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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY TERM, 1942

VOLUME CXLI

HENRY P. STODDART
OFFICIAL REPORTER

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By HENRY P. STODDART, REPORTER OF THE SUPREME COURT,

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1942

JESSE GRECO, APPELLEE, V. WILLIAM SHAVER: OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

2 N. W. (2d) 526

FILED FEBRUARY 13, 1942. No. 31276.

1. **Negligence.** "Negligence consists of doing what a reasonable and prudent person would not have done, or in not doing what a reasonable and prudent person would have done under the existing circumstances." *Blanton v. Michael, Swanson & Brady Produce Co.*, 138 Neb. 883, 295 N. W. 883.
2. ———. "A person is answerable only for the natural and probable consequences of his own acts, and where some new efficient cause intervenes, not set in motion by him nor flowing from any act of his, which causes the injury, it is the proximate cause." *Moses v. Mitchell*, 139 Neb. 606, 298 N. W. 338.

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

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Carnazzo & Kazlowsky, Archie C. O'Brien and *John J. Long, contra.*

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

SIMMONS, C. J.

This is an action for damages brought by the plaintiff against the defendant street railway company and one

William Shaver for injuries arising as the result of a collision. The jury's verdict was for $2,500 in favor of the plaintiff and against both defendants. The trial court ordered a remittitur of $750 which plaintiff granted, reserving the right in the event of an appeal to present the remittitur order as error. Defendant Shaver did not appeal and is not before this court. Defendant street railway appeals presenting as error the insufficiency of the evidence to sustain a judgment against it, various instructions given or refused, and other matters. Plaintiff cross-appeals from the order of remittitur.

The accident occurred about 4:30 p. m. on May 5, 1939, on Twenty-fourth street just north of Poppleton in the city of Omaha. The weather was clear and warm; the pavement was dry. Poppleton street runs east and west; it is about 40 feet wide and at the intersection of Twenty-fourth is on the crest of a low hill running east and west. Twenty-fourth street is paved, runs north and south, and slopes uphill to Poppleton from the south and downhill to the north. The defendant operates a double-track line on Twenty-fourth street. At the time of the accident there was a Terraplane coupé parked facing north on the east side of Twenty-fourth street, and about 20 feet north of Poppleton, parked further north of the coupé, with about 10 or 15 feet distance intervening, was a panel truck owned by the plaintiff. The plaintiff was standing behind his truck (between it and the coupé) taking some materials out of his truck. At that point the distance between the east rail of the north-bound street car track and the curb is less than 13 feet, so that when a street car going north was passing the parked truck there was not sufficient space for an automobile to pass between the parked cars and the street car.

Defendant's street car coming from the south going north approached Poppleton street and stopped on the south side of that street. It then started up going north and gaining speed, but its maximum speed as fixed by the undisputed evidence did not exceed 12 miles an hour.

Defendant Shaver, driving a panel truck approached

Poppleton street from the same direction going at a speed fixed at 20 miles an hour, overtook the street car as it was in Poppleton street (traveling to the right of the street car) and getting out in front of it as the downgrade began on the north side of Poppleton. As the parked coupé became visible, the defendant Shaver turned his truck toward the left, cut in ahead of the street car and onto the street car track. The undisputed evidence is that the motorman saw the Shaver truck as it came abreast the front of the street car. He then sounded the gong, applied the "sand," put on his brakes, and stopped as quickly as the mechanism of the car would operate.

There is not much dispute between plaintiff's and defendants' witnesses as to what happened. Plaintiff's only witness as to the collision, his nephew, was standing near the plaintiff but on the curb. He was asked to tell what he saw, and answered: "Well, I seen a truck angling over towards the west in order to get through; I seen the street car hit the truck. The truck swung over to the—swung over, hit the coupé, and the coupé—and all together were all four of them, in a bunch, and Mr. Greco was pinned in between his door and that coupé." Asked when he first saw the truck, he answered: "When I first saw it, it was swinging over toward the west, to get by. * * * Get by that parked car there." The examination then proceeded as follows: "Q. Where was it with reference to the street car? A. It was ahead—it was north of the street car. Q. Now, did you see both the street car and the truck come together? A. Yes; I did. * * * Q. From where you were could you tell me whether the automobile, the truck, was struck in the front or to the rear? * * * A. It was struck to the rear. Q. Now, what part of the rear; the left, the right or in the center? * * * A. It would be the left rear. Q. And after they came together, will you just tell now what happened to the truck? A. The truck swung. hit the— Q. Well, which direction did it swing? A. It was facing northwest. Q. And did it strike any other object as it was swinging? A. Yes; it smacked that coupé in back of us. Q. And what happened

to the coupé after the truck struck it? A. It came down and hit our truck and pinned Mr. Greco in between them. Q. Now, did you notice what the street car did after it came in contact with the truck? A. Well, it didn't stop. Q. Did it go north? A. It just kept coming north. It stopped just when it couldn't go any more." One of defendant's witnesses (a passenger on the street car) described what happened as follows: "Q. Now, will you turn to these men and tell them in your own way just what you saw, from the first you saw the panel truck until the whole thing was over? Just what you know, in your own way? A. Well, I was standing looking to the east, and I glanced—our street car was past Poppleton when I saw that red panel truck come real fast, and there was another car parked next to the curb, and this panel truck seemed like he had to get through this little place, and he dashed through this little opening, and the street car—and it hit the street car. The opening was too small for the truck to get through."

Defendant's motorman's testimony varies as to how it happened in that he says the Shaver truck first hit the Terraplane and then hit the street car.

After the collision the four vehicles were in about the shape of a "Z" with the street car forming the base, the Shaver truck the diagonal line with its rear left fender at the running board against the right front corner of the street car and the left rear side of the truck along the right front entrance of the street car. The right side of the Shaver truck was then against the left rear of the Terraplane coupé, the Terraplane coupé was against the plaintiff's truck, and plaintiff was in between the last two vehicles. Plaintiff's truck was not moved by the impact but had to be pushed ahead to remove plaintiff, who was injured.

Defendant at the close of the plaintiff's case in chief and again at the close of all testimony moved that plaintiff's cause be dismissed as to it for the reason that the evidence is insufficient to establish a cause of action against it.

"Negligence consists of doing what a reasonable and prudent person would not have done, or in not doing what

a reasonable and prudent person would have done under the existing circumstances." *Blanton v. Michael, Swanson & Brady Produce Co.*, 138 Neb. 883, 295 N. W. 883. We are directly confronted with this question. What negligent act can be charged to the defendant? What did it do that it should not have done? What did it fail to do that it should have done? A search of the record does not disclose the answer.

The trial court submitted to the jury the question of the concurrent negligence of the defendants as the cause of plaintiff's injuries and submitted four particulars in which plaintiff claimed defendant was negligent, which we summarize. First, that it failed to halt its street car when it knew or should have known that a collision was imminent; second, that it carelessly and negligently left its car in motion when it knew or should have known that its continued operation would cause a collision between the street car and the truck; third, that it carelessly and negligently failed to allow the truck driver to overtake and pass the street car when it knew that its failure to do so would cause a collision; and, fourth, that it failed to keep a proper lookout. The answer to all of these alleged acts of negligence is that the plaintiff's evidence is devoid of any evidence to sustain them. Also, the defendant's evidence is all to the effect that the Shaver truck was going faster than the street car, that the truck cut in ahead of the street car, that the motorman was keeping a lookout, that he applied his brakes as quickly as possible, that the street car stopped as quickly as possible; that the point of contact was on the left rear running-board and left fender of the truck and caused by coming in contact with the right front corner of the street car. The evidence will not sustain any finding of negligence based on those grounds. There is some dispute as to what vehicle hit what vehicle, but no matter how this evidence is viewed, the inescapable conclusion is that the defendant street railway was guilty of no act of omission or commission which will support a judgment requiring it to respond in damages to the plaintiff. "A person is answer-

able only for the natural and probable consequences of his own acts, and where some new efficient cause intervenes, not set in motion by him nor flowing from any act of his, which causes the injury, it is the proximate cause." *Moses v. Mitchell,* 139 Neb. 606, 298 N. W. 338.

It is clear from this record that plaintiff was not negligent. It is clear that defendant was not negligent. It is likewise clear that the proximate cause of the collision was the act of the defendant Shaver in driving his truck in the manner shown. Whether or not that constituted negligence is not before us for decision. The trial court erred in not sustaining defendant's motion at the close of the trial. The other assignments of error need not be considered.

Plaintiff presents the remittitur order as an error. The defendant Shaver is not before this court. The judgment against him therefore cannot be disturbed in this proceeding.

The judgment from which the appeal was taken is reversed and the cause dismissed.

REVERSED AND DISMISSED.

JOHN ROGERS V. STATE OF NEBRASKA.
2 N. W. (2d) 529

FILED FEBRUARY 13, 1942. No. 31163.

1. **Homicide.** A homicide committed in the perpetration of a robbery is murder in the first degree. Comp. St. 1929, sec. 28-401.
2. ———. In such a case, the turpitude of the act supplies the element of deliberate and premeditated malice.
3. **Criminal Law.** Evidence examined and *held* to support the verdict of guilty of first degree murder, but the sentence of death is reduced to imprisonment for life.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed: sentence reduced.*

John N. Baldwin, 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 YEAGER, JJ.

CARTER, J.

The defendant was charged with the murder of Wallace Richie. Upon trial of the case, the jury returned a verdict of guilty of murder in the first degree, and fixed the penalty at death. Defendant appeals.

On August 5, 1940, the defendant secured the gun with which the fatal shots were fired, and registered it. Later defendant called Wallace Richie on the telephone and asked him to pick him up in his car at Twenty-fifth and Lake streets in Omaha. Richie picked him up at that address and drove him to South Omaha. Defendant rode in the back seat of the car. After passing through the town of Ralston, defendant covered Richie with the gun and ordered him to stop the car and get out. Defendant got out of the right rear door, opened the right front door and ordered Richie to get out. Richie obeyed and as he got out he struck at defendant, whereupon defendant shot Richie four times, causing his death. Defendant drove the car away without giving any attention to Richie. Defendant later held up a filling station at Gretna and was arrested near Lincoln for that crime. He was taken to Papillion to answer for the holdup at Gretna. The officers testify that he slept on the way to Papillion. Subsequently he was returned to Omaha to answer for the murder of Richie. These, in brief, are the facts upon which defendant was convicted.

That defendant was guilty of first degree murder there can be no question, and counsel for defendant frankly concedes this to be true. This court has held many times, in conformity with statute (Comp. St. 1929, sec. 28-401), that a homicide committed in the perpetration of robbery is murder in the first degree, and in such a case the turpitude of the act supplies the element of deliberate and premeditated malice. *Pumphrey v. State,* 84 Neb. 636, 122 N. W.

19; *South v. State*, 111 Neb. 383, 196 N. W. 684; *Swartz v. State*, 118 Neb. 591, 225 N. W. 766.

We have carefully examined the record and find no error prejudicial to the defendant in it. The only question to be determined is whether the death sentence should be reduced to life imprisonment under the provisions of section 29-2308, Comp. St. 1929, the applicable part of which is as follows: "In all criminal cases that now are, or may hereafter be pending in the supreme court on error, the said court may reduce the sentence rendered by the district court against the accused, when in their opinion the sentence is excessive, and it shall be the duty of said supreme court to render such sentence against the accused as in their opinion may be warranted by the evidence."

In considering whether the sentence should be reduced, a brief history of the defendant may be helpful. Defendant was raised at Stark City, Missouri, and was twenty-two years of age on the date of the crime. He came to Omaha in October, 1939, and was married in March, 1940. The evidence shows that his wife went to Baxter Springs, Kansas, on a visit in July, 1940, and had not returned on the date the crime was committed. Defendant testifies that he received a letter from his wife in Stark City, Missouri, the day before the crime was committed, telling him that she was pregnant and in poor health and that unless he came immediately she would never return to him. Defendant says that this letter caused him to "lose his head" and brought about the perpetration of the crime. Defendant was a bootblack in a shoe shining parlor in Omaha. He had never been in any kind of trouble before and his employer testifies that he had a good reputation as a law-abiding and peaceful citizen. It probably can never be explained why this young colored boy, never before in trouble, should suddenly go berserk and engage in an orgy of crime. We have come to the conclusion, after reviewing the record, that the interests of society do not demand that the death penalty be inflicted. It seems to us that a life sentence is adequate punishment for the offense when all

the circumstances are considered. We do not desire to criticize the action of the jury, in fact they are to be commended for performing their duty as they saw it. Neither do we in any manner desire to mitigate the seriousness of the offense. The age of the defendant, his station in life, his previous reputation as a peaceful citizen and his sudden and impulsive desire to go to the side of his wife seem to us to warrant a reduction of the death sentence to one of life imprisonment. While we realize that precedents are of little value in determining a question of this kind, yet we feel that this case is so similar to *Swartz v. State, supra,* that defendant is entitled to the same considerations as were extended in that case. We are very doubtful if the taking of the life of the defendant is necessary as a deterrent against future crimes of this nature, or that it is the only adequate penalty for the crime committed, tragic as it was. We are inclined to give the defendant the benefit of that doubt.

The judgment of the district court is modified to the extent that the penalty of death is changed to imprisonment for life. As thus modified, the judgment is affirmed.

AFFIRMED: SENTENCE REDUCED.

MABEL POLLAT, APPELLANT, V. ANDY E. WRAY, APPELLEE.
2 N. W. (2d) 352

FILED FEBRUARY 13, 1942. No. 31262.

1. **Appeal.** When a material question of fact is submitted to the jury by the trial court upon which the evidence is insufficient to sustain a finding, it constitutes prejudicial error.
2. **Negligence.** Evidence examined and *held* insufficient to warrant the submission of the question of plaintiff's contributory negligence to the jury.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Reversed.*

Mothersead & York and *Lewis F. Shull,* for appellant.

Neighbors & Danielson, contra.

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

CARTER, J.

Plaintiff instituted this action against Andy E. Wray to obtain a judgment for personal injuries allegedly sustained by the plaintiff as a result of the negligence of defendant's employee. The verdict and judgment were in favor of defendant and plaintiff appeals.

The defendant is the owner and operator of a grocery store in Scottsbluff, Nebraska. On November 22, 1939, plaintiff and her husband were in the store purchasing some groceries. It appears that the store was one where the customer serves himself and pays for his purchases as he leaves. The employee who itemizes the purchases and receives the money therefor is referred to in the evidence as a checker. The defendant's wife, Anne Wray, was working as a checker at the time of the accident involved in this action.

The record shows that Mrs. Pollat was engaged in the selection of her purchases, and at the time of the accident was standing in an aisle north of a bread rack. While she was contemplating her selection of bread, Mrs. Wray ran into her and caused her to fall to the floor. The injuries complained of are alleged to have resulted from this fall. The evidence is clear that Mrs. Pollat did not see Mrs. Wray coming before the accident occurred.

The evidence of Mrs. Wray is to the effect that she was engaged in checking the items of another customer when it was discovered that the customer had forgotten some article obtainable in the rear of the store. Mrs. Wray volunteered to obtain it for her in order to save time, and was hurrying to get the article when she collided with Mrs. Pollat, causing both to fall to the floor. Mrs. Wray says that she saw Mrs. Pollat in the aisle, but just as she was passing behind her Mrs. Pollat stepped back with her right foot and tripped her, and that it was done at a time when Mrs. Wray was unable to avoid the accident.

The evidence shows that the aisle was about four feet wide and that there was more room to pass to the rear of Mrs. Pollat than in front of her. There is no evidence of any warning to Mrs. Pollat of Mrs. Wray's approach, or of any warning to Mrs. Wray that Mrs. Pollat was about to step backward. Mrs. Wray testified that she knew customers moved about and that you never could tell with any degree of certainty as to what they would do.

The trial court submitted to the jury the question of the negligence of Mrs. Wray as defendant's employee and also the question of the contributory negligence of the plaintiff. Plaintiff claims that there was no evidence of contributory negligence to submit to the jury and that the trial court committed reversible error in so doing.

We agree with plaintiff that the evidence is insufficient to warrant the submission of the question of plaintiff's contributory negligence to the jury. It is expected that customers who enter a self-serving store will move about in the aisles in the selection of their purchases. It certainly is expected that such customers will move from place to place and shift from one position to another in making their selections. Likewise, it must be expected that they may step forward or backward or to the side, and Mrs. Wray, the employee participating in the accident with plaintiff, stated that she knew such movements were to be expected. We find nothing in the evidence indicating that Mrs. Pollat was in any way guilty of negligence. The record amply demonstrates that plaintiff conducted herself as a reasonably careful and prudent person. The trial court therefore erroneously submitted the question of plaintiff's contributory negligence to the jury.

This court has ofttimes held that it is reversible error to submit an issue to the jury where the evidence is insufficient to sustain it. *Zancanella v. Omaha & C. B. Street R. Co.*, 93 Neb. 774, 142 N. W. 190; *Tighe v. Interstate Transit Lines*, 130 Neb. 5, 263 N. W. 483; *Roseland v. Chicago, M., St. P. & P. R. Co.*, 130 Neb. 637, 265 N. W. 882; *Knoche v. Pease Grain & Seed Co.*, 134 Neb. 130, 277 N. W. 798.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, APPELLEE, V. O. M. OLSEN, COMMISSIONER NEBRASKA STATE DEPARTMENT OF LABOR, APPELLANT.

2 N. W. (2d) 353

FILED FEBRUARY 13, 1942. No. 31356.

1. **Master and Servant.** Under the provisions of the unemployment compensation law (Comp. St. Supp. 1939, secs. 48-701 to 48-724, inclusive), the commissioner of labor is an interested party in any action arising under it and may appeal the same as any other party to the litigation when he feels himself aggrieved.
2. ———. This is so, even if the appeal be from an order denying benefits to claimant and from which claimant has not appealed.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Motion to dismiss appeal overruled.*

John E. Sidner and *Ray W. McNamara,* for appellant.

John F. Futcher, contra.

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

CARTER, J.

Appellee moves to dismiss the appeal of O. M. Olsen, commissioner, Nebraska state department of labor, for the reasons (1) that he is not a real party in interest, (2) that he has no appealable interest, and (3) that the issues determined in the district court are *res judicata* as to him. A determination of these questions is required by the motion.

The record shows that Grace Radloff left her work with the appellee and filed a claim for benefits under the unemployment compensation law. The deputy commissioner and appeal tribunal allowed the claim. Appellee took an appeal

to the district court for Douglas county where the claim was disallowed. From this order Olsen appealed. The claimant defaulted in the district court and did not appeal to this court. Appellee thereupon moved to dismiss the appeal for the reasons hereinbefore stated.

