the tumor; a blow in one part of the body cannot be made the cause of a tumor arising in another part. * * *

"4. The tumor must be of a type that could conceivably result from trauma. * * *

"5. There must be a proper time interval between the receipt of the injury and the appearance of the tumor."

Now, to illustrate these postulates, if the tip of a person's tongue had recently been examined by a pathologist, and was known to be free of disease, and it was injured by a severe prick of a pin, and a sarcoma developed shortly thereafter in the identical spot, that would be evidence upon which to base the conclusion that the injury brought about the sarcoma. However, no such facts appear to convince us in the case at bar.

Let us examine a few decisions from other courts in cases involving cancers. An employee slipped from a ladder on July 31, 1931, and fell across a pile of lumber, fracturing his hip. Medical evidence was to the effect that his death on August 1, 1932, of cancer of the prostate gland and tumor of the third lumbar vertebra, did not result from his fall. Compensation was denied. *Smith v. White Pine Lumber Co.*, 53 Idaho, 808, 27 Pac. (2d) 965.

In *Ortner v. Zenith Carburetor Co.*, 207 Mich. 610, 175 N. W. 122, a workman crushed his finger, which caused blood poisoning. Settlement was made for the injury. Two years later he filed a petition for a rehearing, asking additional compensation because a cancer had developed in another part of his body. Held, evidence insufficient to show that the cancer was attributable to any injury received in the course of his employment.

In *Schapiro v. Wanamaker*, 197 App. Div. 810, 189 N. Y.

Supp. 343, a clerk fainted and fell, and a drawer fell on her chest. Seven months later an operation was performed for cancer of her breast. The physician testified that it could not be said positively that a blow would cause a cancer; that neither he nor any one else knew. Held, evidence insufficient to sustain a finding that the cancer was attributable to the injury.

In *Slack v. Percival Co.*, 198 Ia. 54, 199 N. W. 323, it was held that a fall by an employee of 12 or 15 feet into an elevator pit, resulting in a fracture of two bones, was insufficient to show that the fall accelerated the growth and development of cancer of the stomach. It was said that a claimant has the burden to establish by a preponderance of the evidence a right to compensation, that it is a legal right, and the matter cannot be left wholly to surmise or conjecture; that it must be established in a legal way, and not by guess or speculation.

We will now consider a few of our Nebraska cases. It has been held by this court that we do not recognize the doctrine that, because an injury may probably be the cause of an ailment, the court should so find, for our rule is that awards of compensation are not based upon possibilities or probabilities, but only upon sufficient evidence showing that the claimant has incurred a disability arising out of, and in the course of, his employment, and that this proof must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N. W. 655.

In *Beatrice Creamery Co. v. Kizer*, 127 Neb. 34, 254 N. W. 690, the employee struck the calf of his leg against a motor sitting on the floor. The result was a bruise on his left leg. He was unable to continue work, and returned home, and remained at home for two days, and then an examination at the Lincoln Clinic disclosed hemorraghic bleeding under the skin of the calf of the left leg. Three days later the same kind of bleeding was discovered under the skin of the calf of the right leg, which had not been in-

jured, and two weeks after the date of the bruise to his leg he was found in a condition of stupor and partial paralysis, and died very shortly thereafter. His claim for compensation was denied on the ground that his death was due solely to acute lymphatic leukemia, and was not due to or contributed to by the injury resulting from the accident. See, also, *Huston v. Gage County Electric Co.*, 134 Neb. 805, 279 N. W. 797.

In compensation cases the burden of proof is always upon the claimant to prove by a preponderance of the evidence that the injury was caused to the employee by an accident arising out of, and in the course of, his employment. This means that the claimant must show with reasonable certainty that the alleged injury occurred, and that it was caused by an accident. *Bartlett v. Eaton*, 123 Neb. 599, 243 N. W. 772. See, also, *Omaha & C. B. Street R. Co. v. Johnson*, 109 Neb. 526, 191 N. W. 691, in which case the employee was never able to work after an accident, and became insane three years thereafter. It was held that the evidence was insufficient to show by inference alone that the death was the result of those injuries.

In *Amos v. Village of Bradshaw*, 128 Neb. 514, 259 N. W. 374, Amos was injured May 10, 1932, by falling off an electric light pole. About a year later he complained of hemorrhoids, and a physician diagnosed the trouble as cancer, and later performed an operation. He died on February 6, 1934, as a result of cancer, and action was brought for compensation by his widow. It is claimed that in falling from the pole he fell on his buttocks, although there is no proof to that effect in the record. The cancer was up about four inches from the rectum, and it is contended that, if a cancerous condition had existed, the fall aroused the same to activity. Two doctors who performed the operation testified that this type of cancer could not be aroused or affected by a fall, and it was held that the facts had not been established to that degree of certainty which would allow a recovery.

To reach a conclusion of the matter in the case at bar

is most difficult, for the defendant insists that the evidence shows it is extremely doubtful whether the deceased ever had an accident which affected his pancreas while working for Wayne county. The witness Henkel, who testified at the trial to seeing him climb back on the grader, had signed a written statement six months after the alleged accident, denying three or four times that any such accident ever occurred. It is quite difficult to know how much weight, if any, should be attached to the evidence of a witness who has told two entirely different stories, and gives no excuse therefor, and makes no attempt to reconcile them. Then we must recall that the deceased himself, six months after the alleged accident, in a written statement which he signed, said that another party was driving the tractor by the name of Westlund.

The widow definitely testified that one night he came home with a cut near the knee, which he bandaged himself, and had a red spot near the right nipple, and said he hurt his hip. If we admit on this evidence that an accident did occur at or about the time alleged, it is impossible that the injury to the chest under the right nipple, to the hip, and to the knee, injured the pancreas in any way, for the evidence shows that if that organ had been seriously injured he would have suffered severe shock and vomiting, and could not have immediately climbed up on the grader and worked steadily through the balance of the day without any complaint. If, in spite of the evidence to the contrary, it be admitted, for the purpose of argument, that in some unknown manner the pancreas was slightly injured, it is highly speculative whether such injury produced, or in any way affected, the carcinoma from which he died. No cancer has ever been deliberately produced by trauma. Severe injuries to flesh and organs of the human body have been followed by cancer at the point of injury, but this is usually the violently malignant form of sarcoma. Medical authorities are sharply divided whether such injuries simply reveal and accelerate the growth of a cancer already there, or do actually cause the sarcoma itself. Not all tumors

in the body caused by trauma develop into cancers.

Awards for compensation cannot be based upon speculation, possibilities, or probabilities. It must be shown by satisfactory evidence, with reasonable certainty, that the death of employee was caused by the accident and injury sustained thereby, which proof must be by substantial evidence leading either to the direct conclusion, or to a legitimate inference that such is the fact. *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N. W. 425; *De Bruler v. City of Bayard*, 124 Neb. 566, 247 N. W. 347.

It is the opinion of this court that the judgment entered by Judge Welch, who first tried the case, denying any award and dismissing the petition, was the proper determination of this case, and therefore the judgment of the district court is hereby

REVERSED.

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JACOB SLOSBURG, JR., CROSS-APPELLEE, V. CHESTER E. HUNTER ET AL., APPELLANTS AND CROSS-APPELLEES: G. P. HORN, TRUSTEE, INTERVENER, APPELLEE AND CROSS-APPELLANT.

285 N. W. 563

FILED MAY 12, 1939. No. 30573.

1. **Bankruptcy.** A trustee in bankruptcy succeeds to the rights which any creditor of the bankrupt had prior to his adjudication for the benefit of the bankrupt estate.
2. **Fraudulent Conveyances.** A conveyance of real estate by a husband to his wife is presumptively fraudulent as to existing creditors and will be set aside unless the good faith of the transaction be established by a preponderance of the evidence.
3. ———. An equity court will not permit a creditor to receive in settlement of his debt against an insolvent debtor property materially greater in value than the debt paid thereby; but if he does so without intending to defraud other creditors, equity will require him to account to other creditors only for the value of the property in excess of the consideration paid therefor.

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

*Carl F. Benjamin* and *McKenzie & Dugan,* for appellants.

*Eugene N. Blazer, contra.*

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

CARTER, J.

This is a suit brought by a creditor and subsequently prosecuted by the trustee in bankruptcy of the estate of Chester E. Hunter, bankrupt, to set aside the conveyance made by the bankrupt to his wife of two tracts of real estate, one of which is located in Sarpy county and the other in Washington county. The trial court held that the transfer of the Sarpy county land was not fraudulent and dismissed the cause of action as to it. The transfer of the Washington county land was held to be fraudulent and the trustee in bankruptcy was directed to sell this tract for the benefit of the bankrupt estate. The defendants Chester E. Hunter and Delle Hunter have appealed from this order and the trustee in bankruptcy cross-appeals.

The defendants Chester E. Hunter and Delle Hunter appeal from the finding of the district court that the transfer of the Washington county land by Chester E. Hunter to Delle Hunter, his wife, was fraudulent. The record shows that Delle Hunter was injured in a street car accident in 1915, and received $1,500 as a full settlement of her claim for damages. The defendant Chester E. Hunter also received $1,000 as a full settlement for damages which he sustained in the same accident. It is the contention of the defendants that in 1921 Delle Hunter used a part of this money to purchase some land in North Dakota, the title to which was taken in the name of Chester E. Hunter. Shortly thereafter the North Dakota land was traded for five small houses in South Omaha and the title taken in the name of Chester E. Hunter. This latter property was in turn traded for a second mortgage on the Washington county land which was in due course of time foreclosed and the land bought in by Chester E. Hunter, subject to a

mortgage for $3,800. On October 1, 1934, Chester E. Hunter conveyed the land to Delle Hunter, and it is this conveyance that is attacked in this suit.

It is not disputed that on March 25, 1932, Jacob Slosburg, Jr., the plaintiff herein, was the owner of a $3,000 note signed by Chester E. Hunter. On February 13, 1936, judgment was obtained on this note for $3,426.40. Transcripts of this judgment were filed in Washington and Sarpy counties on March 6, 1936. On July 3, 1936, Chester E. Hunter filed his voluntary petition in bankruptcy and was adjudicated a bankrupt.

The first mortgage on the Washington county land was paid off except for $200. There is no satisfactory evidence in the record that Delle Hunter paid this mortgage or had the means to pay it. All payments were made by Chester E. Hunter and all taxes prior to October 1, 1934, were also paid by him. During all the times mentioned, Chester E. Hunter was the manager of the Omaha office of Lamson Brothers & Company at a salary of $5,000 a year. The evidence further shows that the land was at all times prior to 1935 leased by Chester E. Hunter. Chattel mortgages on the lessee's stock and equipment to secure the payment of the cash rent were executed in favor of Chester E. Hunter prior to 1935 and never in favor of Delle Hunter prior to that date. The crop returns from the land were all paid to Chester E. Hunter prior to 1935, and such moneys were all used by him. There is no evidence that any of the money was ever paid over to Delle Hunter. It is not satisfactorily shown by the record that the money put in the North Dakota land was that of Delle Hunter. It is not shown that the money received in 1915 for the damages suffered in the street car accident was segregated and retained until the North Dakota land was purchased in 1921. At the same time the Washington county land was conveyed to Delle Hunter by her husband, other lands in Harlan, Chase and Perkins counties were conveyed to her. Both defendants admit that these lands were conveyed to the wife without any consideration whatsoever.

There is evidence by an expert witness in the record that the Washington county land is worth $6,000. The assessed value of the land was shown to be $6,100.

These facts clearly confirm the finding of the trial court that the defendants have failed to sustain the burden of proof required by the law to sustain a conveyance from a husband to a wife as against an existing creditor. The applicable rules are as follows:

A trustee in bankruptcy succeeds to the rights which any creditor of the bankrupt had prior to his adjudication for the benefit of the bankrupt estate. Bankruptcy Act, sec. 70 (a) (e), 11 U. S. C. A., sec. 110; *Globe Bank & Trust Co. v. Martin,* 236 U. S. 288, 35 S. Ct. 377, 59 L. Ed. 583; *Sheldon v. Parker,* 66 Neb. 610, 92 N. W. 923.

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, * * * made with the intent to hinder, delay or defraud creditors * * * as against the persons so hindered, delayed or defrauded shall be void." Comp. St. 1929, sec. 36-401. See *Farmers Elevator Co. v. Peck,* 134 Neb. 305, 278 N. W. 499.

A conveyance of real estate by a husband to his wife is presumptively fraudulent as to existing creditors and will be set aside unless the good faith of the transaction be established by a preponderance of the evidence. *Riggs v. Hroch,* 133 Neb. 260, 274 N. W. 598; *Farmers Elevator Co. v. Peck, supra.*

The trustee in bankruptcy complains in his cross-appeal of that part of the decree of the trial court holding that the conveyance of an undivided one-half of the Sarpy county land to Delle Hunter and the remaining one-half to Eugene H. Tiffany was not fraudulent.

The record discloses that on or about July 11, 1910, the defendant Delle Hunter received $2,000 on an insurance policy covering the life of her father. She invested this money in stocks and bonds until 1914 when she converted her securities into cash and paid $2,000 on a home in Omaha, the title to which was taken in the name of her husband, Chester E. Hunter. Subsequently, the home in

Omaha was traded for the Sarpy county farm, the title to which was also taken in the name of Chester E. Hunter.

The record also shows that Chester E. Hunter was indebted to Eugene H. Tiffany in the amount of $1,700, represented by a note bearing interest at 4 *per centum per annum,* at the time an undivided half of the Sarpy county land was conveyed to him. The evidence of Tiffany was that the land was conveyed to him as security for the loan.

The evidence of the only disinterested witness fixes the value of the Sarpy county land at $10,000 or $11,000. The property was encumbered by a first mortgage of $3,000. Under this statement of the record the trial court was justified in holding that there was ample consideration for the conveyance of an undivided one-half interest in the land to Delle Hunter. That she had $2,000 invested in the land is satisfactorily established. Any reasonable computation of interest on this amount for the time it was invested shows that the value of the property conveyed did not exceed the amount due from the grantor. The trial court was right in sustaining the conveyance of an undivided one-half interest in the Sarpy county land to the defendant Delle Hunter.

It is not disputed, however, that the amount due Tiffany at the time of the conveyance of a half interest in the land to him was only $1,700, including interest. The net value of the land conveyed to him was in excess of $3,000. It is not proper for a creditor to receive in settlement of his debt against an insolvent debtor property materially greater in value than the debt paid thereby. *Griswold v. Szwanek,* 82 Neb. 761, 118 N. W. 1073. The evidence of Tiffany was that he took the deed as security only. Under these circumstances the deed to Tiffany should be treated as security for his note for $1,700, and upon a sale the excess, if any, should accrue to the benefit of the trustee. With this modification the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

KATHERINE BAUER ET AL., APPELLEES, V. ALEX BAUER ET AL., APPELLEES: L. W. EHLERS, APPELLANT.
285 N. W. 565

FILED MAY 12, 1939. No. 30532.

1. **Specific Performance.** Specific performance should, in general, be granted as a matter of course, of a written contract, cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby.
2. ———. Where a lessor or his grantee repudiates and endeavors to prevent enforcement of a lease, by enjoining the lessee from trespassing on the premises, the court has jurisdiction, on cross-petition, to confirm the lease, establish the tenure, and decree the lessee's right to possession, by way of specific performance.
3. **Trusts.** Section 76-265, Comp. St. 1929, providing that, if no declaration of the terms of a trust has been recorded and the name of the beneficiary does not appear of record, a trustee holding title to real estate will be conclusively presumed to have power and authority to dispose of the trust estate, is applicable to a lease made by such trustee.
4. **Estoppel.** When one of two innocent persons must suffer a loss from the acts of a third party, it must be borne by the one whose conduct has rendered the injury possible.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Reversed, with directions.*

*Butler & James* and *Lehman & Swanson*, for appellant.

*I. C. Bachelor, contra.*

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

JOHNSEN, J.

Defendant Ehlers has appealed from the refusal to grant specific performance of a farm lease, on his cross-petition.

Katherine Bauer, owner of the land, and Peter Bauer, a son, and occupant by sufferance, sued to enjoin Alex Bauer, another son, and L. W. Ehlers, from trespassing. The object was to prevent Ehlers from taking possession under a lease given him by Alex Bauer, in writing, dated

April 5, 1937, for a five-year term commencing March 1, 1938. Ehlers cross-petitioned to enforce the lease.

Record title stood in the name of Alex Bauer at the time he executed the lease to Ehlers. He had bid in the property and taken sheriff's deed, on a foreclosure sale against the mother, but had agreed to hold title for her and make conveyance at any time she reimbursed him for his advance.

Sheriff's deed was issued on February 10, 1937. Alex Bauer made leases for the 1937 crop season in his own name. Part of the property he leased to his brother Henry. He permitted his brother Peter to occupy the house and a truck gardening patch. His business sense, however, apparently suggested the inadvisability of continued filial occupancy, and, as early as March, 1937, he began to look for a desirable tenant for the following year. He testified that his mother, too, asked him not to let any of the sons rent the place again. His wife corroborates this testimony. It is denied by the mother, but her knowledge and recollection are not impressive, probably due to her age. Alex Bauer offered the farm to Ehlers, who was reputed to be a good farmer, and, after some negotiations, the lease involved was executed between them. The record indicates that Ehlers acted in good faith and without knowledge that title was being held for the mother. He first learned of this fact from Henry Bauer, when he went on the land in August, 1937, to prepare it for fall seeding.

It is a fair inference from the record that, after the lease was made with Ehlers, Peter and Henry Bauer and a sister, Lydia, who lived with the mother, joined forces to turn her against Alex, and, by their proximity and numbers, succeeded in doing so. Lydia wrote Alex: "Mother don't like your way of doing." Her letter revealed also what probably was the basic grievance: "For heaven's sake don't think we are going to give him (Pete) any money." Peter took the old lady to a lawyer and had her bring suit against Alex, to have it decreed that he held title as trustee and to require him to make conveyance. He had managed to arrange an outside loan, sufficient to tender what Alex had advanced,

and, although he had no rights in the property, he joined as a plaintiff in the petition. Decree was entered in favor of the mother, and she thereafter held legal title.

Ehlers had recorded his lease and, at the commencement of his term, prepared to move on the land. Alex Bauer undertook to assist in dispossessing Peter. This action was then brought, in the name of the mother and Peter, to enjoin Alex and Ehlers from trespassing. The trial court granted an injunction, and denied specific performance of Ehlers' lease.

Making due allowance for the fact that the trial court saw and heard the witnesses, it is our view that Ehlers' lease should be recognized and enforced.

The right to specific performance is ordinarily termed a matter of judicial discretion. *Clarke v. Koenig,* 36 Neb. 572, 54 N. W. 842; 25 R. C. L. 214, sec. 16. It is not discretionary in the sense, however, that it may be granted or denied at the will or pleasure of the judge. Pomeroy, Specific Performance of Contracts (3d ed.) sec. 35. It is governed by the elements, conditions and incidents that control the administration of all equitable remedies. Pomeroy, Equity Jurisprudence (2d ed.) sec. 2184. While no rule of absolute obligation and authority in all cases can be laid down (2 Story, Equity Jurisprudence (14th ed.) sec. 1026), it should, in general, be granted as a matter of course, of a written contract, cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby. *Bennett v. Moon,* 110 Neb. 692, 194 N. W. 802; *Willard v. Tayloe,* 8 Wall. (U. S.) 557, 19 L. Ed. 501. If the party seeking the relief has been guilty of any conduct offensive to the conscience, the remedy may, of course, be denied, under the familiar maxims of equity.

Here, the lease contains all the elements that entitle a contract to specific performance, and there has been no conduct on the part of Ehlers which would justify a denial of the remedy. The provisions and conditions are the cus-

tomary ones in a farm lease. It is for a five-year term, but nothing appears in the record from which it can be said that this is unusual or unfair. No other lease has been executed by the mother, so no conflicting equities are involved. The termination of the sufferance tenure of Peter and Henry Bauer and their disconcertion in removing from the farm are not such hardships as warrant a withholding of the remedy. The sole remaining consideration, then, is whether the mother ought equitably to be held to the obligation created by her son.

There is evidence to support the contention that she authorized the making of a lease with Ehlers. She denies that she authorized the making of it. She denies also that she had any knowledge of it. That question, however, is not controlling. Section 76-265, Comp. St. 1929, provides that, if no declaration of the terms of a trust has been recorded and the name of the beneficiary does not appear of record, a trustee holding title to real estate will be conclusively presumed to have power and authority to dispose of the trust estate. The primary purpose of this statute, of course, was to avoid title uncertainties and to facilitate conveyances, but there is nothing in its language or salutary object that requires a narrow construction, restricting its application to conveyances of the trustee's entire estate and holding that grants of lesser estates and interests are not within its operation. We accordingly hold that its provisions are applicable to a lease made by a trustee, and that in this case Alex Bauer will be conclusively presumed to have had the necessary authority to enter into the lease with Ehlers, who had no knowledge of any lack of right or power.

There is another general principle applicable, under which it also would have to be held that, as against Katherine Bauer, Ehlers was entitled to regard Alex Bauer as the absolute owner of the property, to deal in good faith with him accordingly, and to be protected in any just contract right acquired and against any injury sustained, from acceptance of his apparent status. When one of two innocent persons must suffer a loss from the acts of a third

party, it must be borne by the one whose conduct has rendered the injury possible. *Kansas City Life Ins. Co. v. Neverve,* 133 Neb. 29, 274 N. W. 390; *First Trust Co. v. Danielson,* 132 Neb. 141, 270 N. W. 680; 10 R. C. L. 695, sec. 23. The record shows that Ehlers had prepared to move onto the farm and to make it his home. This deprivation is such a loss or injury as to permit invocation of the foregoing rule.

When Katherine Bauer claimed the title against Alex Bauer, as trustee, she took it subject to the burden of Ehlers' lease.

We should perhaps add that, while the question is not raised by the parties, we have not overlooked the fact, in considering the right to specific performance, that a lease is involved, and not a contract for a lease. There is authority to the effect that the remedy is not available as to an executed lease. *Genardini v. Kline,* 19 Ariz. 558, 173 Pac. 882; 58 C. J. 1026. On the other hand, specific performance has been granted to enforce the right to possession under a lease covenant. *Duckworth v. Michel,* 172 Wash. 234, 19 Pac. (2d) 914. We have specifically enforced a renewal covenant in a lease (*Gorder & Son v. Pankonin,* 83 Neb. 204, 119 N. W. 449), but this may technically be regarded as an agreement to give a lease. Without passing on the universality of the right to seek specific performance of the covenants of a lease, though the other equitable factors are present, it is clear that, where the lessor or his grantee repudiates and endeavors to prevent enforcement of a lease by enjoining the lessee from trespassing on the premises, the court has jurisdiction, on cross-petition, to confirm the lease, establish the tenure, and decree the lessee's right to possession, by way of specific performance, under the well-established doctrine that equity will exercise its jurisdiction to settle a controversy and afford complete relief.

The decree of the district court is reversed and the cause remanded, with directions to enter a decree in accordance with this opinion.

REVERSED.

STATE, EX REL. BEN F. CONKEY, RELATOR, V. MARK J. RYAN, DISTRICT JUDGE, RESPONDENT.
285 N. W. 923

FILED MAY 25, 1939. No. 30721.

1. **Judgment.** A default decree in a suit to quiet title against all persons having or claiming any interest in designated lands, real names unknown, is conclusive against all persons not in possession of said lands and who are not the record holders thereof. Comp. St. 1929, sec. 20-321.
2. **Quieting Title.** The determination of the ownership of accreted lands is often a complicated question of law and fact, and until such determination be made, one entitled to possession under a decree of court quieting title against those in possession and those having or claiming any interest therein, real names unknown, has a superior right until he is divested of such right by the final judgment of a court having jurisdiction of the subject-matter.
3. **Mandamus.** When a litigant is entitled to the possession of real estate under a final judgment of a court having jurisdiction of the subject-matter, and such court refuses to make the judgment effective, a peremptory writ of mandamus may properly be issued.

Original proceeding in mandamus by the state, on the relation of Ben F. Conkey, against Mark J. Ryan, district judge. *Writ allowed.*

*George W. Leamer*, for relator.

*Clarence E. Haley*, for respondent.

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

CARTER, J.

This is an original action filed in this court to obtain a peremptory writ of mandamus against Mark J. Ryan, district judge in and for Dakota county. An alternative writ was issued by this court and the defendant has appeared and answered. The cause was submitted on the pleadings and records properly before the court. The only question is whether a peremptory writ should issue.

The record shows that on November 12, 1936, Ben F.

Conkey, the relator, commenced an action in the district court for Dakota county against Hans Knudsen, Jr., Clara Knudsen, Hans Knudsen, Jack L. Hamp, Lewis W. Newman, Maggie Leedom, Pearl M. Sanford, Sene Knudsen, Maude Harris, Harry J. Goodfellow, Martha E. Goodfellow, Otis Wood, and all persons having or claiming any interest in and to certain accretion lands described therein by metes and bounds, real names unknown. All the parties were duly summoned as provided by section 20-321, Comp. St. 1929. On February 10, 1938, a default was entered against Hans Knudsen, Jr., Clara Knudsen, Lewis W. Newman, Pearl M. Sanford, Maude Harris, Harry J. Goodfellow, Martha E. Goodfellow, and all persons having or claiming any interest in and to said lands, real names unknown. No appeal was taken from this decree and it has therefore become final.

On March 31, 1938, the cause came on for hearing on the claims of Hans Knudsen, Sene Knudsen, Maggie Leedom, Otis Wood and Jack L. Hamp. The court found against all of these defendants and entered a decree to that effect. The first four named answering defendants perfected an appeal to this court and on March 10, 1939, this court affirmed the decree of the district court. *Conkey v. Knudsen*, 135 Neb. 890, 284 N. W. 737. On April 20, 1939, the mandate of this court was filed, and on April 25, 1939, a judgment was entered on the mandate directing that a writ of assistance issue upon the præcipe of plaintiff to put plaintiff in possession of the lands described in his original petition.

On May 5, 1939, the trial court entered an order that one Glen Scherner, who went into possession of a part of the land in question while the appeal was pending in this court, and who claims under an owner of the "old river bank" who was not named as a party defendant in plaintiff's petition, should remain in possession until the claims of all the "old river bank" owners to the accreted lands be adjudicated. Plaintiff contends that under this state of the record he is entitled to possession as a matter of law.

It seems to us that the case largely turns upon the effect

to be given to section 20-321, Comp. St. 1929, which is in part as follows: "In any action wherein the subject-matter is as described in the first or fourth subdivisions of section 7640 (20-517) wherein it is alleged in the petition or other pleading that there are persons who have or that there are persons who claim or appear to have some interest in, right or title to, or lien upon any real or personal property within this state involved in such action, and that the ownership of, interest in, rights or title to, or lien upon such property of such persons, does not appear of record, in or by their respective names, in the county wherein such property is situated, and that the plaintiff or person in whose behalf such allegations are made, after diligent investigation and inquiry, is unable to ascertain and does not know the names or whereabouts if in this state, or the residence of such persons, such action may proceed against all such persons designated as 'all persons having or claiming any interest in' such property which shall be accurately and definitely described, followed by the words, 'real names unknown,' and defendants so designated may be served by publication. * * * Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons who are not in actual possession of such property and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated." Section 76-402, Comp. St. 1929, appears to be to the same general effect as the foregoing section.

There can be no question that Scherner and those under whom he holds possession were not in actual possession of the lands in question at the time plaintiff commenced his suit and obtained service by publication. That a notice of *lis pendens* was on file is not disputed. The question then arises whether Scherner and those from whom he derives his right to possession were record owners within the purview of the cited statute.

It appears that Scherner leased the lands of which he took possession from P. F. Verzani, who had obtained a quitclaim deed from James P. Goodfellow and wife, the owners of record of a part of the "old river bank" to the south of plaintiff. The record further discloses that Verzani obtained his quitclaim deed during the pendency of the case and at a time when he was appearing in the litigation as an attorney for one of the parties to it. It is the contention of Verzani that the accretions to the James P. Goodfellow land extend to the river in a northeasterly direction from his land and including a part of the accretions claimed by plaintiff. It is the contention of plaintiff that the accretions to his land lie between his land and the river in a due easterly direction. It is apparent, therefore, that a determination of the ownership of the disputed accretion lands cannot be made until evidence establishing the course and direction of the Missouri river at that point is produced. Neither can an adjudication of the rights of the various claimants be obtained until surveys are made in accordance with the law governing the ownership of accreted lands. In other words, whether Verzani is a record owner of the lands herein involved is a question of law and fact in the case before us. If he fails to establish that the lands in question accrete to the lands of James P. Goodfellow, he is conclusively barred by the default decree of the district court as provided in section 20-321, Comp. St. 1929. If he is in a position to and does establish that the lands in question accrete to the lands owned by James P. Goodfellow, and he is thereby constituted a record holder, he then for the first time has a right superior to that of the plaintiff. The decrees of the district court herein entered constitute a pronouncement of a *prima facie* title in the plaintiff which entitles him to the possession of the lands until a superior right is adjudicated to be in some other person. To hold otherwise would place a premium on lethargy and inaction as well as to deprive the plaintiff of the fruits of his litigation and the benefits that accrue to the diligent.

We do not decide the rights of the interveners or of any other persons claiming an interest in the subject-matter of the action. These are matters within the original jurisdiction of the district court and not before us in this proceeding.