The unemployment compensation law (Comp. St. Supp. 1939, sec. 48-706) states in part: "(g) * * * The commissioner shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the commissioner." And in subdivision (h) of the same section it is stated: "Within ten days after the decision of an appeal tribunal has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action in the district court."

The question whether the commissioner of labor could appeal, regardless of claimant's failure to do so, was raised in *In re Foy*, 10 Wash. (2d) 317, 116 Pac. (2d) 545, wherein the Washington supreme court said:

"The effect of such a judgment of the superior court is two-fold. In the first place, it denies the right of claimants to unemployment benefits; in the second place, it in effect denies to the state, acting through the commissioner, the right to collect contributions from the employer, based upon the salaries of the employees who are held to be without the scope of the statute. It cannot, then, be positively said that the judgment does not adversely affect the compensation fund. * * *

"We are convinced that it must be held that the commissioner has the right, as an aggrieved party, to appeal to this court from judgments of the superior court on matters of construction, interpretation and application of the act, which judgments are contrary to the rulings of the commissioner in construing the act as applied to certain specific cases, and thereby secure a decision of this court upon such questions."

The commissioner is required to administer the unemployment compensation law in accordance with its terms.

Payments of benefits are not superseded by an appeal except on the order of the commissioner. If payments of benefits are denied on appeal after payments have been in fact made, they must necessarily be charged against some other fund, as the statute specifically provides that they shall not be charged to the employer's account. Benefits not chargeable to an employer's account are necessarily charged to the pooled account provided for in section 48-707, Comp. St. Supp. 1939. In the protection of these funds the commissioner has a direct interest in seeing that a decision out of harmony with the general administration scheme does not disrupt, not only the fund, but the class of qualified beneficiaries as well. In the present case the claimant was paid in full irrespective of the appeal, and the action of the trial court in reversing the award was tantamount to a direction to pay it out of the pooled account instead of the employer's account. The protection of these accounts against erroneous decisions, where the benefits have been paid regardless of appeal, is necessary to prevent the depletion of the pooled account.

This does not mean that the commissioner is representing the claimant on the appeal. Ofttimes the claimant has been paid in full and cares nothing about the appeal. It is not the commissioner's interest in the claim that aggrieves him, —it is the fact that the uniform administration of the benefits to the named class has been interfered with, and the subsequent necessity of debiting the charges against funds not ordinarily used for that purpose, which aggrieves him and gives him an appealable interest. The statute contemplates that he shall not only administer the act uniformly but that he shall use his best endeavors in the litigation of claims to bring about uniformity of decision in the handling of all claims.

This result necessarily leads to the conclusion that the judgment of the district court is not *res judicata* of the case. The commissioner of labor, being a proper party, can, when aggrieved by the result of a district court decision, appeal to this court. The necessity for judicial interpreta-

tions and constructions of the statute is essential to the establishment of a state-wide public policy in the administration of the act. An erroneous decision, out of harmony with administrative construction and in which the claimant no longer has an interest because of the payment of all benefits due pending the appeal, could lead to the establishment of a precedent very damaging to the pooled account without any opportunity for this court to finally pass upon the real question. The labor commissioner as the administrator of the fund is obliged, under the law, to protect the funds in the pooled account the same as those in the employer reserve accounts. In such cases the labor commissioner is aggrieved by the trial court's judgment, if it be erroneous, in directing in effect its payment from the wrong fund. He is also entitled to obtain a proper construction, interpretation and application of the act in order that he can fairly administer the act in a uniform manner, both as to employers and beneficiaries, throughout the state. We think this is what the legislature had in mind when it required the labor commissioner to be made a party.

We have come to the conclusion that the state labor commissioner has such an interest in the litigation that he may appeal when he feels aggrieved. The motion of appellee is therefore without merit and it is overruled.

MOTION TO DISMISS APPEAL OVERRULED.

MARIE MANTELL V. STATE OF NEBRASKA.

2 N. W. (2d) 586

FILED FEBRUARY 13, 1942. No. 31215.

1. **Criminal Law.** "Voluntary statements made by an accused to officers, while he is under arrest and in custody, tending to show his connection with the commission of the alleged crime, are admissible in evidence against him." *Fields v. State*, 125 Neb. 290, 250 N. W. 63.
2. **Witnesses.** Where voluntary statements are made by an accused,

without threat or coercion and when he has been informed of his constitutional privilege that any statement made by him might be used against him, and such statements are recorded by a competent stenographer in shorthand, it is not error for the trial court to permit the stenographer to read from the witness-stand his shorthand notes, if, when extended to script or print, they would be admissible.

3. ———. Where a witness makes voluntary statements as to who shot him and the circumstances under which the shooting occurred, which statements are taken and recorded by a competent stenographer when the witness is rational and competent to make such statements, and subsequently such witness is called for the state at the trial of the cause and changes his testimony to such extent that he does not remember who shot him, the state, when surprised by such testimony, may impeach such witness, on proper foundation, where it is shown that the witness, to other persons and at another time, made inconsistent statements. Such impeaching testimony cannot be considered substantive evidence, but only as it affects his credibility.

4. **Assault and Battery.** Where the evidence is conclusive that the defendant shot with intent to wound, it is not error for the court to fail to instruct the jury with reference to the offense of simple assault, or assault and battery.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

C. E. Walsh, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Herbert T. White, contra.*

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

MESSMORE, J.

The defendant was properly charged in the first count of the information with shooting with intent to wound, and in the second count with shooting with intent to kill. The jury returned a verdict of guilty on the first, and not guilty on the second, count. After the overruling of the motion for a new trial, defendant was sentenced to three years in the women's reformatory in York, Nebraska. From this

verdict and judgment thereon, she prosecutes a petition in error and requests a review of her trial.

The defendant, a young woman, had for over two years, or longer, been living with one Herbert Toole. They had had some difficulty, and on June 21, 1940, they decided to separate. They had supper together that evening, and he was to meet her at 8 o'clock between Patrick and Blondo streets on Twenty-fourth, in Omaha. Toole did not keep this engagement, but instead went to a place known as Rabes Tavern between Twenty-third and Twenty-fourth streets on Lake, arriving there, first, at about 7:30, then leaving and returning to the tavern at 9 o'clock. He walked to the back of the tavern, started for the rest room, saw two women acquaintances, and sat down with them to drink beer.

At about 9 o'clock that evening a taxicab driver picked up the defendant at Sixteenth and Cass streets; she directed him to take her to the north side. After she was seated in the cab she immediately began talking about a gun. This conversation led to the sale of an Iver Johnson .38 for the sum of $4 to defendant by the taxicab driver, and they proceeded to his home to procure it. The gun was loaded with five shells. After purchasing the gun, defendant directed the driver to take her to Twenty-fourth and Lake streets. The record discloses that she went to the Rabes Tavern, located on the south side of the street, with a north entrance and a door to the rear. She sent a man into the tavern to tell Toole that "a lady out at the back" wanted to see him. Toole asked who it was, and the reply was "Marie." Toole arose and started out of the tavern. The defendant fired three shots, one of which struck Toole "underneath the right nipple." The gun was thrown on a garage roof where defendant said it could be found. It was later found there. She left, and Toole was removed to Nicholas Senn Hospital. Subsequently, defendant visited him at the hospital and conversed with police officers about the shooting, saying that she had shot him. This statement was corroborated in her presence by Toole, who said she was the girl who shot him.

The defendant made oral statements about the shooting on the night thereof to the police officers after they had taken her into custody. She subsequently made a written statement concerning the shooting to the county attorney in the police station in Omaha. All of the testimony offered by the state discloses that defendant had been properly warned that statements she made might be used against her, and that she had a constitutional right to refuse to answer any question.

Objection is made to the admission in evidence of the voluntary statements made by defendant and of the written statement. A careful analysis of the record in this respect discloses the pertinency of the general rule as pronounced in *Bush v. State,* 112 Neb. 384, 199 N. W. 792, in which the court said: "The general rule is that, before a confession may be received in evidence, it must be shown that it was freely and voluntarily made. However, we think the statements do not amount to a confession, but are merely statements against interest, or what may be strictly termed inculpatory statements."

In the case of *Fields v. State,* 125 Neb. 290, 250 N. W. 63, this court held:

"Voluntary statements made by an accused to officers, while he is under arrest and in custody, tending to show his connection with the commission of the alleged crime, are admissible in evidence against him.

"It is not error for a trial court to permit a stenographer, who recorded the voluntary statements of the accused in shorthand, to read from the witness-stand the shorthand notes, if such statements, when extended to script or print, would be admissible."

The defendant had no hesitancy in making the statement that she shot Toole and in stating the reason for shooting him,—"I wanted to hurt him like he has hurt me in the past. Q. How did he hurt you? A. By going out with other girls and making me hustle." We see no merit to the contention, raised by defendant, as to the admissibility of such evidence against her.

Toole, after having made voluntary statements, taken by a competent shorthand reporter at the hospital, as to his living with the defendant, their difficulties, and that she was the girl who had shot him, remained in the hospital for a period of five days. Subsequently, he went back to live with the defendant. When he was called as a witness for the state, he testified that he could not see who shot him and that he did not remember; it was dark outside. No doubt exists that he was doing his best to protect the defendant. Without detailing the sordid testimony, the record shows that the defendant supported him by prostitution and was jealous of him because, as she stated, he had other girls "hustling for him." We believe the foregoing facts are sufficient for a determination of this case without further recital of the evidence.

The defendant contends that on *voir dire* examination counsel for the state asked a juror, in substance, whether or not the fact that defendant is a white girl and the man whom she shot is of colored extraction would influence him in rendering a fair and impartial verdict. The contention is that this statement by counsel for the state would prejudice the juror, either against the state or against the defendant, in arriving at a verdict. Objection was made by defendant to the statement, in that it was prejudicial.

The evidence discloses that Toole's father was of Irish descent and his mother was a Creole. The juror was passed for cause, and, after the jury were selected, defendant's counsel moved the court to discharge the jury and declare a mistrial for the reason that the statement made by the county attorney was prejudicial to the interest and rights of the defendant. There is nothing prejudicially erroneous in the statement, and the contention is without merit.

Pictures taken by police photographers of the tavern and of the alleged bullet holes and marks in the wall were objected to for lack of proper foundation, in that there was no evidence to show that the marks in the wall were actual bullet holes, or that they had not been there immediately before the alleged shooting. While the foundation for the

pictures was apparently not in continuity, it was finally shown to be sufficient, within the discretion of the court, to warrant their admission in evidence. We conclude, upon an examination of the record, that there was nothing in the court's ruling in admitting the pictures that was prejudicial to the interest of the defendant.

Exception is taken to statements made by the trial court when Toole, on his direct examination, failed to remember anything about the shooting. He repeatedly answered: "I don't remember." The trial court made this statement: "It might be proper for the Court to advise the witness that witnesses who are sworn to testify in court under oath, it is the purpose and intention of that law for them to tell the truth, and one telling what is not true while testifying as a witness is liable to very serious penalties in this State if that charge can be proved. You may proceed."

There was no objection made to the remarks of the court. Defendant's counsel objected to any further questioning as to what happened at the hospital, for lack of foundation, for the reason that the state failed to show, by competent medical testimony, the state of mind or physical condition of Toole at the time the purported questions were asked and the answers given.

We deem it unnecessary, under the circumstances, to first lay a foundation by a medical expert as to the state of mind or condition of Toole. If the record discloses that Toole voluntarily made the statements and was not coerced or induced under threat to make them, and was rational and competent at the time, there would be no reason why this testimony would not be competent, especially so when later, after leaving the hospital, Toole again lived with the defendant and, on his direct examination on the trial of the cause, failed to remember anything about the shooting, in so far as she was concerned. Obviously, he was a hostile and unwilling witness.

In *Bernhardt v. Chicago, B. & Q. R. Co.*, 132 Neb. 346, 272 N. W. 209, this court held: "Where a party calling a witness is surprised by such witness refusing to testify to a

state of facts which he has led such party to believe he would, the one surprised by such testimony may impeach such witness, upon proper foundation, by showing that the witness, to other persons, at another time, made inconsistent statements; such impeaching testimony cannot be considered substantive evidence, but only as it affects his credibility."

The defendant complains that the court did not submit to the jury the offense of assault and battery, or simple assault, contending that such offense is incorporated in assault with intent to kill or assault with intent to wound. The evidence in the instant case is definitely of such a nature that the offense of simple assault or assault and battery should not be submitted to the jury.

Other assignments of error are without merit. The verdict of the jury and sentence of the court are

AFFIRMED.

EARL TOWLE, APPELLANT, V. OLGA TOWLE, APPELLEE: JOSEPHINE MARSHALL, INTERVENER, APPELLEE.
2 N. W. (2d) 536

FILED FEBRUARY 13, 1942. No. 31294.

Parent and Child. Though the statute and the demands of nature commit the custody of young children to their parents rather than to strangers, it is the duty of the courts to deprive parents of such custody if it is shown that they are unfit to perform the duties imposed by the relation.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Hubka & Hubka, for appellant.

J. A. Hayward, contra.

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

YEAGER, J.

This is an action by Earl Towle, plaintiff and appellant, against Olga Towle, defendant and appellee, and against Josephine Marshall, intervener and appellee, for the modification of that part of a decree of divorce which granted the care, custody and control of Charles F. Towle, the minor child of plaintiff and defendant, to the intervener, and which awarded $25 a month to the intervener for the support and maintenance of the said child. The original decree was entered on January 4, 1940, and was not appealed from.

A trial was had on the application for modification and on March 19, 1941, the district court ordered a reduction in the monthly allowance for support and maintenance for the said minor child, but otherwise denied the application of plaintiff for modification of the decree. From this order the plaintiff has appealed.

On the trial of the divorce action the trial court granted a divorce to the plaintiff, but found that neither plaintiff nor defendant was properly suited to have the care, custody and control of this child, and custody was awarded to the intervener, Josephine Marshall.

The evidence adduced at the trial of the divorce action was made a part of the bill of exceptions here. The entire bill of exceptions has been carefully examined.

Without quoting or summarizing the evidence, we conclude that the trial court was correct in refusing to give custody of this child to either of its parents. From an examination of the record on which the original decree was based and the additional evidence adduced, we are convinced that some one other than either of the parents should have the full custody and control of this boy.

In the light of the evidence, and with full recognition of the force of the legal proposition set forth in the brief of appellant that, "The statute and the demands of nature commit the custody of young children to their parents, rather than to strangers; and the court may not deprive the parents of such custody, unless it be shown that such parent is unfit to perform the duties imposed by the relation,

or has forfeited the right," we find that the action of the district court was correct and should be sustained. See *Norval v. Zinsmaster*, 57 Neb. 158, 77 N. W. 373; *Crandall v. Luhnow*, 137 Neb. 13, 288 N. W. 29.

The judgment of the district court is affirmed, and the attorney for the appellee is allowed an additional fee for service in this court in the amount of $100.

AFFIRMED.

MESSMORE, J., not participating.

LEE WATSON V. STATE OF NEBRASKA.
2 N. W. (2d) 589

FILED FEBRUARY 20, 1942. No. 31322.

1. **Citations.** "Nebraska cases shall be cited by volume and page of Nebraska official reports, if published therein, and if available, by volume and page of such other reports as may contain such cases." Rule 14, a, 3.
2. **Criminal Law.** "To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence." *Vinciquerra v. State*, 127 Neb. 541, 256 N. W. 78.
3. ———. "Where in a criminal case the evidence is circumstantial, the circumstances established, must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of the defendant's guilt. But this rule merely requires the exclusion of such hypotheses as are based on circumstances established by the evidence. It does not require the jury to acquit because of evidence which, if believed, would establish facts consistent with innocence, but which evidence the jury is justified in disbelieving." *Carleton v. State*, 43 Neb. 373, 61 N. W. 699.

ERROR to the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

James E. Bednar, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

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

SIMMONS, C. J.

The defendant was charged with breaking and entering a corncrib with intent to steal in violation of the provisions of section 28-538, Comp. St. 1929; was found guilty by a jury and was sentenced by the court to confinement for a period of three years.

Defendant appeals and presents the insufficiency of the evidence to sustain a conviction, alleges errors in the admission of evidence, and in the instructions, and finally complains that, in any event, the sentence is excessive.

That the crime was committed by some one is not questioned. The dispute as to the sufficiency of the evidence centers around that which the state offered to show that the defendant committed the crime. These facts are definitely established. A crib containing corn was located in a cornfield near the intersection of two roads. August 22, 1940, at about 9:30 p. m. two men driving an automobile making the turn at slow speed from one road to another turned their car so that the lights shown on the corncrib. They discovered growing corn broken down between the crib and the road and a pick-up truck with a stock rack on the rear standing backed up toward the crib. They stopped their car. Their vision was aided by a flashlight, and while the truck and surroundings were so lighted up, a stockily built man came from the vicinity of the corncrib and climbed into the cab of the truck. The car with the two men moved slowly on, when the pick-up truck drove out of the field and speedily away from the scene. An examination of the corncrib and surroundings revealed that one board had been taken from the corncrib, corn removed, and some put in sacks. A number of empty sacks were on the ground. An endgate of a truck was against the crib. Tracks led to the corner of the field where a barbed wire fence gate was

found broken down and thrown out into the road. Outside of the gate in soft dirt was found a clear imprint of an automobile tire. A cast was made of the imprint. There was also found broken glass and the rim from a Ford headlight on the side of the roadway outside the broken gate. Five days later defendant's pick-up truck was examined. It fitted the general description of the one seen at the crib. It had a new rim on the *right* headlight; it had deep scratches on one front fender; and the rear tires had peculiar wear marks and treads similar to those found in the track at the scene of the crime.

Defendant had been a farmer, but for some time had been engaged in a small way in buying and selling live stock and produce. For that purpose he used the truck in hauling and used buildings on the rear of his own and other residence lots in Bellevue. Defendant's physical build corresponded generally with that of the man seen at the corncrib. The state offered evidence as to the above matters and introduced in evidence, over the objection of the defendant, the scratched fender, the new light rim, the pick-up body and the two rear tires taken from the defendant's truck and also the broken lens, the rim, and the endgate found at the corncrib and the cast of the tire impression.

The state also offered the evidence of a neighbor who positively identified from distinguishing marks the endgate as belonging to the defendant. This witness also testified that during the night of the crime and early morning the defendant was seen busily working by electric light in his back yard near his truck on some sort of a wooden structure which the witness called an endgate. In this he was corroborated by another neighbor who testified that the defendant was working in his yard late that night hammering on some sort of a structure.