While we feel that the respondent was acting in good faith with a view of disposing of all the controversial matters involved in a troublesome situation, we are of the opinion that his action deprives the relator of a valuable right to which he is entitled as a matter of law. For the reasons herein set forth, the peremptory writ will issue.

WRIT ALLOWED.

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JOE SOLOMON, APPELLANT, V. A. W. FARNEY, INC., ET AL., APPELLEES.

286 N. W. 254

FILED MAY 26, 1939. No. 30548.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: AMENDMENTS. While, in determining the effect of substantive provisions of the workmen's compensation act, it should be construed as it was at the time of the injury, yet amendments to such act which affect procedure only are retroactive in their operation and apply to cases which arose prior to such amendment.
2. ———: ———: ATTORNEY'S FEES. In cases arising under the workmen's compensation act, attorneys' fees, when allowed, are to be taxed as costs, and as in addition to the amount of the recovery. They constitute no part of the judgment recovered.
3. ———: ———: ———. Under the terms of the judgments herein, certain sums as attorneys' fees being allowed and taxed as costs for plaintiff's attorneys, such amounts were thereby constituted the property of the attorneys for whose benefit the same were allowed and taxed, and were in addition to, and not within, the terms of their contract of employment.
4. ———: ———: ———. In the absence of a contract or custom to the contrary, the attorney may recover disbursements made by him which were usual and reasonably necessary to carry out his employment and such disbursements need not necessarily be expressly authorized by the client in order to be a proper charge against him.

5. ———: ———: ———. Due submission of a claim by an attorney for legal services performed in a suit brought under the Nebraska workmen's compensation law, or of a claim for disbursements made in such suit by him, to, and the approval thereof in writing by, the judge presiding at the trial, validates the same, and such judge's order so directing constitutes the claim as allowed a valid and enforceable attorney's lien against the recovery in such suit had and obtained.
6. ———: ———: ———: NOTICE. Such approval by the judge presiding at the trial is a nonjudicial act, and notice thereof to a claimant in compensation is not a condition precedent to its validity.
7. **Evidence.** The judge presiding at the trial of a workmen's compensation case, when called upon to exercise the powers conferred by section 48-108, Comp. St. 1929, will take judicial notice of all the pleadings filed therein, and of all proceedings theretofore taken, and of his own acts in the progress of such case pending before him, and may act upon his personal knowledge of such matters.

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

*D. O. Dwyer* and *W. L. Dwyer*, for appellant.

*Clifford L. Rein* and *Homer L. Kyle, contra.*

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

EBERLY, J.

This proceeding, according to the præcipe filed in this court, is "an appeal from a judgment rendered on the 25th day of July, 1938, in a certain cause in the district court of Cass county, wherein Joe Solomon is plaintiff and A. W. Farney, Inc., Lora A. Kieck, Clifford L. Rein and Homer L. Kyle are defendants."

The "certain cause" thus referred to, in turn, arises out of, and constitutes a part of, an action prosecuted by appellant under the Nebraska workmen's compensation act wherein, on appeal from the award of the compensation commissioner, a judgment was entered on August 26, 1935, in favor of the appellant and against the defendant A. W. Farney, Inc., in which the trial court specifically provided

that "all of the costs of this action including the sum of $250 for the fees in this court of the plaintiff's attorneys, W. G. Kieck and Clifford L. Rein, be and the same hereby are taxed to the defendant A. W. Farney, Inc." In an appeal prosecuted by the defendant, A. W. Farney, Inc., from the judgment so entered to the supreme court of Nebraska, the judgment appealed from was, in all things, affirmed, and the cause was remanded to the district court for Cass county for further proceedings in harmony with such affirmance, and it was further provided: "A fee for plaintiff's attorney is allowed and taxed in the sum of $100." *Solomon v. A. W. Farney, Inc.*, 130 Neb. 484, 265 N. W. 724. The mandate of this court, after denial of defendant's motion for a rehearing, was transmitted to the clerk of the district court for Cass county, and by him filed in said cause and recorded in the records of that court on April 7, 1936.

It also appears that the original bill of exceptions as settled and allowed by the then judge of the district court for Cass county on November 22, 1935, for the purposes of the appeal thus taken, was also returned to the district court for Cass county.

The certified copy of the appearance docket of the district court for Cass county, one of the record books required to be kept by its clerk (Comp. St. 1929, secs. 20-2209, 20-2210), containing the official records of the payments made into court in satisfaction of this judgment by the Maryland Casualty Company, the insurance carrier, and of the disposition thereof by the clerk of the district court, includes the following, viz.:

"Apr. 8, 1936. Received of Maryland Casualty Company $596 20 adjustment of compensation paid from 12-3-34 to 2-25-35 and in payment of compensation for the period from 2-26-35 to 4-6-36 in partial payment of judgment. C. E. Ledgway, Clerk.

"Apr. 11, 1936. Received of Maryland Casualty Company $386.57 Judgment and costs.

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|---|---|
| Atty. fees in Dist. Court | $250.00 |
| " " " Supreme " | 100.00 |
| Costs due appellee | 23.20 |
| Allowance to pltff for reimbursement | 13.37 |
| | $386.57 |

C. E. Ledgway, Clerk."

On April 11, 1936, there was paid to W. G. Kieck, attorney, for attorney fees as theretofore allowed and taxed, $350; to Clifford L. Rein, for court costs advanced, $23.20; to Joe Solomon $13.37, for plaintiff's reimbursement.

The record contains a copy of the written contract of employment of Kieck and Rein as attorneys to conduct the present litigation. By it, Solomon agreed to pay these attorneys "twenty-five per cent. (25%) of whatever amount is recovered and in the event that nothing is recovered then the parties of the second part (such employed attorneys) receive nothing for their services." This contract was duly submitted to, and on the 18th day of April, 1936, approved in writing by, the district judge presiding at the trial of plaintiff's case. Its validity is not herein questioned, though there was no formal notice served upon Solomon of the presentation of the application upon which it was approved.

This order of approval, dated April 18, 1936, was in form regularly made and entered on that day "at chambers in Nebraska City, Nebraska, in the second judicial district of Nebraska, wherein the district court of Cass county, Nebraska, is regularly had and holden," and under the title and as part of the case as originally commenced by Solomon. It was on that day also filed, and in the form of a journal entry spread upon the records of that court. In addition, to the approval of the attorneys' contract of employment, it was further made a part of the order that such contract "is * * * declared and ordered to be a lien upon all payments of compensation herein ordered to be made by the defendant (A. W. Farney, Inc.) to the clerk

of the district court of Cass county, Nebraska, for the benefit of the plaintiff (Solomon)." Such clerk was further "ordered to pay to Clifford L. Rein and W. G. Kieck, attorneys, * * * 25% of the amount of each of said instalments or payments of compensation on account of their contract and lien as herein approved for attorneys' services." No references were contained in this order of approval as to the $350 attorneys' fees theretofore duly taxed in this proceeding by the district and supreme courts, and which had been on the 11th day of April immediately preceding paid over to W. G. Kieck, one of the attorneys employed in the cause. This order of approval also contained the further direction that the clerk of the district court "out of the compensation moneys, * * * before making any other distribution of said moneys, shall first pay to Clifford L. Rein for disbursements made by him in the above entitled cause in behalf of the plaintiff, Joe Solomon, the sum of $125, compounded of the following items: * * * April 11, 1936, to Dr. A. L. Smith for travel and expert testimony, $100."

Contemporaneous entries made by the clerk of the district court in the records of this case disclose the following payments by him out of the $596.20 paid in by the insurance carrier on April 8, 1936, viz.: On April 18, 1936: To Clifford L. Rein, by order of court, $125; to W. G. Kieck, by order of court, $117.80; to Joe Solomon, by order of court, $353.40.

While Solomon does not deny that he had knowledge of the payment of the $596.20 into court by the insurance carrier to apply on the judgment for compensation, and that he had a dispute with his attorneys as to the proper division thereof prior to the making of the order of April 18, 1936, heretofore referred to, he testifies that he had never authorized the payment of Dr. Smith as a medical expert witness, had no notice or knowledge of the presentation of the claim pursuant to which this order was entered, and now objects to the allowance of the same. It is clear that with knowledge that $596.20 had been paid in,

he, on April 18, 1936, accepted $353.40, which was the amount remaining after the deductions ordered by the court had been made.

In addition, his testimony is, viz.: "Q. Mr. Solomon, at the time the attorneys filed your contract for approval in court were you notified? A. No. Q. Were you present in court when they had the hearing before Judge Livingston to approve your contract? A. I was here; yes. Q. Were you in court when Judge Livingston made his order? A. You mean for the last or first? Q. When he approved the contract? When he ordered them to pay? A. No; they went up there and got it signed in Nebraska City that day."

The record further discloses that commencing on the 28th day of April, 1936, and continuing regularly in each week thereafter, to and including the 5th day of July, 1938, there was paid to the clerk of the district court upon this judgment, by the insurance carrier, the sum of $10 a week. Of each of these sums, $7.50 was immediately transmitted to and received by Joe Solomon, and $2.50 was paid over to the attorneys, Rein and Kieck, or to their successors in interest, and the due acceptance of the respective parties receiving such payments is not questioned in this proceeding.

The record also discloses that on the 1st day of July, 1936, for a valuable cash consideration paid, defendant Homer L. Kyle received from Clifford L. Rein an assignment in writing of all of Rein's right, title and interest in and to the foregoing judgment, and since said date has been the *bona fide* owner thereof and entitled to the proceeds arising therefrom.

It also appears that attorney W. G. Kieck departed this life and that his widow, Lora A. Kieck, has succeeded to the share of W. G. Kieck in the weekly allowances of the attorneys' fees as provided by the approved contract for the same.

No objections were made to the procedure herein outlined, nor was the right of attorneys Rein and Kieck to receive the $350 attorneys' fees as allowed and taxed in

the district and supreme courts challenged, until on the 19th day of January, 1938. On the date last mentioned, Joe Solomon filed in said cause an application which was denominated a "Motion," the purpose of which was that "W. G. Kieck and Clifford L. Rein, or their assignees or heirs, shall be required to give credit to Joe Solomon, the plaintiff herein, in the sum of $365 on their contract, and shall direct the clerk of this court to withhold any further payments to the said attorneys or their assignees or heirs of the 25% contracted for, until the plaintiff shall have received the sum of $1,460, pursuant to the decree rendered in the above entitled action."

A hearing was had by the district court for Cass county on this "motion" on the 5th day of July, 1938, Honorable W. W. Wilson, the district judge thereof, presiding, and evidence was introduced by the parties, as shown solely by the bill of exceptions. At this hearing the plaintiff made an oral application for leave to amend the motion on file by adding thereto a claim for the repayment to plaintiff of the $100 paid to Dr. A. L. Smith for traveling expenses and expert testimony, for the reason that the order of April 18, 1936, directing and authorizing the same "was beyond the scope of the purpose of the motion" upon which that order was entered, which, over the objections of defendants, was granted by the court. However, the transcript discloses that no actual amendment to the pleading was made pursuant to the leave thus granted.

It may be said in passing that we are committed to the view that in civil actions, within the purview of our Civil Code, "Permission to amend a pleading is of no avail unless complied with." *Ingram v. Bank of Commerce*, 114 Neb. 64, 206 N. W. 5. And, "The court will not examine the bill of exceptions to determine issues upon which the case was tried." *Haarmann Vinegar & Pickle Co. v. Douglas County*, 122 Neb. 643, 241 N. W. 117.

On July 25, 1938, after having taken the cause under advisement, an order was entered in the district court for Cass county overruling "said motion and the amendment thereto."

No motion for a new trial was filed in the district court by the plaintiff, the specifications in his notice of appeal filed August 3, 1938, being that he is appealing "from the judgment of the court overruling his motion as amended, to require an accounting for attorney fees allowed by the court and apply same on the contract approved by the court in this action."

The determination of the issues thus presented involve the construction and interpretation of the following statutory provisions embodied in section 48-108, Comp. St. 1929, viz.:

"No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article (workmen's compensation law) shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose."

This provision constitutes a condition precedent created by the state in the exercise of its police power and by it deemed proper and necessary to safeguard the interests of a class for whose benefit the Nebraska workmen's compensation act was enacted. *Dysart v. Yeiser*, 110 Neb. 65, 192 N. W. 953; *Yeiser v. Dysart*, 267 U. S. 540, 45 S. Ct. 399.

The procedure indicated therein may be summary, and may not amount to a suit in equity or an action at law. But substantial compliance therewith secures a determination of the validity of "a claim or agreement for legal services or disbursements" made binding upon all parties to the litigation.

"Notice to a claimant in compensation proceedings is not a condition precedent to the approval of attorney fees by the judge presiding at the trial," which "is a nonjudicial act which may be done anywhere within his district." *Arner v. Sioux County*, 116 Neb. 394, 217 N. W. 603.

The terms and restrictions in this provision quoted, as

applied to those who by their own election submit to the terms of the compensation statute, of which it is a part, and secure relief under provisions of that statute, may not be successfully challenged as invalid because lacking "due process" or as an unconstitutional exercise of judicial power. *Dysart v. Yeiser, supra; Yeiser v. Dysart, supra; Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49; *May v. Charles Hoertz & Son*, 204 Mich. 432, 170 N. W. 305; *Hawkins v. Bleakley*, 220 Fed. 378; *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554.

In the construction and interpretation of section 48-108, Comp. St. 1929, this court is committed to the view, viz.:

"The statute does not fix an arbitrary charge, but leaves the amount to be determined and fixed by the judge. It will not be presumed that the judge will refuse to make a reasonable allowance or to approve a fair and just charge." *Dysart v. Yeiser*, 110 Neb. 65, 192 N. W. 953.

The pleading of appellant in the trial court entitled and filed in the original case, which evidences his claim for relief in the instant proceeding, contains no charge of fraud on the part of the attorneys who are now asked to account for $350 in fees as received by them from the officers of the court; nor is it alleged that the sums thus paid them, and to which they are entitled by order of the judge who presided at the original trial, are of such amounts as to constitute excessive or unconscionable charges. His claim is that he is the actual owner of the $350 taxed as fees, and the direction to pay his attorney $100 advanced by the latter to Dr. A. L. Smith as an expert witness was beyond the power of the court or judge to order.

Preliminary to the consideration of these questions argued at the bar of this court, it will be noted that the subject-matter involved in the present proceeding is a part of, and so related to, the original proceedings had in the determination of the amount of compensation due plaintiff that there is applicable thereto the following rule, viz.: "In a case on trial in any court its records are actually or constructively before the judge. He will therefore take judicial

notice of them and the facts which they establish." 23 C. J. 110. This includes payment of money into court which is entered as of record by the clerk. 23 C. J. 109.

"A court takes notice of the record in the pending case, of all the pleadings filed therein and the proceedings theretofore taken. * * * This is a duty of the court which must be performed without any request from the parties. A court must take judicial notice of its own official acts in the progress of the case pending before it, and may act upon its personal knowledge of such matters." 7 Encyclopedia of Evidence, 999. See, also, *State v. Boyd,* 34 Neb. 435, 51 N. W. 964; *Stewart v. Rosengren,* 66 Neb. 445, 92 N. W. 586.

The appellant, so far as his claim to the $350 attorney fees in controversy is concerned, predicates his right of action on the provision of section 48-125, Comp. St. 1929, as it existed prior to the amendment of 1935, for the reason that, as stated in his brief, it was "in effect at the time of the institution of this action." But this section was amended by section 20, ch. 57, Laws 1935, which was passed with an emergency clause and approved May 25, 1935. The effect of the amendment was to authorize the allowance, upon conditions set forth, of a reasonable attorney's fee in trials of workmen's compensation cases in the district and supreme courts and to require that the same "be taxed as costs against the employer." While, in determining the effect of substantive provisions of the workmen's compensation act, it should be construed as it was at the time of the injury, yet "Amendments to the compensation acts which affect the procedure only, and in no way interfere with the substantial rights of the parties, are retroactive in their operation and apply to cases which arose prior to the amendment." 2 Schneider, Workmen's Compensation Law (2d ed.) 2139, sec. 577.

In *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.,* 98 Neb. 863, 155 N. W. 235, there was before the court the question whether in a suit upon an insurance policy issued and in force prior to the passage and approval of chapter

234, Laws 1913, such policy was subject to the provisions thereof requiring that in an action thereon the court in rendering judgment for a plaintiff therein shall allow him "a reasonable sum as an attorney's fees, in addition to the amount of his recovery, to be taxed as part of the costs." This court answered: "In such case it has been determined in this state that attorney's fees to be so taxed as costs relate only to the remedy, and are to be so taxed without regard to whether the contract sued upon was entered into before or after the enactment of the statute." See, also, *Ward v. Bankers Life Co.*, 99 Neb. 812, 157 N. W. 1017; *Reed v. American Bonding Co.*, 102 Neb. 113, 166 N. W. 196.

This principle is equally applicable to workmen's compensation cases. "In a proceeding under the workmen's compensation act the allowance of a reasonable attorney's fee in the district court affects the remedy only and may be taxed as an item of costs, though the injury for which compensation is allowed occurred before the legislature authorized such a fee." *Western Newspaper Union v. Dee*, 108 Neb. 303, 187 N. W. 919.

"It is also well settled that the recovery of costs is governed by the statute in force at the time the right to have them taxed accrued. In other words, the right to costs depends upon the statutes in force at the termination of the action, and not upon those in force when it was commenced." 5 Standard Ency. of Procedure, 796.

The conclusion is that the statute in force when attorney's fees are properly and timely allowed and taxed in the district and supreme courts controls, and not the statute in force when proceedings are commenced before the compensation commissioner or the compensation court.

The authorities just cited not only determine the applicable statutes, but also are in point as to the incidents and inherent nature of attorney fees taxed as costs.

In the early case of *Rich v. Stretch* (1875) 4 Neb. 186, an action upon a promissory note which, in view of the terms of the instrument in suit and the statute, empowered the trial court to tax an attorney's fee, this court said in

part: "In cases like this, the court is authorized, in its discretion, to allow such fee, not exceeding ten per cent. on the amount of the recovery, but if such an allowance is made, the record should show the fact, and it should be kept entirely distinct from the judgment proper. It is considered in the nature of costs, and should be treated as such."

In 1877 the rule was announced, viz.: "When the instrument sued on provides for an attorney's fee, the allowance of the fee is no part of the judgment for the debt itself, but it is taxed as costs, and is subject to exceptions and review in like manner as the taxation of other costs may be." *Hendrix v. Rieman*, 6 Neb. 516. Since that early day the rule has continued unchanged. *Wirtele v. Grand Lodge, A. O. U. W.*, 111 Neb. 302, 196 N. W. 510; *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178.

Allowed and taxed only as "costs," attorney fees, so considered as no part of the judgment recovered, are within the rule, viz.: "In such case, a motion for an order to the clerk to tax costs does not require the opening or modification of the judgment, and the court has jurisdiction to act upon the motion at a subsequent term of court from that at which the judgment was rendered." *Barkley v. Pool*, 105 Neb. 203, 180 N. W. 77.

See, also, *Allen v. Tallon*, 120 Neb. 611, 234 N. W. 411, wherein this court employed this language, viz.: "In such a case, the attorney's fees are to be taxed as costs in addition to the amount of the recovery." Further, "They constitute no part of the judgment."

It is obvious that the use of the words "whatever amount is recovered," as employed in the contract of hiring to measure the compensation of the attorneys retained, limits the same to the sum which the employee is entitled to receive under the terms of the obligation enforced. It necessarily excludes costs, whether taxed for witnesses or court officers, of which attorneys at law constitute a class. While costs, properly taxed, are enforceable by the pre-

vailing party in a civil proceeding against the judgment debtor by process issued in his own name, still such costs are the property of such persons for whose benefit they are primarily allowed and taxed. Comp. St. 1929, secs. 20-1581, 33-108.

They may be enforced, as such, by a fee bill issued by the clerk of the district court (Comp. St. 1929, sec. 33-108), or by a civil action prosecuted by the person actually entitled to the same, as a primary liability, though he be not a party to the action in which made and taxed, and without regard to whom may be ultimately liable therefor. *Sechler & Brotherton v. Stark*, 12 Neb. 242, 11 N. W. 320; *Hoysradt v. Delaware, L. & W. R.*, 182 Fed. 880; *Aiken v. Smith*, 57 Fed. 423; *Crook v. Tull*, 111 Mo. 283, 20 S. W. 8.

While attorney fees are allowed and awarded to the client, they actually belong to the attorney. *Klein v. Journal Square Bank Bldg. Co.*, 114 N. J. Eq. 510, 169 Atl. 827; *Columbia Ins. Co. v. Artale*, 112 N. J. Eq. 505, 164 Atl. 864; *Scharlock v. Oland*, 1 Rich. (S. Car.) 207.

The conclusion is, therefore, that the sum of $350 originally allowed by court orders as attorneys' fees for plaintiff's attorneys, and as such taxed as costs, was at all times the property of the latter. *Lincoln Gas & Electric Light Co. v. Watkins*, 113 Neb. 619, 204 N. W. 391.

The terms of the order of April 18, 1936, pertaining to attorney fees and disbursements, hereinbefore referred to, and made by the "judge presiding at the trial," in the light of the facts disclosed by the present record, clearly evidence the intent of the maker thereof that the $350, so allowed and taxed, should be considered as in addition to, and not as included in, the 25 per cent. of the amount recovered, approved by such judge.

Appellant lastly insists that the district court was without power, in its order of approval of April 18, 1936, to direct the payment of $100 out of the sum paid into court in partial satisfaction of the judgment for his compensation therein entered to his attorney in reimbursement of an expenditure by such attorney of a like sum to secure the

presence and testimony of an expert medical witness whose evidence was heard by the district judge presiding at the trial, and of whose direction in writing appellant now complains. The challenge is based upon the ground that the questioned expenditure was made by such attorney without previous notice to, knowledge of, or authority from, appellant, and the direction for reimbursement was likewise made without previous notice to plaintiff and is wholly unsupported by written pleadings. He does not challenge the fact that the advancement was actually made by the attorney, nor the reasonableness of the charges thus satisfied. He contends that in the instant case there was no written pleadings upon which the questioned allowance could be supported; that therefore the court acted without jurisdiction, and its determination and direction were mere nullities and may be collaterally attacked. He cites in support of this proposition, *Clemons v. Heelan*, 52 Neb. 287, 72 N. W. 270; *Domann v. Domann*, 114 Neb. 563, 208 N. W. 669; *Banking House of A. Castetter v. Dukes*, 70 Neb. 648, 97 N. W. 805. These cases were, respectively, proceedings prosecuted to recover, (a) certain real estate, (b) to set aside a certain deed of conveyance of real estate, and (c) to recover certain rentals for real estate occupied. They were all "civil actions," in the prosecution of which the compliance with our Civil Code is obligatory.

The Nebraska employers' liability act is to be construed liberally and, so far as possible, to avoid technical forms of court procedure. *Perry v. Huffman Automobile Co.*, 104 Neb. 211, 175 N. W. 1021; *Stoica v. Swift & Co.*, 100 Neb. 434, 160 N. W. 964; *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, 193 N. W. 742.

However, we are here concerned, not with a "civil action" as defined by the Code, but with the performance of a nonjudicial act prescribed by section 48-108, Comp. St. 1929. This section provides for the approval in writing in compensation cases by the "judge presiding at the trial" of claims and agreements "for legal services or disbursements" made by attorneys in support of such suit, and for

their enforceability after such approval. The language of this section does not contemplate or require the use of formal pleadings or that the technical requirements of Code pleading be complied with. The power it creates is vested in a judge, as distinguished from a court. But it is true, of course, that "an act required to be performed by a judge may be lawfully performed by him sitting as a court." 33 C. J. 961.

The approval "in writing" was within the express limitation of the statute under consideration. Notice to a compensation claimant is not a condition precedent to approval of attorney fees and disbursements by the trial judge. *Arner v. Sioux County*, 116 Neb. 394, 217 N. W. 603. The judge "presiding at the trial," by his written approval and direction to pay this claim, evidenced the fact that he deemed the expert testimony, which was secured by the disbursement by the attorney, valuable and the expenditure reasonable.

"In the absence of a contract or custom to the contrary, the attorney may recover disbursements made by him which were usual and reasonably necessary to carry out his employment." Also, "Disbursements need not necessarily be expressly authorized by the client in order to be a proper charge against him." 7 C. J. S. 1046, sec. 180. See, also, *Forbes v. Chicago, R. I. & P. Ry. Co.*, 150 Ia. 177, 129 N. W. 810; *Barcus v. Gates*, 130 Fed. 364.

Therefore, it appears that plaintiff's attorney was entitled to the reimbursement approved and ordered.

It follows that the judgment of the trial court in overruling plaintiff's "motion" of January 19, 1938, and denying any relief whatever thereon is, upon the merits, in all respects correct, and it is

AFFIRMED.

JOHNSEN, J., dissenting.

I am sorry that I am unable to agree with the view of the majority in this case, but my conscience will not permit me to do so.

There can be no question, I think, that the provision in

the workmen's compensation act for attorneys' fees was not intended as a bonus for lawyers (who have never been the object of legislative bounty), but to benefit the injured workman. The only way it can be made to operate for the benefit of the plaintiff in this case is to require that the $350 attorneys' fees allowed by the courts be credited on the sum which his attorneys would otherwise be entitled to receive out of his compensation proceeds under their contract.

From a professional standpoint, I recognize that attorneys' fees cannot belong to the litigant, but this is only in the sense that he cannot claim them as such, and that no allowance can with propriety be made if there has been no attorney involved in the case, or if the attorney under his contract is obliged to surrender the fees to his client. But this certainly does not prevent the amount of an allowance actually received and retained by the attorney from being taken into account and credited on the sum which he would otherwise be entitled to claim under his contract. In a workmen's compensation case, under a contract such as that in this case, this necessarily must be so. No other view, in my opinion, will win public and sound professional acceptance.

CARTER, J., joins in the foregoing dissent.

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## IN RE ESTATE OF ALLAN MCLEAN.
## JENNIE E. MCLEAN ET AL., APPELLEES, V. EARL D. MCLEAN, ET AL., APPELLANTS.

285 N. W. 915

FILED MAY 26, 1939. No. 30574.

1. **Courts.** A county court in this state has full and complete equity powers as to all subjects within its exclusive original jurisdiction.
2. **Executors and Administrators.** In a proper case a county court may require an administrator to apply to the district court for a license to sell the lands of the estate for which he was appointed.

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

*Frank A. Peterson* and *Michael T. McLaughlin*, for appellants.

*Paul F. Good* and *Mark Simons, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Lancaster county requiring Earl D. McLean, administrator of the estate of Allan McLean, deceased, to convey certain lands belonging to the estate to Jennie E. McLean, pursuant to an agreement and stipulation entered into by Earl D. McLean and Jennie E. McLean on January 31, 1934, as a satisfaction of her claim duly allowed against the estate, or, in the alternative, to apply to the district court for a license to sell the lands of the estate in order to pay the claim of Jennie E. McLean.

The record shows that Allan McLean died intestate on May 27, 1933, leaving surviving him his widow, Jennie E. McLean, two sons, Earl D. McLean and Stanley A. McLean, and two daughters, Annabel McLean and Leona McLean Yoder. Earl D. McLean was appointed administrator of the estate.

Jennie E. McLean thereupon filed her claim against the estate on a note for $25,000 and interest. On January 31, 1934, Jennie E. McLean and Earl D. McLean entered into a stipulation and agreement which in part provided that Earl D. McLean should withdraw all objections to the allowance of the $25,000 claim and that Jennie E. McLean should agree to take lands of the estate in satisfaction of her claim according to values at which the same should be appraised for inheritance or estate tax purposes, said lands to be selected within thirty days after the allowance of the claim. The selection of the lands within the required time is established by the record. It appears, however, that Earl D. McLean has at all times refused to join in a conveyance of the selected lands to Jennie E. McLean, or to proceed to sell the lands in order to satisfy the claim.

On November 2, 1937, almost four years after the allowance of the claim in the county court, Jennie E. McLean applied to the county court and obtained an order requiring the defendant, Earl D. McLean, as administrator to apply to the district court for a license to sell real estate belonging to said estate for the payment of the claim of Jennie E. McLean and the expenses of administration. All of the heirs other than Earl D. McLean joined in the application with Jennie E. McLean. An appeal was taken to the district court where an order was entered requiring Earl D. McLean to execute within ten days a deed to Jennie E. McLean for the property selected by her under the stipulation and agreement of January 31, 1934, or upon failure of him so to do, that said Earl D. McLean file within ten days his application in the district court for a license to sell real estate belonging to the estate for the payment of the claim of Jennie E. McLean and the expenses of administration. It is from this order that the appeal before us was taken.

It is the contention of the defendant that the county court is without jurisdiction to require an administrator to apply to the district court for a license to sell real estate. In this we think defendant is in error. The county court has general jurisdiction in probate matters, and while it has no direct control over real estate, it certainly has jurisdiction over administrators and claims filed against the estate. The appointment and discharge of an administrator is a function of the county court. We think that the county court has such control over an administrator that it may require him to perform his duty and not thwart the very objectives of the probate court. The fact that a county court has exclusive original jurisdiction of all probate matters under section 16, art. V of the Constitution, is sufficient authority for the entry of the order of which complaint is made. *In re Estate of Shierman,* 129 Neb. 230, 261 N. W. 155. The county court has full and complete equity powers as to all subjects within its exclusive original jurisdiction. 11 R. C. L. 131, sec. 138.