Defendant admitted the use and possession of the truck on the night of the crime, denied positively the ownership of the endgate and denied the evidence of the witnesses that he had been working in his yard the night in question. He offered the testimony of several witnesses, with whom he

had done business, that they were well acquainted with the truck and that the endgate was not one that they had ever seen on his truck. He offered the evidence of another neighbor explaining that he had been using defendant's truck and, while so using it a few days before the crime, the *left* light had been broken and that he, the witness, had replaced it with a new lens and rim; and also that on another occasion while driving defendant's truck in a field along a wire fence the truck slipped under a barbed wire, and by that evidence sought to explain the scratches. In addition, the defendant offered alibi evidence as to his whereabouts from 8:00 p. m. of the evening in question until the next morning. He also offered testimony that on the next morning he had driven the truck to central Nebraska to purchase live stock, had been gone for some days, and the tires of his truck had had considerable wear between the date of the crime and the date when taken by the officers. The jury heard this testimony, examined the exhibits, and found the defendant guilty.

Defendant contends that a conviction based on circumstantial evidence should not be sustained where, from an impartial consideration of all the evidence, there is reasonable doubt of defendant's guilt. Citations are to cases in the Northwestern Reporter. The attention of the bar is called to the following rule, which, too often, is not followed: "Nebraska cases shall be cited by volume and page of Nebraska official reports, if published therein, and if available, by volume and page of such other reports as may contain such cases." Rule 14, a, 3.

Heidelbaugh v. State, 79 Neb. 499, 113 N. W. 145; *Lowe v. State,* 110 Neb. 325, 193 N. W. 707; *Treppish v. State,* 126 Neb. 21, 252 N. W. 388; *Robino v. State,* 133 Neb. 391, 275 N. W. 463; *Sutherlin v. State,* 136 Neb. 809, 287 N. W. 614, are cases cited by the defendant wherein this court held that the evidence was insufficient to sustain a conviction. They do not, however, change the rule, long followed and stated by this court in *Vinciquerra v. State,* 127 Neb. 541, 256 N. W. 78, as follows: "To justify conviction on

circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence."

"Where in a criminal case the evidence is circumstantial, the circumstances established, must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of the defendant's guilt. But this rule merely requires the exclusion of such hypotheses as are based on circumstances established by the evidence. It does not require the jury to acquit because of evidence which, if believed, would establish facts consistent with innocence, but which evidence the jury is justified in disbelieving." *Carleton v. State,* 43 Neb. 373, 61 N. W. 699.

The jury had for its consideration the evidence found at the scene of the crime which, in its main aspects, was (1) the endgate, positively identified by one witness as belonging to the defendant; (2) the imprint of the tire track with which to compare the tires of defendant's truck; (3) the rim and broken lens from a headlight and the fact that defendant's car had new parts of that kind on its *right* headlight; (4) the broken wire gate and the scratches on the fender; (5) the defendant's admission that on the night in question he was driving the truck. This evidence, together with other facts not now summarized, was clearly sufficient, if believed, as it apparently was, to sustain the conviction. Defendant's evidence was either in denial or explanation of the state's evidence and an alibi. His principal alibi witness admitted that he had pleaded guilty to a felony. The defendant's evidence, if true, would be inconsistent with his guilt. But the jury had the right to reject and disregard, as it evidently did, the testimony as improbable and untrue. *Smith v. State,* 61 Neb. 296, 85 N. W. 49.

Defendant complains that it was error to admit the plaster cast of the tire track and the rear tires of defend-

ant's truck in evidence without first showing that the truck was in the vicinity of the crib on the night in question and without showing how much the tires had been worn between August 22 and August 27. To sustain this contention defendant relies upon the first twenty-two lines of the third paragraph of the opinion in *Heidelbaugh v. State,* 79 Neb. 499, 113 N. W. 145. The first paragraph of the syllabus states the rule which the court applied in that case. "In a prosecution for the crime of arson, evidence describing the shoes worn by the accused and footprints found near the place where the crime was committed is proper and competent. But it is error to allow the witness making such comparisons to express his opinion that the footprints were made by the accused."

In the instant case the witnesses identified the exhibits, but expressed no opinion as to the conclusions to be drawn from the exhibits. We see no error in the admission of these exhibits. The comparison of the tires and the cast was left for the jury, and they reached their own conclusion thereon, having had the benefit of defendant's testimony as to the amount of wear the tires had had in the five-day period between August 22 and August 27.

The defendant next contends that it was error to permit the state to dismantle the truck and to receive parts of it in evidence and that the jury should have been permitted to view the truck as a complete unit. Defendant does not point out wherein this is prejudicial, and no prejudice is apparent to us.

Instruction No. 7 given by the trial court is as follows:

"You are instructed that in order to warrant a conviction on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged; and it is the invariable rule of law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the

guilt of the party charged and as cannot upon any reasonable theory, be true, and the party charged be innocent."

Defendant holds that the law is correctly stated in the last portion of the instruction, but complains of the use of the phrase "*should* be of a conclusive nature" in the first portion of the instruction, and alleges that it minimizes the force of the instruction that "facts and circumstances *must* be shown." The use of the word "must" and not "should" would have been preferable, but the instruction taken as a whole placed the required burden of proof upon the state and protected the rights of the accused. We cannot conceive that the jury were misled by it. The giving of the instruction in the form used was not error requiring a reversal.

Finally, defendant contends that the sentence is excessive, "particularly in view of the fact that no property was taken." The maximum sentence under the statute is ten years. The defendant on the witness-stand admitted that he "plead guilty" to a felony. In his brief it is stated that he "was serving time at the penitentiary at the time of the trial." The facts of his previous conviction, not stated in this record, were probably known to the trial court. We see no reason for disturbing its judgment in that regard.

The judgment of the trial court is

AFFIRMED.

LOUP RIVER PUBLIC POWER DISTRICT, APPELLEE, V. PLATTE COUNTY, APPELLANT.

2 N. W. (2d) 609

FILED FEBRUARY 20, 1942. No. 31237.

1. **Drains.** Appeals from decisions of the county board, when it makes assessments to construct a drainage ditch, shall be by a petition in error, under section 20-1903, Comp. St. 1929.
2. ———. "The right to appeal from the assessment of benefits by the county board in the creation of a drainage district is not the right of appeal provided by section 31-115, Comp. St. 1929." *Loup River Public Power District v. Platte County*, 135 Neb. 21, 280 N. W. 430.

3. ———. The county board, in assessing the benefits of a drainage ditch, shall apportion the benefits not alone to the property abutting thereon, but, in addition, assess benefits against property which will be benefited by the proposed improvement. Comp. St. 1929, sec. 31-109.

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

Jesse L. Dougherty, for appellant.

August Wagner and *C. N. McElfresh, contra.*

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

PAINE, J.

This is an action in which the Loup River Public Power District sought to enjoin Platte county from collecting taxes assessed against it by the county board, in the sum of $5,912, for its proportion of the cost of the construction of Looking Glass drainage ditch. The district court held that the district was benefited to the amount of $3,400 only, and Platte county appealed, and the district cross-appealed.

The petition alleged that the plaintiff was a corporation, organized under Senate File No. 310, Laws 1933, ch. 86, with its principal place of business at Columbus, Nebraska, for the purpose of building and operating a hydroelectric power plant.

Plaintiff further alleged that the said drainage ditch does not touch the right of way of the plaintiff, and that the plaintiff has received no benefits whatever from the construction or operation of said drainage ditch. However, the county board assessed the plaintiff district for benefits in the amount of $5,912, and intends to levy additional taxes for future benefits unless restrained. Plaintiff alleges that the amount assessed is beyond the benefits conferred, and is taking property without compensation, in violation of section 21, art. I of the Constitution of Nebraska, and in violation of articles V and XIV of the amendments to the Constitution of the United States.

It is further alleged by the plaintiff that a hearing was had by the county board to determine the amount of the benefits, but the evidence was not taken down, and no bill of exceptions can be prepared, and as a bill of exceptions is indispensable for review the plaintiff's remedy by error proceeding is inadequate, and therefore plaintiff has no remedy at law for the protection of its property from such illegal assessment except by injunction.

When the plaintiff power district constructed its canal, it was obliged to carry flood waters westerly along the north line of its canal and empty them into the Looking Glass creek and by reason thereof property owners were benefited.

It is alleged that the action of the county board was not based upon the evidence, but the board arbitrarily fixed the amount of benefits, with full knowledge that the plaintiff had received no benefits from the construction of said ditch, and with full knowledge that farm land had received benefits greatly in excess of the assessments made against the land.

The plaintiff power district charges that, after the drainage ditch was constructed, certain persons diverted water into Looking Glass creek, flooding certain lands, and claims were made against the power district, and to eliminate this flood condition the power district did certain work, costing $5,122.13, and $1,800 worth of work still remains necessary to be done to prevent these lands from being flooded, and that this benefit to the property in the drainage district more than exceeded all the benefits to the power district in the construction of the drainage ditch.

The plaintiff power district prays that assessment be stricken from the tax rolls and the county enjoined from attempting to collect any part thereof, or, if the court should determine that the power district received any benefits, that the money expended by it be offset against the benefits so found to be derived, and the county enjoined from levying any assessment against its property that may be incurred in the completion or extension thereof, and that, if the court finds that future additions or extensions benefit

the plaintiff, it will be given credit against such benefits for the moneys by it expended in the construction of the drainage system, as hereinbefore described.

A motion to strike many portions of the petition, and then a demurrer, were both overruled by the court.

The defendant, Platte county, in its answer denied every allegation of the petition not admitted. It is admitted that the county, by virtue of article I, ch. 31, Comp. St. 1929, constructed Looking Glass Creek drainage ditch, and assessed as benefits the sum of $5,912 against the plaintiff power district; that the power district filed an appeal from the county board to the district court, which dismissed the appeal on the ground that no appeal lay from the county board to the district court on the assessment of benefits, and that the proper remedy was by writ of error, which was affirmed by the Nebraska supreme court.

The defendant county further alleged that the assessment was valid, legal, and binding on the plaintiff, and that the court has no jurisdiction to enjoin the collection in this proceeding, and prayed that the petition be dismissed.

A decree was entered by the district judge, finding that the plaintiff is entitled to equitable relief, and that the assessment of $5,912 is grossly excessive and should be reduced to the amount of $3,400, for which amount judgment was entered, with interest at 9 per cent. from June 15, 1936, and costs, which the defendant should add to the costs of construction of said improvement. The defendant, Platte county, objected to said reduction in the assessment, and the plaintiff power district excepts to the assessment in any amount.

Platte county relies for reversal upon the following errors: The overruling of the demurrer of the county; the overruling of the objection of the county to the introduction of any evidence; the overruling of the motion of the county to dismiss the petition made at the close of the plaintiff's evidence; the entering of a decree for $3,400; and overruling the motion for a new trial.

Many of the matters involved in this appeal were pre-

sented to this court in the case of *Loup River Public Power District v. Platte County,* 135 Neb. 21, 280 N. W. 430, and in the opinion in that case it was held that appeals from decisions of the county board, when it makes assessments to construct a drainage ditch, shall be by a petition in error, under section 20-1903, Comp. St. 1929, filed in the district court, to reverse, vacate or modify the assessments made for the cost of construction of such a ditch as was built in this case, and that an attempt to prosecute an appeal under section 31-115, Comp. St. 1929, confers no jurisdiction on the district court to review such an order, citing *Whedon v. Lancaster County,* 76 Neb. 761, 107 N. W. 1092; *McCague Investment Co. v. Metropolitan Water District,* 101 Neb. 820, 165 N. W. 158; *Dodge County v. Acom,* 72 Neb. 71, 100 N. W. 136.

Because of this former opinion involving this same drainage ditch, additional statements of facts need not be set out in full in this opinion. It appears that the former opinion was released by this court on June 15, 1938, and on April 1, 1939, the petition was filed in the case at bar, seeking to restrain Platte county from collecting the assessment which had been levied against the plaintiff, as a result of which the trial court reduced the amount of the assessment and restrained the county from collecting the balance.

The plaintiff insists that the decision in *Hayman v. City of Grand Island,* 135 Neb. 873, 284 N. W. 733, is ample authority for the proceeding brought in this case, and it is therefore necessary to examine that case with care.

The city of Grand Island widened a street, cutting off 30 feet, a row of large shade trees shading the houses, and also the sidewalk, from across the front of Mrs. Hayman's property, and for the cost of widening this street special taxes were levied against her property in the sum of $1,053.30. The appraisers awarded the plaintiff in the condemnation proceedings the sum of $1,800, which she accepted. She paid the taxes before the same became delinquent, and protested that they were illegal, and demanded repayment. On the same day she served notice on the city treasurer of her

intention to bring suit against the city for the recovery of said special taxes.

At the trial in the district court, the jury were instructed that the sole issue to determine was whether special benefits accrued to plaintiff by the widening of the street, and, if so, the amount thereof. The jury returned a verdict for the plaintiff in the amount of $777.44, and a judgment was entered thereon.

There were two sections of the statute involved, the first being section 16-628, Comp. St. 1929, and which applies to cities of the first class. The other provision is found in section 77-1923, Comp. St. 1929, which provides generally that, when it is claimed a tax is illegal, the taxpayer may pay the same to the treasurer and demand the refund of the same. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393, 69 N. W. 958. The *Hayman* case just discussed is entirely different from the one we have before us.

It is argued by the power district that the Platte county board in the case at bar did not have the evidence taken down, and that it would have been impossible to have secured a bill of exceptions, but it is not necessary that all of the evidence be taken on such a hearing. The attorney for the power district could have made up his own bill of exceptions of all the things upon which he desired to appeal, and if he had disclosed error in such bill of exceptions, no matter how incomplete it might have been, the district court could have proceeded with the case just the same as if a complete bill of exceptions had been filed. That was the phase presented to us and disposed of in 135 Neb. 21.

It is further argued by the district that the canal of the district is not contiguous to any other land against which assessments are levied, and we are cited to the case of *Drainage District No. 1 v. Village of Hershey*, 296 N. W. 879 (139 Neb. 205), to the effect that "All assessments made by a drainage district must be made on property specially benefited by the improvement, and no assessments for the improvement may be made on property outside of the district." However, the facts in that case show that it was an

attempt to collect for benefits to property not owned by the village of Hershey, and was obviously null and void.

But the section of the statute governing this matter reads as follows: "The county board shall also by their order direct the surveyor or engineer to make and return a schedule of all lots, lands, public or corporate roads, or railroads that will be benefited by the proposed improvement, whether the same are abutting upon the line of the proposed improvement or not, and an apportionment of a number of lineal feet and cubic yards to each lot, tract of land, road, or railroad, according to the benefits which will result to each from the improvement, and an estimate of the cost of location and construction to each, and a specification of the manner in which the improvement shall be made and completed." Comp. St. 1929, sec. 31-109.

Since 1881 this provision has been in force, and clearly provides that, if the land is benefited by the proposed improvements, it need not abut upon the line thereof.

Now, the evidence in this case shows that, to protect the canal of the district, a drainage ditch was constructed along the north side of the canal for more than a mile, and this water was led westerly and emptied into Looking Glass creek, just before the power district went under the creek in its siphon.

This drainage ditch along the north side of the canal was certainly a protection to the power district against flood water coming off from these farms, and by disposing of it into Looking Glass creek the district was benefited in having this flood water disposed of down the creek and by the new drainage ditch sent from Looking Glass creek directly to the Loup river; thereby it disposed of this extra load of water to the advantage of the power district.

The assessment of benefits of $5,912 against the power district was decided by the trial judge to be much larger than required to meet the actual benefits which the power district derived from the ditch. Even admitting that this assessment is much larger than it should have been, as the evidence in the bill of exceptions seems to support, yet this

court is powerless in this proceeding to correct the excessive assessment by an injunction proceeding when the statute clearly requires that such errors of the county board be corrected by a petition in error. This is so because under the law the assessment is not void, neither is it illegal, but it is claimed to be excessive; therefore, as the assessment was properly made by the county board, its error in fixing the amount too large cannot be corrected by this court in this proceeding at this time.

In our opinion, the trial court lacked the power to reduce this assessment in this injunction proceeding, and its decree is therefore set aside.

REVERSED.

BERT PALMER, APPELLEE, V. WILLIAM C. SAMPLE, APPELLANT.
2 N. W. (2d) 583

FILED FEBRUARY 20, 1942. No. 31277.

Workmen's Compensation. In a compensation case, "It is sufficient to show that the injury and preexisting disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the accident arose out of the employment." *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N. W. 688.

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

Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem*, for appellant.

Gilbert P. Hansen, Donald S. Krause and *R. B. Hasselquist, contra.*

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

PAINE, J.

This is an appeal by the defendant in a workmen's com-

pensation case, in which plaintiff was awarded compensation for temporary total disability and thereafter for 40 per cent. partial permanent disability.

Lawrence F. Welch, one of the judges of the compensation court, awarded plaintiff the sum of $15 a week from January 11, 1940, to June 26, 1940, for his temporary total disability and also certain medical bills, from which award the plaintiff appealed directly to the district court for Douglas county.

After trial in the district court, plaintiff was awarded $11.91 a week from January 11, 1940, to December 2, 1940, a period of 46 5/7 weeks, for his temporary total disability, less the amount already paid, and thereafter the sum of $4.76 a week for a period of 253 3/7 weeks for his 40 per cent. partial permanent disability. It was also ordered that defendant should pay Dr. J. P. Drozda's bill of $96.50 and Dr. James Kelly's bill of $15. From this judgment, the defendant appealed.

The facts of the accident may be summarized from the bill of exceptions about as follows: The plaintiff, Bert Palmer, a married man, 51 years of age, had worked 21 consecutive years for defendant company, with but three weeks off. During all of that time the record shows that he only lost one day, or part of a day, for industrial disability, when a piece of steel went in his eye, but he was back at work the next day. He was an automobile repair man, who would install lights and reflectors, detach radiators and wheels, and straighten bumpers and fenders, and do the heaviest kind of lifting.

The plaintiff worked on both floors in the garage, but the lockers were upstairs. On the day of the accident, January 10, 1940, about 5:00 p. m. he was through work for the day, and had just gone upstairs and changed his clothes, putting on a leather jacket and a heavy overcoat.

While coming down the cement stairway, which had been scrubbed with caustic, plaintiff's feet slipped when he was about half way down, which jerked his hand from the handrail, and he struck right in the middle of his back, and

rolled the rest of the way down the steps. When he came to he was sitting on a box with Mr. Sample, the proprietor, and Mr. Milke, the foreman, and Mr. Rouie, the floor man, looking after him. He was dazed at first, but left the garage about 6 o'clock when they closed up, and when he got home his wife put hot towels on his back and put him to bed. The next morning they directed his wife by telephone to send him to Dr. Frank Conlin, and about noon they got down to the Medical Arts building, and Dr. Conlin made an examination and sent him to Dr. Fouts for X-rays. He then came back to Dr. Conlin's office and lay under a heat lamp for about an hour, then went home and went to bed. He came down to Dr. Conlin's office for a heat lamp treatment every day for some five weeks, missing only one or two days because the weather was bad, or it pained him too much to go down, and his wife continued the treatment at home with hot towels and oil of wintergreen.