Defendant also advances the contention that the county court by its order has determined whether the real estate belonging to the estate shall be sold. To this we cannot agree. The order requires the administrator to apply to the district court for a license to sell the real estate. Whether or not the lands of the estate shall be sold is still for the district court to determine.

"As a general rule creditors have the right to apply for an order directing the sale of decedent's realty for the payment of debts, especially when the representative neglects or refuses to do so, although it has been held that a creditor has this right only after his debt has been acknowledged, or his claim registered after being probated and allowed." 24 C. J. 558.

Defendant contends that plaintiff is limited to a suit on the administrator's bond as provided by section 30-1505, Comp. St. 1929. This section of the statute is not exclusive and does not deprive the plaintiff of any other remedy she may have under the law.

The evidence in this case is too voluminous to detail in this opinion. We are convinced, after an examination of it, that the finding of the trial court that the administrator should be directed to apply for a license to sell the lands belonging to the estate for the payment of claims, taxes and expenses of administration is amply supported. Decedent passed away almost six years ago. Defendant as administrator has refused to proceed with the sale of the lands or to convey the lands selected by plaintiff to her in accordance with the stipulation and agreement to which all the other heirs acquiesced. The record discloses that, instead of a diligent attempt to close the estate, the administrator is doing everything he can to prevent its final settlement. Under such circumstances the trial court is justified in directing the administrator to either convey the lands selected by plaintiff to her, or to require the satisfaction of plaintiff's claim by their sale.

We, therefore, conclude that Earl D. McLean be directed, within ten days from the filing of the mandate of this

court in the district court for Lancaster county, to convey to Jennie E. McLean, pursuant to the offer of plaintiff made during the oral argument of the case in this court, the lands selected by her as described in the decree of the district court from which this appeal was taken, or, if Earl D. McLean refuses to so do, that he as administrator be directed within ten days thereafter to apply to the district court for Lancaster county for a license to sell the lands of the estate for the payment of expenses of administration, taxes, claims against the estate duly allowed, including the claim of Jennie E. McLean, and any further charges lawfully due from the estate.

AFFIRMED.

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HENRY HEINEMAN, APPELLEE, V. MATTHEW THIMGAN, APPELLANT.
285 N. W. 920

FILED MAY 26, 1939. No. 30593.

1. **Limitation of Actions.** In the absence of an agreement between the parties or directions by the debtor as to its application, a credit in favor of a debtor for work and labor, if duly applied as a part payment on the creditor's claim against the debtor, may be sufficient to interrupt the running of the statute of limitations.
2. **Evidence** examined and *held* sufficient to sustain the verdict of the jury.

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

*D. O. Dwyer* and *W. L. Dwyer*, for appellant.

*Williams, Beynon & Nye, contra.*

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

CARTER, J.

This is an action to recover on an open account for work and labor. Plaintiff recovered a judgment for $286.25, and defendant appeals.

The evidence shows that plaintiff worked for defendant as a carpenter during the years 1923, 1924, 1925, 1927 and 1928, and that there was due on the account the sum of $297.10, which remained unpaid. Plaintiff commenced his action on November 10, 1937. Plaintiff pleaded certain credits on the account in the years 1931, 1932, 1933 and 1934, which are alleged to have tolled the statute of limitations. It is the contention of the defendant that the work and labor for which the credits were given were performed by his son and without knowledge on his part. The statute of limitations is also pleaded as a defense.

An examination of the record discloses that the evidence as to the facts was in conflict. The jury evidently believed the evidence of the plaintiff and his witnesses. It has long been the rule of this court that the verdict of a jury based on conflicting evidence will not be disturbed. We find no reason for departing from the rule in the case at bar.

It is the contention of the defendant that, if a creditor becomes indebted to his debtor, that fact will not operate as a payment *pro tanto* and toll the statute of limitations, unless there be an agreement between the parties that it shall be so applied.

We think the correct rule is that a credit in favor of a debtor may, if duly applied as a part payment on the creditor's claim against the debtor, be sufficient for the purpose of interrupting the running of the statute of limitations. *Earl v. Napp,* 218 Wis. 433, 261 N. W. 400. It is well established that in the absence of some other direction by the debtor at the time of making a payment, or an agreement with the creditor as to some other application, the latter may apply a payment upon such account against the debtor as he chooses. In *Earl v. Napp, supra,* the court used the following apt language which is applicable to the case at bar: "Usually occasion for resort to that rule arises only when there is a question as to which of several accounts or claims owing by a debtor is to be credited with a payment which he did not apply on any particular one of his

accounts. However, if, under such circumstances, a creditor is authorized, as a matter of law, to apply the debtor's payment or credit to such of the debtor's accounts as the creditor chooses, then, when there is but one account, he is certainly likewise authorized to apply such a payment or credit on that account. Consequently, if, in the case at bar, a question had been submitted, and the jury had found in answer thereto that the delivery of the lime was made under such circumstances that the plaintiff became indebted therefor to the defendant, then, because of the absence of any request by the latter for any other application of his resulting credit, the plaintiff would have been authorized, as a matter of law, to apply that credit, as he did, on the defendant's note."

The trial court properly instructed the jury in accordance with the views herein expressed. The jury decided for the plaintiff on conflicting evidence. This court is powerless to substitute its judgment for that of the jury under such circumstances even if it believed the jury to have been in error.

AFFIRMED.

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NETTIE CUVA, APPELLEE, V. GLENS FALLS INSURANCE COMPANY, APPELLANT.
285 N. W. 917

FILED MAY 26, 1939. No. 30563.

1. **Appeal.** "When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted." *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109.
2. ———. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923.

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

*Gross & Crawford,* for appellant.

*O'Sullivan & Southard, contra.*

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

MESSMORE, J.

This is an action brought in the district court for Douglas county to recover on two fire insurance policies, one on household and personal effects for $1,000, and the other on a dwelling-house for $2,000. The cause of action for damage to the dwelling, which stood in the name of plaintiff's husband, was assigned by him to the plaintiff, in order that the entire matter could be litigated in one case.

Plaintiff sought to recover $637.98 as damages for household furniture and clothing, and $1,216.80 for damage to the house. Defendant admitted the issuance of the two policies and the fact that a fire had occurred, and that some damage resulted therefrom; denied that the damage was of the nature and extent as alleged by plaintiff, and alleged that the fire had been occasioned by the act of procurement by the insured, and that, as a matter of public policy, there could be no recovery therefor. As to the cause of action for the household and personal effects, defendant alleged that, even if the fire had not been incendiary, there could be no recovery because plaintiff had submitted false proofs of loss, claiming destruction of items not contained in the premises at the time of the fire, which would be violative of the provision that the entire policy should be void in case of any fraud or false swearing by the insured, touching any matter relating to the insurance or subject thereto, whether before or after the loss. The jury by a five-sixths verdict found for the plaintiff, allowing $955.65 for damage to the building, and $244.35 for damage to the contents. Defendant appeals.

The evidence discloses the following: Joseph Cuva, 44 years of age, his wife Nettie, and six children, two girls and four boys, ranging in age from 3 to 15 years, lived at 1760 South Ninth street in Omaha, in a modern, 5-room,

frame dwelling, with basement, all rooms situated on one floor. It was purchased in 1926 for $2,600. March 13, 1936, at 6:30 or 7 o'clock in the evening, the entire Cuva family went in an automobile to the home of Joe Italia, a cousin of Joseph Cuva, where they were giving a children's party. Cuva stayed at his cousin's home for about an hour and a half, leaving to return to his own home, where he wrapped a lunch, which had been prepared by his wife, and took a nap for an hour or two. Leaving the house about 9:45, he proceeded to the home of his uncle, Conceto Prestito, who worked part-time at the smelting works subject to call. Prestito's home was about a block from the Cuva home. Plaintiff called her husband by telephone at his uncle's home about 10 o'clock p. m., informing him that the younger child had eaten some ice cream and cake and had become sick, and that the family were staying at the Italia's that night. The Italia home is a 5-room house, with four beds in the house, and the Italias have three children, so, in all, 13 persons were staying in the Italia home that evening. Joe Italia was to bring the Cuva family home, but, due to the child's sickness, Mrs. Cuva requested her husband by telephone to call for the family the next morning. Cuva left his uncle's home about 10:30 p. m., going to the American Smelting & Refining Works plant where he was employed as an electric-crane operator, checking in for work at about 11 p. m. He worked until the next morning at 7 o'clock when he drove directly to his home. He did not enter the house, stating it was too dangerous, as the floor was all burned away. He met one Ormsby, an insurance adjuster, whom he later employed. He went for his wife and children about 9 or 9:30 o'clock and took them to her mother's home.

The fire was of incendiary origin, and this fact is not questioned. The evidence further discloses that there was found in the dining-room a barrel, with about a 40-gallon capacity, half-filled with gasoline; that the level was even with the top of the dining-room table, and that streamers, made of paper and saturated with turpentine and naptha

gasoline, had been placed in such a position that they led into the barrel containing the gasoline; that the barrel was set inside of a galvanized tub; that the barrel was leaky, and the inflammable fluid was apparent on the floor. There is evidence that the Cuvas had a barrel in their yard which they testified was of 15-gallon capacity. Some witnesses fixed the capacity of the barrel, half-filled with gasoline, at 25 to 40 gallons. There is evidence that the ignition of the tapers was caused by some instrument of delayed ignition that had been used and set upon the streamers, and a gas connection, with a number of ends removed, was apparent. The doors and windows were locked, and the locks were presumed to be ordinary locks which a skeleton key would open. There is some evidence of a special lock on the back door. The only ones possessing keys to the house were Joseph and Nettie Cuva. The alarm was received at 1:37 in the morning. The first fire apparatus arrived a minute or so later. The windows and doors were knocked in and water was applied to the flames. The firemen discovered the barrel, half-filled with gasoline, the paper streamers leading to the barrel, and that a trap door leading to the basement from the upper part of the house had been nailed down; that there were no embers in the furnace; that it was cold. Cuva stated that when he left the house he banked the furnace fire.

The origin of the fire was in the dining-room. It had burned out through the ceiling and communicated to the loft in the south bedroom, dropped down between the joists and burned into the basement, and a large hole was burned in the dining-room adjacent to the kitchen. The kitchen was only affected by heat. There was no fire in the southwest bedroom, only heat and smoke. The living-room was scorched, and surface burns appeared on some of the furniture. The wallpaper was scorched, and the south bedroom pretty well scorched.

The evidence further discloses that Joseph Cuva came to this country in 1912, was admitted to citizenship in 1917, attended the Pacific school in Omaha, worked at

different jobs for a period of six or eight months, and has been steadily employed in the smelter since 1926. He has no debts except a doctor's bill and a hospital bill, both aggregating a trifle over $200. Certain repairs were made on the house which are detailed in the evidence. The house is clear of encumbrance, and the taxes are paid.

After the fire Cuva was questioned by the officers. He first stated that he received the telephone call from his wife while at the smelter where he worked; he later stated that he received this call at his uncle's home; that he usually took his uncle to work at the smelter in his car.

The policies of insurance provided for immediate notice in writing to be given the company of any loss, and a signed and sworn statement to be rendered to the company, setting forth the cash value of each item and the amount of the loss thereon. Mrs. Cuva, with the aid and assistance of her husband and children, furnished a list of all the wearing apparel of the family, the furniture, bedding, kitchen utensils, dishes, silverware and glassware that were in the house at the time the house and contents were fired. As a detailed description of the items would unnecessarily lengthen this opinion, some of the wearing apparel may be summarized as follows: Suits of underwear 34; shoes 16 pairs; hose 86 pairs; overalls 24 pairs; dresses 27; shirts 40. The testimony of the chief of the fire department, two fire captains, three firemen, and two members of the arson squad, two adjusters, an upholsterer and furniture dealer was, in effect, that the house contained no such number of items as set forth in the proof of loss submitted by the plaintiff; that not more than 15 items of clothing were found in the house. All of such clothing was contained in the drawers of a dresser in the dining room, in a chifforobe in one bedroom and on some hangers on a cross-pole in a bedroom. None of the articles was in any way touched by fire. The dresses on the cross-poles had been scorched but not burned. There were no pillow cases, sheets or other bedding, and the mattresses on one bed and a child's crib had been burned. A few dishes and a small amount of

silverware were found in the home. The proof of loss provided for two dozen plates, two dozen cups and saucers, two dozen glasses, and two dozen silver forks. There was a discussion about a radio being in the house at the time of the fire; defendant's witnesses stating that there was no radio in the house at the time. The only food found in the house was a part of a loaf of bread, a part of a bottle of catchup, and a small amount of flour in a canister. The explanation given for the scarcity of food was that Mrs. Cuva generally did her buying for the family on Saturday night, when she could obtain better bargains. The greater weight of the evidence clearly discloses that the number of articles found in the house at the time of the fire is, to a great degree, less than the amount as claimed in the proof of loss. Mrs. Cuva and Mr. Ormsby testified as to religious and other pictures hanging on the walls of the house and being seen, before and after the fire, by the parties. Defendant's witnesses testified that there were no such pictures as claimed by the plaintiff.

The following rule of law is applicable to the situation as disclosed by the record:

"A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923. To the same effect is *Hoffman v. McKeen Motor Car Co.*, 95 Neb. 238, 145 N. W. 257.

"When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted." *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109; *Exchange Bank v. Gifford*, 102 Neb. 324, 167 N. W. 69; *Peterson v. Omaha & C. B. Street R. Co.*, 131 Neb. 676, 269 N. W. 510; *Id.*, 134 Neb. 322, 278 N. W. 561. See, also, *Atwater v. Sellers*, 122 Neb. 118, 239 N. W. 629.

It is unnecessary to discuss other assignments of error,

in view of our holding. It follows that the judgment of the district court should be and is reversed and the cause remanded for a new trial.

REVERSED.

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STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, APPELLEE, V. JOHN A. MAGUIRE, APPELLANT.
285 N. W. 921

FILED MAY 26, 1939. No. 30660.

1. Judges. Municipal courts are provided for in the Constitution of Nebraska by virtue of the authority therein granted to establish, by law, other courts inferior to the supreme court.
2. ———. Vacancies in the office of judge of the municipal court in this state are to be filled as provided in section 21, art. V of the Constitution.
3. ———. Section 22-102, Comp. St. 1929, construed, and *held* to designate who shall exercise appointive power, but does not fix term of appointment.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, ELLWOOD B. CHAPPELL, JEFFERSON H. BROADY and JOHN L. POLK, JUDGES. *Affirmed.*

*Sam C. Zimmerman* and *Otto K. Perrin*, for appellant.

*Walter R. Johnson, Attorney General, John L. Riddell, Rush C. Clarke, C. S. Beck, Sterling F. Mutz, Bernard S. Gradwohl* and *R. W. Devoe, contra.*

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

KROGER, District Judge.

The question presented by this appeal is whether an appointment to fill a vacancy in the municipal court of the city of Lincoln is for the unexpired term or until the next election at which the vacancy can be filled.

The undisputed facts as disclosed by the record are that, at the general election in 1936, John L. Polk was elected municipal judge for the ensuing term of four years, commencing January, 1937. In the fall of 1937,

John L. Polk was appointed to the district bench and resigned as municipal judge. On December 31, 1937, the appellant, John A. Maguire, was appointed municipal judge of the city of Lincoln, after a previous appointee had resigned. The appointment by the governor, under date of December 31, 1937, was "for a period not exceeding January, 1941." In the spring of 1938, Edward C. Fisher, the appellant, and others filed as candidates for said office at the primary election, and appellant and Edward C. Fisher were the successful nominees. At the election in November, 1938, Edward C. Fisher received the highest number of votes and was declared elected. Appellant thereupon refused to surrender his office and two actions were commenced by the attorney general, one praying for a writ of mandamus directing appellant to surrender the books, records and office of judge of the municipal court of the city of Lincoln, and the other seeking to enjoin him from performing the functions of that office pending a determination of the controversy. These actions were later consolidated and trial was had before the four judges of the district court in and for Lancaster county, Nebraska, sitting en banc, and the judgment of the trial court was in favor of the plaintiff. From this judgment and the overruling of his motion for new trial, John A. Maguire appeals.

It is the contention of the appellant that since section 22-102, Comp. St. 1929, provides that "Any vacancy in the office of the judge of the municipal court shall be filled by appointment in the same manner as judges of the district court," it not only means that they are to be appointed by the governor, but they are also to be appointed for the unexpired term.

It is the contention of appellee that section 21, art. V of the Constitution of Nebraska, definitely disposes of this controversy in that it provides that vacancies in the office of any judge of the supreme court or of any district court shall be filled by appointment by the governor for the unexpired term, and that "Vacancies in all other elective offices provided for in this article shall be filled by election.

but when the unexpired term does not exceed two years the vacancy may be filled by appointment in such manner as the legislature may provide."

There is some confusion as to the correct wording of section 21, art. V of the Constitution of Nebraska. According to the engrossed copy prepared after the proposed amendments had been submitted and voted upon by the people, said section reads: "Vacancies in all other elective offices shall be filled by election." From an examination of the original proposal, which was proposal 313, section 18 of the Constitutional Convention, we find that the words "provided for in this article" follow immediately after the word "offices" and reads as follows: "Vacancies in all other elective offices provided for in this article shall be filled by election." This proposal, in its original form, was voted upon and passed by the Constitutional Convention and was submitted to the people and adopted in that form, and it was after the adoption of the amendment that the words "provided for in this article" were erroneously omitted from the Constitution, and that portion of section 21 should read "Vacancies in all other elective offices provided for in this article shall be filled by election."

Appellant argues that, since municipal courts are not mentioned in the Constitution, they are not provided for by the Constitution, and that consequently the office of municipal judge is not included in the provision "Vacancies in all other elective offices provided for in this article shall be filled by election," but, being a legislative office, is governed by the applicable statutes. This view does not appear to be tenable.

By section 1, art. V of the Constitution, all judicial power is 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." While municipal courts are not specifically mentioned, the authority for the establishment of the same is clearly contained in the provision "and such other courts inferior to the supreme court as may be created by law." That was the holding of this

court in the case of *State v. Hunter,* 99 Neb. 520, 156 N. W. 975, by virtue of a similar provision in the Constitution of 1875. Can it be said that the Constitution makes provision for the creation of a municipal court, but that such court is not "provided for" by the Constitution? The answer is obvious.

Thus, it was held in *O'Donoghue v. United States,* 289 U. S. 516, 53 S. Ct. 740, that section 1, art. III of the United States Constitution, makes provision for the supreme court and the court of appeals of the District of Columbia, although there, as in our state Constitution, such courts are not specifically mentioned, but are held to be provided for under the authority granted congress to establish courts inferior to the supreme court of the United States.

And in the case of *People v. Rucker,* 5 Colo. 455, where a question almost identical with the one presented here was before the court, that court used the following language: "We are asked to say that 'provided for' means created or established, and that it includes only the courts created and established by the article. This would be substitution, not interpretation." See, also, 15 C. J. 854.

We are convinced that the municipal courts are provided for within the meaning of section 21, art. V of the Constitution of Nebraska, and that vacancies in said courts are to be filled as by said section provided.

In this case, the unexpired term at the time of appellant's appointment exceeded two years and, in accordance with the constitutional provision, it was to be filled by election, and any statute attempting to provide a different method of filling the vacancy would be invalid.

We do not, however, hold that section 22-102, Comp. St. 1929, is unconstitutional. If it were to be construed as appellant contends for, it would be unconstitutional. But it is not necessary to so construe it, and we interpret that section to designate who has the appointive power, and that it does not attempt to fix the term of the appointment.

The judgment appealed from is

AFFIRMED.

ALLEN GETTY, APPELLEE, V. NORTH RIVER INSURANCE COMPANY, APPELLANT.
286 N. W. 271

FILED JUNE 2, 1939. No. 30445.

1. **Insurance.** When the finding of the jury in an action on a fire insurance policy on an issue of fraud by plaintiff's alleged intentional overvaluation of the insured property is against the insurance company on the merits, the question whether the answer states a defense becomes moot.
2. **Evidence** examined and *held* sufficient to sustain the verdict of the jury.

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

*Wright, Wright & Kennedy* and *Stanton & Stanton,* for appellant.

*Fischer, Fischer & Fischer* and *W. T. Thompson, contra.*

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

CARTER, J.

Plaintiff commenced this action to recover on two fire insurance policies issued by the defendant. From a verdict and judgment for $2,700 the defendant appeals.

The evidence discloses that on December 16, 1936, the defendant issued a fire insurance policy in the amount of $2,000 on a one and one-half story cement block veneer dwelling-house located in Stromsburg, Nebraska, which was totally destroyed by fire on January 2, 1937. On July 23, 1936, the defendant insured the household goods in the above described dwelling in the amount of $700.

The defendant admits the issuance of the policies, the payment of the premiums thereon, and total destruction of the property by fire. Defendant alleges as a defense that plaintiff and defendant's agent, John H. Getty, the son of plaintiff, conspired to fraudulently overvalue the house at the time the policy was issued; and that, when the fire started, plaintiff and his son intentionally delayed giving the fire alarm for an unreasonable period of time, which

resulted in a complete loss of the dwelling and its contents.

It is the contention of the plaintiff that the valued policy law, Comp. St. 1929, sec. 44-344, is a bar to the pleading and proving as a defense that fraud was perpetrated on the insurance company by intentionally overvaluing the dwelling. In support of this contention plaintiff cites the cases of *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313; *Fadanelli v. National Security Fire Ins. Co.*, 113 Neb. 830, 205 N. W. 642; *United States Fire Ins. Co. v. Sullivan*, 25 Fed. (2d) 40. We do not feel any necessity to discuss this point, or the cases cited in support thereof, in view of the issues submitted to the jury and their findings thereon.

The evidence of the defendant shows that plaintiff purchased the dwelling-house in question about fourteen months before it burned for the sum of $500. There is evidence also that plaintiff made certain repairs and improvements of the approximate value of $150. Plaintiff testifies that the value of the dwelling was $3,000. An agent of another insurance company which had insured the dwelling against fire in the amount of $2,000 testified that he inspected the house and in his opinion it was worth $2,500 to $3,000. This evidence presented a question of fact for the jury, and we find no reason for interfering with their conclusion on this question.

There is evidence on the part of Audrey Jurgens, the housekeeper, that John H. Getty discovered the fire and delayed turning in the fire alarm by driving slowly toward the main part of town. John H. Getty testifies that he tried to turn in an alarm by telephone and found the telephone out of order. He testifies that he drove toward town as fast as weather conditions would permit, but due to wind, snow and poor condition of the road he was unable to drive as fast as usual. There is also evidence in the record on the part of the housekeeper, indicating that John H. Getty was guilty of setting fire to the house. This evidence is disputed by John H. Getty. The verdict of the jury conclusively disposes of these questions of fact.

The defendant complains of the refusal of the trial court

to instruct the jury that the value of plaintiff's dwelling-house was to be determined by its value upon the open market and not by the cost of replacement. The trial court properly refused this instruction. If the plaintiff was entitled to recover, the only verdict that could be properly returned is one for the face amount of the policy as provided by the valued policy law. Comp. St. 1929, sec. 44-344.

All questions of fact having been resolved against the defendant by the jury, and there being sufficient evidence to sustain the verdict, the defendant's contention as to the facts is concluded thereby. We have examined all questions of law raised by defendant, and conclude that the record is free from prejudicial error. An attorneys' fee of $100 is allowed plaintiff as costs for the services of his attorneys in this court.

AFFIRMED.

PAINE, J., dissenting.

I find myself absolutely unable to agree with the opinion adopted by the majority of the members of the court in this case, and therefore respectfully dissent.

This case is difficult, for it was first argued to the court on November 22, 1938, and a reargument was ordered on March 21, 1939.

It appears to me that the verdict returned by the jury is not supported by the facts in the case, and I will briefly review the evidence.

Action was brought on two policies of fire insurance, viz., $2,000 upon a dwelling, and $700 upon the furniture therein. The jury returned a verdict for the full amount on each policy, and the court taxed attorney's fees of $200. Defendant appeals.

The defense, as set out in the answer, was that the plaintiff conspired with his son, who was the local agent of the defendant company at Stromsburg, Nebraska, to cheat, wrong, and defraud said company, and that said son represented to the company that said dwelling-house was of the value of $3,000, when the value of the same did not exceed $500, which sum the plaintiff had a short time before

paid for the real estate; that because of such false representations this defendant was deceived, and did believe the dwelling was of the value of $3,000, as represented; that had the defendant known the real value of the real estate it would not have issued the policy; that the defendant believed said false representations, relied upon them, and because of said fraud said policy never became a valid and binding obligation, and the defendant tenders into court the amount of the premium paid therefor.

It is further alleged in said answer that the plaintiff had knowledge of said fire and needlessly and purposely delayed giving notice or any alarm to the fire department of the city of Stromsburg for an unnecessary length of time, and until said fire had progressed to such an extent that said building could not be saved, thereby causing its total destruction, when a large part thereof could have been saved had prompt notice been given.

The plaintiff identified the policy of the defendant company, which was issued at Stromsburg, Nebraska, under date of December 16, 1936, by his son, J. H. Getty, as agent, and signed by his son. He also identified the policy for $700 upon the household effects.

The evidence discloses that no taxes had been paid upon this real estate since 1927, and that, of the $500 paid by Dr. Getty, the purchaser, over $300 was applied to delinquent taxes, and less than $200 paid to the estate which owned the property.

Upon cross-examination the plaintiff testified that he had purchased the property about a year and two months before it burned, and that it was about 22 years old. He testified that he asked his son to insure the property, as his son was agent for the defendant company; that they talked over the matter and inserted the value of the house at $3,000 in the application, as that was what they thought the building would be worth to build, and plaintiff testified that he asked for insurance in the amount of $2,000. Plaintiff testified that his son lived in the house, and they both ate there, but that he slept at his office; that after he

bought the place he repaired the roof in spots, doing some of the work himself, and put in electric lights, and had the house papered and painted. Plaintiff testified that at the time he purchased the house he understood it was being rented for $5 a month. He testified, when recalled to the stand, that on the morning of the fire he did not try to use the telephone from his office before going over to the telephone office to turn in the alarm.

J. H. Getty testified that he was the son of the plaintiff, Allen Getty; that he was in the law and insurance business; that when he wrote the application for his father he placed the actual value upon the premises of $3,000; that it would cost more than that to replace the house. He sent in the report and application, and the company sent out the policy to be signed and delivered.

He testified that he got out of bed about 4 a. m. to put more wood in the heating-stove, and went back to bed and dozed off, and was awakened by the smell of smoke.

He testified that he first discovered the fire in the dining-room; that the telephone was in the dining-room, and he could not get to it to report the fire; that he closed the dining-room door as he saw the fire, but the smoke had thickened up awfully fast, and there was a lot of crackling in the dining-room, that it was a stormy morning, lots of snow and quite a lot of wind; that he honked his horn all the way down-town; that he grabbed the telephone in his father's office, but the telephone would not work; that he did not think of stopping at the telephone office to report it on the way down.

He testified that his father dressed, and then backed his car out of the garage adjoining his office, and drove around to the telephone office; that he drove around also, but brought the housekeeper and her little boy back to his father's office to stay, and he and his father both drove out to the fire; that when he got there the fire chief was right in the flames, with the chemical hose, doing all he could; that the closest hydrant was two blocks away, and they did not use the water hose. He said he was driving

a Lincoln sedan, and did not waste any time getting downtown.

On cross-examination he said the defendant company does not ask the applicant to sign the application, so he signed it.

J. L. Johnson, who sold the property to the plaintiff, testified that it was rented for $5 a month at the time it was sold; that it was sold to settle his brother's estate; that at first he had carried $1,500 of insurance on the place, but the last time they had it insured it was cut down to $1,000 on the house and $75 on the barn.

Dr. Roy L. Minnick testified that he went to the fire about 5 a. m.; that when he arrived the basement was all on fire; that he could not see any fire upstairs in the house.

James Farris, the chief of the fire department, testified that the telephone central called him at 5:15 a. m.; that the fire alarm can be turned in at the central telephone office or at the fire station; that when he got out there, there were 10 or 12 people there; that in his opinion the fire started in the basement.

Charles Barber testified that he was engaged in the real estate business at Stromsburg for 20 years; that in his opinion the Getty property was worth $400 on January 2, 1937, which price included the land and the other buildings; that the house itself was probably worth $300; that if the house had been wired for electricity and a new cesspool constructed it would increase the value of the property about $100.

Exhibit No. 10 showed that it was ten blocks from the Getty house to the fire department, where alarm could be made, and that, by driving from the Getty house, over the route J. H. Getty took on the morning of the fire, to his father's office, and then his father driving back to the telephone office, it made a trip five and a half blocks farther to turn in the alarm than would have been necessary if Halsey had turned in the alarm at the telephone office on his way down to his father's office.

The defendant introduced in evidence the deposition of

the housekeeper who was living at the house the night it burned. A brief summary of her testimony on direct and cross-examination is as follows: She was 22 years of age, and had a son five years of age, who was with her at Stromsburg. She testified that she was employed by Allen Getty, the plaintiff, as housekeeper, and that the plaintiff got his meals at the house some of the time, and got supper there the night before the fire, but did not sleep there; that his son, J. H. Getty, whom she called Halsey, slept at the house nights. She had been in the employ of plaintiff for about three months before the fire. She described the small amount of odd pieces of furniture in each room. She testified that a week before the fire Halsey took out two chairs, and also the library table and radio; that in the basement there was a large amount of cordwood, and that they used wood in the cookstove.

She testified that the fire occurred on January 2, 1937; that Halsey was at the house for supper, then went uptown, and came home about 9 o'clock, and proceeded to get intoxicated on wine, of which he drank almost a quart; that it was the first time she had seen him intoxicated; that three or four days before the fire Halsey brought home about a pint of kerosene; that it was in a whisky bottle, and was not labeled kerosene, but that she picked it up and smelled of it a day or so later; that he had left it standing on the basement steps.

She testified that she heard Halsey get up about 20 minutes before the fire started, but she did not know where he went, and 10 or 15 minutes later he told her he smelled smoke; that she got up, and there was smoke coming through a hole in the floor, under the bed, from the basement; that she immediately took her little boy, who was sleeping with her, and her coat, and went out the kitchen door to the garage; that the smoke was coming up around and under the door to the basement; that Halsey made about three trips back into the house, and brought out four or five of her dresses to the car, a typewriter, and a couple of quilts, and that after the fire she noticed that the washing-

machine, which had been kept on the porch, was off of the porch. He then got in the car and they started for town. She testified that she could see the fire in both basement windows as they drove by, but saw no fire in the upstairs or in the dining-room; that he usually drove very fast, but that this night he drove at a slow rate of speed, in fact, the slowest she had ever seen him drive; that he drove to the office of his father, the plaintiff, and went in and left her and her boy out in the car; that she could look in the window, and that while he and his father were there talking the son tried to use the telephone; that after five or ten minutes the plaintiff backed his car out and drove down to the telephone office; that it was almost half an hour from the time she first knew of the fire until they got to the plaintiff's office. She said that the two chairs Halsey took out of the house about a week before had been taken downtown to get them glued or repaired, and that they had been brought back, and were out in the garage the morning of the fire, and that he said the radio was taken down to be repaired; that they did not honk the horn coming into town, but when they started from the plaintiff's office to the telephone office the horn was honked, and that as soon as they got to the telephone office the alarm was turned in. She testified that she stayed at the plaintiff's office, and around 8 o'clock Dr. Getty came back to his office and used the telephone, and that it worked all right, and that no one had worked on the telephone from the time she first got there until plaintiff used it.

In the case of *Cuva v. Glens Falls Ins. Co., ante,* p. 359, 285 N. W. 917, this court reversed a verdict and judgment on two fire insurance policies, and held:

" 'When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted.' *Dunbier v. Day,* 12 Neb. 596, 12 N. W. 109.

" 'A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been

found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded.' *Garfield v. Hodges & Baldwin,* 90 Neb. 122, 132 N. W. 923."

The plaintiff bases his action upon the valued policy law, section 44-344, Comp. St. 1929. Aside from the valued policy law, there are four other sections of our statutes which apply directly to the case at bar:

"It shall be unlawful for any insurance company or any agent to knowingly issue any fire insurance policy upon property within this state for an amount which, with any existing insurance, exceeds the *fair value* of the property or of the interest of the insured therein, or for a longer time than for five years, except as provided in section 11 of article X (44-911)." Comp. St. 1929, sec. 44-701.

"It shall be unlawful for any party having an insurable interest in property located in this state to knowingly procure any fire insurance policy upon his interest in such property, for an amount in excess of the fair value of his interest in the property, or for an amount which, with any existing insurance thereon, exceeds the fair value of his interest in the property." Comp. St. 1929, sec. 44-702. See, also, Comp. St. 1929, sec. 44-703.

" 'Over-insurance' exists where a party having an insurable interest in property has insurance thereon against the same hazard or peril in *excess* of the *actual value of his interest therein.*" Comp. St. 1929, sec. 44-102.

"Intentional misrepresentation of the value of the property insured as would influence the insurer, and without which the policy would not have been issued, renders it void and it is immaterial whether the policy is a valued or open one." 14 R. C. L. 1050, sec. 227.

Chief Justice Marshall, in the case of *Armstrong v. Toler,* 11 Wheat. 258, 6 L. Ed. 468, laid down the rule in this language: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled, than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law."

"It is, therefore, ordinarily true that the principal is bound by knowledge of such facts as come to the agent in the course of the business. But where the company's agent violates his trust, and colludes with the applicant to cheat and defraud the principal, the applicant cannot avail himself, as against the insurer, of the agent's knowledge in reference to matters to which the cooperation for the fraudulent purpose relates. And it makes no difference whether the acts done in fraud of the principal are intended to promote merely the interest of the applicant or the common interest of the applicant and the agent, for in neither case are such fraudulently concerted acts binding upon the person intended to be defrauded, and the same rule applies whether the agent conspires with the assured to defraud the company by false statements, or whether the act of the applicant is merely permissive. It is sufficient that the latter assents that the agent may insert the false statements in the application, both knowing them to be false; nor can the assured, with knowledge of the extent of an agent's authority, obtain any benefit from a contract made in excess of his authority by collusion by such agent." 2 Joyce, Law of Insurance (2d ed.) 1235, sec. 504. See, also, *Morrissey v. Travelers Protective Ass'n,* 122 Neb. 329, 240 N. W. 307; *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146, 187 N. W. 787.

The "fair value" of property is the amount for which such property can be sold in the market, and is not the cost of replacing the building by construction of a new building of like size and type.

Actual cash value, within the meaning of that term in the standard form of fire insurance policy, is the market price of the insured property at the time of the fire, and where there is no established market price, the market price must be estimated at such amount as in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Butler v. Aetna Ins. Co.,* 64 N. Dak. 764, 256 N. W. 214.

In *Seal v. Farmers & Merchants Ins. Co.,* 59 Neb. 253,

80 N. W. 807, it is said: "The representations of the applicant become the basis of insurance, and if they be false, touching matters material to the risk, the contract obtained through their influence cannot be enforced." See, also, *Gould & Kennard v. Kendall & Smith,* 15 Neb. 549, 19 N. W. 483; *Chapman v. Meyers,* 84 Neb. 368, 121 N. W. 245; *Towle v. New York Life Ins. Co.,* 121 Neb. 175, 236 N. W. 439.

"It is held that a gross exaggeration of the value prevents a recovery, and fraudulent overvaluation avoids. And, if the owner of property insured knowingly exaggerates the value of the property to an amount far beyond the cost price and the market value, and the insurer relies upon the statement of such excessive value in entering into the contract, such valuation is a conclusive presumption of fraud, sufficient to annul the contract." 1 Joyce, Law of Insurance (2d ed.) 420, sec. 162.

The plaintiff stands on the proposition that the valued policy law is a bar to the pleading and proving as a defense that fraud was perpetrated on the company by intentionally overvaluing the property.

In *Orient Ins. Co. v. Daggs,* 172 U.S. 557, 19 S. Ct. 281, Justice McKenna, in discussing the valued policy law, said: "It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done,—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. *Its presumptions cannot be urged against fraud,* and it permits the subsequent depreciation of the property to be shown. We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property."

The valued policy law of Washington was set up as a defense when an over-insured dwelling-house burned, with a $600 policy in force which the owner had promised to

cancel when he took out a $1,500 policy, but failed to keep his promise. The court reversed a judgment for plaintiff, and said: "We are of the opinion that this means only that the damages suffered by the insured, upon a total loss of the insured structure, shall be measured by the amount specified in the policy, when there is a valid enforceable insurance contract; and that it *does not prevent the company from setting up fraud and misrepresentation by the insured* as to the value of the structure, inducing the issuing of a policy in an excessive amount, for the purpose of avoiding the insurance contract. Of course, to successfully avoid a policy because of fraud so grounded would require a very clear case of misrepresentation and inducement." (Italics ours.) *Myles v. Northern Assurance Co.*, 113 Wash. 158, 193 Pac. 703. See, also, *Quisenberry v. National Fire Ins. Co.*, 132 Neb. 793, 273 N. W. 197.

It is my opinion that gross overvaluation, fraudulent misrepresentation, and concealment may be alleged as a ground for contesting the valuation notwithstanding an incontestable clause of a valued policy law. 1 Joyce, Law of Insurance (2d ed.) 436, sec. 163c; 1 Couch, Cyclopedia of Insurance Law, sec. 74c; 14 R. C. L. 1050, sec. 227; 8 Couch, Cyclopedia of Insurance Law, sec. 2151; *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, 187 N. W. 787.

Defendant insists that the evidence clearly establishes the fact that there was an unreasonable and unwarranted delay in reporting the fact that the property was on fire, which delay was sufficient to give the fire such a start that it could not be put out by the fire department under any circumstances, and this misconduct on their part is sufficient to bar recovery on the policy in this case.

A case in point is *Phoenix Ins. Co. v. Mills*, 77 Ill. App. 546. We have the case of a locked storehouse being on fire, filled with groceries. It was about 11 p. m. A number of men, some with buckets of water, gathered about the place, but plaintiff refused to unlock the door, stating that his goods were insured and he wanted pay for them. A judgment for plaintiff was reversed, and it was said:

"While nonfeasance by the insured may be culpable negligence, preventing others from extinguishing a fire is actual malfeasance, and will prevent a recovery under a policy of insurance by the wrong-doer."

In the March term, 1849, the court of Massachusetts had before it the case of *Chandler v. Worcester Mutual Fire Ins. Co.*, 3 Cush. 328, in which the lower court had held that evidence of gross negligence and carelessness and gross misconduct of the plaintiff as the cause of the destruction of the building would not constitute a defense to the action, and rejected the evidence. Chief Justice Shaw, in granting a new trial, said that, if an assured sees burning coals roll down to the wooden floor and he does not brush them up, it would be nonfeasance. It would not prove an intent to burn the building, but it would show culpable recklessness and indifference to the rights of others. Also, suppose the flame would begin to kindle in a small spot which a cup of water would put out, and the assured has the cup of water at hand, but neglects to put it on, this is culpable negligence. Then follows this statement: "The doctrine of the civil law, that *crassa negligentia* was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration, that, although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slighest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury."

It is my opinion that the verdict returned by the jury in this case is contrary to the evidence and to the law, and that this court announced the true guide in *Cuva v. Glens Falls Ins. Co., supra*: " 'When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted.' *Dunbier v. Day,* 12 Neb. 596, 12 N. W. 109; *Exchange Bank v. Gifford,* 102 Neb. 324, 167 N. W. 69; *Peterson v. Omaha & C. B. Street R. Co.,* 131 Neb. 676, 269 N. W. 510; *Id.,* 134

Neb. 322, 278 N. W. 561. See, also, *Atwater v. Sellers*, 122 Neb. 118, 239 N. W. 629."

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DEPARTMENT OF BANKING, APPELLANT, V. RALPH HEDGES ET AL., APPELLEES. ISAAC KURTZ ET AL., APPELLEES.
286 N. W. 277

FILED JUNE 2, 1939. No. 30575.

1. **Banks and Banking.** The department of banking, created by legislative enactment (Laws 1933, ch. 18; Laws 1935, ch. 16), is a legal entity, and by section 8-1,130, Comp. St. Supp. 1937, as receiver and liquidating agent of an insolvent bank, has full right and lawful authority forthwith, by a proceeding in court, to prosecute an action to collect constitutional stockholders' liability for benefit of creditors.
2. **Constitutional Law**: CONSTRUCTION. "The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense, and while the Constitution, as amended, must be construed as a whole, still where the words employed in a constitutional provision are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning, for courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed." *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N. W. 772.
3. **Banks and Banking**: INSOLVENCY. The term "adjudged," as used in section 7, art. XII of the Constitution, as amended in 1930, in part as follows: "The stockholder shall become individually responsible for the liability hereby imposed, immediately after any such banking corporation, or banking institution shall be adjudged insolvent," is not conclusive in that a judicial adjudication of insolvency is required, but also includes the right of the superintendent of banks to declare a banking corporation or banking institution insolvent (Comp. St. Supp. 1937, sec. 8-190), especially so in the absence of language in the constitutional amendment requiring a judicial adjudication.
4. ———: RECEIVERSHIP. The term "receiver," as used in section 7, art. XII of the Constitution, as amended in 1930, in part as follows: "The receiver of said corporation or institution shall have full right and lawful authority, as such receiver, forthwith to proceed by action in court to collect such liabilities," is

not conclusive in that it means only a judicial receiver appointed by the court, but includes the department of banking as receiver and liquidating agent of an insolvent banking corporation or institution.

5. ———. Section 8-1,130, Comp. St. Supp. 1937, using the same language as appearing in section 7, art. XII of the Constitution of Nebraska, as amended in 1930, except that, in place of the word "adjudged" the word "declared" is used, and in place of the word "Receiver" the words "Department of Banking as Receiver and Liquidating Agent" are used, provides for an expedient means to enforce collection of stockholders' liability, and is remedial and procedural only, not affecting the substantial rights of the parties and always within the control of the state.

6. Constitutional Law. Article 1, ch. 8, Comp. St. Supp. 1937, does not change the liability nor affect the substantial rights of stockholders in banking corporations in this state. The changes occurring therein since defendants acquired their stock relate merely to procedure or remedy, and such methods of procedure, which do not affect the substantial rights of the parties, are within the control of the legislature and are not violative of section 10, art. I of the Constitution of the United States.

7. ———. No vested rights are impaired by statutory provision which creates a remedy for an existing right.

8. ———. Article 1, ch. 8, Comp. St. Supp. 1937, creating the department of banking and granting to it supervision and control of banking, is not unconstitutional as an attempt to delegate judicial power to such department, and does not confer such power.

9. ———. Statutes conferring upon the department of banking and superintendent thereof quasi-judicial powers and duties are not unconstitutional as an encroachment upon the judicial branch of the government, where such powers and duties relate to matters which are peculiarly affected with public interest, or are subject to regulation under police powers, and where provision is made for appeal from the decisions of such agencies to the courts.

10. ———. Sections 8-190, 8-192, 8-199, 8-1,131, 8-1,133, 8-1,132, Comp. St. Supp. 1937, set out in the opinion, analyzed and examined, and *held* not to constitute a delegation of judicial power to the executive department or provide for executive adjudication of controversies, but specifically provide that, when exercise of judicial power is required to effectuate performance of various administrative functions necessary to liquidation, the judicial power is invoked and the statutes so require.

11. ———. The creation of an administrative receivership of insolvent banks by legislative enactment (Laws 1933, ch. 18) does

not interfere with or take from the court supervision of the administration of trusts or the exercise of equity powers of the court in this respect, especially so when the statute provides for judicial administration and supervision as a matter of public policy; and such provisions of the statute do not constitute an encroachment upon judicial power, in violation of section 1, art. II of the Constitution of Nebraska.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Reversed.*

*Robert H. Downing* and *Harold Johnson,* for appellant.

*Perry, Van Pelt & Marti* and *Butler & James, contra.*

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

MESSMORE, J.

The department of banking of the state of Nebraska, statutory receiver and liquidating agent of the Indianola State Bank, insolvent, brought this action in equity in the district court for Red Willow county, Nebraska, and by amendment to its petition filed April 21, 1938, alleged full right and authority to bring and maintain the suit. The action proceeds against defendants Kurtz and Lord, to determine the liability of each defendant and the amount to be contributed by him to the unpaid liabilities of the bank and for judgment to be entered against them for such amounts. The amended petition sets forth the liabilities of the bank and contains the following allegations: That the assets will be insufficient to pay the liabilities; that the bank was insolvent in January, 1934, which fact was admitted by the officers thereof who failed to restore solvency; that the bank was adjudged insolvent by the superintendent of banks January 15, 1934; that defendants, having full knowledge thereof, made no objection thereto; that the receiver then proceeded to liquidate the affairs of the bank under article 1, ch. 8, Comp. St. 1929, as amended in 1933; that creditors' claims were filed, classified and allowed, including claims of defendants Kurtz and Lord;

that dividends were ordered withheld on defendants' claims pending payment of their stockholders' liability; that defendants filed a petition in the district court, demanding payment of their dividends, and, pursuant to a stipulation of the parties and order of the court, furnished bonds, conditioned for the payment of their liabilities as such stockholders when determined, and dividends were paid to defendants; that the district court approved compromise settlements of doubtful assets of the bank, sales of real and personal property, and settlement of superadded liability of its stockholders, and made distribution of four dividends to its creditors.

The trial court sustained a demurrer to plaintiff's amended petition on several grounds. Plaintiff elected to stand upon its amended petition and not to plead further, resulting in a dismissal of the action, from which plaintiff appeals.

The first ground of the demurrer attacks the capacity of the plaintiff to bring and maintain this action. Plaintiff cites and relies on article 1, ch. 8, Comp. St. Supp. 1937, incorporating Senate File No. 263, passed by the 1933 session of the legislature (Laws 1933, ch. 18)—a comprehensive banking act creating a department of banking, superseding the department of trade and commerce, and providing for the regulation, supervision and control of going banks and the liquidation of insolvent banks, with resort to the judicial arm of government, as provided by the act.

*State v. Hoskins State Bank,* 132 Neb. 878, 273 N. W. 834, filed June 11, 1937, is cited by the defendants on the proposition: "The Department of Banking has no legal existence and therefore no capacity to prosecute this action." In the cited case the then attorney general applied to the district court to discharge a judicial receiver, appointed as such, and to substitute in such receiver's place a statutory receiver, as evidenced by article 1, ch. 8, Comp. St. Supp. 1937. Under the act there was no statutory authority for such receiver to act or accept an appointment as judicial

receiver. The opinion stated (p. 881): "It would seem that to make valid the appointment of an entity other than a natural person as a judicial receiver, such entity must be legally qualified by statute to be so appointed" and by strict construction of the statutes involved the court so decided. The power of the department of banking to sue was not an issue in the case. The word "entity" means a real being, existence. "Legal entity," therefore, means legal existence. The department of banking is a creature of statute. Under the statute its existence is perpetual, although its membership may change, and under the act it is charged with important duties. It has a superintendent of banking and other assistants, as shown by the act. It, therefore, has a legal existence. (The method of liquidating banks in Nebraska has always been provided by statute.)

In the case of *State v. State Bank of Minatare,* 123 Neb. 109, 242 N. W. 278, the court pointed out an avenue whereby the legislature might provide a method of centralized and unified liquidation by the creation of an administrative board, with powers to liquidate the affairs of insolvent state banks, independent of the judiciary, resulting in the passing of Senate File No. 263 by the 1933 session of the legislature.

The capacity of state agencies created by legislative act to maintain suit is expressed in *In re Burk,* 66 Ind. App. 435, 118 N. E. 540, where the industrial board, created by statute and expressly authorized to sue, was an agency of the state government and such a legal entity as could sue to recover a penalty provided for in the workmen's compensation act, the benefit inuring to the state. See, also, *Albert v. Milk Control Board,* 210 Ind. 283, 200 N. E. 688; *State v. Bates,* 317 Mo. 696, 296 S. W. 418.

In the title to chapter 18, Laws 1933, appears the following language: "To provide for the prosecution and defending of any and all suits by the Superintendent of Banks in the name of the Department of Banking, the delinquent bank or in his own name as Superintendent of Banks * * * and empower the Department of Banking as receiver and

liquidating agent of insolvent banks to enforce the constitutional provisions relative to stockholders' liability." See section 8-1,130, Comp. St. Supp. 1937, and, as to prosecution and defending of all suits as outlined in the title of the act, see section 8-1,129, Comp. St. Supp. 1937. The supreme court of Nebraska has recognized the right to sue by the superintendent of banks.

In *Department of Banking v. Walker*, 131 Neb. 732, 269 N. W. 907, the department of banking brought a suit as receiver and liquidating agent. The case of *Department of Banking v. Flotree*, 135 Neb. 416, 281 N. W. 857, was an action at law on contract, guaranteeing payment of the creditors and depositors of the bank named. It was therein held: "Plaintiff possessed ample powers to bring and maintain this action,"—citing *Department of Banking v. Walker, supra.* See, also, *Luikart v. Bunz*, 125 Neb. 867, 252 N. W. 473; *Farmers State Bank v. Luikart*, 131 Neb. 692, 269 N. W. 627; *State v. Odd Fellows Hall Ass'n*, 123 Neb. 440, 243 N. W. 616.

In 9 C. J. S. 170, sec. 88, it is said: "Under constitutional or statutory authorization, an action to enforce the stockholders' liability may properly be brought by a state superintendent or commissioner of banks liquidating the affairs of the bank."

We conclude that the department of banking, as created by chapter 18, Laws 1933, is such a legal entity as may be expressly authorized and empowered, by virtue of said act, to sue to enforce collection of stockholders' liability.

The demurrer was sustained further on the ground that the action was prematurely brought, and that there had not been an adjudication of insolvency of the Indianola State Bank, as required by the 1930 constitutional amendment.

Defendants' position is that the laws in force at the time they became stockholders in the Indianola State Bank in 1931 constituted a part of their contract and contemplated a judicial hearing to have the bank adjudged insolvent, and further contemplated the appointment of a judicial receiver by the court. The petition in the instant case does

not show such judicial adjudication had been made, but pleaded a finding of insolvency by an administrative officer.

In the case of *Luikart v. Paine*, 126 Neb. 251, 253 N. W. 86, it was said (p. 253): "Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof." The precise question presented was the nature of the obligation created by the purchase of bank stock in 1925. The contractual obligation created was with respect to the then provisions of the Constitution, and the constitutional double liability of stockholders in banking corporations was, prior to the amendment of 1930, a secondary liability, to be enforced only after assets had been exhausted, and the amount due on liability had been judicially determined, so that the constitutional amendment of 1930, if applicable to stock purchased prior to its adoption, would materially change the contractual liability. The assets had not been exhausted, and the amount necessary to pay all creditors had not been judicially determined. Therefore, the action was prematurely brought.

In *Luikart v. Higgins*, 130 Neb. 395, 264 N. W. 903, the decision in *Luikart v. Paine, supra*, was adhered to. The court held: "A suit to recover stockholders' constitutional double liability on corporate bank stock purchased prior to 1930 amendment, brought before the corporate assets are exhausted and before the exact amount justly due is judicially determined, is premature." And it was further stated, in substance, that the 1930 amendment changes the time for payment of stockholders' double liability from the time the assets of the bank are exhausted to immediate payment on adjudication of insolvency. Defendants contend that in the instant case the change in time of payment accelerates the date the liability is due, and thus changes the obligation, since the time and method are material parts of a contractual obligation and such change thereof constitutes impairment of the contract. U. S. Const. art. I, sec. 10. There is no change in the status

of the obligation; that is, from a secondary to a primary obligation, and this question is not involved.

The reason for the holding in the foregoing cases is apparent from the analysis given, and they are distinguished from the instant case, as will appear later in the opinion.

In *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N. W. 772, it was held: "The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense, and while the Constitution, as amended, must be construed as a whole, still where the words employed in a constitutional provision are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning, for courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed." Cases and texts cited.

In 1930, section 7, art. XII of the Constitution of Nebraska, as amended, provided: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing or existing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities. The stockholder shall become individually responsible for the liability hereby imposed, immediately after any such banking corporation, or banking institution *shall be adjudged insolvent*, and the *receiver* of said corporation or institution shall have full right and lawful authority, as such receiver, forthwith to proceed by action in court to collect such liabilities." (Italics ours.) Prior to the enactment of section 8-1,130, Comp. St. Supp. 1937, hereinafter set out, section 8-190, Comp. St. 1929, was in force, providing for procedure in insolvency, and providing, in substance, for a judicial determination of insolvency by a court upon evidence presented.

Section 8-1,130, Comp. St. Supp. 1937, provides: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing or existing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities. The stockholder shall become individually responsible for the liability hereby imposed, immediately after any such banking corporation, or banking institution shall be declared insolvent, and the Department of Banking as Receiver and Liquidating Agent of said corporation or institution shall have full right and lawful authority, as such Receiver and Liquidating Agent forthwith to proceed by action in court to collect such liabilities."

It will be observed that in the constitutional amendment the word "adjudged" was used in place of the word "declared" in the statutory provision above set out; that instead of the word "Receiver," as used in the constitutional amendment, the statutory provision uses "Department of Banking as Receiver and Liquidating Agent," and in place of the words "such Receiver" in the constitutional amendment, the statutory provision uses "such Receiver and Liquidating Agent."

We have above set forth the constitutional provision and the sections of the statute involved, the comparison thereof and the changes in the language of the statute, as compared with the constitutional amendment, and upon which the defendants rely.

The word "adjudged," as used in the constitutional amendment, is interpreted by the defendants to mean a judicial determination and not a determination by an administrative finding and declaration.

In 2 C. J. S. 48, it is said: "While it has been held that the term ("adjudged") implies a judicial determination of a fact, and the entry of a judgment, it does not necessarily refer to a final judgment but may be applied as well to

interlocutory orders or decrees of court; and in particular connections it has been held that the word does not necessarily carry with it the idea of a judgment according to law. * * * The term has been held to mean adjudicated or judicially determined; decided or determined; deemed; found or decided." It may not be final or definite.

In *Page v. Jones,* 7 Fed. (2d) 541, it was held: "Indispensable conditions precedent to the enforcement of stockholders' double liability, under Comp. St. sec. 9689, are, first, adjudication of Comptroller of the insolvency of the bank, and that it is in liquidation, and, secondly, adjudication and order of assessment for requisition on the stockholders of the bank." To the same effect is *Smith v. Shepler,* 8 Cal. App. (2d) 717, 48 Pac. (2d) 999.

The word "adjudged" is used in various forms in reference to administrative officers, boards, commissions, departments, and such boards, administrative officers and departments adjudge and determine facts and conditions. *Opinion of the Justices,* 87 N. H. 492, 179 Atl. 344, 110 A. L. R. 819, held: "A valid administrative judgment has the same force of obligation and finality as a judicial one."

The use of the word "adjudged" in the constitutional amendment did not, in the absence of language requiring a judicial adjudication, bar the right of the superintendent of banks, an officer of the banking department, created by the legislature of this state, to declare, and by so doing adjudge, a bank insolvent. The word "declared," as appearing in section 8-1,130, Comp. St. Supp. 1937, is analogous to "adjudged," in the sense in which the word is used in the constitutional amendment, and does not deviate from or determine a distinction in this respect.

The word "receiver," as used in section 7, art. XII of the Constitution of Nebraska, does not necessarily mean a judicial receiver, and the power to appoint a receiver is not vested solely in the judicial branch of government.

In the case of *Mercantile Warehouse Co. v. Johnson,* 138 Kan. 889, 28 Pac. (2d) 775, it was held: "Under the statutes of this state, the appointment by the bank commissioner of

a receiver of a failed state bank is not a judicial act." And in quoting from *Jeffries v. Bacastow*, 90 Kan. 495, 135 Pac. 582, it was said:

" 'The appointment by the bank commissioner of a receiver for an insolvent state bank, under the banking act of this state, is not a judicial act which must be performed by a court and not by an executive officer.

" 'The fact of insolvency having been discovered, the statute directs the bank commissioner's course, and the designation by him of a person to wind up the affairs of the bank is no more a judicial act than his order to the board of directors to remove a dishonest cashier. His powers are purely administrative and in no way infringe upon the ancient authority of courts to determine rights of person and property in specific controversies pending before them.' " See, also, High, Receivers (4th ed.) 52, sec. 39.

In *Picklesimer v. Morris*, 101 W. Va. 127, 132 S. E. 372, it was held: "The receiver of an insolvent banking institution appointed by the commissioner of banking, with the consent of the governor, is a statutory receiver and is not subject to the control of the courts in the process of liquidation of the insolvent bank unless he fails or refuses to act, or acts to the prejudice of another's rights in the discharge of his statutory duties." See *People v. Niehaus*, 356 Ill. 104, 190 N. E. 349; *Carey v. Giles*, 9 Ga. 253.

We conclude that the 1930 amendment to the Constitution in the use of the word "receiver" did not specifically refer to a judicial receiver, to be appointed by a court, and language to such effect is absent from the constitutional amendment.

In 2 Morse, Banks and Banking (5th ed.) sec. 677, it is said: "Where, at the time of the insolvency, the only remedy against the shareholders was by proceedings in equity on the part of the bill-holders, and subsequently, pending the liquidation of the affairs of the bank, a new statute was passed creating the machinery of the bank commissioners, and providing a simple and expeditious means whereby

they could enforce collection from shareholders (the amount of actual liability not of course being varied), it was held that the shareholders in the already insolvent bank could not object to the application of this new statute to their own case. It bore upon the remedy only, not upon the liability."

In 3 Zollmann, Banks and Banking, p. 380, it is said: "A statute which confers this power is constitutional, even where there is a constitutional provision which imposes the liability but fails to state by whom this liability is to be enforced. It is immaterial to the stockholders whether their liability is enforced by a creditor, a receiver, or the superintendent" of banks.

In 9 C. J. S. 170, sec. 88, it is said:

"However, unless the Constitution specifically prescribes and limits the persons by whom such actions may be brought, it is within the power of the legislature to authorize particular persons to sue, and statutes conferring such authority have been sustained. Further, since such legislation is procedural, and since methods of procedure which do not affect the substantial rights of the parties are within the control of the legislature where no new right is created nor any penalty imposed, a statutory change as to the person who may enforce the liability may apply to stockholders who became such before its enactment as well as to those who became such thereafter. From this it follows that the authority of a particular officer or person to sue must be determined by the law as of the date at which suit is begun.

"Under constitutional or statutory authorization, an action to enforce the stockholders' liability may properly be brought by a state superintendent or commissioner of banks liquidating the affairs of the bank."