In February Dr. Conlin told him that the insurance company wanted him to get back to work, and Dr. Conlin thought he could go back to work in two weeks, but his injury had not gotten any better, and he had lost 18 pounds and had pain, and went to Dr. Drozda, his family doctor, the next day after he quit going to Dr. Conlin. Dr. Drozda gave him an examination, massaged his back, put a heat lamp on it, and then sent him to Dr. Kelly for an X-ray, and at the time that the plaintiff testified in court he was still under Dr. Drozda's care. He has a heat lamp at his home, and his wife puts the lamp on and rubs his back almost every night. Dr. Drozda gave him concentrated cod liver oil and prescribed rich food to build back the 18 pounds he had lost, but at the time he testified he was still 15 pounds under his weight on the day of the accident.

At the time of the accident, business was very quiet and he was working solely on a commission basis, receiving one-third of the cost of each job on which he worked. He made $15 to $18 some weeks when business was dull, and other weeks from $25 to $40 a week, and has never returned to work since the accident.

Charles R. Weir, an employee of the Omaha police department, residing at 3025 Davenport street, saw plaintiff across their back yards almost daily after the accident, and in the summer time saw him sitting in the back yard with his back exposed to the sun, and he testified that plaintiff has been very inactive since the accident. Several other neighbors testified to the same effect, and recount that before the accident plaintiff had played baseball, and would swim and dive when out on picnics, and since the accident Mr. Buck testified that he has seen plaintiff's face break out into a sweat when he was just trying to get up out of a chair.

In the opinion of this court, there is no evidence whatever which casts the slightest doubt on plaintiff's evidence as to the exact time, manner, and result of his serious fall. There is no attempt on the part of the defendant to disprove the fall by calling as his witnesses Mr. William C. Sample, the defendant and owner of the garage, Mr. Milke, the foreman, or Mr. Rouie, the floor man, who were all standing around plaintiff when he came to after the accident.

The X-ray photographs disclose, according to the medical evidence, that plaintiff has for a long time had a dormant case of osteoarthritis of the vertebral column, and while plaintiff may not have known anything about it at the time, yet as a result of the fall there was set up an acute traumatic arthritis, which is the cause of his pain and his present disability.

This court has said: "Where an employee in performing the duties of his employment is accidentally injured by falling into water cooler than the atmosphere and continues to work in wet clothing and thus suffers a shock which reanimates a dormant disorder resulting in his death, his dependents are entitled to compensation under the workmen's compensation law." *Chatt v. Massman Construction Co.*, 138 Neb. 288, 293 N. W. 105.

And again: "It is sufficient to show that the injury and preexisting disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute

that the accident arose out of the employment." *Skelly Oil Co. v. Gaugenbaugh,* 119 Neb. 698, 230 N. W. 688. See, also, *Gilcrest Lumber Co. v. Rengler,* 109 Neb. 246, 190 N. W. 578; *Dymak v. Haskins Bros. & Co.,* 132 Neb. 308, 271 N. W. 860; *Maul v. Iowa-Nebraska Light & Power Co.,* 137 Neb. 128, 288 N. W. 532.

The defendant has furnished the court as an exhibit three rolls of films, taken by Felber Maasdam, who is an industrial cinematographer, and took these movies through a telescopic lens from about a block away, for a few moments at a time, without plaintiff knowing that he was being photographed from a distance.

They show the plaintiff distributing some dirt from a small pail over his lawn on several different days, and rolling up the door of his garage, which, a neighbor testified, rolled very easily. He is shown raking up a couple of baskets of leaves, and picking up a quart bottle of milk, and carrying a small package of potatoes out of a potato market.

After giving this case a careful study, we have reached the conclusion that the accident happened as alleged; that the resulting trauma aggravated a latent disease in the plaintiff's dorsal vertebra, and as a result he has not been able to resume his former employment, which required heavy lifting.

Under all the facts in the record, including the medical testimony, we have reached the conclusion that a 25 per cent. partial permanent disability of $2.98 a week for a period of 253 3/7 weeks will be sufficient, and in all other respects the decree and award of the district court are affirmed at costs of appellant.

AFFIRMED AS MODIFIED.

HARRY S. MURPHY, APPELLANT, V. TRAVELERS INSURANCE COMPANY, APPELLEE.

2 N. W. (2d) 576

FILED FEBRUARY 20, 1942. No. 31078.

1. **Insurance.** When an unusual, unexpected and unforeseen injury results from an intentional act of the person injured, the ensuing injury is caused by accidental means, even though no mischance, slip or mishap occurred in the doing of the act.
2. ———. Evidence that insured dentist acquired X-ray "burns" on index finger by continuous use of X-ray, and that dentist was thereby totally disabled from performing his professional duties, *held* sufficient to sustain recovery on accident policy insuring against loss from bodily injuries through external, violent and accidental means.
3. ———. The provisions of insurance policies should be considered as used in their ordinary and popular sense, and paid insurers will not be permitted to avoid liability by the application of strict definitions or a resort to legal adroitness and ingenuity.
4. ———. Total disability exists "from the date of accident" within the meaning of the policy when it results within the time required by the process of nature for the injury to produce the effect.
5. ———. When the strict enforcement of a provision of an insurance policy will result in unreasonable and unjust forfeitures, or an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy.
6. ———. Evidence examined and *held* sufficient to establish that plaintiff was wholly and continuously disabled as the result of accident within the meaning of the policy.

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

Wear, Boland & Nye, for appellant.

Kennedy, Holland, DeLacy & Svoboda, contra.

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

CARTER, J.

This is a suit to recover benefits under the provisions of two policies of accident insurance. At the close of all the

evidence both parties moved for a directed verdict. The trial court sustained the motion of the defendant and entered a judgment against the plaintiff. From this judgment the plaintiff appeals.

The plaintiff was a dentist. For twenty years prior to the date of the alleged accident he had used an X-ray machine in the practice of his profession. In taking X-ray photographs it had long been his practice to insert the index finger of his left hand in the patient's mouth in order to hold the film firmly against the teeth while the pictures were being taken. It is not disputed that this practice, long followed by the plaintiff, eventually resulted in the X-ray burns and the injuries complained of in this case. There is no evidence in the record of excessive exposure to the X-ray on any specific occasion; nor is there any evidence of mischance, slip or mishap occurring in the performance of his professional duties.

The record shows that on February 8, 1936, plaintiff observed that the skin on the index finger of his left hand broke open and a secretion began to emit therefrom. On November 15, 1938, the skin in the palm of his left hand cracked open. On February 7, 1939, the hand became so bad that plaintiff sought the advice of medical specialists in Chicago. On March 10, 1939, an operation was performed upon the hand and the afflicted portions thereof amputated. It is not questioned that plaintiff was unable to practice his profession after the operation was performed. The evidence shows, however, that plaintiff was able to continue his practice with the aid of assistants up to October, 1938, and that he discontinued the practice of dentistry at that time. It is admitted that one policy lapsed in September, 1936, and the other in November, 1936. The first question to be determined is whether the foregoing facts are sufficient to establish an accident within the meaning of the insurance contracts.

The applicable provisions of one policy are:

"The Travelers Insurance Company * * * does hereby insure * * * Dr. Harry S. Murphy * * * against loss, as

herein defined, resulting directly, independently and exclusively of any and all other causes from bodily injury effected solely through accidental means, as specified in the following schedules: * * *

"Or, if such bodily injury * * * shall directly, independently, and exclusively of all other causes and within thirty days from date of accident, wholly and continuously disable and prevent the insured from attending to any and every kind of duty pertaining to his occupation, the company will pay the insured so long as he lives and is so disabled, the single weekly indemnity aforementioned."

The applicable provisions in the other policy are:

"The Travelers Insurance Company * * * does hereby insure Harry S. Murphy * * * against loss resulting from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means (suicide, sane or insane is not covered). * * *

"Or, if such injuries, independently and exclusively of all other causes, shall wholly and continuously disable the insured from the date of accident from performing any and every kind of duty pertaining to his occupation, the company will pay, so long as the insured lives and suffers such total disability, a weekly indemnity of * * *."

Actions were filed on November 25, 1939, on both policies. Plaintiff seeks to recover weekly indemnity in each case for total disability from November 15, 1938, to November 15, 1939, together with a weekly indemnity for the three weeks that plaintiff was confined in the hospital.

We are of the opinion that, when an unusual, unexpected, and unforeseen injury or death results from an intentional act of the insured, the ensuing injury or death is caused by accidental means, even though no mischance, slip, or mishap occurred in the doing of the act. It is the contention of defendant that, while the result was accidental in the sense that it was unintentional, it was not caused by accidental means within the purview of the language of the policy. We do not think the attempted distinction between accidental means and accidental result can properly be made.

The insured did not do anything which was ordinarily considered dangerous, although the possibility of danger was known if the practice were persisted in over a long period of time. The amount of tolerance to exposure to the X-ray without injurious effect varies with the individual. The accident was not the casual exposure of the fingers to the X-ray, but the cumulative overdose of it which was unexpected and unanticipated, and which resulted from almost daily exposure too long continued. The break down of the tissues evidenced by the breaking of the skin and the subsequent cancerous condition clearly marks the date of the accident. The fact is that an external force, ordinarily not harmful, was suddenly and unexpectedly transformed into a force of violence which severely injured plaintiff's hand. If there was an accidental result there necessarily was an accidental means, the two cannot logically be separated. There was no cause intervening, from the time plaintiff's finger first showed signs of injury until the amputation was performed, which could reasonably be called an accident. The process of causation was unbroken and progressive from the time the cumulative effect of the exposures manifested itself until the amputation was performed. Either there was no accident at all, or there was an accident throughout. We think there was an accident throughout within the reasonable intendments of the policies. This view is not only the more reasonable, but is supported by very persuasive authority.

In *Western Commercial Travelers Ass'n v. Smith,* 85 Fed. 401, the court very aptly said: "The significance of this word 'accidental' is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use,—the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use

than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means."

In *United States Mutual Accident Ass'n v. Barry,* 131 U. S. 100, 9 S. Ct. 755, the insured voluntarily jumped from a platform, 4 or 5 feet high, to the ground, and it was alleged that the jar from the jump produced a stricture of the duodenum from the effects of which death ensued. It will be noted in this case that the act was intentional and that the resulting jar at the time of landing was certainly contemplated. Only the result was unexpected. The court said (p. 121): "It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the

usual course of things; or not as expected;' that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

In *Wiger v. Mutual Life Ins. Co.*, 205 Wis. 95, 236 N. W. 534, in answering the contention that the means of death were not accidental, because they were "set in motion by the voluntary act of the decedent," and that "the consequences were the result of this act, without the intervention of any mischance or slip in the doing of the act," the court said: "It is our conclusion that the term 'accidental means' must be interpreted according to the usage of the average man. So interpreted we have no doubt that the means of death in this case must be designated as accidental. To eliminate from the definition of 'accidental means' all cases where the injury happened as the natural or foreseeable result of a force or event voluntarily set in motion by the insured may have some scientific justification, but is contrary to the common understanding of the term and tends unfairly to limit such policies to cases where the insured is guilty of no negligence."

"Where, however, the death or injury is not the natural or probable result of the insured's voluntary act, or something unforeseen occurs in the doing of the act, the death or injury is held to be within the protection of policies insuring against death or injury from accident or accidental means." 7 A.L.R. 1132.

A case very similar as to the facts, as well as the principle of law involved, is *King v. Travelers Ins. Co.*, 123 Conn. 1, 192 Atl. 311, wherein the court held that evidence that insured dentist acquired ulcers on his index finger by continuous use of X-ray, and that the dentist was thereby prevented from performing some of his daily occupational duties, was sufficient to support a verdict awarding recovery on policies insuring dentist against loss from "bodily in-

jury" through "accidental" means and through "external, violent and accidental means."

A rupture of the ear caused by diving from a plank into 6 or 7 feet of water while bathing was held to be an accident resulting from accidental means. *Rodey v. Travelers Ins. Co.*, 3 N. M. 316, 9 Pac. 348. Death from asphyxia caused by deadly gas in a shallow well into which insured voluntarily descended to fix a pump was held to have been caused by accidental means. *Pickett v. Pacific Mutual Life Ins. Co.*, 144 Pa. St. 79, 22 Atl. 871. Where insured was pulling on a limb of a tree to remove it and fell backwards when it broke, resulting injuries were held to have been caused by accidental means. *Rowden v. Travelers Protective Ass'n*, 201 Ill. App. 295. Where insured was killed while driving an automobile at a high rate of speed, the court held that it was not the law that "if an injury or death is the result of a man's intentional act, it is not an accident," stating that the fact that an intentional act, not *per se* dangerous, and not intended or expected to be attended with injurious results to the actor, may by some unforeseen, unexpected, or unusual contingency become the accidental means of injury to the actor, is too clearly demonstrated by common observation, common experience, and innumerable precedents to justify argument. *Rowe v. United Commercial Travelers Ass'n*, 186 Ia. 454, 172 N. W. 454. These cases support the rule that injuries unintentionally and unexpectedly sustained in the doing of an intentional act are accidents within the ordinary and usual meaning of the term.

There are cases which come to a contrary conclusion and distinguish between accidental result and accidental means in this type of policy. The case of *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U. S. 491, 54 S. Ct. 461, is a leading case that makes this distinction. Many cases supporting both views are annotated in 7 A. L. R. 1132, and 41 A. L. R. 1376. But, after careful consideration, we conclude that the better reasoning is contained in the cases supporting the view expressed herein. The provisions of insurance policies should be considered as used in their ordinary and popular

sense. If this be done, the distinction between accidental result and accidental means cannot be said to exist. It is a distinction without a difference in so far as the average lay person is concerned. The writer of the contract has it within his power by simplicity and clarity of expression to remove all doubt. Courts cannot and ought not permit the insurer to escape liability by a resort to legal adroitness and ingenuity. We conclude, therefore, that a reasonable interpretation of the contract, when applied to the facts in the case at bar, requires a holding that plaintiff suffered an accident within the meaning of the insurance policies.

On February 8, 1936, plaintiff became fully aware that he suffered an injury. The index finger of the left hand cracked open on that date. Certainly, the accident had then occurred. The cumulative effect of the exposures produced a condition described as cancerous. Without the intervention of any external force or disease it progressed until the amputation was necessary. Plaintiff carried on his practice for more than two years thereafter and defendant, as a defense, invokes the language of the policy, to wit, "if such injuries, independently and exclusively of all other causes, shall wholly and continuously disable the insured *from the date of accident.*" In other words, it is contended by defendant that plaintiff literally must have been totally disabled from February 8, 1936, in order to be entitled to insurance benefits. We think that plaintiff was totally disabled from the date of the accident when the controlling clauses of the insurance policies are properly interpreted. In *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903, this court stated the rule applicable to the case at bar in the following language:

"We think it may be said to be a matter of common knowledge that in a great many, perhaps in a large majority of, instances in which bodily injuries are received, the real nature and extent of said injuries do not reveal themselves until a greater or less time in the future and after the first pains from the hurt shall have passed away. The injured part often lies dormant for an indefinite period, with but

little or no consciousness of its existence by the person injured, although from the very moment of the accident, perhaps, the processes of nature may be busily engaged in developing what may have seemed to be but a slight hurt into a most serious and perhaps fatal injury. In such a case it cannot be said that the injury is not continuous and from the date of the accident, nor can it fairly or justly be said that the disability is not continuous and from date of the accident, because the injured party enjoys a brief respite from pain and suffering, only to be endured to a greater degree when perverted nature again asserts itself. Occurring then under the circumstances stated, to hold that a brief respite from the conscious ill effects of an injury during which respite the insured was able to transact the most, if not all, of his ordinary business should bar recovery, seems to us neither reasonable nor just. It is the undisputed evidence that at the end of two weeks the injury to the insured grew worse and worse until it culminated in his death five months later. All of the medical witnesses testified that the insured died of sarcoma, a malignant disease, and that the disease had its origin in the injury sustained, and that it was a gradual development from the date of injury to the date of death."

In *Thomas v. Mutual Benefit Health & Accident Ass'n,* 136 Kan. 802, 18 Pac. (2d) 151, the court said: "There is some conflict in the authorities on the question, depending to an extent on the terms of the policy. Some do not recognize the so-called 'processes of nature doctrine,' but most of the courts hold that the term 'immediate' as used in such contracts does not mean instantaneously, but that a disability is immediate where it results within the time required by the process of nature for the injury to produce the effect." See, also, *Erickson v. Commercial Travelers,* 103 Kan. 831, 176 Pac. 989. We think the reasoning applied when the word "immediate" was used in the policy has equal force when the words "date of accident" and "within thirty days from date of accident" are employed. The Kansas court in a later case, *Penquite v. General Accident,*

Fire & Life Assurance Corporation, 121 Kan. 174, 246 Pac. 498, came to a contrary conclusion and refused to apply the same interpretation and reasoning to the provisions of a policy requiring total disability from date of accident which it employed in deciding a case where immediate total disability was required. After a study of the logic of the cited Kansas cases we accept the reasoning contained in the *Thomas* case and reject as unsound the distinctions attempted in the *Penquite* case.

In *Booth v. United States Fidelity & Guaranty Co.*, 3 N. J. Misc. 735, 130 Atl. 131, the same principle was expressed in the following language: "In view of the nature of the contract and the object sought, it is a fair and reasonable construction to hold that, where the injury is such that the results continue from the date of accident and wholly incapacitate the assured within such time as is required for the processes of nature to bring about such total disability, there is a continuous and total disability from the date of the accident."

We conclude that plaintiff was totally disabled "from date of accident" and "within thirty days from date of accident" within the meaning of the policy as interpreted by the rule announced in the *Rathbun* case and others herein cited.

It is argued, however, that the words "from date of accident" and "within thirty days from date of accident" are so plain and definite that they are not subject to construction. If this be true, then the clauses involved must be ignored under another well-established rule of this court. This court is committed to the rule that, when the strict enforcement of a provision of an insurance policy will result in unreasonable and unjust forfeitures, or an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy. Serious internal injuries often do not develop or manifest themselves until long after the accident happened. The injured person may be completely oblivious of his condition although the processes of nature may be actively engaged in developing the latent hurt into a severe or even fatal injury. The fact that the insured

under such circumstances pursued his usual occupation and performed some or even all of his occupational duties ought not in all fairness militate against him when the more serious but hidden injury subsequently manifests itself. The strict interpretation of such a clause would lead to an unjust result in many such cases so contrary to the general understanding of its ordinary lay meaning that the weight of authority is toward the so-called process of nature rule; that is, that when a disability follows an accidental injury within such time as the processes of nature require to totally incapacitate the injured person, such disability is immediate and, in law, begins on the date of the accident. As was said in *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276: "Accident insurance is not a method of procuring premiums conditioned on unreasonable phrases preventing recovery for accidental injuries. There should be honesty and fair dealing on both sides."

Defendant further contends that total disability was not established. The policies define the term total disability as injuries which shall wholly and continuously disable and prevent the insured from attending to any and every kind of duty pertaining to his occupation. The evidence is clear that as a result of the accident plaintiff was totally disabled from carrying on his profession as a dentist on and after November 15, 1938. From and after that date plaintiff's left hand could not be used in his work and he was actually compelled to desist his work. The progressive condition of the hand thereafter, cancerous in its nature, was such that additional proof is hardly necessary to establish that plaintiff could not use it in working in the mouths of his patients. There is much evidence in the record of his inability to do his work after that date which requires no recitation here. Under the decisions of this court, there can be no question that plaintiff was totally disabled and suffered loss of time within the meaning of the policies after November 15, 1938. See *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903; *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850; *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276.

We are of the opinion that the plaintiff, and not the defendant, was entitled to judgment when both parties moved for a directed verdict at the close of all the evidence. The judgment of the district court is reversed and the cause remanded, with directions to sustain the motion of the plaintiff for a directed verdict and to enter judgment for plaintiff in accordance with the views expressed herein.

REVERSED.

TEWELL, District Judge, dissenting.

I find myself unable to agree with the majority opinion in this case, and feel it my duty to express briefly some of the reasons why. I shall discuss only two of such reasons, and express a query as to a third.

From the facts stated in the majority opinion, it will be noted that the X-ray was applied to the plaintiff's hand exactly in the manner, at the times, and in the exact dosage intended and designed by him, and that no mishap, not intended by him, occurred in any of the various applications. The evidence shows that repeated exposure to X-ray, without a sufficient length of time between exposures to allow the power of all prior exposures to be abated, causes the power of the X-ray to accumulate, until the total unabated power of the various exposures to destroy tissue becomes equal to that of such a prolonged single exposure as would cause such total accumulation of unabated power at one time. The plaintiff had used an X-ray for many years prior to 1936. He knew of its capacity to thusly accumulate such power. It is conceded that no one application of X-ray made by plaintiff would injure any one. The result without doubt was not intended. The majority opinion holds that under such a state of facts the injury to plaintiff's hand was caused by accidental means. To this I cannot agree. The injury cannot be said to have been unusual, or even to have been unexpected on the part of the plaintiff, if by "unexpected" we mean that it was a surprise to him. With both of the two statements expressed in paragraph 3 of the syllabus of the majority opinion I agree. However, I am sure that the ordinary lay person thinks of some force having been

unintentionally and undesignedly applied, whenever he hears that his friend was injured by accidental means, or even by accident. If one intentionally and knowingly comes into contact with the live germs of smallpox, and thusly contracts the disease, it is not ordinarily thought by any one that such disease was caused by accidental means, even though its victim felt sure he would escape it, as many times he might. The quotations given in the majority opinion from *Western Commercial Travelers Ass'n v. Smith*, 85 Fed. 401, and *United States Mutual Accident Ass'n v. Barry*, 131 U. S. 100, 9 S. Ct. 755, cited therein, quite well define the phrase "accidental means." They state, in effect, that for an injury to be caused by accidental means, the force that caused it must either (1) have been applied other than as intended by the person injured, or (2) that the injury must be such an unnatural, or rare, or unexpected consequence of an intended act as to prevent it from being a result that would reasonably be anticipated. All cases cited in the majority opinion as supporting the view therein expressed upon a factual basis can logically be explained, even though one restricts the meaning of accidental means to that of a force applied other than as intended by the person injured, without the addition of the balance of the definition above given. The opinion in *Bennett v. Travelers Protective Ass'n*, 123 Neb. 31, 241 N. W. 781, not cited in the majority opinion, likewise can be so explained. Cases arising under the workmen's compensation act, where only a definition of the word "accident" is involved, and then only as used in that act, are not in point. The majority opinion mentions two views as to the meaning of the phrase "accidental means," and cites cases purporting to support each view. If there are two views, the difference between them comes more from a wrong application of the facts to an attempted statement of the rule, than from any real difference. Be that as it may, it appears very clearly to me that the facts in this case do not bring it under either of such views. The X-ray was applied exactly as intended, and the result, to plaintiff's knowledge, was all but sure to

follow. The result was not accidental. The means were not accidental. It is conceded that negligence on the part of assured is no defense to an action upon a policy such as either of these involved. It should be conceded that neither of the policies involved insures against loss from an occupational disease.

Secondly, the majority opinion directs rendition of judgment for the plaintiff without further trial. Both policies had lapsed for nonpayment of premium by the end of November, 1936. The accident is alleged to have occurred on February 8, 1936, that being when an injury was first noticed. The plaintiff practiced his profession daily until in October, 1938, when he took a trip to South America, intending to continue such practice upon his return. The operation upon his hand was performed on his way home from South America. From the record it is quite evident that neither the plaintiff nor the defendant made any issue of the extent to which the plaintiff's fingers were exposed, if at all, to the X-ray subsequent to the lapse of both policies. No evidence was introduced by the defendant. Certainly the record does not show that the plaintiff's fingers were not exposed to the X-ray after the lapse of both policies. The burden of proof was upon the plaintiff. May not a large portion of the cause of the plaintiff's injury have occurred after the lapse of both policies? The record does not answer this question. The record does show that the plaintiff used the X-ray for nearly two years after both policies had lapsed, but does not show to what extent, if at all, his fingers were exposed to its rays. Both policies involved contain provisions for payments for partial disability. It should either be held that the general finding of the trial court in favor of the defendant included a finding that the cause of the plaintiff's injury occurred after the lapse of both policies, or the defendant should be permitted to introduce evidence upon such issue.

Thirdly, if what is designated as the process of nature rule is to be held to have been within the contemplation of the parties, when the words "within thirty days from date

of accident" were inserted in one of these policies, and the words "from the date of accident" were inserted in the other by the plaintiff and defendant, surely such contemplation must be held to have extended only to cases in which the cause of disability was clear, and was complete while the policy was in force. If such process of nature rule is to be adopted, then should not the holding in *Shambaugh v. Great Northern Life Ins. Co.*, 131 Neb. 415, 268 N. W. 288, be overruled?

The more nearly words and phrases in an insurance contract that are allowable and not ambiguous are given their usual and also a definite meaning, and such meaning aptly and accurately applied to the facts of a case in which they are involved, the less damage will the great masses of the insuring public suffer. Any other course tends toward trickery on the part of the insurer, and fraudulent claims on the part of the insured, either of which in the end only damages the insuring public, and makes government by rule more difficult to maintain. Any other course tends toward still more restrictive words and phrases, toward a rise in rates to meet uncertainties, and toward increased litigation. Perhaps a statutory restriction against any policy of insurance against loss by accident, other than prescribed forms, sufficient in number and variety to meet public needs, would be of great service to the insuring public. I feel that the judgment of the trial court should be affirmed.

GEORGE AXBERG ET AL., APPELLEES, V. CITY OF LINCOLN, APPELLANT.

2 N. W. (2d) 613

FILED FEBRUARY 20, 1942. No. 31244.

1. **Municipal Corporations.** Under the provisions of section 2, art. XI of the Constitution, a home rule charter must be consistent with and subject to the Constitution and laws of this state.
2. ———. Under a home rule charter, a city may provide for the exercise of every power, not contravening constitutional inhibi-

tions, connected with the proper and efficient government of the municipality.

3. ———. Where the legislature has enacted a law affecting municipal affairs, but which is of state-wide concern, such law takes precedence over any action taken by a home rule city under its charter.

4. ———. The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern, and when the legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities.

5. ———. Cities which have adopted a home rule charter, as authorized by the Constitution, are subject to the general laws of the state, except as to municipal matters of strictly local concern.

6. ———. Whether or not an act of the legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises.

7. ———. A statute providing for pensions for superannuated and disabled firemen in metropolitan and first-class cities is a matter of state-wide concern applicable to home rule cities within the class.

8. ———. An act of the legislature providing for pensions for superannuated and disabled firemen in metropolitan and first-class cities "except any city of the first class that has heretofore adopted a charter for its own government" is special and class legislation violative of the uniformity provisions of section 18, art. III of the Constitution.

9. ———. A valid classification of cities for purposes of legislation must admit of additions to it. It must not be so constituted as to preclude addition to the numbers included within it.

10. ———. The provisions of section 18, art. III of the Constitution, are mandatory, and legislation alleged to be void as class or special legislation is subject to judicial review.

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

Clarence G. Miles, Peterson & Devoe, Frederick H. Wagener, Max Kier and *Chauncey E. Barney,* for appellant.

Bernard S. Gradwohl, contra.

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

CARTER, J.

This is an action instituted against the city of Lincoln, seeking a declaratory judgment as to the rights, status and other legal relations of the parties under sections 2439 to 2442, inclusive, Comp. St. 1922, and for a further declaration that chapter 151, Laws 1923, purporting to amend said sections, is unconstitutional and void. From an adverse judgment defendant appeals.

The record shows that the city of Lincoln is a city of the first class, operating under a home rule charter adopted in 1918 pursuant to the powers granted by article XI of the Nebraska Constitution. The city maintains a paid fire department, and plaintiffs are all paid members of the department, who entered the employment since 1923. It is the contention of plaintiffs that they are entitled to pension benefits under the original firemen's pension law passed in 1895, and that an amendatory act passed in 1923 is unconstitutional and consequently does not affect their rights.

The original firemen's pension act provides in part as follows: "All metropolitan cities, and cities of the first class having a paid fire department, shall pension all firemen of the paid fire department * * *." Comp. St. 1922, sec. 2439. In 1923 the legislature amended this act to read in part as follows: "All metropolitan cities, and cities of the first class having a paid fire department, except any city of the first class that has heretofore adopted a charter for its own government, shall pension all firemen of the paid fire department * * *." Comp. St. 1929, sec. 35-201. In 1912 the Constitution of Nebraska was amended in part as follows: "Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state * * *." Const. art. XI, sec. 2. In 1918 the city of Lincoln, pursuant to this provision, enacted its home rule charter. The city of Omaha adopted its home

rule charter in 1922, and the city of Grand Island adopted its home rule charter in 1928. No other cities in the state have adopted home rule.

The first question to be answered is whether a statute relating to pensions for superannuated and disabled firemen is applicable to cities which have adopted a home rule charter under constitutional provisions. Under our Constitution, a home rule charter must be consistent with and subject to the Constitution and laws of this state. This means that a provision of a city home rule charter takes precedence over a conflicting state statute only in instances of strictly local municipal concern. *Carlberg v. Metcalfe*, 120 Neb. 481, 234 N. W. 87. This court has also held that the purpose of the constitutional provision is to render cities independent of state legislation as to all subjects of strictly municipal concern. *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N. W. 643. Is the matter of firemen's pensions in metropolitan and first-class cities of strictly municipal concern?

The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter. But where the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter. Whether or not an act of the legislature pertains to a matter of local or state-wide concern becomes a question for the courts when a conflict of authority arises.

We have come to the conclusion, after an examination of the authorities, that a statute providing for firemen's pensions is a matter of state-wide concern applicable to all cities within the designated class, whether they be home rule cities

or not. In *City of Cincinnati v. Gamble,* 138 Ohio St. 220, 34 N. E. (2d) 226, the court said:

"Why has this court coupled together police, fire and health as objects of interest and moment to the whole state? Reflection reveals that there are certain basic reasons that impel such a course; and in conclusion it is well to state them briefly.

"The state, considered in relation to its subdivisions, is the imperium and as such by its very nature has state control in state affairs. Since the municipality is imperium in imperio only in the exercise of powers conferred upon it by the state Constitution, it must in all other respects be subordinate to state authority. If fire, police and health departments be deemed purely matters of local self-government, they could be abolished and the state would be unable to step in. Obviously the abolishment of any or all of them would affect state interests. So would even impairment. Indeed, police and fire protection and health preservation are essential to the administration of state government in such a way as to accomplish vital purposes expressed in its organic law. * * * The Constitution guarantees life, liberty and property and imposes upon the state the duty to protect and defend these rights. That duty does not end at city limits. Control of deadly, contagious diseases may often require uniform state action; prevention of fire may be ineffective without unified effort reaching into urban, suburban and rural sections; and the policing of the state might well be inadequate to public need if done by a state constabulary with power to act only in areas outside municipalities. The state must remain sovereign in all such affairs else its authorities cannot protect rights assured to its citizens by its Constitution. These are fundamental reasons why police, fire and health undertakings are essentially attributes of state sovereignty and matters of state-wide concern."

In a similar case the Wisconsin supreme court said:

"So far as we have been able to discover in all jurisdictions where the question has arisen because of a conflict between a charter ordinance adopted under a home-rule provision

of a Constitution and an act of the legislature, the matter of police and fire protection has been held to be a 'matter of state-wide concern' * * *.

"The determination of other courts and a consideration of the fundamental reasons which underlie those determinations require us to hold that the preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are matters of state-wide concern." *Van Gilder v. City of Madison,* 222 Wis. 58, 267 N. W. 25.

And likewise in *Luhrs v. City of Phoenix,* 52 Ariz. 438, 83 Pac. (2d) 283, the court said:

"The jurisdictions that do not have freeholders' charters and also those that have are in accord in holding that the matter of providing pensions for superannuated policemen is of state-wide concern, and most of them agree that the matter of providing for and regulating city fire departments is state-wide. * * *

"We conclude that the matter of pensioning policemen, as also the matter of fixing a minimum wage for policemen and firemen, is of state-wide concern, and that chapters 40 and 43, *supra,* are valid pieces of legislation.

"We think the preservation of order and the protection of life and property and the suppression of crime are primary functions of the state * * *."

It is interesting to note that *State v. Love,* 89 Neb. 149, 131 N. W. 196, and *Adams v. City of Omaha,* 101 Neb. 690, 164 N. W. 714, are cited in support of this holding.

In *State v. Jost,* 265 Mo. 51, 175 S. W. 591, the court stated the rule in this language:

" 'In fact that section of the Constitution expressly provides that the city may adopt a charter for its own government, but it limits this by requiring that the charter so adopted must be "consistent with and subject to the Constitution and laws of this state." '

"In fact the very constitutional provision behind which respondents seek to hide, limits the scope of their charter powers. Such document, upon matters of general state concern, as is the peace and safety of its citizens, must be

subject not only to the Constitution, but the laws of the state as well. * * *

"There is therefore no substance in this contention of the respondents. A metropolitan police force is a matter of general state concern * * *."

It has been held that fire protection is a thing not only of local concern, but in which the general public has a vital interest. *People v. City of Springfield,* 370 Ill. 541, 19 N. E. (2d) 598. And it has also been held that the maintenance of a fire department is a matter of general public interest and not merely of local concern. *Hamilton v. City of Charleston,* 116 W. Va. 521, 182 S. E. 575. See, also, *Littell v. City of Peoria,* 374 Ill. 344, 29 N. E. (2d) 533.

Appellant cites *City of Pasadena v. Charleville,* 215 Cal. 384, 10 Pac. (2d) 745, and *Murphy v. City of Piedmont,* 17 Cal. App. (2d) 569, 62 Pac. (2d) 614. It is evident from a reading of these cases that they can have no application here. The provision of the California Constitution is so different from ours that in the *City of Pasadena* case the court was obliged to say: "By the charter amendment the powers of the city 'over municipal affairs became all-embracing, restricted and limited by the charter "only," and free from any interference by the state through general laws. * * * The result is that the city has become independent of general laws upon municipal affairs.' "

Appellant also relies upon *State v. City of Lincoln,* 137 Neb. 97, 288 N. W. 499, wherein it was held that the city council of Lincoln, under the provisions of its home rule charter, had the right to discharge one of its firemen without a hearing before the council as provided by a general statute. There are many cases holding that a home rule city has control over the personnel of its fire department because it is solely a matter of municipal concern, and hence not subject to legislative control. See cases cited in *City of Wewoka v. Rodman,* 172 Okla. 630, 46 Pac. (2d) 334. The court in *State v. City of Lincoln* also said, "for informational purposes, but without any implication, that no pension rights are here involved."

We do not think that this case sustains appellant's contention.

We conclude that pensions for superannuated and disabled firemen are matters of state-wide concern and that a statute providing for their payment applies to cities governed by home rule charters the same as other cities in the designated class. We think that the great weight of authority not only supports this rule, but the trend of the decisions of this court support the same view. See *State v. Nolan,* 71 Neb. 136, 98 N. W. 657; *State v. Love, supra; Carlberg v. Metcalfe, supra; Consumers Coal Co. v. City of Lincoln, supra; Sandell v. City of Omaha,* 115 Neb. 861, 215 N. W. 135; *State v. City of Lincoln, supra; Adams v. City of Omaha, supra.*

Appellees contend that section 35-201, Comp. St. 1929 (Laws 1923, ch. 151) is unconstitutional and void. The part of the statute under consideration provided: "All metropolitan cities, and cities of the first class having a paid fire department, except any city of the first class that has heretofore adopted a charter for its own government, shall pension all firemen," etc. It is apparent on the face of it that its operation is not uniform upon the designated class. Under its terms the city of Lincoln is not obliged to pay firemen's pensions while the city of Grand Island is required to do so, even though they are both cities of the first class. The freezing of the class in this manner has repeatedly been held to violate the uniformity provisions of section 18, art. III of the Constitution.

In *State v. Scott,* 70 Neb. 685, 100 N. W. 812, the court stated the rule as follows: "An act of the legislature which regulates a county office, and which by its terms limits its operation to counties having a population of 50,000 'according to the census of 1900,' is local and special in its application, since it can never apply to any other counties than the two which were in the class at the time of the passage of the act." See, also, *State v. Kelso,* 92 Neb. 628, 139 N. W. 226; *State v. Gering Irrigation District,* 114 Neb. 329, 207 N. W. 525; *White Construction Co. v. City of Beloit,* 189 Wis. 5,

206 N. W. 908; *State v. Dorland,* 56 N. J. Law, 364, 28 Atl. 599.

It is urged by appellant that section 18, art. III of the Constitution, does not prohibit the passage of special legislation where the situation cannot be properly remedied by a general law. It is also contended that there is no provision in the Constitution which forbids legislative classification of subjects for purposes of legislation where such classification is not arbitrarily made. We shall treat these two contentions together.