When defendant stockholders purchased the stock in the Indianola State Bank, the constitutional provision determining that liability on said stock attached when the bank was adjudged insolvent was in full force and effect. This the stockholders knew. They obtained no vested right in

the manner of procedure. The situation is different and distinct from that in *Luikart v. Higgins, supra.* Mere methods of procedure in actions on contract do not affect the substantial rights of the parties and are always within the control of the state. It is to be assumed that parties make their contracts with reference to the existence of such power in the state.

In *Luikart v. Bunz, supra,* the effect of the decision is: "The state Constitution changing procedure in a suit on contractual liability does not impair obligations of contracts and is applicable to existing contracts. No vested rights are impaired by statutory or constitutional provision which creates a remedy for an existing right." See *Denny v. Kennedy,* 229 Ky. 178, 16 S. W. (2d) 1030; *In re Davis,* 103 Neb. 703, 173 N. W. 695.

We hold that article 1, ch. 8, Comp. St. Supp. 1937, does not change the liability of stockholders in banking corporations. The changes occurring therein since defendants acquired their stock relate merely to procedure or remedy, and such methods of procedure which do not affect the substantial rights of the parties are within the control of the legislature, and are not violative of section 10, art. 1 of the Constitution of the United States.

The trial court sustained the demurrer on the further ground that the act passed by the 1933 session of the legislature, in attempting to designate the department of banking as receiver of the bank, was unconstitutional in that it sought to confer judicial powers upon the executive department, in violation of section 1, art. II of the Constitution of Nebraska, which reads as follows: "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."

The Constitutions of the respective states are the supreme law within their respective jurisdictions and are limita-

tions of power. It is necessary that authority exist somewhere to determine whether or not the limitations have been exceeded. From the early history of this country, and after much clash of opinion and sometimes bitter argument, the doctrine is now firmly established that this delicate duty devolves upon the judiciary.

Defendants contend that the following sections of article 1, ch. 8, Comp. St. Supp. 1937, set out in substance, constitute an encroachment upon the judicial powers, in violation of section 1, art. II of the Constitution of Nebraska:

Section 8-190, Comp. St. Supp. 1937, passed in 1933, provides in part: "Upon determination of insolvency of any bank by the Superintendent of Banks, and failure of owners thereof to restore solvency within the time and in the manner provided by law, or upon violation of the laws of the state by the bank, the Superintendent of Banks shall make a finding in writing of the condition of the affairs of such bank and a declaration of insolvency; said finding and declaration shall be filed with the clerk of the district court of the county in which said bank is located."

Prior to 1933, under the same statute, which the 1933 act amended, the district court performed the function of finding and determining the insolvency of a bank and directed liquidation. Section 8-191, Comp. St. 1929, provides, in substance, that jurisdiction is conferred upon the judge of the district court to act in connection with the insolvency, liquidation or reorganization of a bank in chambers, with the same effect as in open court. And section 8-192, Comp. St. Supp. 1937, designates the department of banking as receiver and liquidating agent of failed or insolvent banks, and is nearly analogous to section 8-192, Comp. St. 1929, wherein it was stated that the secretary of trade and commerce should be the sole and only receiver of failed and insolvent banks. By section 8-194 (a), Comp. St. Supp. 1937, as enacted in 1933, the superintendent of banks was given power to appoint deputies and assistants, with powers, specified in a certificate of appointment, to assist him in the liquidation; and copy of the certificate to be filed in the

office of the clerk of the district court of the county in which the bank is located. Powers are also given the superintendent of banks to employ such counsel and expert assistants as may be necessary to perform the work of liquidation, and he, the superintendent of banks, subject to the approval of the district court of the county in which the bank is located, fixes the compensation for services rendered by special deputies and assistants, which shall be taxed as costs of the litigation.

Section 8-199, Comp. St. Supp. 1937, as enacted in 1933, provides: "Upon the expiration of the time fixed for presentation of claims, the Superintendent of Banks shall thoroughly investigate all claims and file with the clerk of the district court of the county in which said bank is located, a complete list of all claims against which he knows of no defense, and which, in his judgment are valid, and designating their priority of payment, together with a list of the claims which in his judgment are invalid, and he shall also file an order allowing or rejecting said claims as classified. When the Superintendent of Banks reclassifies or rejects a claim, which rejection shall be made when he doubts the justice of a claim, he shall serve written notice of such reclassification and/or rejection upon the claimant, by registered mail, and file with the clerk of the district court of the county in which the bank is located an affidavit of the service of such notice, which affidavit shall be *prima facie* evidence of such service. Such notice shall state therein the time and place for the filing by claimant of his objections to the classification, reclassification or rejection of his claim."

Section 8-1,131, Comp. St. Supp. 1937, enacted in 1933, provides for the superintendent of banks to collect all debts due and belonging to such bank, and if he desires to sell or compromise any or all or doubtful debts, or all of the real and personal property of such bank, he shall apply to the district court of the county in which the bank is located for an order permitting such compromise or sale on such terms and in such manner as the court may direct.

Section 8-1,133, Comp. St. Supp. 1937, provides: "At any time after the expiration of the date fixed for the presentation of claims, the district court may, upon application of the Superintendent of Banks, by order authorize the Superintendent of Banks to declare out of the funds remaining in his hands after the payment of expenses one or more dividends, and at the earliest possible date he shall declare a final dividend as may be directed by the district court of the county in which the principal office of such bank is located." And section 8-1,132, Comp. St. Supp. 1937, provides that the superintendent of banks shall file a report of his acts of liquidation of each insolvent bank with the clerk of the district court from time to time, and upon the completion of the liquidation file a final report. Notice may be given as the court may direct, and upon hearing thereon and approval thereof by the court such liquidation shall be declared closed and the corporation dissolved.

Subdivision (b) of section 8-194, Comp. St. Supp. 1937, in part provides: "The Secretary of the Department of Trade and Commerce shall from time to time allocate to the various receiverships the expense of the department of trade and commerce, by reason of such receiverships, other than the compensation and expenses of the deputy receiver in charge, and certify to the courts in which the receiverships are pending the amount so allocated which shall be taxed and paid as costs in the receivership."

The defendants contend that the language "in which the receiverships are pending" constitutes a judicial proceeding. This provision of the statute (Comp. St. 1937, sec. 8-194, subd. (b)), passed by the 1933 session of the legislature, referred to receiverships which were actually pending in the several courts, and likewise referred to the secretary of the department of trade and commerce, who was the chief officer of the banking department under the former manner of liquidation. The act was introduced prior to the enactment of Senate File No. 263, the 1933 administrative banking act, approved May 13, 1933, with an emer-

gency clause. The meaning of this section of the statute is obvious, and it is not a part of the 1933 banking act.

Cases from other jurisdictions, involving provisions of statutes similar to those questioned here, follow:

In *Gordon v. Washington*, 73 Fed. (2d) 577, it was held: "Pennsylvania Code providing that Secretary of Banking, upon taking possession of property of an institution as receiver, shall file as plaintiff certificate of possession in judgment index in office of prothonotary in county in which institution is located, does not, in absence of statute, subject secretary or institution to jurisdiction of state court of that county, although secretary may invoke its jurisdiction at proper time."

In *Cochran v. Bennett*, 37 Ga. App. 202, 139 S. E. 428, it was held: "The judge of the superior court, when passing upon an application of the superintendent of banks for permission to sell the assets of a bank which has been taken over by the superintendent (See Nebraska statutory provision, Comp. St. Supp. 1937, sec. 8-1,131), and in passing an order authorizing a sale of the assets of the bank by the superintendent * * * is not administering the assets of the bank, and passes upon and adjudicates no rights of parties, but is merely, under statutory authority, directing a state officer who is not an officer or receiver of the court, in the discharge of a statutory duty." See *Bennett v. Duke*, 38 Ga. App. 598, 144 S. E. 686.

In *Mercantile Warehouse Co. v. Johnson, supra*, it was held: "The fact that a receiver of a failed state bank applies to a district court for an order to sell or compound bad or doubtful debts due to the bank or to sell real or personal property, or for an order fixing a time within which claims must be presented or be barred, does not vest the court with a continuing general jurisdiction over the receiver, so that a claimant, whose claim has been refused by the receiver, may thereafter file an application in such proceeding in that court for the allowance of his claim and procure a restraining order against the receiver not to proceed with the payment of liquidating dividends. If the

claimant wishes to establish his claim, it should be done in an independent action."

In *Robinson v. People's Bank of Leslie,* 266 Mich. 178, 253 N. W. 259, the commissioner of banking, assuming to act under the Michigan statutes (Act No. 32, Pub. Acts 1933), took over the custody, management and control of a bank. The court held that such act "does not vest in banking commissioner authority of a judicial nature as receiverships for liquidation and reorganization proceedings are subject to review by the courts and does not, therefore, violate Constitution 1908, art. 4, sec. 2, providing that no person belonging to one department of government shall exercise powers properly belonging to another."

"The statute making secretary of banking department receiver of institution whose property he had taken over, and making him responsible to court in which certificate of possession was filed, 'subjects' secretary to jurisdiction of particular court only in sense that provision points out state court which shall have jurisdiction when such jurisdiction is invoked." 3 Michie, Banks and Banking, 1939 Supp. p. 36. See *Gordon v. Washington, supra,* affirming *Washington v. Gordon,* 8 Fed. Supp. 913.

In *Burket v. Bank of Hollywood,* 61 Pac. (2d) (Cal. App.) 50, it was held: "Liquidation of banks under superintendent of banks is not a 'judicial function' but an 'administrative power' conferred by the Legislature, and the court has no inherent power to ameliorate the rigor of the provision of such statutory directions as are prescribed." See *State v. Norman,* 86 Okla. 36, 206 Pac. 522; *Lyon v. McKeefrey,* 171 Fed. 384, 96 C. C. A. 340; *Craughwell v. Mousam River Trust Co.,* 113 Me. 531, 95 Atl. 221.

In *Farmers State Bank v. Luikart,* 131 Neb. 692, 269 N. W. 627, filed November 12, 1936, in speaking of the administrative banking act of this state, the court said (p. 694):

"The legislature intended to provide for an administrative receivership of banks independent of judicial control. Section 8-190, Comp. St. 1929, as amended by section 53,

ch. 18, Laws 1933, as amended by section 1, ch. 16, Laws 1935. * * *

"The amendment made it manifest that the legislative intention was to establish an administrative receivership of banks, and the only question for the court to determine was the insolvency of the bank and failure to restore to solvency. If it is established that the bank is insolvent and its stockholders have failed to restore solvency, the superintendent has acted within his powers."

The appellees brought suit against the banking department of this state to take charge of the bank and liquidate it. The trial court issued an injunction against the superintendent of banks, as provided in the administrative act (Comp. St. Supp. 1935, sec. 8-190), when the officers, directors, etc., of a failed bank feel aggrieved, they may invoke the aid of a court by appeal to determine the question of solvency. This court reversed the lower court. The holding in the case is significant.

In reference to the foregoing provisions of the statute set out in substance, and referring to section 8-192, Comp. St. Supp. 1937, there is no delegation of judicial power to an executive department evident in this provision of the statute, unless the power to be a bank receiver is strictly judicial. Here the legislature makes the appointment, and the only power it delegates to an executive department is the power to be a receiver.

The next opportunity for controversy was over the allowance of claims. Comp. St. 1929, sec. 8-1,100, as amended. The stockholders in the instant case invoked the jurisdiction of the court for the payment of claims on their deposit, and on stipulation of the parties their dividends were, by the court, ordered paid to them upon their furnishing bonds to insure the payment of the liability here sued upon. The bonds were given and approved by the clerk of the district court as ordered by the court. See *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585.

In no instance does the administrative receivership act of 1933 provide for executive adjudication of controversies.

When exercise of judicial power is necessary to effectuate performance of various administrative functions necessary to liquidation, the judicial power is invoked and the statutes so require.

Statutes conferring upon administrative officers and agents quasi-judicial powers and duties, wherein they have been interpreted by other states, have uniformly been held not to be unconstitutional as encroachments upon the judicial branch of government, and this is especially true where such powers and duties relate to matters which are peculiarly affected with public interest or are subject to regulation under police powers, or where provision is made for appeal from decisions of such agencies to the courts.

As stated in the annotation in 78 A. L. R. 774: "Under all statutes thus far brought in question, the power given administrative officers to take charge of the affairs and property of insolvent banks, or those in an unsafe condition, and, if necessary, or under stated circumstances, to levy an assessment against stockholders, has been upheld, as against the constitutional objection that such power is judicial and may not be validly conferred upon administrative officers. The view generally taken, although language bearing on the point is not always precise, is that power of the sort in question is not in strictness, or in the constitutional sense, judicial, but consists merely of a practical discretion reasonably incident to the exercise of police power." See 7 Am. Jur. 34, sec. 14. Agreeing with the principle announced in the above annotation are decisions of the United States, and of the courts of Arkansas, California, Georgia, Kansas, Kentucky, Massachusetts, Minnesota, Nevada, and West Virginia. See, also, *Cosmopolitan Trust Co. v. S. L. Agoos Tanning Co.*, 245 Mass. 69, 139 N. E. 806.

While the federal Constitution contains no express provision prohibiting the exercise of judicial power by persons other than judicial officers, as does that of this state, it provides for three departments of the government, the legislative, the executive, and the judicial, and, with the limita-

tions provided for therein, all judicial power is vested in its courts.

As early as 1869, in *Kennedy v. Gibson*, 75 U. S. 498, 19 L. Ed. 476, the federal supreme court sustained the action of the comptroller in appointing a receiver of an insolvent bank, and ever since that time has recognized the validity of the comptroller's authority. The question, whether judicial power was conferred upon the comptroller of the currency by the acts of congress, empowering him to take possession of and liquidate national banks and assess their stockholders, was raised in *Bushnell v. Leland*, 164 U. S. 684, 17 S. Ct. 209. The court briefly disposed of the matter, holding that its prior decisions, therein cited, affirming the validity of diverse acts of the comptroller and his agents in the matter of closing and liquidating national banks, were decisive of the question. The decision is a direct holding that judicial power is not exercised by the comptroller in the closing and liquidation of national banks or in assessing the stockholders thereof; that the acts of congress in question do not attempt to vest judicial power in such officer.

In *Picklesimer v. Morris, supra*, it was said (p. 131): "Many decisions uphold the constitutionality of acts for winding-up the affairs of insolvent banks by a state officer or department as a valid exercise of the police power. The business of banking is so intimately interwoven with the business of the state, that public welfare demands that it should be supervised, visited, examined, controlled and liquidated, if need be, by experts. The exercise of such power by the Legislature is dictated and warranted by sound public policy. *Koch v. Missouri-Lincoln Trust Co.*, 181 S. W. (Mo.) 44; *State v. Scranton Title Guaranty, etc., Co.*, 27 Idaho, 752, 152 Pac. 189; *McDavid v. Bank of Bay Minette*, 193 Ala. 341, 69 So. 452; *Noble State Bank v. Haskell*, 219 U. S. 104, 31 S. Ct. 186, Ann. Cas. 1912A, 487." See, also, *Bryan v. Bullock*, 84 Fla. 179, 93 So. 182; *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264; *Coffin Bros. & Co. v. Bennett*, 164 Ga. 350, 138 S. E. 670, affirmed in 277 U. S. 29, 48 S. Ct. 422.

In *American State Bank v. Jones,* 184 Minn. 498, 239 N. W. 144, the commissioner of banks brought an action to recover an assessment levied by him against a stockholder of an insolvent bank to enforce stockholders' double liability. The defense was that such action was unconstitutional and void under section 1, art. 3 of the Minnesota Constitution, as being an attempt to delegate and confer judicial power on the commissioner of banks; also void and unconstitutional under section 7, art. 1 of the Minnesota Constitution. Section 1, art. 3, of the Minnesota Constitution, refers to the three separate parts of government. The opinion (p. 499) said: "The commissioner of banks is an administrative officer of the executive department of the state. He is given power to ascertain, in the first instance, without notice or hearing, whether in fact the bank is insolvent or unsafe or has violated its charter or the state laws governing banks. For that purpose he is authorized to examine the books, records, and business of the bank. He is not required to make any formal decision or findings. * * * If the bank feels aggrieved, it may apply to the district court to enjoin further proceedings and have a trial on the merits of the right of the commissioner to take possession and liquidate its business." (The same right prevails in this state.) It was held not to be an exercise of judicial power within the meaning of the constitutional provision cited. On page 500 we find this language: "Considering the entire law relating to the powers of the commissioner, and relating to banks and banking, it seems clear that the powers conferred are administrative rather than judicial. Executive officers are constantly required to pass judgment upon questions of fact arising in the daily performance of their duties and to act thereon, but that does not amount to the exercise of judicial powers. * * * At most, such determinations by an executive officer, while in a sense judicial, are but administrative acts requiring the exercise of common sense judgment. Such acts are sometimes characterized as quasi judicial, but not as constituting an exercise of judicial power."

In *Jeffries v. Bacastow, supra,* the statute conferring authority upon the bank commissioner is somewhat similar to that here involved. The court said in the opinion (p. 497): "The defendants take the position that this law is unconstitutional. The argument is that the appointment of a receiver is a judicial act to be performed by a court of equity, and that it cannot be performed by an executive officer, like the bank commissioner, under a government framed like ours upon the theory of a separation of powers. This argument is built entirely upon a name. The person spoken of as 'receiver' might just as well have been called a special deputy bank commissioner. Before insolvency the management of a bank is placed by law in the hands of a body of men, created by statute, designated a board of directors, who act under the supervision and in many respects under the control of the bank commissioner. After insolvency, and in certain other contingencies, this management is exercised by a single official chosen by the bank commissioner, who is called, for convenience and by analogy, a receiver."

In *State v. Neble,* 82 Neb. 267, 117 N. W. 723, the court, in discussing the superintendent of public instruction, stated: "Yet it is within common knowledge that he is clothed not only with executive, but judicial, and to some extent with legislative powers, the judicial to perhaps as full extent as the executive. His decisions (judicial) upon all subjects determinable by him within his department are binding upon county superintendents, teachers and school boards, unless reversed or overruled by a court having the required jurisdiction. * * * The conferring of judicial powers upon an executive or administrative officer can extend to such acts as may be necessary to enable the proper discharge of the duty, or to set in motion such other agencies as may be necessary to the complete discharge of the duty required to be performed."

By a long line of decisions, this court has been committed to the proposition that the department of public works is an administrative body, possessing quasi-judicial

powers, and is not in violation of section 1, art. V of the Nebraska Constitution, the section referring to powers vested in the courts. See *Dawson County Irrigation Co. v. McMullen,* 120 Neb. 245, 231 N. W. 840; *Shumway v. Warrick,* 108 Neb. 652, 189 N. W. 301; *In re Application of Babson,* 105 Neb. 317, 180 N. W. 562; *State v. Oliver Bros.,* 119 Neb. 302, 228 N. W. 864; *Investors Syndicate v. Bryan,* 113 Neb. 816, 205 N. W. 294; *Morrill County v. Bliss,* 125 Neb. 97, 249 N. W. 98.

Before the enactment of laws providing for administrative or executive receiverships in the different states, the process of liquidating insolvent banks extended over a period of some considerable time, engendering public complaint and criticism. The United States government early recognized the need of expeditious, economical and efficient administration of insolvent banks and, by legislation, met the need, and the legislatures of the various states, following the example set by the United States government, enacted legislation for the same purposes. Nebraska, in 1933, by its legislature, conceived the need of such legislation and followed the example set by the United States and the various states.

The statute creating administrative receiverships, enacted in 1933 (Comp. St. Supp. 1937, ch. 8, art. 1), involved in this proceeding, is not unconstitutional as an encroachment upon judicial power, and is not violative of section 1, art. II of the Constitution of Nebraska.

For the reasons given herein, the trial court erred in sustaining defendants' demurrer to plaintiff's amended petition. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

JOE RUSSO, APPELLANT, V. SWIFT & COMPANY, APPELLEE.
286 N. W. 291

FILED JUNE 2, 1939. No. 30576.

1. **Evidence.** Judicial notice is taken of the diseases to which men are subject, and, in a general way, of the causes or sources of such diseases and the nature and effect of injuries, diseases and physical defects, so far as they are matters of common knowledge and universally known, as evidenced by standard dictionaries, encyclopedias, and standard, accepted medical authority.
2. **Master and Servant:** WORKMEN'S COMPENSATION LAW: OCCUPATIONAL DISEASE. An occupational disease is, or must be, one which is a natural incident of a particular occupation, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general. The disease of echinococcosis *held* not to be an occupational disease incident to the employment of the plaintiff.
3. ———: ———: DUTY OF MASTER. The duty of an employer to warn an employee of the dangers of his employment is limited to dangers of which the employer knows, or ought to know, or which he has reason to believe that the employee does not know and will not discover in time to protect himself. The rare and unusual disease of echinococcosis does not constitute such danger of the employment in which the plaintiff was engaged as to require the employer to anticipate or to know, with a reasonable degree of certainty, of its existence in defendant's plant.
4. ———. An employer is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not reasonably have been anticipated.
5. **Pleading.** Allegations of plaintiff's petition examined, *held* not to state a cause of action under the common law sufficient to charge defendant with negligence, and demurrer thereto was properly sustained.
6. ———. Allegations of plaintiff's petition, seeking to allege a cause of action under the following sections of the statute: Sections 48-401, 48-403, Comp. St. 1929, under article 4 entitled "Health and Safety Regulations;" section 54-946, Comp. St. 1929, under article 9 entitled "Protection of Health of Domestic Animals;" and section 81-1501, Comp. St. 1929, under article 15 entitled "Sanitation of Premises Used for Manufacture or Preparation of Foods," are insufficient to show a violation of said sections, and demurrer thereto was properly sustained.

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

*Paul J. Garrotto* and *Samuel P. Caniglia,* for appellant.

*Rosewater, Mecham, Shackelford & Stoehr* and *A. L. Knabe, contra.*

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

MESSMORE, J.

Plaintiff, a resident of Omaha, Nebraska, entered the employ of the defendant corporation in its Omaha plant in April, 1925. His duties were those of a beef washer. He continued in such employment until the month of December, 1935, when he became totally and permanently disabled as the result of a disease known as "echinococcosis." On October 16, 1936, he filed a petition in the district court for Douglas county, seeking to predicate a cause of action under the common law, charging the defendant corporation with negligence. His second amended petition, in substance, explanatory of the cause of action, follows:

At the time the plaintiff entered the employment of the defendant he was not informed by it, nor did he know, of the danger of infected meats and hides. No information as to protection for his health from the ravages of meat, infected with contagious or infectious disease, was given to the plaintiff or brought to his knowledge by the defendant. Therefore, during the months of May, June and July and during the whole year of 1933, the plaintiff gradually contracted a disease known as "echinococcosis." Said disease germs entered the plaintiff's system through the pores and skin of his hands and through his lungs. The disease germs were negligently and carelessly allowed to remain on meats which the plaintiff was handling in the regular course of his employment, and in the air of the room in which he was working. In this connection plaintiff alleges that such germs spread and developed and grew

in this plaintiff's system until December, 1935, when this plaintiff, as a result of the gradual contraction of said disease, became permanently and totally disabled; that this plaintiff contracted said echinococcosis, not as a result of any negligence on his part, but through the sole and proximate negligence on the part of defendant and its agents, in purchasing cattle which they knew, or, with the exercise of reasonable care, should have known, were infected with the disease; in negligently failing to discover that said cattle were so infected, and negligently failing to destroy and otherwise place said infected cattle in a position where the disease could not spread to this plaintiff; in failing to warn the plaintiff that such cattle were infected; in permitting plaintiff to unknowingly handle cattle which the defendant knew, or should have known, were infected with a dangerous and contagious disease; in failing to provide plaintiff with gloves or suitable apparatus which would protect him from the ravages of a dangerous and contagious disease, and in failing to provide ventilators, disinfectants or any other proper method of exterminating said disease.

To this petition the defendant demurred generally. The demurrer was sustained, and from this order plaintiff appeals, contending that such ruling constituted error.

The effect of a general demurrer was expressed by this court in the case of *Van Horn v. Lincoln Sales Outlet Co.*, 127 Neb. 301, 255 N. W. 36, as follows: "A demurrer is an admission of the truth of all facts properly averred in the pleading demurred to; it admits, however, only such facts as are well pleaded and all intendments and inferences that may fairly and reasonably be drawn therefrom."

The issue to be determined is: Does the plaintiff's second amended petition allege facts sufficient to constitute a cause of action at common law, charging the defendant with negligence? Having in mind the effect of a general demurrer, we direct our attention to the second amended petition. Our first inquiry is as to the nature of the disease known as "echinococcosis," which plaintiff alleges caused

his total and permanent disability. In this connection plaintiff alleges that he gradually contracted the disease known as echinococcosis; said disease germs entered this plaintiff's system through the pores and skin of his hands and through his lungs.

"Judicial notice will be taken of scientific facts which are universally known, and which may be found in encyclopedias, dictionaries, or other publications." 15 R. C. L. 1127, sec. 55. The plaintiff has used a scientific term which has a usual and ordinary meaning, capable of definition in standard dictionaries, medical dictionaries, encyclopedias, and accepted medical authority. We are not privileged to take cognizance of scientific matters of uncertainty or dispute, or of insufficient notoriety, even though learnedly discussed in scientific publications. We will, therefore, confine ourselves to the definition of the term "echinococcus" and the understandable, common and accepted conception of the disease.

In the case of *McCauley v. Imperial Woolen Co.*, 261 Pa. St. 312, 323, 104 Atl. 617, in speaking of the disease known as "anthrax," the court took judicial notice that it is a matter of general knowledge that such disease is primarily a disease of animals, "which may be transmitted to men when handling infected animal materials, like wool; it is caused by the entrance into the human body of anthrax bacilli, and their rapid multiplication and development."

In 23 C. J. 146, it is said: "Judicial notice is taken of the diseases to which men are subject, and in a general way of the causes or sources of such diseases, and the nature and effect of injuries, diseases, and physical defects, so far as they are matters of common knowledge."

In the case of *Richardson v. Greenberg,* 188 App. Div. 248, 176 N. Y. Supp. 651, the court said (p. 252): "It is a matter of common knowledge that the conditions generally prevailing in cases of infectious disease are caused by poisons or toxins exuded by living organisms or bacteria present within the human body;" and in such case Encyclopedia Britannica and other accredited authority were

resorted to. See *Sobol v. Sobol,* 88 Misc. 277, 150 N. Y. Supp. 248; *Janssen v. Mulder,* 232 Mich. 183, 205 N. W. 159.

In view of the foregoing holdings, we now turn to the following authorities defining echinococcus.

Webster's New International Dictionary (2d ed.) 1938, defines "echinococcus" as: "The cystic larval stage of a small tapeworm (*Taenia echinococcus*): The adult infests the intestine of the dog; the larva develops in various tissues of cattle, sheep, swine, and man, being often fatal. The cyst or hydatid, formed by the larva, becomes very large and secondary cysts develop within it, from the walls of which tapeworm heads or scoleces grow. These, if eaten by a dog, may develop into adult worms." The same dictionary defines "cysticercus" as: "The larval form of certain species of tapeworms having the head and neck of a tapeworm attached to a sac-like body filled with fluid;—called also a *bladder worm, hydatid,* and *measle* (as, pork *measle*). These larvæ live in the tissues of various living animals, and, when swallowed by a suitable animal, develop into adult tapeworms in the intestine."

It is interesting to note that in Stitt's Practical Bacteriology, Blood Work and Animal Parasitology (5th ed.) p. 342, under "Taenia echinococcus," it is said:

"The adult stage of this parasite is passed in dogs. It is one of the smallest tape-worms known, being only about 1/6 inch long. It has a head with four suckers and a rostellum encircled with hooks. There are only three to four segments. The larval stage, on the contrary, gives one of the largest of larval cestodes. * * *

"The larval stage is also found in hogs and sheep, and it is probable that by reason of the dog's eating the echinococcus cyst of such animals at the abattoir we owe the increase in this serious infection.

"Man contracts the infection from association with dogs. * * * As stated above, the adult stage is passed in the intestine of the dog. Should the egg-bearing segments passed by the dog contaminate the hands of a man and a single

egg be ingested, we may have hundreds of *Taenia* larvæ produced."

In Wheeler's Handbook of Medicine, by Jack (6th ed.) p. 200, under "Life History," it is said: "When ripe the eggs set free from the intestine of the host—the dog or wolf—may be swallowed in drinking water or on vegetable food, and thus reach the stomach of man. There the embryos are liberated, perforate the intestinal walls, and getting into the circulation, are by this or other means carried to the liver or other organ, where they become encysted and develop a spherical vesicle which may reach a great size."

In 1 Clinical Diagnosis and Symptoms, by Martinet, p. 508, "echinococcus" is described as follows:

"Infection of man or mammals with this parasite takes place by the ingestion of ova (egg). The hexacanthic embryos, set free during the process of digestion, pass through the walls of the stomach or intestine and enter the blood vessels or lymphatics, whence they travel to various organs. * * *

"Echinococcus disease is transmitted to man and domestic animals by the dog, which harbors the mature tenia and sets free the ova with his excreta."

To like effect is Principles and Practices of Medicine, by Osler and McCrae (9th ed.) p. 296, wherein it is said: "In some countries man is an intermediate host, owing to accidental ingestion of the ova (egg). The little six-hooked embryo, freed from the egg-shell by digestion, burrows through the intestinal wall and reaches the peritoneal cavity or the muscles; it may enter the portal vessels and be carried to the liver. It may enter the systemic vessels, and, passing the pulmonary capillaries, as it is protoplasmic and elastic, may reach the brain or other parts. * * * It is not known definitely how long the echinococcus remains alive, probably many years, possibly as long as twenty years." The tenth edition of the foregoing work is more comprehensive, but reaffirms the same subject-matter. See Osler's Principles and Practice of Medicine, McCrae

(10th ed.) pp. 300, 301, 303. Other definitions to like effect are found in Dorland, American Illustrated Medical Dictionary (16th ed.) p. 435, and Encyclopedia Americana, 1937.