In *State v. Hall,* 129 Neb. 669, 262 N. W. 835, this court said:

"There is no prohibition against 'class legislation' by that name in the Constitution of this or any other state, or that of the United States, but the terms are used in decisions from all jurisdictions as a characterization of legislation in contravention of the Fourteenth Amendment to the Constitution of the United States providing: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws;' also state Constitutions and statutes prohibiting the enactment of special laws granting any special or exclusive privileges, immunities or franchises, or the passage of any laws for the benefit of individuals inconsistent with the general laws of the land. * * *

"The applicable provisions of our Constitution are found in section 18, art. III, providing:

" 'The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted.'

"A law to be general must operate uniformly upon all persons and localities of a class brought within the relations or circumstances provided for. *State v. Berka,* 20 Neb. 375.

It follows from this statement of the rule that a law is not general but special which does not operate uniformly upon the class within the relations or circumstances provided for." See, also, *Steinacher v. Swanson*, 131 Neb. 439, 268 N. W. 317.

And in *State v. Julow*, 129 Mo. 163, 31 S. W. 781, the court said: "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each."

An authoritative text-writer says: "But a statute would not be constitutional * * * which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments." Cooley, Constitutional Limitations (8th ed.) pp. 807-809.

We think that section 35-201, Comp. St. 1929, is not only void as local and special legislation in its application, but it is violative of section 18, art. III of the Constitution, in that it is not uniform as to class. There is no sufficient reason advanced why one city of the first class should be exempted from the special obligations and burdens of the firemen's pension law, while others in the same class are required to submit to such obligations and burdens. The attempt of the legislature, by the enactment of section 35-201, Comp. St. 1929, to divide the class constitutes arbitrary action, and the contentions of appellees to the contrary are without merit. It therefore violates section 18, art. III of the Constitution.

Having reached the foregoing conclusions, we do not deem it necessary to pass on the question whether chapter 151, Laws 1923, is violative of section 14, art. III of the Constitution, on the theory that the subject of the bill was not clearly expressed in the title.

We conclude that sections 2439 to 2442, inclusive, Comp. St. 1922, constitute a valid exercise of legislative powers and that such sections are applicable to all cities within the designated class, including home rule cities, for the reason that they involve matters of state-wide concern; and that chapter 151, Laws 1923 (Comp. St. 1929, secs. 35-201 to 35-204, inclusive), is unconstitutional and void as violative of section 18, art. III of the Nebraska Constitution. The conclusions reached by the trial court are therefore correct and, for the reasons herein stated, the judgment entered is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

The city of Lincoln governs itself by a home rule charter adopted under constitutional provision. The question is whether or not such a home rule city may be compelled by state law to pension its superannuated or disabled firemen. I am unable to join in that part of the majority opinion which holds that pensions for members of a paid fire department of such a city are a matter of state-wide concern.

The protection of life and property by the maintenance of a fire department is a matter of state concern. The question as to whether or not the members of a paid fire department shall be pensioned goes to the matter of their compensation and not necessarily to the maintenance of such a department. Whether or not a home rule city should pension its firemen is a matter for the home rule city, and not the state, to decide. It is a matter of local concern. The city of Lincoln, operating under its home rule charter should not, against its will, be compelled by state law to pension its firemen. I have several reasons for this conclusion.

First: The pensioning of the firemen is not shown to be necessary in order that a paid fire department be maintained. These pensions must be paid from city tax funds.

The city's obligation is to maintain an adequate fire department. If it decides that it should and does maintain such a department, without providing pensions for the members thereof, it has performed its governmental duty. To compel it to pension its firemen to meet a state need (if one exists) is to compel it to spend its tax revenues, not for a city, but for a state purpose.

Second: The decision of the majority is contrary to the intent and purpose of the home rule charter provision which is to render cities as nearly independent as possible of state legislation. *State v. City of Lincoln,* 137 Neb. 97, 288 N. W. 499.

Third: The decision of the majority is contrary to the reasoning of this court in *State v. City of Lincoln, supra.* See, also, *State v. Johnson,* 117 Neb. 301, 220 N. W. 273; *Schroeder v. Zehrung,* 108 Neb. 573, 188 N. W. 237.

Fourth: If the reasoning of the majority is to be followed, then almost any governmental action taken by a home rule city may be brought within the classification of "The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime" and declared to be a matter of state concern. To do so is to weaken, if not to destroy, the advantages of the home rule provision of our Constitution.

MESSMORE, J., dissenting.

The majority opinion states the general rule, supported by many foreign decisions, that the matter of firemen's pensions is of state-wide, rather than of local, concern. This holding does not conflict with our decision in *Munch v. Tusa,* 140 Neb. 457, 300 N. W. 385, for the reasons given in such opinion, and the cases are distinguishable. I am fully convinced that the broad language used in the decisions of this court with reference to home rule charters dictates a different rule to be made in this state than that formulated in the majority opinion. I quote from a few of the Nebraska decisions:

In *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N. W. 643, the court held: "The purpose of the consti-

tutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter."

In *Schroeder v. Zehrung*, 108 Neb. 573, 188 N. W. 237, the following language appears in the opinion: "If a city, after having adopted a home rule charter, was still to be subject to all the provisions of the former legislative charters, there could be no object or purpose in adopting a home rule charter."

It is apparent that the foregoing broad language is indicative that this state definitely intended home rule charters to place the government of the city in the hands of the people, who are most concerned about its development in fire and police protection, and other matters. A pension to be paid to firemen must, by necessity, be paid by the taxpayers of the city where the fireman is employed. This is a matter of compensation allowed on the basis of meritorious service as a fireman. The best judges of that meritorious service are those who have the authority to employ the personnel of the fire department and to watch their work through the period of time, to determine their competency and their right to compensation and a pension.

Suffice it to say that the people of the state generally, residing without the jurisdiction of a home rule charter city, should have nothing to do with the selection of the personnel of a fire department or the right to discharge any member thereof for inefficiency, and, further, should have no right to determine the necessary qualifications of such personnel, as far as their rights to pensions are concerned, and who, in fact, are not taxed in any manner to provide pensions; are not taxed in any manner to provide for even a portion of the salary of a fireman while employed, and assuredly are not entitled to a voice in the matter of pensions or compensation. That is to say, whether the city of Lincoln shall pay its policemen or firemen all they earn currently, or shall pay them part of their salary as it currently accrues, and the balance in the form of pensions, is certainly not such a matter of

general concern to the people of the state as to involve a public need or policy. If the people of the state are concerned with that question, they can be only indirectly or remotely affected.

Therefore, I am convinced that the most logical and reasonable rule to adopt in this state would be that a pension to be paid to firemen in the service of a home rule charter city, and,—to repeat,—to be paid by the taxpayers of such city, is a matter of purely local, and not of state-wide, concern.

I concur in that part of the majority opinion which holds that chapter 151, Laws 1923 (Comp. St. 1929, secs. 35-201 to 35-204), is unconstitutional and void.

Even though the majority opinion reflects the general rule and is adequately supported by authority, I am convinced, under the circumstances, that a rule, such as I have suggested, meets the requirements of this state and should be the law.

ROSE, J., concurs in both of the above dissents.

YEAGER, J., concurring.

After an examination of the dissenting opinions filed in this case, I feel obliged to point out the fallacies contained therein. No cases from jurisdictions having similar constitutional provisions which sustain the view therein expressed are pointed out. The rule contained in the majority opinion seems to have been uniformly followed.

It is said in the dissenting opinions that the pensioning of firemen is not shown to be necessary to maintain a paid fire department, and that the best judges on the question of pensions are those who have the authority to employ the firemen and to superintend and appraise their work. This is not a judicial question. It is clearly a legislative one which is of no concern to the courts. We have often said that we cannot substitute our judgment for that of the legislature on matters falling within the purview of the legislative branch of our government.

The contention that to require a home-rule charter city to pension its firemen is to compel it to spend its tax revenues for a state purpose and not a municipal one is disproved in

the dissenting opinions themselves. If such a reason was valid, the maintenance of a fire department by a city could not be prescribed by the legislature. In addition to that, nonhome-rule cities of the first class which are required by law to pension superannuated and disabled firemen could escape the provisions of the law by the force of the same reasoning.

The arguments and reasons stated in the dissents might well be advanced to the legislature where the membership may vote their personal convictions, but in this tribunal we must adhere to the principle of the administration of law by rule as distinguished from the whims and caprices of men. The legislature having determined the policy of the state, we are bound to acquiesce in its judgment on a matter purely legislative in character.

ERNEST C. WELLER, APPELLEE, V. VALLEY COUNTY ET AL., APPELLANTS.

2 N. W. (2d) 606

FILED FEBRUARY 20, 1942. No. 31305.

1. **Taxation.** In an appeal to the district court from a county board of equalization, the court shall hear the appeal as in equity and without a jury.
2. **Appeal.** "In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Comp. St. 1929, sec. 20-1925.
3. ———. Under the rule that equity cases are triable *de novo* on appeal, the only purpose of a motion for new trial in such cases is to call attention of the court to errors occurring during the trial.

4. **Taxation.** In case of an appeal by a taxpayer from the action of the board of equalization in fixing the value of property for taxation, the burden is upon the appellant to show that the action of the board is erroneous.
5. ———. The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action.
6. ———. The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant.

APPEAL from the district court for Valley county: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

John P. Misko, for appellants.

Davis & Vogeltanz, contra.

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

YEAGER, J.

This is an appeal by the county of Valley, Nebraska, the board of equalization of Valley county and board of county supervisors of that county, defendants and appellants, from the judgment of the district court for that county fixing the value of certain lands owned by Ernest C. Weller, plaintiff and appellee, on appeal from the action of the county board of equalization. The county being the party defendant and appellant in interest, for the further purposes of this opinion no further reference will be made to the other parties defendant.

The lands had been regularly assessed at a valuation of $18,400 for the year 1940. From this assessment the plaintiff made complaint to the county board of equalization. His complaint was dismissed by the board, whereupon he prosecuted his appeal to the district court where, after trial to

the court, judgment was entered reducing the value of these lands to $10,000. It is from this judgment that the appeal herein is taken.

After the appeal was docketed and transcript filed in this court, motion was made by the appellee to dismiss the appeal; first, on the ground that motion for new trial had not been filed within the three days provided by statute for that purpose (Comp. St. 1929, sec. 20-1143), and, second, that the bill of exceptions had not been settled, allowed and certified by the district judge.

The first stated ground is without merit in the light of the statutes and decisions of this court. Section 77-1705, Comp. St. 1929, provides in part as follows with reference to appeals from boards of equalization: "The court shall hear the appeal as in equity and without a jury * * *." Section 20-1925, Comp. St. 1929, provides as follows: "In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

Under the rule that equity cases are triable *de novo* on appeal, the only purpose of a motion for new trial is to call attention of the court to errors occurring during the trial or on the ground that new evidence has been discovered. This must be done within three days, except for newly discovered evidence, before such errors may be considered by the supreme court. For other errors motion for new trial is unnecessary. *Ogden v. Garrison*, 82 Neb. 302, 117 N. W. 714; *Farmers Loan & Trust Co. v. Joseph*, 86 Neb. 256, 125 N. W. 533; *Douglas County v. Barker Co.*, 125 Neb. 253, 249 N. W.

607; *Pitman v. Henkens*, 125 Neb. 621, 251 N. W. 282; *Sutherland v. Sutherland*, 132 Neb. 558, 272 N. W. 549.

On the second question it is true that, at the time of making the motion to dismiss, the bill of exceptions had not been filed in the district court. It has now been properly filed and certified so this objection is no longer of importance.

In the light of the rulings on the motion to dismiss the appeal there are but two assignments of error which require consideration. The appellant urges that the decision is not sustained by the evidence and that it is contrary to law.

All necessary formalities were complied with in presenting the case to the district court.

On the trial the appellee called numerous witnesses. These witnesses variously valued the land at from $8,500 to $12,357. Most of them fixed the value below $10,000. The appellant called but one witness on the question of valuation, who fixed the value at $12,800. On the basis of this evidence the court fixed the value of the lands at $10,000.

It is this evidence that the appellant asserts does not as a matter of law support the finding and judgment in this case. In support of its position appellant cites the rule announced in *Meridian Highway Bridge Co. v. Cedar County*, 117 Neb. 214, 220 N. W. 241. There it was stated: "The sound discretion reposed in the board of equalization to hear and determine the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon." This rule, if proper in any case, has no application here. All witnesses who testified valued the lands below the value fixed by the board of equalization, and we must assume that they were men having reasonable minds.

The rule applicable here is announced in *Western Union Telegraph Co. v. Dodge County*, 80 Neb. 23, 117 N. W. 468. There it is stated: "Where a taxpayer appeals from the action of the board of equalization in fixing the value of his property for taxation, the burden is upon the ap-

pellant to show that the action of the board is erroneous." The same authority holds that there is a presumption that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action. See, also, *State v. Savage,* 65 Neb. 714, 91 N. W. 716; *Hatcher & Co. v. Gosper County,* 95 Neb. 543, 145 N. W. 993; *Kennedy v. Buffalo County,* 134 Neb. 744, 279 N. W. 464.

The presumption obtains only while there is an absence of competent evidence to the contrary. It disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board. This court so held substantially in *Lancaster County v. Whedon,* 76 Neb. 753, 108 N. W. 127, and *Western Union Telegraph Co. v. Dodge County, supra.*

No rule of law has been cited or found that would justify this court in overturning or overriding the judgment and decision of the district court in the case at bar.

The evidence, it is true, is conflicting, but it is clear from all of the evidence that the valuation fixed by the board of equalization was excessive. It is equally clear that the appellee has sustained the burden of showing that the lands in question did not exceed the value of $10,000.

The judgment of the district court is

AFFIRMED.

JOHN WILLIAM JAMES, APPELLANT, v. HARRY KREBECK ET AL., APPELLEES.

2 N. W. (2d) 629

FILED FEBRUARY 27, 1942. No. 31198.

1. **Automobiles.** In the statute providing that an unintoxicated owner or operator of a motor vehicle shall not be liable for

damage to a guest therein, unless caused by the gross negligence of the former, the term "gross negligence" means a degree of negligence greater than want of ordinary care and greater than slight negligence but not necessarily extending to wanton or wilful or intentional disregard for the guest's safety.

2. ———. In an action by a guest to recover damages from the owner and driver of an automobile, the issue of gross negligence must be determined from the facts and circumstances of each case and must be submitted to the jury, where the pleadings and the proofs are sufficient to support a verdict in favor of plaintiff.
3. **Appeal.** In reviewing a peremptory instruction for defendant in an action for damages, issuable facts which the evidence in favor of plaintiff tends to prove will be regarded as established and proper inferences from such evidence will also be considered.
4. **Automobiles.** "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." Comp. St. Supp. 1941, sec. 39-1141.
5. ———. Where a motorist advises his guest of an observed danger in time to avoid it, the law does not require the guest to warn the motorist of the same danger as a condition of recovering damages for the latter's gross negligence.
6. ———. Evidence summarized in opinion *held* sufficient to support a verdict in favor of a guest on the issue of a motorist's gross negligence.
7. **Appeal.** Where the evidence shows that the verdict of a jury is clearly wrong, a judgment thereon is reversible on appeal.

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

M. S. McDuffee and *Elmer C. Rakow,* for appellant.

Jackson & Rice, Matzke & Bek and *Ralph M. Kryger, contra.*

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

ROSE, J.

This is an action to recover $21,000 for personal injuries alleged to have been suffered by plaintiff in a collision between two automobiles, each operated on a public highway by one of two defendants.

John William James, plaintiff, a minor 19 years of age at the time of the collision, brought the action by his mother and next friend, Sarah James. The defendants are Harry Krebeck and Hollis Wright, each an owner and driver of a car in the collision.

Plaintiff was a gratuitous guest of Wright in the front seat of the latter's Ford automobile. Krebeck drove a 1937 Buick. Plaintiff pleaded in his petition that the collision and his resulting injuries were caused by the gross negligence of Wright and the negligence of Krebeck. Each defendant denied the negligence imputed to him by plaintiff.

After plaintiff adduced his evidence at the trial, the district court sustained a motion by defendant Wright to direct a nonsuit as to him on the ground that the evidence was insufficient to sustain a verdict for plaintiff on the issue of gross negligence essential to a recovery by him as a guest. With Wright thus released from liability for gross negligence, the trial proceeded against Krebeck for alleged negligence on his part and for resulting injuries to plaintiff. The cause was submitted to the jury and from judgment on a verdict in favor of defendant Krebeck the action was dismissed. Plaintiff appealed.

It is argued on appeal that the evidence is sufficient to prove gross negligence of Wright and resulting injury to plaintiff and that the peremptory instruction is erroneous and prejudicial. Is this position well taken? The pertinent statute provides that an unintoxicated owner or operator of a motor vehicle shall not be liable for damage to an invited, gratuitous guest riding therein, unless caused by the gross negligence of such owner or operator. Comp. St. Supp. 1941, sec. 39-1129. As used in the statute the term "gross negligence" means a degree of negligence greater than want of ordinary care or of slight negligence but not necessarily extending to wanton or wilful or intentional disregard for the guest's safety. *Gilbert v. Bryant*, 125 Neb. 731, 251 N. W. 823; *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677; *Kovar v. Beckius*, 133 Neb. 487, 275 N. W. 670.

Under the automobile guest law the issue of gross negligence must be determined from the facts and circumstances of each case and must be submitted to the jury, where the pleadings and proofs are sufficient to support a verdict in favor of plaintiff. *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823.

In reviewing a peremptory instruction for defendant in an action for damages, issuable facts which the evidence in favor of plaintiff tends to prove, will be regarded as established and proper inferences from such evidence will also be considered. *Rogers v. Brown,* 129 Neb. 9, 260 N. W. 794.

Some of the undisputed facts shown by the record are: The Ford car driven by defendant Wright collided with the Buick car driven by defendant Krebeck on highway 275 about a mile and a half east of Meadow Grove shortly before noon May 1, 1940. The highway runs east from Meadow Grove, but there is a wide "S" curve further east than the point of collision. Wright was going east and Krebeck west. The highway was a good, smooth, practically level, oil mat pavement 24 feet wide with a white stripe on the median line and six-foot shoulders. Krebeck came out of the curve from the east and was on the straight highway at the time of the impact, while Wright was approaching the curve from the west. The cars came together on or near the white stripe in the center line of the highway a few feet from a curve sign by the roadside. Plaintiff was severely injured.

There is also evidence sufficient to prove the following facts: The curve was in a level valley where the highway was three or four feet above the general surface of adjacent land. The weather was fair and vision unobstructed. The motorists could see each other approaching for several hundred feet. Each turned his car to the left, or wrong side of the road, before the cars collided. When the cars came to rest the Ford was on a fence along the north side of the road and the Buick was upside down with part of it on the wrong side of the white stripe. Burnt rubber wheel marks showed that before the cars collided a portion of each

had been on the wrong side of the median line. The motorists approached each other at 45 or 50 miles an hour without slackening speed. There was no other traffic at the time and place to confuse or handicap the drivers.

The foregoing statements are not narrations of facts which the court finds upon review, but are recited as facts which the evidence on behalf of plaintiff tends to prove or as reasonable and logical inferences from such facts for consideration in testing the peremptory instruction. It is a fair inference that both drivers turned to the left when a slight turn by either to the right would have prevented the collision. There is nothing to show that either car left the pavement before the crash. It may fairly be inferred also that each defendant could have passed the other in safety on his own side of the white stripe or on the six-foot shoulder. The road law provides:

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." Comp. St. Supp. 1941, sec. 39-1141.

This is a well-known general law essential to safety on the highways. Instead of obeying it and assuming that the driver of the Buick would do likewise in time to prevent a collision, Wright, though observing the approaching Buick at a considerable distance, did not turn to the right, or slacken his speed or seek safety on his own side of the road, or on the shoulder thereof, but turned to the left in front of the on-coming, fast-moving Buick and contributed to, or caused, the collision. His conduct, considered in all its features, under the circumstances shown, evidenced a degree of negligence greater than want of ordinary care and greater than slight negligence, and amounted to evidence of gross negligence for the consideration of the jury. By creating or contributing to an emergency in which he did not pursue the safer of two courses, he did not thus escape liability for the consequences of his own gross negligence. *Thompson v. Edler,* 138 Neb. 179, 292 N. W. 236. There was evidence of a strong wind at the time of the collision, but there is noth-

ing in the record to show it obscured vision or prevented safe motoring on the highway.

Contributory negligence of plaintiff in failing to warn Wright of danger, though pleaded as a defense, was not proved when the verdict in the latter's favor was directed. On the contrary, it was then shown by the evidence that Wright had a clear view of the highway ahead of him, saw the Buick car approaching and remarked to his guest, the plaintiff: "Look at that car," and "wondered if it was ever going to get over." Since Wright had the entire situation in view and under consideration, the law did not impose upon his guest the duty to give warning of a danger already known to the driver. On the record for review it is clearly shown that the trial court erred to the prejudice of plaintiff in directing a verdict for Wright.

The evidence tends to prove that Krebeck saw, or could have seen, the Ford car approaching at a distance of several hundred feet when he came out of the curve; that he was driving between 45 and 50 miles an hour; that he did not slacken speed; that he turned his car to the left in violation of law; that part of his car was on the wrong side of the white stripe at the time of the impact; that he could have avoided the collision by obeying the law and turning to the right; that he was guilty of negligence similar to that imputable to Wright. The verdict and the judgment in favor of Krebeck were therefore clearly wrong. It follows that the dismissal in favor of each defendant is reversed and the cause remanded for further proceedings.

REVERSED.

DAN ALLES, APPELLEE, V. WHITE MOTORS COMPANY, APPELLANT.

2 N. W. (2d) 597

FILED FEBRUARY 27, 1942. No. 31256.

1. **Negligence.** In an action to recover damages for personal injuries, evidence that defendant negligently operated an electric switch and thus closed folding doors on plaintiff *held* sufficient to support a verdict in his favor.

2. ———. "To recover under the doctrine of the last clear chance, a plaintiff must have been in a position of peril which was known or, by the exercise of ordinary care, ought to have been known to defendant in time to avoid injury by the exercise of ordinary care." *Nyegomir v. Union P. R. Co.*, 130 Neb. 380, 264 N. W. 879.

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

Perry, Van Pelt & Marti, Arthur E. Perry and *Ralph Robert Perry,* for appellant.

Chambers, Holland & Locke, contra.

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

ROSE, J.

This action was brought by Dan Alles, plaintiff, to recover from White Motors Company, defendant, $10,000 in damages for alleged negligence causing personal injuries.

Defendant is a corporation engaged in selling and repairing automobiles at Eighteenth and O streets, Lincoln, Nebraska. April 10, 1940, plaintiff, while employed by the Capitol Service Station, delivered for the latter to defendant 20 gallons of gasoline, putting five gallons in each of four new cars. He parked the delivery truck on Eighteenth street west of defendant's building, went through the doorway of folding, electrically-operated doors on the west side, delivered the gasoline, went to the office, collected his bill, passed out through the same open doorway and extended his left hand and arm through a space between the south edge of the doors and the jamb to close them by operating an electric switch on the wall. Before his arm was withdrawn the doors closed and he was severely injured between the shoulder and the elbow.

Plaintiff alleged that the sole cause of his injuries was the negligence of defendant and its employee and agent, James H. Losey, who operated another switch and thus closed the doors on plaintiff's arm.

The answer of defendant to the petition contained a general denial. It was specifically denied that defendant or any of its employees closed the doors on plaintiff's arm or caused them to be so closed. It was affirmatively alleged that plaintiff was guilty of such negligence as to bar recovery.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $2,500. From judgment therefor defendant appealed.

Counsel for defendant take the position that plaintiff, as a matter of law, was guilty of such contributory negligence as to bar recovery and that a verdict in favor of defendant should have been directed at the close of plaintiff's evidence.

The doors that closed on plaintiff's arm could have been set in motion by pressure on either one of two electrical switches. One was on the west wall by the jamb where the doors closed on plaintiff's arm. The other was within approximately nine feet of the desk used by Losey, who was in charge of the parts room in defendant's place of business. Who operated the switch at the time of the accident was a vital issue on which the evidence was in direct conflict.

Counsel for defendant argue that plaintiff barred recovery by exposing himself to obvious danger; by momentary inattention to known danger; by blind reliance on nonoperation of the switch near Losey's desk; by thoughtless disregard of known danger. In the argument on these propositions there were references to testimony tending to prove the following facts: The doors were of standard make, were in good repair and of a model in extensive use. Plaintiff was familiar with the operation of the doors and previously closed them under similar circumstances. He knew the time required for the closing of them and that his arm should be immediately withdrawn to prevent injury. Had he listened, he could have heard the electric motor when it started. He could have seen and felt the doors as they moved, but did not withdraw his arm in time to prevent the accident. He did not need to enter or depart through this open doorway. There were other doors through which he could have entered and departed. Employees of defendant

only were authorized to open and close the west doors. Plaintiff did not have permission to do so.

It is from evidence of the character indicated and from other evidence of similar import that counsel insist plaintiff, by contributory negligence, barred recovery as a matter of law.

Other evidence, however, requires attention. Defendant's general manager testified that the west doors were used to let people and vehicles in and out. Plaintiff or his witnesses testified in substance: Defendant ordered gasoline from the Capitol Service Station and plaintiff, an employee of the latter, was directed to deliver it. He drove the delivery truck to the west side of defendant's building and parked it there. The west doors stood open and the doorway was the most direct course to the place of delivery. He carried the gasoline through the open doorway to the places where it was needed. He had made deliveries to defendant's place of business 200 times or more. Other employees of the Capitol Service Station made deliveries in the same manner. On the way out, just before the accident, in passing Losey's desk, plaintiff asked him if he wanted the doors closed, and was answered, "yes." Plaintiff had previously closed the doors by reaching through the opening from the outside and was about to do so again when he looked around and saw Losey's hand drop from the other switch. Plaintiff did not realize the doors were closing on him until he felt the pressure on his arm when he could not get it out. He did not touch the switch. Other employees from the Capitol Service Station had used the same doorway and had operated the electric switch. This practice was permitted by defendant and by Losey for years.

There is evidence of each item in the foregoing summary. At the time of the accident plaintiff was the only person near the switch on the west wall and Losey was the only person near the other switch. Each testified he did not touch a switch at the time. One or the other was mistaken. The jury in view of all the evidence and circumstances shown believed plaintiff and rendered a ver-

dict in his favor. On conflicting evidence the jury were judges of the fact in issue and they found in effect that the agent of defendant set the doors in motion. Since plaintiff did not touch the switch on the west wall, as found by the jury, the proximate cause of his injury was the operation of the other switch and no one was near it at the time except the employee and agent of defendant. On this issue there was ample evidence to sustain the verdict.

Did plaintiff expose himself to obvious danger and thus bar recovery as a matter of law? He had been invited to defendant's place of business. When he arrived, the west door was open. While he was going in and out through it, no one interfered with him. There was no proof of a warning sign to use another door or not to touch the switch. Without injury plaintiff previously extended his arm through the same opening, operated the switch and safely withdrew his arm. The evidence does not show this was dangerous without the turning of the other switch. There is evidence to the effect that plaintiff, while at the switch on the west wall, was in plain view of Losey who had said he wanted the doors closed. Under such circumstances, it would be exacting too much of the law to make it say, as a condition of recovery, that plaintiff should have anticipated the negligent manipulation of the switch near Losey's desk, should have heard the whir of the motor as it set the doors in motion and should have seen and felt the movement of the doors in time to have withdrawn his arm. On the issue of contributory negligence barring recovery, the verdict in favor of plaintiff is supported by sufficient evidence.

The giving of an instruction submitting to the jury the doctrine of the last clear chance is assigned as error requiring a reversal of the judgment in favor of plaintiff. It is argued that this doctrine was not applicable to the case at bar because there was insufficient time to prevent the accident after defendant discovered the peril of plaintiff. In a former case the supreme court ruled as follows:

"To recover under the doctrine of the last clear chance, a plaintiff must have been in a position of peril which was known or, by the exercise of ordinary care, ought to have been known to defendant in time to avoid injury by the exercise of ordinary care." *Nyegomir v. Union P. R. Co.*, 130 Neb. 380, 264 N. W. 879.

It is a fair inference from evidence already narrated that Losey, the employee of defendant in charge of the parts room, told plaintiff he wanted the doors closed, that Losey was in plain view of plaintiff as the latter approached the switch on the west wall, that at the same time Losey saw, or should have seen, plaintiff, and that all Losey then needed to do to prevent the accident was to keep his hands off the switch near his desk. In this view of the evidence, the one obviously taken by the jury, Losey not only caused plaintiff's peril, but, by the exercise of ordinary care, could have prevented the injury of which complaint is made. The conclusion is that error prejudicial to defendant in the giving of this instruction does not affirmatively appear in the record. In other respects error requiring a reversal has not been found.

AFFIRMED.

SIMMONS, C. J., and CARTER and YEAGER, JJ., dissent.

META SPETHMAN ET AL., APPELLEES, V. CARL HOFELDT ET AL., APPELLEES: CHARLES E. O'BRIEN ET AL., INTERVENERS, APPELLANTS.

2 N. W. (2d) 620

FILED FEBRUARY 27, 1942. No. 31212.

1. **Attorney and Client.** The proper method to enforce an attorney's lien is to file a petition in intervention.
2. ———. The litigant has an absolute right to settle litigation, but such a settlement, if made without the knowledge or consent of his attorney, does not affect an existing attorney's lien.
3. ———. A lawyer, in attempting to compromise or settle a case, should deal through opposing counsel, not directly with the opposing litigant, except with the consent of his counsel.

4. ———. A party adverse to attorney's client cannot, after an attorney's lien has attached, destroy it by a voluntary settlement made without the knowledge of such attorney.
5. ———. If all of the services have been performed by an attorney, the amount due him is determined by his contract, or if there is no contract, then by a determination of the reasonable value of his services.
6. ———. If, at the time a client settled a case without the knowledge of his attorney, certain services were still required to be performed, then the amount due such attorney will be fixed on a *quantum meruit* basis, unless his contract of employment, if one there be, provides what amount is to be paid for such partial services.

APPEAL from the district court for Sarpy county: JOHN A. RINE, JUDGE. *Reversed, with directions.*

Charles E. O'Brien and *William R. Patrick, pro se.*

Gilbert S. Brown, contra.

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

PAINE, J.

This is an appeal by two attorneys from an allowance, which they claim is entirely inadequate, upon an attorney's lien duly filed in the district court.

An action upon an attorney's lien came before the district court for Sarpy county upon a petition of intervention, answer and reply. It was decreed that the interveners had a first lien of 25 per cent. upon the amount their client received, of $995.47, in the proceeds of the sale of certain real estate, thereby allowing interveners upon their attorneys' lien the sum of $248.87, with $50.95 costs and expenses advanced, and further cost of $8 in the intervention proceedings, and directed that such sums be paid within three days after the entry of the decree, instead of allowing them 25 per cent. upon the amount the attorneys claim she was entitled to receive, of some $5,175.

From this decree, the interveners have appealed solely on the one question of the amount due them on their attorneys'

lien. As no cross-appeal was taken, all other matters not appealed from are considered *res judicata.*

The interveners, in their motion for a new trial, set out that their client, Hannah Hofeldt, was entitled to nine-tenths of $5,750 under her written contract with the heirs of Fred Hofeldt, deceased; that the decree awarding interveners only 25 per cent. of the $995.47 for which said Hannah Hofeldt sold and assigned her interest in the cause of action and decree of foreclosure, without the knowledge and consent of the interveners and without satisfying their attorneys' lien, is contrary to the evidence, and in fraud of their rights under an attorney's lien.

Gilbert S. Brown, the attorney for the appellee, Mrs. Hannah Hofeldt, denies that interveners were actually her attorneys, and insists that the decree was exactly what she wanted done; that she dismissed the action herself, and the real question is whether the attorneys are entitled to any fee at all. It is further argued by him that the policy of the law is to encourage litigants to settle their cases; that this court should not take all she has and force her to pay the exorbitant attorney's fee they are claiming.

It appears that attorney Brown secured a contract for 25 per cent. for representing Hannah Hofeldt, although he also represented the other heirs, whose interests were in some respects adverse to hers. Then she dismissed Mr. Brown, and on June 17, 1939, signed a memorandum retaining attorney Charles E. O'Brien to represent her interests in a mortgage foreclosure action on the Carl Hofeldt farm in Sarpy county, and authorized him to take the steps he deemed necessary to protect her interests. This was followed by a contract for attorney's services, on the usual printed form, signed by Hannah Hofeldt July 8, 1939, employing Charles E. O'Brien to represent her in the matter of Meta Spethman et al. v. Carl Hofeldt et al., and providing that said O'Brien shall receive for his services a sum equal to 25 per cent. of all properties and moneys received by Hannah Hofeldt, which she agrees to pay, together with all legitimate expenses and court costs, and she authorized her at-

torney to deduct his fee from any moneys collected by her.

Thereupon, Mr. O'Brien employed Mr. Patrick to assist him as associate counsel at his own cost, and on December 12, 1939, filed notice of the attorney's lien of 25 per cent. of the recovery of their client, Hannah Hofeldt, which the county court found to be nine-tenths of $5,750.

It will aid in understanding the issues to recite some of the facts of the litigation. Fred Hofeldt in his last will devised his estate, consisting principally of an $18,000 mortgage, to his nine children, to the entire exclusion of his wife, Hannah. By an agreement, exhibit D, attached to the petition, all of the children in writing agreed that Hannah Hofeldt, the widow of Fred Hofeldt, should receive all of the interest of $720 a year due on the $18,000 mortgage given by the son, Carl Hofeldt, up to and until March, 1937, except a one-tenth part of said sum which was to go to certain minors, in consideration of which written agreement the widow accepted the terms of the will and waived her election to assert her one-third interest in the estate.

In strict accordance with this agreement, the county court directed that said real estate mortgage and note be transferred to Hannah Hofeldt, so that she might receive and collect the interest thereon up to March, 1937, less the share adjudged to be the share of certain minors, all as per decree of final distribution entered by the county court on August 2, 1929.

When the $18,000 mortgage became due on March 1, 1937, it was not paid, and the heirs employed attorney Brown to make collection of the same, and finally Carl Hofeldt, mortgagor, agreed to pay $40 an acre in full settlement of the mortgage, but he failed to carry out this agreement or others that he made. On June 12, 1939, a petition of foreclosure was filed and a receiver was appointed.

This case was tried before District Judge Wilson, and the decree of foreclosure provided that the net sum should be distributed *pro rata* as per agreement between the parties, and plaintiffs were granted a deficiency judgment.

When the matters set up in the petition of intervention of attorneys Charles E. O'Brien and William R. Patrick were at issue, Judge Wilson called Judge Rine of Omaha in to hear the case, who held for the interveners, but decided they were entitled to but $248.87.

Exhibit No. 16, dated June 14, 1940, was an assignment for one dollar of the interest of Hannah Hofeldt in the decree of foreclosure, in which she sold all of her interest therein, which was set out to be nine-tenths of 46/227 of $7,000, to Martin Bloom, of Plattsmouth.

There appears in the bill of exceptions, as interveners' exhibit No. 2, a letter, dated May 29, 1940, signed by Mrs. Hannah Hofeldt, addressed to attorney Charles E. O'Brien in which she states to him that she has been informed that an offer to purchase the Carl Hofeldt farm, in which she has an interest, will bring her slightly more than $900, and states that as her attorney he is requested to consent to such sale and to withhold any further action for a reasonable period.

Upon receipt of this letter, attorneys O'Brien and Patrick at once drove to see her, and explained the whole matter, and thereupon she signed the following statement written at the bottom of interveners' exhibit No. 2, reading as follows:

"June 1, 1940

"Dear Mr. O'Brien:

"Upon further consideration I hereby revoke the foregoing direction and hereby authorize you and Mr. Patrick to proceed with the appeal to the supreme court.

"(Signed) Mrs. Hannah Hofeldt"

This case is replete with charges of fraud, misrepresentation and deceit between the attorneys and litigants, and it is charged on the one side that the children were willing to defraud their mother out of the amount they had agreed to pay her, and assisted Mr. Bloom, the banker at Plattsmouth, in buying out her large interests for a sum of approximately $900, and the interests of all of the heirs for some $7,000, and sold this property for $9,600, but were required to place

in escrow $1,500 of the purchase money to await the result of these intervention proceedings.

These charges are all denied by the heirs, who claim that it was the best disposition that could have been made of the property, and that they were all interested in their mother's behalf, and no one defrauded in any way.

The action in intervention, brought to enforce an attorney's lien of 25 per cent. upon the property belonging to the widow, Hannah Hofeldt, who was around 80 years of age, was the proper course to pursue. This lien was duly filed in the foreclosure action, and was a lien against the share therein belonging to the widow. Comp. St. 1929, sec. 7-108. Such a lien is similar to any other lien, as an artisan's lien, for instance, and the holder of the lien is required to prove the claim.

This court as early as 1873 adopted a statement of another court (*Shapley v. Bellows*, 4 N. H. 347) in holding that, "It is laid down as a general rule of law that an attorney has a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit in which it was obtained, and that this right of lien is paramount to any rights of the parties in the suit, or to any set-off." *Boyer v. Clark*, 3 Neb. 161. See, also, *Griggs & Ashby v. White*, 5 Neb. 467; *Reynolds v. Reynolds*, 10 Neb. 574, 7 N. W. 322; *Myers v. Miller*, 134 Neb. 824, 279 N. W. 778, 117 A. L. R. 977.