Having in mind the foregoing definitions and a brief history of the disease of echinococcosis, we are impressed with the fact that it is an exceptional, unusual and rare disease. The definition of an occupational disease is adequately expressed by the authorities as follows:

In the case of *Glodenis v. American Brass Co.*, 118 Conn. 29, 170 Atl. 146, it was held that, to come within the definition of an occupational disease, "the disease must be one which is a natural incident of a particular occupation, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general." See *Industrial Commission v. Roth*, 98 Ohio St. 34, 120 N. E. 172; *General Printing Corporation v. Umback*, 100 Ind. App. 285, 195 N. E. 281.

It is therefore obvious that in his occupation as a beef washer plaintiff was not suffering from an occupational disease.

Much space is devoted in appellee's brief and in the reply brief of appellant to the proposition of whether or not the disease of echinococcosis, alleged to have been contracted by plaintiff, is an accident, within the meaning of the workmen's compensation law of this state. Comp. St. 1929, sec. 48-152; Comp. St. Supp. 1937, sec. 48-152. We are not directly confronted with that problem and will, therefore, not determine it. The plaintiff's theory of his alleged cause of action is based on the employer's duty to his employee as reflected by the following authorities, cited by plaintiff:

"It is the duty of a master to exercise reasonable care to protect his servants from exposure to contagious or infectious disease while in the performance of their work, and such duty, like that to provide a reasonably safe place and appliances, is absolute, and cannot be delegated. If it

requires an inspection, it is not performed by employing competent and skilled inspectors, but there must be, in fact, a reasonably careful and skilful inspection, and the master is responsible for an injury to a servant from a cause which such an inspection would have discovered and removed." *O'Connor v. Armour Packing Co.,* 158 Fed. 241, 85 C. C. A. 459.

In *Zajkowski v. American Steel & Wire Co.,* 258 Fed. 9, it was said: "It is the duty of the employer to warn and instruct the employee as to the dangers and to furnish him with reasonably effective means to avoid them, and where as the direct result of failure to perform this duty an employee in the exercise of reasonable care suffers injury through a disorder so contracted, he is entitled to recover." See *Wiseman v. Carter White Lead Co.,* 100 Neb. 584, 160 N. W. 985; *Pigeon v. Fuller & Co.,* 156 Cal. 691, 105 Pac. 976; *Thompson v. United Laboratories Co.,* 221 Mass. 276, 108 N. E. 1042, all to the same effect.

In *Stevens & Sons Co. v. Daigneault,* 4 Fed. (2d) 53, it was said: "It is well settled that a duty rests on an employer to warn his employees of defects or dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself. (Cases cited.) But failure to warn will not be regarded as negligence, unless the employer knew, or ought, in the exercise of reasonable and ordinary care and diligence, to have known, that a warning was necessary."

*Grammer v. Mid-Continent Petroleum Corporation,* 71 Fed. (2d) 38, expresses the duty of the employer as follows (p. 40): "An employer is not an insurer; his duty to furnish safe working conditions is not an absolute one, although it is nondelegable; his duty is to use reasonable care to that end. Ordinarily, fulfillment of that duty is established when it appears that the employer conformed to the common usages of the industry, for one cannot ordinarily be said to be negligent if he does that which ordinary

men, like situated, do." Cases further supporting this view are too numerous to cite, and such holding is quite universal. It is further said that the limit of the master's duty is to exercise ordinary care to supply reasonably safe places, appliances and methods; that the test of his discharge of this duty is the exercise of ordinary care as persons of ordinary intelligence and prudence commonly furnish in the circumstances.

The very essence of the plaintiff's cause of action is negligence. In cases of this kind, "Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation." Annotation, 4 A. L. R. 490.

A careful analysis of the plaintiff's second amended petition discloses that he had been in the employ of defendant as a beef washer from 1925, and had worked for a period of eight years thereafter, experiencing no difficulty with the disease of echinococcosis or illness therefrom, which strongly evidences that the defendant had no knowledge of, or reason to suspect with any degree of certainty, the development in its plant of this rare and unusual disease. No workman, other than the plaintiff, was affected in any manner with the disease. He fixes the time of contracting the infection in May, June, and July, and during the year of 1933, when, as he alleges, he gradually absorbed the disease through the pores and the skin of his hands and through his lungs, and he did not become totally and permanently disabled until 1935. Such allegations of the petition are conclusive of the consideration given to the disease by the plaintiff and reflect that he had little, if any, knowledge of it, or of the infection, or of its effects, until 1935.

In 39 C. J. 288, it is said: "The master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not reasonably have been anticipated, a failure to take precautionary measures is not

negligence on the part of the master for which he is liable to the servant. But where the facts are such that the consequences attributable to the negligence of a master are within the field of *reasonable anticipation,* he is liable for an injury received by a servant in consequence thereof." (Italics ours.)

Our research fails to disclose a single case involving the disease known as echinococcosis, in connection with the occupation of the plaintiff, or with the industry of the defendant; nor does the plaintiff cite any such case.

The knowledge chargeable to the employer is stated in the case of *Canfield v. Iowa Dairy Separator Co.,* 172 Ia. 164, 154 N. W. 434, as follows: "Knowledge, actual or constructive, is an essential ingredient of negligence. Therefore, when the master carries on his business in the usual and ordinary manner, without knowledge that such manner is or may be dangerous to the servant, he is not liable for resultant injury to the servant." And the principle is stated in *Seefried v. Wangler Bros. Co.,* 164 N. W. 739 (181 Ia. 504), as follows: "The master is required to anticipate and foresee or guard against what usually happens or is likely to happen, and is not required to anticipate or foresee and guard against that which is unusual and not likely to happen, the test being whether the injurious result or consequence is probable or merely possible." See *Collins v. Pecos & N. T. R. Co.,* 110 Tex. 577, 212 S. W. 477; *Potter v. Richardson and Robbins Co.,* 6 Boyce (Del.) 314, 99 Atl. 540; *Yarbrough v. Wisconsin Lumber Co.,* 211 S. W. (Mo. App.) 713.

"Anticipation is applied in the determination of negligence vel non (or not). If no injury may be anticipated, no duty is breached by a failure to exercise care; but, if anticipated injury may result, then the duty arises." Annotation, 4 A. L. R. 490.

Are we to say, in considering the duty of the defendant (employer) towards the plaintiff (employee), that the defendant was guilty of negligence towards the plaintiff in failing to exercise reasonable care, in failing to use the

intelligence, ordinarily required in the industry, in furnishing a safe place to work and proper appliances, and in failing to warn the plaintiff? The very nature of the disease of echinococcosis and the manner in which it is contracted are indicative of the fact that an exceptional and unusual standard of care would be necessary on the part of the defendant industry to know or anticipate its existence, and such duty is not required of an employer. We repeat: Under the circumstances as pleaded by the plaintiff, is the disease one which can fairly and reasonably be charged to the knowledge of the defendant? There must be reasonable ground on which to charge the defendant with notice of the existence of the disease. Again referring to the definition of the disease, it is apparent that the term "echinococcus" refers to a parasite, which has its own life cycle, acquired by ingestion and not through the pores and the skin, and in extremely rare instances by inhalation. None of the cases cited by the plaintiff goes to the extent, as contended by him, of establishing a cause of action under the averments of the second amended petition.

Plaintiff's petition, wherein he seeks to allege a cause of action under the factory act and other provisions of the statute, set forth in his brief as follows: Sections 48-401, 48-403, Comp. St. 1929, under article 4 entitled "Health and Safety Regulations;" section 54-946, Comp. St. 1929, under article 9 entitled "Protection of Health of Domestic Animals;" and section 81-1501, Comp. St. 1929, under article 15 entitled "Sanitation of Premises Used for Manufacture or Preparation of Foods," is defective in failing to allege sufficient facts to show a violation of said sections.

For the reasons given in this opinion, we hold that the demurrer was properly sustained.

AFFIRMED.

IN RE ESTATE OF HARRY HALL.
DEPARTMENT OF BANKING, APPELLANT, V. NATIONAL BANK OF COMMERCE, EXECUTOR, APPELLEE.
286 N. W. 262

FILED JUNE 2, 1939. No. 30580.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed.*

*Robert H. Downing, Harold Johnson* and *Frank B. Morrison,* for appellant.

*Butler, James & McCarl, contra.*

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

MESSMORE, J.

The petition herein is on appeal from an order of the county court of Frontier county, Nebraska, rejecting a contingent claim. The department of banking of the state of Nebraska is receiver and liquidating agent of the Farmers Security Bank of Maywood, Nebraska, claimant, and plaintiff, by B. N. Saunders, superintendent of banks, alleges the following pertinent facts:

The Farmers Security Bank was duly organized and chartered February 12, 1916, and operated as a banking corporation until February 1, 1938. The bank had been insolvent for some time, which fact was known to its officers and stockholders and to defendant executor of the estate of Harry Hall, deceased. On February 5, 1938, the superintendent of banks found, declared and adjudged the bank to be insolvent. The declaration and adjudication of the fact was made in writing and filed with the clerk of the district court in said county; notice was given of said finding and served on or about February 10, 1938, upon the officers and directors of the bank and upon the National Bank of Commerce, of Lincoln, Nebraska, executor of the estate of Harry Hall, deceased. No objection was made by the Farmers Security Bank, its officers, directors, stock-

holders, or the executor of the Harry Hall estate. No attempt was made to appeal to the courts by way of injunction proceedings, or otherwise, from said finding, declaration and adjudication.

In the course of the liquidation of the Farmers Security Bank by plaintiff, in accordance with the provisions of chapter 18, Laws 1933, the defendant executor on March 30, 1938, filed a claim with the plaintiff in the receivership proceedings for moneys deposited in said bank by Harry Hall during his lifetime, which claim was classified and allowed by the superintendent of banks under an order dated June 13, 1938, which order was filed with the clerk of the district court of the county on June 14, 1938. It is further alleged that Harry Hall owned 127 shares of the capital stock of the Farmers Security Bank, par value of $100 each, totaling $12,700, for which plaintiff claims his estate is liable to the creditors of the bank for unpaid liabilities thereof, which accrued when he was a stockholder, in an amount equal to the stock held by him; that the liability is contingent upon the deficiency due creditors after the assets of said bank have been exhausted, and the proceeds applied upon claims of depositors, and further contingent upon the judgment against the estate in a court of competent jurisdiction. The plaintiff prays the court to order the defendant executor to retain sufficient assets of said estate with which to pay said contingent claim when the same shall become absolute, or, if the estate be insolvent, sufficient to pay a proportionate share of the dividends to other creditors.

The defendant, as executor of the estate of Harry Hall, deceased, demurred to the petition of plaintiff on the following grounds: (1) Said claimant does not have legal capacity to sue. (2) The petition of claimant does not state facts sufficient to constitute a cause of action. (3) Said petition, on its face, discloses that there has been no adjudication of insolvency of the Farmers Security Bank by any court of competent jurisdiction, and the attempt to confer upon the superintendent of banks the power to ad-

judge the insolvency of the bank is an attempt to confer a judicial power upon an executive officer, and is in violation of the Constitution of Nebraska, Const. art. II, sec. 1, which reads: "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." (The foregoing provision of the Constitution is not quoted in the demurrer, but obviously the third paragraph of the demurrer refers directly to such section and article.) (4) Said petition, upon its face, discloses that the plaintiff herein was attempting to be appointed receiver by the legislature of the state of Nebraska independently of the courts, and that the attempt is a judicial proceeding to make the statutory designation of a receiver binding and conclusive upon the courts, in violation of the Constitution. The demurrer was sustained by the trial court. The department of banking elected to stand upon the petition and not plead further. The claim and petition of the department were dismissed. Plaintiff appeals to this court.

The principal question raised in this appeal is whether or not the claimant did have legal capacity to sue, and the questions presented on this appeal are identical with those presented in the case of *Department of Banking v. Hedges, ante,* p. 382, 286 N. W. 277, except that the instant case arises under the Constitution of Nebraska as it existed prior to the 1930 amendment (Const. art. XII, sec. 7), while the *Hedges* case arises under the 1930 amendment. There is not involved in the case at bar the question of impairment of obligation of contracts, as provided in section 10, art. I of the Constitution of the United States, which prohibits a state from impairing obligations of a contract. In all other respects and on the points of law raised, as far as this appeal is concerned, the opinion in *Department of Banking v. Hedges, supra,* controls.

The trial court erred in sustaining defendant's demurrer.

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

REVERSED.

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DEPARTMENT OF BANKING, APPELLANT, V. C. S. ADAMS ET AL., APPELLEES.
286 N. W. 290

FILED JUNE 2, 1939. No. 30581.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed.*

*Robert H. Downing, Harold Johnson* and *Frank B. Morrison,* for appellant.

*Butler, James & McCarl, Beeler, Crosby & Baskins* and *Robert Crosby, contra.*

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

MESSMORE, J.

The plaintiff, as statutory receiver of the Security State Bank of Curtis, Nebraska, an insolvent banking corporation, brought this action to enforce the collection of stockholders' liability. The following are the pertinent facts alleged in the petition:

The Security State Bank was organized, incorporated and chartered under the laws of Nebraska in 1914 as a banking corporation, with a capital stock of $30,000. The bank was taken over by the department of banking January 16, 1934, and notice given to the bank and its officers. The president and cashier of the bank acknowledged that the bank was insolvent. Solvency was not restored by the stockholders. On January 22, 1934, the superintendent of banks adjudged the bank to be insolvent, made a finding in writing and a declaration of insolvency of said bank and caused the same to be filed with the clerk of the district court for Frontier county, Nebraska. No objections were made by the stockholders,

and the superintendent of banks, through the department of banking, as receiver and liquidating agent, proceeded to liquidate the affairs of said bank, as provided by article 1, ch. 8, Comp. St. 1929, as amended. On April 23, 1938, there was a judicial adjudication by the court that the assets of said bank had been exhausted and the proceeds thereof had been applied to the bank's liabilities, and that a deficiency remained due creditors, amounting to $78,614.04. The defendants, Garnette L. Nelson, Helen B. Pyle and Lois May Shifflet, each owned, since 1921, three and one-third shares of the capital stock of said bank, and on August 31, 1933, at which time said bank was known by said defendants to be insolvent and was being operated by virtue of the bank moratory laws as a restricted bank, they executed assignments of said shares and caused them to be recorded in the books of said bank in favor of defendant Bertha L. Pyle, who, in addition to the shares assigned to her, owned, since 1921, five shares of the capital stock of said bank. The prayer is for an accounting, and for a determination of the amount each defendant is liable to contribute to the payment of unpaid liabilities of said bank and for judgment in the amount so determined.

The defendants demurred to plaintiff's petition, which demurrer was sustained by the trial court. The department of banking elected to stand upon the petition and not plead further. The claim and petition of the department were dismissed, and plaintiff appeals to this court.

The defendants' demurrer to the petition contains the same subject-matter as the demurrer in the case of *Department of Banking v. Hedges, ante,* p. 382, 286 N. W. 277, with the exception that the question as to impairment of contracts, in violation of section 10, art. I of the Constitution of the United States, is not involved herein, for the reason that the liability in the instant case is determined by the constitutional provisions and the laws in force prior to the 1930 amendment, under which amendment the *Hedges* case arose. In all other respects, the questions of law raised are identical with the case of *Department of Banking v.*

*Hedges, supra,* and the opinion rendered therein is controlling.

The trial court erred in sustaining the defendants' demurrer. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

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DEPARTMENT OF BANKING, APPELLEE, V. E. T. FOE ET AL.: F. A. GOOD, APPELLANT.

286 N. W. 264

FILED JUNE 2, 1939. No. 30611.

1. **Banks and Banking.** "The department of banking, created by legislative enactment (Laws 1933, ch. 18; Laws 1935, ch. 16), is a legal entity, and by section 8-1,130, Comp. St. Supp. 1937, as receiver and liquidating agent of an insolvent bank, has full right and lawful authority forthwith, by a proceeding in court, to prosecute an action to collect constitutional stockholders' liability for benefit of creditors." *Department of Banking v. Hedges, ante,* p. 382, 286 N. W. 277.
2. ———. The repeal of a constitutional provision, imposing double liability on corporate stockholders of an insolvent bank, not containing a saving clause, does not affect the obligation of such stockholders as to liabilities incurred by the banking institution prior to such repeal.
3. **Constitutional Law.** Where private rights of parties have vested by judgment of a court, they cannot, by subsequent legislation, be taken away, but must be thereafter enforced by the court, regardless of such legislation.
4. **Statutes.** "Where a legislative act, though complete in itself, refers to another act for the procedure to be taken, the latter act, *pro tanto,* becomes a part of the former to the same extent as though actually incorporated therein." *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429.
5. **Garnishment.** The legislature has power to determine public policy in respect to subjecting the salaries of public officers and employees within its control to garnishee process.
6. **Officers.** A statute, providing for garnishment of salaries of officers and employees of the state, or any county, township, municipal or municipally owned corporation, or school district, *held* not violative of section 19, art. III of the Constitution of Nebraska, prohibiting increase or diminution of compensation of public officers during their terms of office.

7. **Garnishment.** The salary of an officer, whose qualifications, tenure and emoluments of office are contained within the Constitution, subject to regulation by the legislature within constitutional restriction, may be garnished under a law passed by the legislature, subjecting such salary to garnishee process.
8. **Constitutional Law.** An act, subjecting the salaries of all officers and employees of the state, city, county, municipal or municipally owned corporation, township or school district, to garnishee process, operating uniformly and alike on every member of the class designated, is not unreasonable or arbitrary class legislation and does not violate the Fourteenth Amendment to the Constitution of the United States.

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

*J. C. McReynolds,* for appellant.

*Robert H. Downing, Harold Johnson, C. J. Aldrich* and *F. C. Radke, contra.*

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

MESSMORE, J.

This is an appeal in a garnishment proceeding from an order of the district court for Lancaster county, entered October 12, 1938, the court ordering the garnishee, Continental National Bank, to pay into court the sum of $44.24, and the state auditor to pay into court the sum of $125, constituting 10 per cent. of the third quarterly salary due the defendant, a state railway commissioner. The motion of defendant Good for exemptions as head of a family was sustained. Motion for a new trial was overruled. Defendant Good appeals.

Counsel in their briefs detail the history of previous litigation as between the parties. Only such part thereof as may be necessary to assist in a determination of this appeal will be set out.

On November 22, 1937, the department of banking of the state of Nebraska, receiver and liquidating agent of the Cowles State Bank, Cowles, Nebraska, obtained a judgment in the district court for Webster county against the defendant Good (hereinafter referred to as defendant) in

the sum of $1,000 and costs, on stockholders' double liability as a stockholder in the Cowles State Bank. Defendant appeared, presented his defense, and did not appeal from the judgment. This appeal is from the order made in the garnishment proceedings as above stated.

Defendant assigns as error: The department of banking is not an entity and has no capacity to sue, and the judgment herein is void *ab initio*.

This court held in *Department of Banking v. Hedges, ante*, p. 382, 286 N. W. 277: "The department of banking, created by legislative enactment (Laws 1933, ch. 18; Laws 1935, ch. 16), is a legal entity, and by section 8-1,130, Comp. St. Supp. 1937, as receiver and liquidating agent of an insolvent bank, has full right and lawful authority forthwith, by a proceeding in court, to prosecute an action to collect constitutional stockholders' liability for benefit of creditors."

Defendant next assigns as error the fact that, at the general election of November 8, 1938, section 7, art. XII of the Constitution of Nebraska, establishing double liability of stockholders, was, by vote of the people, repealed, and such repeal vacated the judgment herein against the defendant and rendered all proceedings thereunder since the 8th day of November, 1938, null and void, including the garnishment proceedings hereunder, for the reason that such repeal was without a saving clause.

In *Luikart v. Paine*, 126 Neb. 251, 253 N. W. 86, it was said (p. 253): "Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof." Practically all courts which have had occasion to pass upon the liability of stockholders in banks regard this liability as being contractual. 7 Am. Jur. 81, sec. 98. See *Luikart v. Higgins*, 130 Neb. 395, 264 N. W. 903. This has been the rule uniformly followed. Such a contractual right ought to be enforceable, inasmuch as the nature of it and the methods of enforcing it depend upon constitutional and statutory provisions creating it, and which entered into the implied con-

tract at the time the stock was purchased. We must look to these provisions as they existed prior to the repeal to ascertain the extent of the liability and the manner of enforcing it. The question presented, with reference to the repeal of section 7, art. XII of the Constitution of Nebraska, is that the repeal of such constitutional provision is complete and is not protected by any saving clause.

In *Kaliski v. Gossett,* 109 S. W. (2d) (Tex. Civ. App.) 340, it was held:

"The repeal of the constitutional provisions for stock assessments against bank stockholders without any saving clause does not abate a suit on a liability which had fully accrued before such repeal." In the body of the opinion the court said (p. 343): "This conclusion is fully justified by *Pierce Coombes, Petitioner, v. Milton E. Getz,* 285 U. S. 434-452, 52 S. Ct. 435, 436, 70 L. Ed. 866 (the leading case on the question). * * * 'The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right * * *) to enforce his cause of action upon the contract.' (*Coombes v. Getz, supra.*)

"Thus we take it that neither the repeal of the constitutional provision nor the statutes relating to shareholders' liability does not abate or otherwise affect the cause before us, but, on the contrary, we must pass upon same as though there had not been any repeal of either the statutory or the constitutional provisions." See, also, *Henry v. Alexander,* 186 S. Car. 17, 194 S. E. 649.

Defendant attempts to distinguish the case at bar from

*Coombes v. Getz, supra,* on the ground that the court was dealing with officers and directors of a corporation who had embezzled funds, and the action was by the plaintiff, acting directly in his own interests, while in the case at bar the plaintiff had no direct interest in the funds and was acting for the benefit of another class of persons,—depositors in state banks. The principle of law is the same. The plaintiff was acting in a designated capacity for the benefit of the creditors of this particular bank.

The provision of the Constitution of the United States "declares that no state shall pass any law impairing the obligation of contracts. * * * Any enactment, regardless of its source, to which a state gives the force of law is a law within the meaning of this provision, and this includes * * * state Constitutions and constitutional amendments. * * * The repeal of a law which constitutes a contract is an impairment of its obligation." 12 Am. Jur. 24, sec. 396.

"The repeal of a constitutional provision imposing a double liability on corporate stockholders does not affect the obligation of stockholders as to liabilities incurred by the corporation prior to such repeal." 12 C. J. 723. See, also, 13 Am. Jur. 584, sec. 573.

In *In re Westchester Title & Trust Co.,* 170 Misc. 860, 10 N. Y. Supp. (2d) 190, released January 21, 1939, it was held: "The repeal of constitutional provision for liability of stockholders of bank did not affect liability which accrued prior to the effective date of repeal. Const. art. 8, sec. 7."

In *Mooney v. Drainage District,* 134 Neb. 192, 278 N. W. 368, this court held: " 'The private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation.' *Hodges v. Snyder,* 261 U. S. 600."

The private rights of the creditors had been vested by the judgment against the defendant on his stockholders' liability. The repeal of section 7, art. XII of the Constitution of Nebraska, was subsequent thereto, which is equiva-

lent to subsequent legislation. This principle of law, as above announced, is in point.

In the instant case,—a garnishment proceeding,—the attack is made on the judgment previously entered in Webster county on the defendant's stockholders' liability. The attack is collateral. This court held in *Gwynne v. Goldware,* 102 Neb. 260, 166 N. W. 625: "A decree rendered in a case by a court having jurisdiction of the subject-matter and parties cannot be successfully assailed collaterally, and is binding on the parties and those claiming by, through or under them until it is reversed, modified or otherwise set aside." The defendant in the original suit on stockholders' liability answered, judgment was rendered against him, and he did not appeal therefrom.

Defendant contends that chapter 58, Laws 1925, is amendatory, in that it amends, by addition and by reference to it in terms, the general garnishment laws. The title to said chapter 58 is as follows: "An act to provide for garnishment of officers and employees of the state of Nebraska or any county, township, municipal corporation, municipally owned corporation, or school district." Section 1 of the act in part provides: "That all provisions, requirements, conditions and exemptions, of the garnishment laws of the state of Nebraska, shall apply to all state, county, municipal, municipally owned corporation, township and school district officers and employees, to the same extent and effect as such laws apply under the existing statutes of the state of Nebraska to officers and employees of private corporations."

This court held in *State v. Ure,* 91 Neb. 31, 135 N. W. 224: "The mere fact that an act of the legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if in other respects it is a complete act in itself." The above holding was quoted in the case of *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273.

The act in question, as shown by the title, discloses conclusively that it purports to be an independent, separate

and new act, covering the entire subject to which it relates, and, as it is not amendatory, it does not run counter to section 14, art. III of the Constitution, providing: "No law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." See, also, *State v. Moorhead*, 100 Neb. 298, 159 N. W. 412, and *Richardson v. Kildow*, 116 Neb. 648, 218 N. W. 429. In the latter case it was held: "Where a legislative act, though complete in itself, refers to another act for the procedure to be taken, the latter act, *pro tanto*, becomes a part of the former to the same extent as though actually incorporated therein."

Defendant contends that sections 20-1012 and 20-1013, Comp. St. 1929, being chapter 58, Laws 1925, are unconstitutional in their entirety, null and void, and, if constitutional in any respect, have no application to those constitutional state officers whose salaries, qualifications, tenure and emoluments are fixed by the Constitution, and that the legislature has no power to provide by law for the garnishment of such officers' salaries.

We have heretofore set out the title to chapter 58, Laws 1925, and a part of section 1 of the act. The act further provides, in substance, that consent is given for garnishment suits and proceedings against the state of Nebraska and all units of government, as above set out, and provides that the section "shall apply only in case it is sought to hold and apply the earnings of such officers and employees which earnings have been earned by personal services rendered to the state" or to any subdivision of government, as heretofore set out. The second section of the act provides for the proceedings and designates how they shall be brought.

28 C. J. 181, is cited as follows: "The power of the legislature to authorize garnishment of the salaries of constitutional officers is at least doubtful. The question has been answered in the negative as to officers whose qualifications, tenure, and emoluments are fixed by the Constitution, and in the affirmative as to officers provided for by the Consti-

tution but whose compensation is fixed by the legislature."

In the case of *Stockard v. Hamilton,* 25 N. M. 240, 180 Pac. 294, the appellant contended that the office of district attorney was a constitutional one, created by the Constitution, and that the disbursing officers of the state have the right to pay the salary of this office for the purpose only for which it was designated, and that the legislature could not legislate that it should be disbursed otherwise. The court said (p. 244): "The contention is true, in case the office is one created by the Constitution, and when the qualifications, tenure, and emoluments therefor are fixed by that instrument; but this does not apply to the office of district attorney. The Constitution itself makes no provision as to the emoluments of the office in question, but specifically provides that the district attorneys shall receive such salaries as may be provided by law, thereby giving to the legislature the plenary (full, entire, complete) power in this respect." The court held that "the salary of a district attorney may be garnished in the hands of the disbursing officer of the state."

In the case of *Ruperich v. Baehr,* 142 Cal. 190, 75 Pac. 782, the majority opinion held that the legislature undoubtedly had the power to determine its own public policy in respect to subjecting the salaries of public officers and employees within its control to garnishee process, and the legislative intent was held to declare the salaries or wages of officers and employees of the state government within the control of the legislature may be diverted to the payment of debts of such officers and employees. In the opinion appears this statement (p. 194): "We are not here concerned with constitutional offices and officers, and we do not wish to be understood as holding that the act under discussion can be applied to them." This question was not in the case, which involved the salary of a stenographer in the department of electricity of the city and county of San Francisco. The defendant relies on the concurring opinion of Justice Van Dyke, who stated, in substance, that "The act under consideration, adding a new section to the Code of Civil

Procedure, is, however, broad enough in its terms to cover all offices in the state," and that the legislature did not have power to interfere with the payment of salaries or compensation of constitutional officers, wherein the salary or compensation of such officers is provided for by the Constitution, and gave this example: "The governor and other executive state officers 'shall, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected;'" and determined that the garnishee process cannot be employed to intercept or reduce the salary or compensation of officers as in the Constitution provided, and that the act was clearly unconstitutional in such respect. It will be noted in the California case that, while the direct question did not involve a constitutional officer, the concurring opinion manifestly determined the constitutionality of the act, as it related to constitutional officers, so we have the holding, as contended for by the defendant in the instant case, in the concurring opinion.

Section 20, art. IV of the Constitution of Nebraska, provides for the creation of the railway commission in 1906, fixing the term of office of the commissioners, their powers and duties, and stating: "Compensation shall be fixed by the legislature." Section 3, art. XVII of the Constitution adopted in 1920, provides: "Until otherwise provided by law the following salaries shall be paid: * * * members of the state railway commission, each $5,000 per annum."

In the case of *State v. Hall,* 125 Neb. 236, 249 N. W. 756, this court held:

"The Constitution gives to the legislature the power to increase or decrease the salaries of state officers, provided it acts within constitutional limitations.

"The constitutional prohibition against changing the salary of such officer during his term of office, as found in section 19, art. III of our Constitution, is explicit and unambiguous."

Section 19, art. III, Const., reads: "The Legislature shall

never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof be increased or diminished during his term of office."

In *State v. Hall, supra,* the respondent referred to section 3, art. XVII of our Constitution, fixing the salaries of officers until otherwise provided by law, and stated that it was "an express grant of power to the legislature to fix the salaries." The court said (p. 241): "This is a strained construction of the law, for the language gives the legislature the power, which otherwise it would not have, to change the salaries of such officers, but such change must not be made in a manner to violate other provisions of the Constitution relating thereto." It was said that, placing the two sections together, they would read: " 'Until otherwise provided by law the following salaries shall be paid: * * * members of the state railway commission, each $5,000 per annum. The legislature shall never grant any extra compensation to any public officer * * * after the services have been rendered * * * nor shall the compensation of any public officer * * * be increased or diminished during his term of office, including any officer whose compensation is fixed by the legislature subsequent to the adoption hereof.' "

The defendant contends that the sole and only power which the legislature was granted by the Constitution of 1920 is found in section 25, art. IV of the Constitution, which in part reads: "The officers provided for in this article shall receive such salaries as may be provided by law, but the salary of no officer shall be changed more than once in eight years;" that such section of the Constitution should be construed with section 3, art. XVII of the Constitution, as heretofore set out; and that the term "provided by law," as used in the Constitution, means as provided by the Constitution itself; that the sole power to change a salary or schedule of salaries once in eight years

does not change the meaning of the expression as so used, and that the legislature does not have plenary power; that is, full, complete and final power.

The fundamental question involved may be said to be under section 19, art. III of the Constitution, referring to that part thereof: "Nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof be increased or diminished during his term of office."

In this connection, in the case of *State v. Surety Finance Co.*, 42 Ariz. 42, 21 Pac. (2d) 929, the court passed upon the question of whether or not the salary of a constitutional officer of the state could be lawfully garnished; the salary of the secretary of state in the years 1931-1932 being involved. The office of secretary of state was provided for by the Constitution and the salary was fixed therein until otherwise provided by the legislature. Arizona Const. art. V, secs. 1, 13. At the time of the garnishment, his salary was fixed by the legislature. In the instant case, the salary is fixed by the Constitution, but subject to regulation by the legislature, as indicated in *State v. Hall, supra,* above set out. In the Arizona case, in speaking of section 17, part 2, art. 4, of the Constitution of Arizona, which provides that the salaries of public officers shall not be increased or diminished during their terms of office, it was stated in the opinion (p. 44):

"It is said the application of an officer's salary or wages, or any part thereof, through the process of garnishment to the payment of his debts, is a diminishing thereof, and there is some authority for such a contention. (Citing the concurring opinion of Justice Van Dyke in *Ruperich v. Baehr, supra.*) But it occurs to us that the officer gets the full benefit of his salary, whether it is paid to him directly or applied by the law on his honest debts. When salary is applied on what an officer owes, it benefits him, or his estate, just as much whether its application be through his voluntary act or by compulsion of law. In the latter case the only thing he is deprived of is the liberty of spending

his salary as he pleases, but in this his situation is not at all different from any other debtor who is forced to pay his debts. In *Hanson v. Hodge,* 92 Wash. 425, 159 Pac. 388, it was held that such an application of an officer's salary did not diminish it.

"The matter of the public policy of the state is entirely in the hands of the legislature, except as restrained by the Constitution." Such is the law in this state.

The garnishment act complained of by defendant was in force when he was a candidate for and was elected railway commissioner. If it provided a means for diminishing his salary, it so provided at the time he became a candidate for the office. He must thereby have assented to such provision to the extent that it might be so applied to him. We see no reason, nor is any reason apparent, under the laws of this state, why the remedy should not extend to creditors of constitutional state officers, where the legislature has the power to increase or decrease the salaries of such officers, within the limits prescribed by the Constitution. The fact that a constitutional officer may owe certain personal obligations incurred by him is, apparently, his own personal affair, and, in the exercise of his expenditure of funds and creation of credit by his own act, he stands in the same relation as any other individual of the state who may owe a personal obligation. We do not concur in the conclusions reached by the concurring opinion in *Ruperich v. Baehr, supra.*

The garnishment law of this state (Comp. St. 1929, secs. 20-1012, 20-1013; Laws 1925, ch. 58) is not violative of the Constitution of Nebraska, especially as to that part of section 19, art. III. There is no direct or implied restraint in our fundamental law upon the powers of the legislature to subject the compensation of constitutional officers of this state to demands of their creditors through the process of garnishment. The salary is not diminished; it is merely subject to legal process to enforce payment of the officer's obligation. The officer's act contributes to the diminishment of the salary, not the legislature.

Defendant contends that the act in question is unconstitutional in that it is unreasonable, arbitrary, class legislation, violative of the Fourteenth Amendment to the Constitution of the United States. The act is broad; it subjects to garnishee process salaries of all state, city, county, municipal or municipally owned corporation, township and school district officers and employees, meaning all of the officers and employees of such subdivisions of government. It operates uniformly and alike on every member of the class designated and meets the conception of the law of this state on the subject. See *State v. Berka,* 20 Neb. 375, 30 N. W. 267.

In *State v. Hall,* 129 Neb. 669, 262 N. W. 835, it was held: "The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, * * * to be valid the law must operate uniformly and alike upon every member of the class so designated."

A case in point is *Cavender v. Hewitt,* 145 Tenn. 471, 239 S. W. 767, wherein a statute, authorizing garnishment of county and municipal officers and employees and exempting state officers and employees therefrom, was attacked on the ground that it constituted class legislation. The court held that it did not constitute class legislation, and it was stated in the opinion (p. 476): "The constitutional provision invoked does not prohibit the legislature from making class distinctions in the enactment of laws. It simply prohibits the granting to any individual or individuals rights, privileges, immunities, and exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law." To like effect is *Ruperich v. Baehr, supra,* where a garnishment law of California was held not to be class or special legislation if it relates to a class, and the class is founded upon intrinsic differences, requiring or reasonably justifying different regulations. Without restating the substance of this opinion, we refer thereto as previously set out.

Subject to the rules of proper classification, public offices and their incumbents may be divided into classes for purposes of legislation concerning them. *State v. Hall, supra.*

A general law does not violate the constitutional provisions requiring uniformity in its operation, if it applies to all persons and objects within the class to which it relates. The act in question is not violative of the Fourteenth Amendment to the Constitution of the United States, and is not unreasonable and arbitrary class legislation.

Other assignments of error claimed by defendant are held to be without merit.

AFFIRMED.

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GEORGE B. WILSON, APPELLEE, V. CAPITAL FIRE INSURANCE COMPANY, APPELLANT.
286 N. W. 331

FILED JUNE 2, 1939. No. 30629.

1. Insurance: CONTRACT: CONSTRUCTION. "In construing a contract of insurance, words used therein will be considered as used in their ordinary and popular sense." *Stone v. Physicians Casualty Ass'n,* 130 Neb. 769, 266 N. W. 605.
2. ———: ———: ———. Clause in contract limiting liability of company to $5,000 for loss resulting from bodily injuries to one person includes consequential as well as direct damages.
3. ———: ———: ———. Where policy of liability insurance limits liability of company to $5,000 for loss resulting from injuries to one person, and to $10,000 for any one accident, and two or more persons are injured, the insurer is liable for only $5,000 for loss resulting from injuries to one person, notwithstanding the fact that the total damage suffered by all injured parties was less than $10,000.

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

*Chambers, Holland & Locke,* for appellant.

*Beghtol, Foe & Rankin, contra.*

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

KROGER, District Judge.

This appeal requires the interpretation of the "limits clause" in an automobile liability insurance policy, and the only question for determination is the extent of the insurer's liability under such policy.

One George B. Wilson, hereinafter referred to as plaintiff, was the owner of a Buick automobile, and in March, 1931, obtained from the Capital Fire Insurance Company, of Lincoln, Nebraska, a corporation hereinafter referred to as defendant, an automobile liability policy carrying limits of $5,000 and $10,000 for loss from an accident resulting in bodily injuries to one or more persons.

On October 15, 1933, while this policy was still in full force, plaintiff's automobile was involved in an accident in which Bertha Heineman and Henry Heineman sustained personal injuries and property damage.

Bertha Heineman filed suit against the plaintiff on August 21, 1934, and obtained a judgment in the sum of $5,000, which judgment with costs the defendant in this action paid.

Thereafter and on July 11, 1935, Henry Heineman commenced an action against the plaintiff seeking damages by reason of personal injuries sustained by him, property damage, and loss of the services and companionship of his wife, medical and nursing expenses incurred in treating his wife's injuries, all because of said accident. This action resulted in a judgment in favor of Henry Heineman and against the plaintiff in the sum of $4,000. Special findings were made by the jury, finding that the damage suffered by Henry Heineman on account of personal injuries and loss of time and medical and surgical expenses was $250; that damages to his automobile were $25; and that said Henry Heineman suffered damages on account of loss of services and companionship of his wife and on account of medical and surgical and nurse expenses as the result of his wife's injuries in the sum of $3,725. Defendant herein admits liability of the items for $250 and $25, but denies liability for the item of $3,725, on the ground that

it had already paid the limit provided by the policy for damages resulting from bodily injuries to one person as a result of the accident.

Plaintiff thereupon filed this suit and, a jury being waived, trial was had to the court, the facts being stipulated. The trial court entered judgment for the plaintiff for the full amount of his claim, together with costs and attorneys' fees. From the overruling of a motion for new trial, this appeal is prosecuted.

The applicable provisions of the policy of insurance are as follows:

"The company does hereby agree to insure the assured named in this policy against loss from the liability imposed by law, upon the assured, for damages on account of bodily injuries * * * accidentally suffered or alleged to have been suffered during the period of this policy by any person or persons not employed by the assured as a result of the ownership, maintenance or use of automobile described in copy of application * * * subject to the following conditions and limitations:

"The liability of the company for loss from an accident resulting in bodily injuries to or in the death of one person only is limited to an amount not exceeding Five Thousand and 00/100 Dollars.

"And subject to the same limit for each person, the total liability of the company for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to an amount not exceeding Ten Thousand and 00/100 Dollars. Such limits to apply whether this policy is issued in the name of one assured or more."

If we understand the position of the plaintiff correctly, he bases his right to recover upon two grounds: First, that this was an accident in which more than one person was injured, and consequently the $10,000 limitation applied; and, second, that the damages recovered by Henry Heineman for the loss of services and companionship of his wife and on account of medical and surgical and

nurse expenses were consequential damages which plaintiff was entitled to recover, and the $5,000 limitation in the policy means that no more than $5,000 could be demanded by any one claimant.

In this case there were two persons suffering bodily injuries. The jury found that Bertha Heineman suffered damages because of personal injuries in the sum of $5,000, and a second jury found that Henry Heineman suffered bodily injuries as a result of the accident to his damage in the sum of $250. As to these items there is no dispute, and the defendant has paid those amounts or indicated a willingness to pay.

The disputed question in this case is whether the defendant is liable for the item of $3,725 awarded to Henry Heineman for loss of services and companionship of his wife and medical and other expenses incurred in the treatment of her injuries, in view of the limitation of liability contained in the policy.

A large part of plaintiff's brief is devoted to the proposition that consequential damages are recoverable under a policy insuring against liability arising out of the operation of an automobile. With plaintiff's contention that such damages are recoverable, we fully agree. However, the question here is not whether the policy covered consequential damages, but rather whether the damages assessed against him exceeded the limitation contained in his policy.

It is argued on behalf of plaintiff that the policy is ambiguous and uncertain, and that it should be construed against the insurance company, as it had the power to clarify any of its terms at the time the policy was prepared. We have carefully examined the policy in question and fail to find any ambiguity in its provisions. The phrase "and subject to the same limit for each person" clearly refers to the preceding clause of the contract and appears to be as clear and free from ambiguity as can be expressed in the English language. Terms of an insurance policy are not to be distorted from their natural meaning so as to give the appearance of being ambiguous. To do so

would have the effect of creating a new contract between the parties. Giving the limitation clauses in the instant case their natural meaning, it is apparent that the limit of the company's liability for injuries to one person is $5,000, whether such damages are direct or consequential. In this case there would have been no loss of services, companionship or expenses incurred on account of Mrs. Heineman, but for the injuries she sustained in the accident. Clearly the item of $3,725 represents a loss sustained because of injuries to one person, and having already paid the full limit of its liability on account of damages caused by injuries to that person, the defendant was not liable for the item mentioned. The fact that Mr. Heineman was also injured would not increase or diminish the consequential damages caused by the injuries to Mrs. Heineman, and there would be no logical reason for construing the provisions of the policy to mean that, if Mrs. Heineman alone had been injured, the liability of the company would be limited to $5,000, but that, since Mr. Heineman had also been injured, even though his damages were only $250, the liability of the company for Mrs. Heineman's injuries would be increased beyond the $5,000 limitation.

In the case of *Mannheimer Bros. v. Kansas Casualty & Surety Co.*, 149 Minn. 482, 184 N. W. 189, a similar policy was before the court, and it was held that the limitation therein contained was unambiguous and free from doubt and could not be added to without making a new contract for the parties.

In the case of *Rankin v. Travelers Ins. Co.*, 254 App. Div. 687, 3 N. Y. Supp. (2d) 444, the limitation of the policy was $5,000 for all damages arising out of bodily injuries to one person. The husband was the first to bring suit and he recovered $2,500 on account of the loss sustained by him because of the injuries to his wife. Later, suit was brought by the wife, and it was held that, since the insurer had already paid $2,500 to the husband, there remained no further liability to the wife on her judgment beyond the sum of $2,500.

In the case of *Lowery v. Zorn*, 184 La. 1054, 168 So. 297, it was held that, under a policy limiting liability to $5,000 for injuries to one person and to $10,000 for any one accident, the insurer was liable for only $5,000 to a party suffering damages in excess of that amount, notwithstanding the fact that the total damage suffered by both injured parties was less than $10,000. See, also, *Klein v. Employers Liability Assurance Corporation*, 9 Ohio App. 241; *Putnam v. Employers Liability Assurance Corporation*, 4 Atl. (2d) (N. H.) 353.

In allowing a recovery on account of injuries to Mrs. Heineman in excess of $5,000, the trial court was in error, and the judgment of the trial court is reversed and the cause remanded, with instructions to enter judgment in favor of the plaintiff for $275, with interest, plus the costs incurred in the district court for Lancaster county, Nebraska, in the case of Henry Heineman v. George B. Wilson, and all costs incurred in this action up to the time of the filing of defendant's answer, and that all costs incurred thereafter, including the costs of this appeal, be taxed to the plaintiff.

REVERSED.

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VERNA R. WASSUNG, APPELLANT, V. JOHN KENT WASSUNG, APPELLEE.

286 N. W. 340

FILED JUNE 9, 1939. No. 30500.

1. **Divorce.** Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments.
2. **Courts.** Courts of general jurisdiction have the inherent power to do all things necessary for the administration of justice within the scope of their jurisdiction. This includes supervisory power over their process and the power to stay temporarily

execution on judgments rendered by them whenever it is necessary to accomplish the ends of justice and prevent injustice.

3. **Divorce.** Provisions for the maintenance of children in divorce cases are for the benefit of the child or children, and not for the benefit of the parent.

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

*Walker & McArthur,* for appellant.

*Clarence G. Miles* and *Meredith K. Nelson, contra.*

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

SIMMONS, C. J.

This case involves the modification of a divorce decree for child support. The trial court modified the decree as to future payments and provided for the collection of the accrued payments on a monthly basis. Plaintiff appeals, and defendant cross-appeals.

Plaintiff and defendant were married in 1919. A daughter was born to them in 1921.

The trial court granted the defendant herein a divorce upon his cross-petition in 1925, in which divorce decree it was provided that the plaintiff should have the custody of the minor child, and that the defendant should pay child support in the sum of $20 per month, beginning February 19, 1925, and each month thereafter, until the further order of the court, or while the child was a minor or unmarried.

At the time of the divorce proceedings, defendant's wages were $42 per week. They were reduced to $35 per week in 1928; and in June, 1930, to $28.25 per week. The plaintiff was not employed when the divorce was granted. At the time of the trial of the present case, and for some time prior thereto, she was employed at a salary of $75 per month.

The defendant made the payments required by the decree up to January, 1933. From that date to February 8, 1936, without having secured a modification of the decree, he paid $10 per month, and from February 8, 1936, to June 26,

1937, he paid $5 per month to the plaintiff. In September, 1937, the plaintiff garnished defendant's salary, and collected $141.25 (all of his wages then due). The plaintiff caused a further garnishment summons to be issued in November, 1937, upon which nothing was received.

On December 14, 1937, the defendant asked the court to relieve him of all payments for the support of his daughter, accrued and to accrue under the terms of said decree, alleging his changed circumstances, to wit: A reduction in wages; his remarriage in 1927; the dependency of his wife and two children by his second marriage; and his indebtedness for necessities secured for his present family, debts in part caused by the taking of his wages in the garnishment proceedings.

Neither of the parties appear to have property other than household goods and an automobile. In each case, it appears that the entire salary is required for the support of, and necessities for, the dependent family.

The trial court, modifying the original decree, relieved the defendant of all obligation to make child support payments in the future, determined the accrued amount due under the decree which had not been paid, and provided that, beginning April 1, 1939, the defendant should pay the plaintiff the sum of $10 per month on the 1st day of each and every month thereafter until the accrued instalments were fully paid; and enjoined the plaintiff from enforcing the payment of said accrued and unpaid instalments by execution, attachment, garnishment, or in any other manner until the 1st day of April, 1939, and thereafter, except in accordance with the provisions of the decree.

Plaintiff asks this court to vacate the order of the district court, and reinstate the 1925 decree. The defendant on cross-appeal asks to be relieved of all liability for payments accrued and to accrue under said decree.

The reduction in defendant's wages and the employment of the plaintiff are changes in the circumstances of the parties that justify a prospective modification of this decree under the power granted the court in section 42-312,

Comp. St. 1929, and section 42-324, Comp. St. Supp. 1937.

The trial court concluded that payments of $10 per month hereafter by the defendant to the plaintiff for the support of the minor child were proper, and in that conclusion we concur.

Does the court have the power to modify the decree in so far as accrued and delinquent payments are concerned?

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

"All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments." Comp. St. 1929, sec. 42-319.

The original decree herein is a final judgment. *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428.

Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments.

This rule is consistent with the holdings of this court with reference to alimony and child support, down to and including the case of *McIlwain v. McIlwain,* 135 Neb. 705, 283 N. W. 845, and *Graham v. Graham,* 135 Neb. 761, 284 N. W. 280.

Courts of general jurisdiction have the inherent power to do all things necessary for the administration of justice within the scope of their jurisdiction. This includes supervisory power over their process and the power to stay tem-

porarily execution on judgments rendered by them whenever it is necessary to accomplish the ends of justice and prevent injustice. 14 Am. Jur. 370, sec. 171; 23 C. J. 521; 7 R. C. L. 1033, sec. 62; 1 Freeman, Executions (3d ed.) p. 117, and cases cited in the above texts. It is a power which should be exercised sparingly and only in those instances where justice requires it.

The district courts of Nebraska are courts of general jurisdiction. Const. art. V, sec. 9. In the exercise of their equity jurisdiction the district courts are not limited by statute. *Cochran v. Cochran,* 42 Neb. 612, 60 N. W. 942; *Rhoades v. Rhoades,* 78 Neb. 495, 111 N. W. 122; *Bodie v. Bates,* 95 Neb. 757, 146 N. W. 1002. Executions are a process of the court. Comp. St. 1929, sec. 20-1501. Judgments and decrees for alimony or maintenance "may be enforced and collected in the same manner as other judgments of the court wherein they are rendered." Comp. St. 1929, sec. 42-323. The decree in this case is subject to the power of the court over all its decrees and its processes.

We recognize that section 20-1505, Comp. St. 1929, provides: "Hereafter no stay of execution or order of sale upon any judgment or decree shall be granted for a longer time than nine months from and after the rendition of such judgment or decree." That section and sections 20-1506 to 20-1514, inclusive, were passed as one act in 1875. Laws 1875, p. 49.

It is clear from the provisions of that act that the legislature had in mind the matter of stays of execution on judgments and decrees where the ultimate purpose was the recovery of money only. Here the ultimate purpose of this decree is the care of the child of the marriage. The court was not concerned solely with the payment of money by defendant to the plaintiff, but was concerned with the payments of money by the defendant to the plaintiff "for the maintenance and support of the minor child." It is that purpose that must be accomplished to the extent that it is possible to do so by order of the court.

In *Winter v. Winter,* 95 Neb. 335, 145 N. W. 709, this

court was presented with the following situation. A divorce decree ordered the defendant husband to pay the plaintiff wife alimony at the rate of $15 a month. The defendant remarried. Defendant's wages were garnished. He claimed the benefit of the exemption statute as the head of a family. At that time, the statute provided: "All heads of families, who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." Cobbey's Ann. St. 1909, sec. 1522. This court held that the defendant could not defeat the collection of alimony by remarrying and claiming the benefit of the exemption law, and that that statute did not prevent the court's carrying out the purpose of the alimony statutes and the doing of an obvious justice in the premises. The court discussed the general powers of courts of equity, which exist independent of, and also by statute; the fact that the divorce laws are to be liberally construed; and the wide discretion which the legislature gave trial courts in matters of alimony, and child support and custody in divorce proceedings.

The statute involved in *Winter v. Winter, supra,* is as inclusive as section 20-1505, Comp. St. 1929, is exclusive.

In *Granger v. Craig,* 85 N. Y. 619, judgment was for the foreclosure of a mortgage; the defendant upon appeal desired a stay, not allowed by the provision of the Code, and the stay was granted. The court held: "The Code, however, does not abridge the power that the supreme court has always had over its own judgments, to correct mistakes in them, to vacate them for irregularity, to stay proceedings on them for such time and on such terms as to the court seem proper." That holding has been repeatedly affirmed in New York.

In *Skinner v. Hannan,* 81 Hun, 376, 30 N. Y. Supp. 987, there was an absence of a Code provision for an order which the court made. The court stated: "All the practice is not contained in the Code and rules. The court possesses inherent power to adopt a practice or grant a remedy to meet

the exigencies of a particular case, and thus give effect to the provision of the Code."

The stay of execution granted by the trial court in this case does not affect the right of plaintiff to be paid. It regulates only the manner and the time in which the rights fixed by the judgment shall be enforced.

As was stated by this court in *Earle v. Earle,* 27 Neb 277, 43 N. W. 118: "We are of the opinion that courts of equity should have and do have the jurisdiction to grant relief in cases of this kind without reference to the statutes of the state, but by and through the jurisdiction growing out of the general equity powers of the court."

This court has always considered that children involved in divorce actions are wards of the court, and that the ultimate decisions as to the children must be made from the standpoint of their best interest.

The duty of a father to his offspring, and his liability for their support and education, continue as imperative after, as before, a divorce. *Connett v. Connett,* 81 Neb. 777, 116 N. W. 658.

The defendant has a duty to support his minor child, Glenrose, that this court will not ignore. He likewise has a duty to support his two minor children by his second marriage that is as imperative as his obligation to support the daughter of his first marriage. The defendant cannot escape his liability to any of the three children.

The plaintiff made no effort to enforce payment of the full amount at the times required by the decree. Partial delinquencies covering a period of four years and eight months accrued before the plaintiff asked the court to issue its process to enforce payment. Her inaction is a factor contributing to the creation of the present situation.

To permit the plaintiff under these facts to levy execution or garnishee all of defendant's wages and immediately collect the accrued instalments will jeopardize, if not make impossible, the defendant's care and support of the two children of the second marriage.

To prevent the immediate collection of that entire amount,

and to provide for its orderly payment to the plaintiff, consistent with the needs of the minor child, Glenrose, and the ability of the defendant to pay, will not in any wise jeopardize the care of the child, Glenrose. It might be to her advantage to have the payments so made. It will likewise be to the advantage of the children of the second marriage.

The collection of the full amount due at this time cannot be of retroactive benefit to the child, Glenrose. Support payments in cases of this character are for the benefit of the child or children, not for the benefit of the parent. Instalment payments as provided by the district court in its decree of April, 1938, will be for the best interests of all three children.

The defendant contends that he should be relieved of all liability for the support of his minor child because the plaintiff has poisoned the mind of his child against him.

The record does not sustain the defendant's contention in that regard. However, assuming that that fact were established, the child should not be made to suffer further because of the suspicions and dissensions of the divorced parents.

We recognize that the decrees of the courts must be respected by litigants, and that courts cannot condone deliberate disobediance of their orders. That the defendant has not obeyed the order of the court with reference to the payment is clear. That he did it knowingly is clear. Were he and the second wife alone to suffer from the present enforcement of the full terms of the decree, we would not interfere with that enforcement. To enforce the decree as desired by the plaintiff would be to cause an extreme hardship on the two children of the second marriage who have the right to look to the defendant for support. Their interests require the court to intervene and protect the right of the father to care for them as well as his daughter by his first marriage, to the extent of his ability.

The decree of the trial court is

AFFIRMED.

EBERLY, J., dissents.

## CRETE MILLS, APPELLEE, V. SMITH BAKING COMPANY, APPELLANT.

286 N. W. 333

FILED JUNE 9, 1939. No. 30625.

1. **Taxation.** Taxes voluntarily paid cannot be recovered back, and if they are paid with knowledge and without compulsion they are voluntarily paid.
2. **Sales: PROCESSING TAXES.** A processor of wheat flour, under the Agricultural Adjustment Act, was charged with the duty of paying the processing tax, and not with the duty of acting as agent for the government in the collection of the tax from its vendees. Agricultural Adjustment Act, sec. 9, as amended, 7 U. S. C. A. sec. 609.
3. ———: ———. A processor of wheat products upon whom a processing tax was imposed, which was due and payable before any sale of its products took place, is under no legal obligation, after the law imposing it was declared unconstitutional, to repay to the purchaser an amount equal to the processing tax in the absence of an agreement to do so, though the amount of the tax is added to and buried in the contract price.
4. ———: ———. The provisions in the contracts set forth in the opinion, with reference to the decrease or abatement of the contract price in the event the processing tax was decreased or abated, applies only to the contingencies provided in the Agricultural Adjustment Act and not to contingencies resulting when the act was declared unconstitutional.
5. **Contracts.** Where parties expressly contract under what circumstances an obligation may arise with reference to a certain subject-matter, in the absence of fraud or mutual mistake, it excludes the possibility of an implied agreement of a different nature.
6. **Sales. PROCESSING TAXES.** A milling company, which filed its return under the Windfall Tax Act and paid the tax levied against processors who had not paid the full amount of processing tax levied under the Agricultural Adjustment Act prior to the date it was declared unconstitutional, is not liable to a buyer for such taxes paid by him where the processing taxes were not levied against the buyer and were buried in the contract price.

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

*William Niklaus*, for appellant.

*Perry, Van Pelt & Marti, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE AND JOHNSEN, JJ., AND KROGER, DISTRICT JUDGE.

CARTER, J.

This action was commenced by plaintiff to recover $2,758.51 for flour delivered under written contracts between December 5, 1935, and January 30, 1936. Defendant in its answer and counter-claim contends that it is entitled to recover $1.38 on each of 3,120½ barrels of flour sold by plaintiff to defendant from May 2, 1934, to January 6, 1936. A jury was waived and a trial had to the court. Judgment was for the plaintiff for the full amount and defendant appeals.

The delivery and contract price of the flour are not disputed. The question to be determined is the right of the defendant to recover back $1.38 per barrel of the contract price of the flour.

The item of $1.38 per barrel of flour is claimed by the defendant to represent the amount paid by it to the plaintiff to cover a processing tax imposed upon the latter under the provisions of the Agricultural Adjustment Act, 7 U. S. C. A. sec. 601 *et seq.*, and which act was declared unconstitutional on January 6, 1936, by the supreme court of the United States. *United States v. Butler*, 297 U. S. 1, 56 S. Ct. 312. The plaintiff paid all processing taxes due the federal government under the foregoing act to and including May 31, 1935. On June 1, 1935, plaintiff enjoined the collection of the processing tax and impounded the funds subsequently derived from the tax. After the adjudication of unconstitutionality of the Agricultural Adjustment Act, the impounded money, less fees, costs and attorneys fees, was returned to the plaintiff. Congress thereupon passed the Windfall Tax Law, 26 U. S. C. A. sec. 345 *et seq.*, by which a tax of 80 *per centum* was levied on the money so impounded, less expense and tax adjustments made with the purchasers of flour. Such purchasers who received tax adjustments were subjected to the provisions of the Windfall

Tax Law on the amounts received by them. Plaintiff offered the defendant such a tax adjustment in the amount of $1 per barrel for the 882½ barrels of flour delivered during the period the processing tax was impounded, and it was refused. The plaintiff then paid the Windfall Tax to the federal government as provided by the Windfall Tax Act.

The evidence shows that the processing taxes were at no time billed separately from the composite price for the flour set forth in the contracts of purchase. It is stipulated by the parties that no money was paid to the plaintiff by defendant under any formal or written protest and that no demand for the return of the money paid or objections concerning processing taxes were made by defendant to plaintiff at any time during said period.

Defendant contends that the payments of the processing taxes to plaintiff were involuntary. That the payments were voluntarily made, in the light of recent decisions on the subject, is beyond question. In *Johnson v. Scott County Milling Co.*, 21 Fed. Supp. 847, the court said: "The court declares the law to be that, where one voluntarily pays money with full knowledge of all the facts, in the absence of fraud or duress, he cannot recover the same back although mistaken as to the law, and that the plaintiff, having voluntarily paid the purchase price of the flour purchased from the defendant, cannot recover the same back in this action."

In *Heckman & Co. v. Dawes & Son Co.*, 12 Fed (2d) 154, the court in a very similar case said:

"Taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary. * * *

"The revenue act of 1918, as construed by the Treasury Department, imposed a tax on the manufacturer, not the dealer. The defendant, as such manufacturer, paid this tax. In selling to the plaintiff, it added to the selling price the amount of the tax, which plaintiff voluntarily paid in order to continue 'dealing in cider, which was a large and profitable portion of its business.' Defendant paid no tax for the plaintiff but for itself. The sale to the plaintiff

was not induced by misrepresentation as to law or fact, nor was it the result of undue influence on the one side and undue confidence on the other. The payment of this 10 per cent. by the plaintiff, therefore, was the result of nothing more than a mistake of law, and such a situation presents no ground for equitable relief." See, also, *Cohen v. Swift & Co.*, 95 Fed. (2d) 131; *Dorland v. City of Humboldt*, 129 Neb. 477, 262 N. W. 22.

It is established by the record that plaintiff has paid all the processing taxes due the federal government prior to May 31, 1935, and that it has paid the Windfall Tax due the federal government on the balance of the processing taxes collected. Under this state of facts defendant is not entitled to recover back any part of the tax paid to plaintiff. In *Johnson v. Scott County Milling Co., supra,* the court said: "The court declares the law to be that the so-called 'Windfall Tax Act' was passed for the purpose of the government's recovering from the processors taxes not paid under the Agricultural Adjustment Act, and that the Congress of the United States having adopted a policy of the recovery of said unpaid processing taxes for the benefit of the government and having levied a tax for that purpose, and the defendant having made return under said revenue act and paid said tax, defendant is not liable to the plaintiff in this action."

In *Hodgman Rubber Co. v. Dumaine*, 93 Fed. (2d) 165, the court said: "Furthermore, inasmuch as the Amoskeag Company, the seller, has paid the tax to the United States and received nothing back, if it could be inferred from the contracts that the promise of the buyer was to pay the seller a stated price for the goods and also pay him an additional sum to pay the tax, the appellant could not, even then, maintain its claim for the amount of the tax, first, for the reason that the Amoskeag Company would have complied with its contract by paying the government the tax, and, second, because it could not be said to have unjustly enriched itself at the appellant's expense, for it paid the tax and has not been reimbursed through a refund of it."

The contention is advanced that defendant is entitled to

recover under the terms of the contracts of purchase of the flour. Each of the contracts contained the following: "Taxes: The price named in this contract includes all taxes as at the date hereof proclaimed by the secretary of agriculture by virtue of the authority vested in him by the Agricultural Adjustment Act of the United States. Under said act it is provided that said taxes may be changed from time to time. It is recognized by the parties hereto that there is a growing tendency on the part of the United States and the separate states to tax grain and grain products, containers and other items used in connection with the manufacturing, processing, blending, sale, or distribution thereof. It is, therefore, agreed and understood that if, after the date of this contract, the commodities and/or containers, or other items used in connection with the manufacturing, processing, blending, sale or distribution thereof, shall become subject to any increase in taxes or to any new or additional tax or taxes other than those included in the price hereof (if the seller shall be required by law to collect such increases or additional taxes), then, in that event, said increases or additional taxes shall be added to the price hereof; and correspondingly if any tax included in the price hereof shall be decreased or abated, then, in that event, said decrease or abatement shall be deducted from the price hereof."

This identical provision has been construed in the similar case of *Johnson v. Igleheart Bros.*, 95 Fed. (2d) 4, wherein it was determined that contracts for the sale of flour, providing that the price included taxes under the Agricultural Adjustment Act, that such taxes might be changed, that if the taxes were increased before delivery, the amount of increase should be added to the price, and, if reductions were made, the buyer would be allowed the amount of the reductions, and if any tax included in the price should be decreased or abated, the decrease or abatement should be deducted from the price, applied only to the contingencies provided in the act which authorized increases, decreases, abatement, and refunds, and had no application to con-

tingencies which resulted when the Agricultural Adjustment Act was declared unconstitutional.

In *Zinsmaster Baking Co. v. Commander Milling Co.*, 200 Minn. 128, 273 N. W. 673, the court said: "If it be true that the sale price was a composite price per barrel so that the tax was 'buried in the price' under all or any of the contracts involved, plaintiff cannot recover any part of such composite price."

In *Golding Bros. Co. v. Dumaine*, 93 Fed. (2d) 162, the court stated the rule as follows: "It seems to be well settled that, where a sales contract provides that the purchaser is to pay a stated price and that alone, the purchaser cannot recover from the seller the amount of the tax, if the tax is later done away with by a repeal of the statute or by its being declared unconstitutional, or, if the tax is simply reduced, recover the amount of the reduction, even though the tax had not been paid by the vendor, or, if paid, refunded to him."

Other cases holding to the same effect are *Wayne County Produce Co. v. Duffy-Mott Co.*, 244 N. Y. 351, 155 N. E. 669; *Lucas v. Panos*, 190 Wash. 402, 68 Pac. (2d) 617; *Planters Nut & Chocolate Co. v. Brown-Murray Co.*, 128 Pa. Super. Ct. 239, 193 Atl. 381.

The contention is advanced that there is an implied agreement to return a sum of money equal to the amount of the processing taxes paid after the Agricultural Adjustment Act was declared unconstitutional. The applicable rule is: "Where parties expressly contract under what circumstances an obligation may arise with reference to a certain subject-matter, and the contract is entered into without fraud or mutual mistake, it excludes the possibility of an implied covenant of a contradictory or different nature." *Johnson v. Igleheart Bros., supra.*

Defendant relies on *Cream of Wheat Corporation v. Moundridge Milling Co.*, 24 Fed. Supp. 998. This case seems to sustain the contentions of the defendant. It appears, however, to be based upon previous decisions of the supreme court of Kansas. There are so many decisions to the con-

trary interpreting the very provisions involved in the contract before us which appear to be supported by the better reasoning that we feel obliged to accept them and to disregard the *Cream of Wheat Corporation* case. In so doing, we necessarily come to the conclusion that the trial court correctly entered judgment for the plaintiff for the full amount of its claim.

AFFIRMED.

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ROY HENRY V. STATE OF NEBRASKA.
286 N. W. 338

FILED JUNE 9, 1939. No. 30662.

1. **Criminal Law.** Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct crimes committed by the accused is not admissible.
2. ———. In a prosecution for incest, it is reversible error to admit evidence, over objection, of separate and distinct crimes committed by the accused against a female other than the prosecutrix.

ERROR to the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Reversed.*

*Charles H. Flansburg,* for plaintiff in error.

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

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

CARTER, J.

The defendant was convicted of the crime of incest with his daughter, Fern Henry. From the verdict and judgment of the court imposing sentence, the defendant brings the case by error proceedings to this court.

The state was permitted to call one Hazel Jones as a witness, who testified that she expected to be delivered of an illegitimate child within a few days and that the defendant was the father of her unborn child. It appears from the record that the pregnant condition of this witness was obvious to the jury. The defendant contends that the ad-

mission of this evidence over objection was prejudicial error.

We are convinced that in prosecution for incest it is reversible error to receive evidence, over objection, of separate and distinct crimes committed by the accused against a female other than the prosecutrix. Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct crimes committed by the accused is not admissible. *Swogger v. State,* 116 Neb. 563, 218 N. W. 416; *Crawford v. State,* 116 Neb. 629, 218 N. W. 421; *Doerffler v. State,* 129 Neb. 720, 262 N. W. 678. Clearly, the elements of the crime of incest do not include motive, criminal intent, or guilty knowledge.

In *Leahy v. State,* 31 Neb. 566, 48 N. W. 390, the accused was cross-examined as to a similar attempted rape made by the accused on a girl other than the prosecutrix on the day following his alleged attack on the prosecutrix. This court in discussing the admissibility of this evidence said: "That this statement and the attending circumstances were of the most prejudicial character cannot be doubted. The second offense, if committed, was entirely disconnected with the first. The fact that Miss B. was summoned as a witness, by the state, and sitting in plain view in the courtroom, in connection with the statement of the assistant prosecuting attorney of what he intended to prove, or if we take the prosecuting attorney's statement, what they claimed they had a right to prove, brought before the jury a second offense of the same nature, although in a less degree than that with which the accused was then on trial."

In *Nickolizack v. State,* 75 Neb. 27, 105 N. W. 895, the defendant was tried on a charge of statutory rape. Evidence of a similar crime against a female other than the prosecutrix was admitted in evidence over objection. This court said: "On a trial of one charged with the crime of rape, evidence of an attempt of the accused to commit a similar crime on another person is inadmissible."

In *Abbott v. State,* 113 Neb. 524, 206 N. W. 153, this court said: "On the trial of one charged with the offense

of sodomy, it is error to permit a witness to testify that on an occasion, more than a year previous to the time charged, the defendant had asked her an improper or indecent question, where it appears that such question had no relation to the offense charged." See, also *Stagemeyer v. State*, 133 Neb. 9, 273 N. W. 824.

We think the trial court erred in permitting evidence of other crimes with persons other than the prosecutrix and that the error was prejudicial to the rights of the defendant.

REVERSED AND REMANDED.

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JAMES POULTRY COMPANY, APPELLANT, V. CITY OF NEBRASKA CITY, APPELLEE.

286 N. W. 337

FILED JUNE 9, 1939. No. 30381.

**Eminent Domain.** Evidence of past profits shown with a reasonable certainty, within the discretion of the trial court, may be admitted, not as a separate element of damage, but as an element which may be taken into account in fixing the value of the leasehold.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. Opinion on motion for rehearing of case reported in 135 Neb. 787. *Judgment of reversal adhered to.*

*Frank A. Hebenstreit, Thomas E. Dunbar* and *Kennedy, Holland, DeLacy & Svoboda*, for appellant.

*Varro E. Tyler* and *Raymond Frerichs, contra.*

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

MESSMORE, J.

This case has been previously heard by the court and an opinion adopted, appearing in 135 Neb. 787, 284 N. W. 273. Subsequently, a motion for rehearing was filed by appellant as to certain paragraphs of the syllabus and for a modification with respect thereto.

We are convinced that the law of the case, as set forth in the syllabus in the former opinion, is correct. However, certain parts of the opinion have been justly criticized by attorneys for appellant, and proper correction will, therefore, be made.

The appellant contends that evidence was offered in the lower court with respect to past profits, not for the purpose of recovering prospective profits, but for the purpose of merely trying to recover for the value of the leasehold, as reflected by the impairment of the use to which the leasehold was adapted, by reason of the construction of the viaduct, that, therefore, the showing of past profits is a proper inquiry in order to reflect the market value of the leasehold.

We conclude the rule in this respect should be: Where past profits may be shown with a reasonable degree of certainty within the discretion of the trial court, such evidence may be admitted, not as an independent or separate element of damage, but for the purpose of showing the value peculiar to the leasehold and its location. Such evidence is admissible as elements which may be taken into account in considering the value of the leasehold. Some of the pertinent authorities supporting this rule follow:

In *Iron City Automobile Co. v. City of Pittsburgh*, 253 Pa. St. 478, 495, 98 Atl. 679, the court said: "If the leasehold is one which, because of certain peculiar qualities, in and of itself, actually produces a revenue or enables the tenant directly to make a regular saving in the conduct of his business, aside from the results of his personal management * * * then these are elements which may be taken into account in fixing the value of the term."

In *Dallas County v. Hart Bros.*, 271 S. W. (Tex. Civ. App.) 408, the court said (p. 409): "The loss in the profits of the business then being conducted was a proper subject of inquiry, and such loss might have been considered, not as furnishing the basis of compensation, but as tending to show the diminished value of the lease." See *Hayes v. City of Atlanta*, 1 Ga. App. 25, 57 S. E. 1087.

In this state, in the case of *Kenney v. Braun*, 113 Neb.

12, 201 N. W. 641, the court held: "In an action by a lessee to recover damages for a wrongful eviction from a theatre leased by him for motion-picture shows, he may recover loss of profits for the unexpired portion of the term, if proved with reasonable certainty."

In *Wittenberg v. Mollyneaux*, 60 Neb. 583, 588, 83 N. W. 842, this court said: "That a party may recover for gains prevented as well as for losses sustained when such damages are not only certain, but are the natural and probable result of the wrong complained of, is a point no longer open to dispute in this state. *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910; *Wittenberg v. Mollyneaux*, 55 Neb. 429." See, also, *O'Shea v. North American Hotel Co.*, 109 Neb. 317, 191 N. W. 321.

This supplemental opinion is for the purpose of clarifying the court's position upon the admissibility of evidence of past profits. Any subject-matter contained in the original opinion in conflict herewith is not to be considered. In all other respects, the original opinion is adhered to.

For the reason given herein and the reasons stated in our former opinion, the judgment of the trial court is reversed, and the cause remanded, and the motion for rehearing is overruled.

JUDGMENT OF REVERSAL ADHERED TO.

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## IN RE ESTATE OF GERTRUDE A. LOVE. WILLIAM L. WALKER ET AL., APPELLEES, V. ESTATE OF GERTRUDE A. LOVE: FRANK C. BOEHMER, GUARDIAN AD LITEM, APPELLANT.

286 N. W. 381

FILED JUNE 16, 1939. No. 30539.

**Executors and Administrators:** ATTORNEY'S FEES. An allowance may not be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate unless the services redounded to the interest of all persons interested in the estate and were beneficial to the estate.

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

*Frank C. Boehmer*, for appellant.

*George I. Craven, William L. Walker* and *John McArthur, contra.*

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

CARTER, J.

This is a suit on a claim for attorneys' fees filed by the claimants against the estate of Gertrude A. Love, deceased. From an allowance of $1,000 made by the district court, the guardian *ad litem* of two minor heirs appeals.

The record shows that the testatrix, Gertrude A. Love, executed a will in 1924, wherein she named one Harvey S. Bell as executor and trustee. After the death of Harvey S. Bell, the testatrix executed a codicil in 1926 in which she named the First Trust Company of Lincoln, Nebraska, as executor and trustee. The codicil contained no other provision whatsoever. Gertrude A. Love died on June 15, 1936, leaving as her only heirs at law and beneficiaries under her will two grandsons, John Byron Love and Robert James Love, both minors. By the terms of the will the estate is devised to the trustee to be used for the support and education of the minor heirs until the younger attains the age of thirty years, at which time the estate is to be distributed between them. It is stipulated that the value of the estate is $25,000. After the will was filed in the county court, Augusta Strauch, the mother of the two minor heirs, filed objections to the probate of the codicil. The county court admitted the will and codicil to probate and an appeal was taken to the district court by Augusta Strauch. Before the case came on for trial in the district court, a settlement of the case was had and a stipulation entered into whereby the First Trust Company renounced any rights it may have had by virtue of the codicil, and consented to the appointment of F. B. Baylor as administrator with will annexed

and trustee under the will. The decree of the district court sustains the action of the county court in admitting the will and codicil to probate. Other than the substitution of F. B. Baylor as trustee and administrator with will annexed for the First Trust Company as trustee and executor, the decree of the county court was not disturbed. The attorneys for Augusta Strauch then made application to the county court for the allowance of attorneys' fees for the services they had rendered to the estate. The claim was denied *in toto* by the county court and an appeal was taken to the district court. After a trial, the district court allowed attorneys' fees of $1,000 against the estate. The case is now before us on an appeal from this order.

It is conclusively established by the evidence that the only purpose of the litigation was to void the effect of the codicil, and thereby secure the removal of the First Trust Company as executor and trustee. It is also shown that no loss to the estate resulted from the appointment of the First Trust Company as such executor and trustee.

The general rule is that no allowance may be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate unless the services redounded to the interest of all persons interested in the estate and were beneficial to the estate.

It is the contention of appellees that the codicil did not express the intention of the testatrix, for the reason that it was drawn as the result of the undue influence of an agent of the First Trust Company, the named executor and trustee therein. It is also contended that the designation of the First Trust Company as executor and trustee was void, for the reason that the subscribing witnesses to the codicil were stockholders in the First Trust Company, the named executor and trustee therein, and section 30-208, Comp. St. 1929, is cited in support thereof.

The foregoing issues were not determined upon a trial, for the reason that the named executor and trustee filed a renunciation of its designation as such by the codicil. It

seems to us that the only question for determination is whether the estate was benefited by appellees' services, and, if so, a determination of a reasonable fee for such services.

There is no higher nor more solemn obligation of the courts than to see to it that estates which undergo administration are carefully guarded and preserved. This is especially so where the interests of minor heirs are affected. The courts should not hesitate to disallow charges against estates which are not found to be necessary charges, and no different rule can obtain when the fees of attorneys are involved. That appellees performed in a prompt and efficient manner the legal services they were asked by their client to perform is apparent from the record. But the question whether the value of such services should be paid by the estate rests upon their value to the estate.

We will assume, without deciding, that the designation of the First Trust Company as executor and trustee in the codicil was void. This being true, the duty devolved upon the county court to appoint an administrator with will annexed. It cannot be questioned that the First Trust Company, under the law of this state, is competent to be executor and trustee. It qualified for such position by giving a $15,000 bond as required by the county judge. We fail to see how an estate can have a pecuniary interest in the appointment of an executor, administrator, or a trustee, although it might have such an interest if it were necessary to remove an executor, administrator, or trustee for cause. We think the majority rule is that no allowance will be made out of the estate for costs and attorneys' fees incurred in procuring letters of administration, or in litigating the right to administer on the estate, even though a party asking for such an allowance was successful in obtaining letters of administration for himself or for his nominee. The selection of a competent administrator or trustee is incidental to the administration of an estate. In the case at bar the services for which compensation is sought were not rendered in connection with the administration of the

estate. It appears to have been a contest between Augusta Strauch and the First Trust Company, the named executor and trustee in the codicil, as to who should act as such executor and trustee. In this contest the estate had no interest. It was not shown that the services rendered by appellees preserved the estate, or in any way added to its value. In fact the evidence affirmatively shows that the estate neither sustained loss nor gain by the litigation. Under such circumstances there is no basis for an allowance of costs and attorneys' fees against the estate.

This court has held that the county court has authority to allow attorneys reasonable fees as a claim against the estate when such attorneys were employed by the executor, and rendered services which were necessary and beneficial to the estate. *Hazlett v. Estate of Moore*, 89 Neb. 372, 131 N. W. 589. Attorneys' fees have been allowed when they were employed by one heir and the litigation resulted in benefits to all of the heirs of the deceased. *In re Estate of Merica*, 99 Neb. 229, 155 N. W. 887. In denying attorneys' fees this court in the case of *In re Estate of Charles*, 123 Neb. 630, 243 N. W. 847, said: "His efforts and the services of his attorneys were not beneficial to the estate. They did not by the litigation create or preserve a fund available for the payment of their expenses. Their allowance would diminish the inheritance of the heirs under the statute of descent." It is clearly the rule that an estate of a decedent will not ordinarily be held liable for attorneys' fees for services rendered at the request of a legatee. *St. James Orphan Asylum v. McDonald*, 76 Neb. 630, 110 N. W. 626. An estate of a decedent is liable for attorneys' fees for services rendered at the request of a legatee, even when successful, only when the services preserved the estate, added to its value, or were otherwise beneficial to it. In the instant case the services of counsel preserved no part of the estate nor added anything to it. Special circumstances are not pointed out that show the estate was in any way benefited. The allowance of attorneys' fees against the estate in this case would diminish the inheritance of

the two minor heirs to the extent of the allowance made. The litigation would therefore result in a net loss to the estate in an amount equal to the attorneys' fees allowed. Under this situation and in the absence of special circumstances, attorneys' fees cannot be allowed against the estate.

The contentions of appellees that the First Trust Company was disqualified because the codicil appointing it was subscribed to by witnesses who were stockholders of the First Trust Company can in no way change the rule. Unless it be shown that the estate was conserved or otherwise benefited by the services rendered, the applicant is in the position of any other litigant in so far as the payment of costs and attorneys' fees are concerned. We necessarily conclude that the allowance of attorneys' fees and costs by the district court was erroneous. The judgment is reversed and the application dismissed.

REVERSED AND DISMISSED.

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M. L. RICH, APPELLEE, V. BERTHA COOPER ET AL.: IDAMA I. COOPER ET AL., APPELLANTS.

286 N. W. 383

FILED JUNE 16, 1939. No. 30596.

1. Judgment: DORMANCY. If execution shall not be sued out within five years from the date of any judgment, or if five years shall have intervened between the date of the last execution and the time of suing out another, such judgment becomes dormant and ceases to operate as a lien on the estate of the judgment debtor.
2. ———: REVIVOR. The statute, section 20-1413, Comp. St. 1929, requiring the revivor of actions within one year is not exclusive and a revivor may be had thereafter by bill or supplemental petition.
3. ———: ———. The limitation of one year for the revivor of actions has no application to the revivor of a dormant judgment.
4. ———: ———. The lien of a judgment which has attached to the real estate of a judgment debtor in his lifetime may be enforced in equity without reviving the judgment.
5. ———: ———. A petition to foreclose a judgment lien is properly entertained when it appears that the judgment creditor has no adequate remedy at law.

6. ———: ———. The commencement of a suit to foreclose a judgment lien before the judgment became dormant, and the pendency thereof afterwards, does not operate to continue the judgment in force beyond the statutory period.
7. ———: ———. Under such circumstances, the decree of foreclosure of the judgment lien must be rendered before the judgment becomes dormant to be effectual.

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

*Halligan, McIntosh & Halligan,* for appellants.

*Cook & Cook, contra.*

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

CARTER, J.

This is an appeal from a decree of the district court for Dawson county foreclosing the lien of a judgment.

Plaintiff obtained a judgment against Richard J. Cooper in the county court of Dawson county on November 8, 1927, in the amount of $219.59 with interest and costs. On November 19, 1927, the judgment was transcripted to the office of the clerk of the district court for Dawson county and became a lien upon certain lands belonging to Cooper which were described in plaintiff's petition. On October 24, 1932, an execution was issued which was subsequently returned wholly unsatisfied. On December 2, 1934, Cooper died intestate and possessed of the real estate heretofore mentioned in addition to his homestead. A claim for the full amount of the judgment was filed in the county court on January 7, 1936. No proceedings to revive the judgment have been had. On October 7, 1937, a petition praying for the foreclosure of the lien of the judgment against the lands of the deceased other than his homestead was filed, said lands being particularly described therein. The decree of the district court foreclosing the judgment lien was entered on September 30, 1938. The record further discloses that the heirs at law of Richard J. Cooper, deceased, conveyed their interest in said lands to Emily L. Peden by warranty

deed recorded June 5, 1937. Due to the fact that a husband of one of the heirs refused to consummate the transaction, the property was deeded back to the heirs at law of Richard J. Cooper on June 10, 1937, by a quitclaim deed which does not appear to have been recorded.

It is the contention of the defendants that the judgment had become dormant and that the claims of creditors of the estate had attached as liens against the property of the estate during the dormancy of the judgment and were consequently superior to the judgment lien.

Defendants contend that the judgment became dormant upon the death of Richard J. Cooper, the judgment debtor. This contention is based upon the provisions of section 20-1413, Comp. St. 1929, which provides that an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made. This section of the statute has been held to be nonexclusive and is not a bar to revivorship proceedings after one year by bill or supplemental petition. *Hayden v. Huff*, 62 Neb. 375, 87 N. W. 184; *Keith v. Bruder*, 77 Neb. 215, 109 N. W. 172. And in *School District v. Kountze Bros.*, 3 Neb. (Unof.) 690, 92 N. W. 597, the court said: "The limitation of one year for revivor of actions does not apply to proceedings to revive a dormant judgment."

It has generally been held that a valid execution cannot issue after the death of a party to a judgment without first reviving the judgment. But the lien of a judgment continues after the death of the judgment debtor, and may be enforced in equity without revival of the judgment. 16 Standard Ency. of Procedure, p. 413; 34 C. J. 659.

In *James v. Life*, 92 Va. 702, 24 S. E. 275, the court said: "A bill in equity may be maintained against the personal representative of a decedent and his devisees or heirs at law to subject the real estate of the decedent to the payment of a judgment recovered against him in his lifetime, without first reviving such judgment at law."

Also, in a similar case, the court, in *Laidley v. Reynolds*, 58 W. Va. 418, 52 S. E. 405, said: "The judgment is a lien by mere force of the statute. When once it fastens on the land it sticks to it notwithstanding the death of either party, and may be enforced in equity without revival, revival being necessary only for the purpose of issuing execution. The lien does not come from an execution. It is not a part of the action in which the judgment was rendered. It comes from the statute, and may be enforced always in equity."

Other cases to the same effect are *Morton v. Adams*, 124 Cal. 229, 56 Pac. 1038; *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420; *Evans v. Silvey & Co.*, 144 Ala. 398, 42 So. 62.

It appears from the record in the instant case that the assets of the estate were not sufficient to pay plaintiff's claim. It also appears that the record title had been conveyed by the heirs at law of Richard J. Cooper at the time the suit before us was commenced. It would seem that plaintiff had no adequate remedy at law and that his petition for relief in a court of equity is sustainable. In a similar case, *Griswold v. Johnson*, 22 Mo. App. 466, the court said: "Where a judgment was rendered and a transcript of it filed before the sale of land by the judgment debtor to a third person, it is a lien upon the *property* and *it* is liable for the amount thereof. Before resorting to means for the enforcement of the lien, in a case where the judgment debtor is dead, the judgment creditor must have exhausted his legal remedies, as, for instance, by showing an allowance of his claim in the probate court against the estate of the judgment debtor; except where it would have been useless; as where it is admitted, as in this case, that the judgment debtor died leaving no estate whatever, of any kind or description. Since the *lien* cannot be enforced in the probate court, and the judgment debtor being dead no execution can issue; a court of equity has jurisdiction to enforce the lien of the judgment."

The record shows that the last execution on the judgment in question was issued on October 24, 1932. Under the provisions of our statute on the subject, the judgment would not

become dormant until five years from that date. Comp. St. 1929, sec. 20-1515. The petition for the foreclosure of the judgment lien was filed on October 7, 1937, but the decree was not entered until after the five-year period had elapsed. That a suit in equity was an available remedy for the foreclosure of the judgment lien at any time before the judgment became dormant without a revivor is established by the authorities. But in the case at bar the judgment had become dormant and the lien lost when the decree was taken. There was nothing left upon which a decree could be predicated. The applicable rule can best be stated by quoting from the opinion in *Flagg v. Flagg,* 39 Neb. 229, 58 N. W. 109, wherein the court said:

"Judgments are liens only by force of statute. A judgment of the district court in this state is a lien upon the real estate of the debtor within the county, from the first day of the term of court at which it was entered; and such lien remains in force for five years from the date of the judgment. In order to continue the lien beyond this period the statute, in express terms, requires that an execution must be issued within the life of the judgment. The issuance of an execution within five years prolongs the judgment and preserves the lien of the judgment for five years longer. The bringing of this action was not equivalent to, nor did it take the place of, the issuing of executions upon the judgments. The pendency of this suit did not prevent plaintiff from suing out executions. *See Bish v. Burns, supra.*

"*Newell v. Dart,* 28 Minn. 248, is analogous to the case at bar. That was an action in the nature of a creditor's bill to subject property of the judgment debtor to the payment of a judgment recovered against him. By the statute of Minnesota, a judgment recovered in that state survives, and the lien thereof continues, for the period of ten years, and no longer. There the action was brought within that period; but before a decree was rendered therein, plaintiff's judgment, which by the suit he was seeking to enforce, became dormant. It was contended in that case, as here, that the pendency of the action had the effect to keep alive the

judgment. The court held that the commencement of the suit before the judgment was barred, and the pendency thereof afterwards did not operate to continue the judgment in force beyond the statutory period.

"It is argued that the action may be treated as one to recover on the various judgments held by plaintiff, and as they were in full force when this suit was commenced, the statute of limitations ceased to run at the date of the summons which was served on the defendants. In no proper sense can this be regarded as a suit at law to recover a judgment upon plaintiff's judgments. It is merely an equitable action brought to foreclose a mortgage, and for the marshaling of liens upon the mortgaged premises. But if we regard this as an action at law upon domestic judgments, plaintiff would stand in no better position. The commencement of the action would prevent the running of the statute of limitations against the causes of action,—the judgments, —but it would not preserve the liens of the judgments after they became dormant. Had a new judgment been obtained by plaintiff, such judgment would have been a lien only from the first day of the term of court, which would have been subsequent to the recording of Conkling's mortgage; hence, the mortgage would have been the prior lien. Our conclusion is that plaintiff's judgment became barred and ceased to be a lien as against Conkling's mortgage, notwithstanding the pendency of this action." See, also, *Newell v. Dart,* 28 Minn. 248, 9 N. W. 732; *Cotton v. First Nat. Bank of Superior,* 51 Neb. 751, 71 N. W. 711; *Predohl v. O'Sullivan,* 59 Neb. 311, 80 N. W. 903.

Under these holdings plaintiff's judgment became dormant during the pendency of the action and before decree was entered. On becoming dormant it ceased to operate as a lien upon the estate of the judgment debtor. There was nothing remaining therefore to support a decree of foreclosure of the judgment lien.

REVERSED.