A special attorney's lien for his services in procuring an award for his client rests upon the equity of an attorney to be paid his fees and disbursements, according to his contract, out of the judgment which he has obtained. 5 Am. Jur. 392, sec. 219.

The litigant has an absolute right to settle litigation, but a settlement made without the consent of an attorney does not affect the existing lien of such attorney. 7 C. J. S. 1180, sec. 231.

"Where a judgment to which an attorney's lien has attached has been compromised between plaintiff and defendant in fraud of the attorney's rights, such settlement and compromise may be set aside at the suit of the attor-

ney defrauded." *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N. W. 1. See, also, *Griggs v. Chicago, R. I. & P. R. Co.*, 104 Neb. 301, 177 N. W. 185.

"Negotiations with Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." Canons of Professional Ethics, Canon 9. See article X, Rules creating, controlling and regulating Nebraska State Bar Association. This is doubtless subject to a qualification, that if opposing counsel gives consent, then negotiations may be entered into with his client.

In *Zentmire v. Brailey*, 89 Neb. 158, 130 N. W. 1047, Judge Rose said: "Did the dismissal deprive the attorney of his right to enforce his lien on the attached property? The lien created in favor of the attorney a right independent of the wish or control of any of the suitors. The law is that the statutory lien of an attorney is paramount to any rights of the parties to the action. *Rice & Gorum v. Day*, 33 Neb. 204. It cannot be defeated by the stipulation of the litigants or by a dismissal without the attorney's consent. *Aspinwall v. Sabin*, 22 Neb. 73. Stanley, therefore, by dismissing the action when his attorney was absent and by failing to call to the attention of the court the existence of the lien of the attorney, did not deprive him of his right to the benefits thereof." And in paragraph 1 of the syllabus, it is said: "An attorney's lien in due form, when filed in a pending action, binds realty previously attached therein to satisfy the client's claim."

Under the facts in the record in the case at bar, Martin Bloom was chargeable with actual knowledge of the existence of the intervening attorney's lien at and prior to the time that he bought out the interests of their client. It has been held, under the terms of the Nebraska attorney's lien statute (Comp. St. 1929, sec. 7-108), that after an attorney's lien has attached a party adverse to the attorney's client cannot, if he has notice thereof, destroy

it by a voluntary settlement made without consent or knowledge of the attorney, without rendering himself liable for the value of the lien. See *Heinisch v. Travelers Mutual Casualty Co.*, 135 Neb. 13, 280 N. W. 234; 5 Am. Jur. 408, sec. 246; *Myers v. Miller*, 134 Neb. 824, 279 N. W. 778.

There is no contention that the widow actually received nine-tenths of $5,750, but the amount which she actually was entitled to receive, and could have received had she persisted and strenuously fought for her legal rights, would be the amount against which the attorney's lien would be computed.

If the widow conveyed her legal right in a much larger sum to Mr. Bloom for $900, or any other sum, that would not necessarily fix the amount upon which the interveners could recover 25 per cent. This is true because the interveners must show to the court that they have rendered the services which their contract required them to render.

An attorney's lien covers disbursements made on behalf of his client in taxable costs and also compensation for his services. If the amount of his compensation was agreed upon and the services have all been performed, the amount due is determined by his lien. If, on the other hand, there was no agreement as to the amount to be paid for his services, then the attorney would be entitled to recover the reasonable value of his services, and such amount could be collected by the enforcement of the attorney's lien. If the services had not all been performed at the time the client settled the litigation without the consent of his attorney, then the attorney would be entitled to the agreed price, if such a contingency is covered by the contract of employment, and, if there be no contract covering such an eventuality, then the attorney is entitled to a reasonable compensation for his services, and resort to the lien, in either event, for the enforcement of payment. 5 Am. Jur. 395, sec. 222.

It is clear that Mr. Bloom purchased her interest with knowledge of all of the facts in relation thereto, and would be required to show why the interest he purchased from

Hannah Hofeldt was not liable to pay whatever share should be charged against the assets which Mr. Bloom became in possession of by such assignment from Hannah Hofeldt.

The determination of these questions cannot well be made by this court from the evidence which appears before us at the present time, but there is sufficient evidence to convince the court that the amount of the finding and decree of the district judge was not sufficient to meet the amount due to interveners under the attorney's lien.

It is therefore reversed and remanded, with instructions to the district court to take evidence upon the points in issue, and render a new finding in accordance with the facts, and for the sum equitably due to interveners under the attorney's contract and lien.

REVERSED.

H. JOE BOHMONT, APPELLANT, V. WILLIAM H. H. MOORE ET AL., APPELLEES.

2 N. W. (2d) 599

FILED FEBRUARY 27, 1942. No. 31275.

1. **Appeal.** All matters decided expressly or by necessary implication in an opinion reversing a judgment become the law of the case in any future trial.
2. ———. Questions raised by a motion for a rehearing are adjudicated by a ruling on that motion and cannot again be litigated in a subsequent trial.
3. ———. Ordinarily, the reversal of a judgment and remand for further proceedings, without specific directions to the trial court, is a general remand which places the parties in the same position as if a trial had not been had.
4. ———. But if the undisputed facts are such that but one judgment could be rendered, the trial court should enter such judgment, notwithstanding the mandate did not so direct.
5. ———. It being adjudicated in the former trial that a recovery was barred by a final judgment in favor of two codefendants, it becomes the law of the case and the trial court could properly enter judgment for the defendants after a general remand.
6. ———. A case will not be reversed where the complaining party would not be entitled to succeed in any event.

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

Lloyd E. Chapman and *G. E. Hendricks,* for appellant.

Mockett & Finkelstein and *Peterson & Devoe, contra.*

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

CARTER, J.

The defendant Martell State Bank moved for a judgment in its favor on the mandate issued by this court on a former appeal. The plaintiff brings the case to this court for review, alleging that the judgment against him was erroneously entered.

The record shows that plaintiff commenced an action against the Martell State Bank, William H. H. Moore and J. Carl Sittler to recover damages for the breach of a bailment contract. It was alleged in the petition that plaintiff rented a safety deposit box from the Martell State Bank several years prior to November 2, 1938, that he placed $14,000 in currency therein for safe-keeping, and when he called to get the money on November 2, 1938, it was not in the safety deposit box. A more detailed statement of the facts will be found in the former opinions. *Bohmont v. Moore,* 138 Neb. 784, 295 N. W. 419, and *Bohmont v. Moore,* 138 Neb. 907, 297 N. W. 559. The mandate of the supreme court issued on the former appeal stated "that the judgment rendered by you be reversed * * * and the cause remanded for further proceedings." It is the effect of this remand, when considered in connection with the opinions of the supreme court accompanying it, that gives rise to the question herein to be determined.

In the original petition filed in the district court, it was alleged that the bailment agreement was made with the Martell State Bank and that the only persons who handled any transactions pertaining to the safety deposit box were the defendants Moore and Sittler. The trial court directed a verdict in favor of Moore and Sittler. The judgment en-

tered in their behalf was never appealed from and consequently has become final. As to the Martell State Bank, the case was submitted to the jury, who returned a verdict against it for the $14,000. The Martell State Bank appealed to this court, and in reversing the case this court, among other things, said: "If the liability of a banking corporation, sued for tort, is necessarily dependent upon the culpability of its president and cashier, who are the immediate actors and who, in an action against them by the same plaintiff for the same act, have been adjudged not culpable, defendant banking corporation, under such circumstances, is entitled to a directed verdict."

On rehearing, the attention of the court was called to the fact that the action sounded in contract and not in tort. In the second opinion, *Bohmont v. Moore,* 138 Neb. 907, 297 N. W. 559, this court said: "The plaintiff's petition sounds in contract and further contains a direct allegation of negligence, thus presenting two aspects of recovery. Suffice it to say that the rules of law set forth in the opinion are applicable to the plaintiff's cause of action, based on a breach of the bailment agreement." The petition contains the following allegation: "That by reason of the failure of the defendants to return said money to the plaintiff and by reason of their negligence in not properly protecting and caring for said money owned by the plaintiff as aforesaid, the plaintiff has been damaged in the sum of $14,000." There can be no doubt that this was a general allegation of negligence. The fact that defendants Moore and Sittler were joined as parties defendant is additional proof that plaintiff considered that negligence was an essential element to a recovery, for if the action was one in contract they would have no personal liability. But, in any event, this court in its second opinion concluded that the rules as to negligence were applicable. We do not have the transcript of the evidence in that case before us and for that reason we cannot determine upon what theory the case was tried in the district court. For aught we can say, the parties tried it on the theory that the loss was due to the negligence of the

bank acting through its officers, Moore and Sittler. If this be the basis of the holding, it is unquestionably correct, as this court has many times held that, where a certain theory on any issue is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not. *Behle v. Loup River Public Power District,* 138 Neb. 566, 293 N. W. 413; *U. S. Tire Dealers Mutual Corporation v. Laune,* 139 Neb. 26, 296 N. W. 333. We realize fully that the record before us does not establish the truth of this supposition. But it does indicate a reason why this court has held that all matters decided expressly or by necessary implication in its opinion in reversing the first judgment become the law of the case as to any future trial.

In *Kuhns v. Live Stock Nat. Bank,* 138 Neb. 797, 295 N. W. 818, this court said: "So, too, all matters decided expressly or by necessary implication by this court in its opinion in reversing the first judgment became the law of the case. This applies not merely to all questions actually and formally presented, but to all existing in the record and necessarily involved in the decision. Such points will not be reconsidered in this appeal."

And in *Anheuser-Busch Brewing Ass'n v. Hier,* 61 Neb. 582, 85 N. W. 832, this court said: "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated."

And, also, in *Blum v. Truelsen,* 139 Neb. 282, 297 N. W. 136, this court held:

"The plaintiff in this appeal raises the same propositions that were considered in the motion for rehearing, in attacking that part of the judgment releasing Henry T. Truelsen from liability on the note. This court determined the issue so raised when the motion for rehearing was denied.

"'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and

that such facts or questions become *res judicata* and may not again be litigated in a subsequent action.' 30 Am. Jur. 920, sec. 178. In the instant appeal the subject-matter has been fully determined in the opinion in *Blum v. Truelsen, supra,* and by the motion for rehearing therein, and cannot be again litigated."

An examination of the record in this case reveals that every point raised by the plaintiff was determined against him on the former appeal. The holding that the final judgment in favor of Moore and Sittler was a bar to a recovery against the bank was attacked in the motion for a rehearing and this court in its opinion overruling the motion for a rehearing adhered to its former decision. The issue consequently has been finally decided and becomes the law of the case.

Plaintiff argues that the court determined that instruction No. 4 was erroneously given and that, unless a new trial had been intended, there would have been no occasion to consider the correctness of any of the instructions. We quite agree that under our present view of the case there was no necessity to pass upon the correctness of instruction No. 4 and that it is some evidence that a new trial before a jury, correctly instructed, was intended. But another well-settled rule does away with any such conclusion in the present case. Our former decision holds that the final judgments in favor of Moore and Sittler are a bar to a recovery against the bank. This being true, another trial could accomplish nothing. The judgments would be a bar in any event and require a judgment in favor of the bank. In other words, the judgment entered in favor of the bank was the only one that could be rendered under the present state of the record.

In *Bliss v. Live Stock Nat. Bank,* 124 Neb. 880, 248 N. W. 645, this court said: "Without question it is a general rule that reversal of a judgment and remand for further proceedings in accord with the opinion, without specific direction to the trial court as to what it shall do, except such as conveyed by the words, 'for further proceedings,' is a general remand, and the parties stand in the same position as if

the case had never been tried. This court and other courts have frequently so held. However, there are some exceptions to the rule. If the undisputed and admitted facts are such that but one judgment could be rendered, the trial court should enter such a judgment, notwithstanding the mandate did not specifically direct the trial court's action."

In *Kuhns v. Live Stock Nat. Bank, supra,* this court said: "In this connection the decision of this court in the instant case on the first appeal necessarily included the determination that the cause of action alleged in the trustee's petition, both as to fact and law, was clearly sustained by the record and that such trustee was therefore entitled to a judgment as prayed. This became the law of the case, and was properly, as such, interpreted by the trial court on the entry of its judgment 'upon the mandate' here appealed from. As an additional reason, it may be said that a case will not be reversed for errors, where the complaining party would not be entitled to succeed in any event." See, also, *Regouby v. Dawson County Irrigation Co.,* 128 Neb. 531, 259 N. W. 365.

Plaintiff further contends that, if a new trial was not intended, this court would have reversed and dismissed the action as to the bank. While this is usually true, there are some recognized exceptions to the rule, one of them being that, if the undisputed and admitted facts are such that but one judgment can be rendered, the trial court should enter such a judgment. A case will not be reversed where the complaining party would not be entitled to a judgment in any event.

The trial court evidently came to this same conclusion. The judgment of the district court being the only one that could properly be entered, it is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I agree with the majority that this is an action "to recover damages for the breach of a bailment contract." I agree that plaintiff alleged that the defendant bank and its officers were negligent in not properly caring for and protecting the money which plaintiff alleges he placed

in the safety deposit box which he rented from the defendant bank. I agree that plaintiff considered that negligence was an "essential element" of the case. I disagree with their conclusion that because of the allegation as to negligence the action was not "one in contract." This conclusion is based on the fact that negligence is an element to be established, as the proximate cause of the loss to the bailor. "The great weight of authority is to the effect that the transaction (the lease of a safety deposit box) constitutes a bailment for hire." 67 C. J. 596. "It is the duty of the bailee to exercise ordinary care and diligence." *Ibid.* 597. "If the bailee fails to exercise such care and diligence, it is liable for any loss of the contents of a safe deposit box *which occurs as a proximate result of its negligence.*" *Ibid.* 598. "Where it is sought to hold the safe deposit company liable on the ground of negligence, the burden is on plaintiff to prove defendant's duty and negligence as alleged, but where a *prima facie* case is proved, as where it is shown that the loss occurred without plaintiff's knowledge or consent while the property was deposited with defendant, it is then incumbent on defendant to show by a preponderance of evidence that the loss was not caused by any negligence on its part." *Ibid.* 601. These principles generally have been recognized by this court. In *Sulpho-Saline Bath Co. v. Allen,* 66 Neb. 295, 92 N. W. 354, this court with approval quoted from Story on Bailments as follows: "When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect." In the opinion, this court said: "Having received the property as bailee, the burden was on the defendant below to show that it was lost, if such was the case, without negligence upon its part." See, also, *Campbell v. Missouri P. R. Co.,* 78 Neb. 479, 111 N. W. 126, and *Davis v. Taylor & Son,* 92 Neb. 769, 139 N. W. 687.

Negligence therefore was an element in the "action to recover damages for the breach of a bailment contract." That the plaintiff so recognized it and that it was so treated in the

trial is established by the first opinion herein where it is recited: "The plaintiff contends that, when the renter of a box proves, first, the existence of the contract of rental, second, the deposit of money, or other valuables, under the agreement, and, third, the failure to return the money, or other valuables, on demand, if the bank renting the box then fails to explain or excuse the nondelivery, it is liable in damages, just as any other bailee for hire; that the *prima facie* case, when made, rests upon a presumption of negligence on the part of the depositary, which must be rebutted to escape liability." (138 Neb. 784.)

But even if this view is erroneous, then the following rules seem applicable. "Where a complaint states a cause of action in contract and it appears that this is the gravamen of the complaint, the nature of the action as *ex contractu* is not affected or changed by the fact that there are also allegations in regard to tortious conduct on the part of defendant, such as allegations in regard to negligence, or fraud, or conversion, which in such cases may be disregarded as surplusage." 1 C. J. S. 1101, sec. 46. "An action for the negligent performance of a contract not involving a breach of duty imposed by law sounds in contract, and, if the complaint clearly sounds in contract, the fact that negligence is also alleged will not affect or change the character of the action." 1 C. J. S. 1107, sec. 49.

The majority opinion states: "We do not have the transcript of the evidence in that case (the first appeal) before us and for that reason we cannot determine upon what theory the case was tried in the district court." As I see it, it is not necessary to have the bill of exceptions in the first case to determine the "theory" upon which plaintiff tried his case. That theory is stated in the above quotation from the opinion. However, we have the right to order the bill of exceptions returned to us. Section 20-1924, Comp. St. 1929, provides: "In the event a rehearing of any such cause or proceeding shall be allowed by the supreme court, *or if for any other reason* said court shall need or desire the use of

such original bill or bills of exception or testimony in equity and law cases, it is hereby authorized to order the return of the same to it." If there is any question as to what that record shows, it is our right and duty to examine into it. *Witzenburg v. State,* 140 Neb. 171, 299 N. W. 533.

It is true that the opinion in the first case considered the question of negligence. It is obvious, however, that throughout that discussion and in the authorities cited negligence was considered as an element of a contract action and as it affected the rights of a bailor, duties of a bailee, and the burden of proof.

The difficulty we are now facing arose not because of allegations and proof of negligence, but because the plaintiff included the officers of the bailee bank as defendants, both in his designations of parties and in some of his allegations. The trial court in the first action recognized that they were not proper parties and dismissed them, and the action proceeded as one against the defendant bank "for damages for breach of a bailment contract."

This court in the first opinion *on its own motion* raised this question of the joinder of the officers of the bank. It then stated a rule applicable to a corporation committing a tort, and stated that the bank was "a tort-feasor, together with" its officers. This is the first appearance in the case of the contention that this is a tort action as distinguished from a contract action. In syllabus point 7 a rule applicable to a banking corporation "sued for tort" is stated, as are similar rules stated in the opinion. It is to be noted, however, that this court did not make an adjudication of that matter and did not dismiss the case and did remand the case generally "for the reasons given" in the opinion.

What was the reason that required a remand?—the error which existed in instruction 4 which was discussed at length in the opinion. Had this court determined that a judgment for the defendant either here or below should be entered, then such an order here or a remand, with instructions to enter such an order, would have been the proper action. That adjudication was not made.

A motion for a rehearing was filed by plaintiff and briefs by *amici curiæ*. The majority state that "The holding that the final judgment in favor of Moore and Sittler was a bar to a recovery against the bank was attacked in the motion for a rehearing and this court in its opinion overruling the motion for a rehearing adhered to its former decision." On this feature of the case the plaintiff's motion for a rehearing presented only the proposition that the dismissal of Moore and Sittler was proper for the reason that, "in making contracts for a corporation, the employees act as agents for the corporation only, and in a suit for breach of the contract, only the corporation, or the principal, can be liable." The proposition that "the court erred in deciding that a judgment upon a directed verdict in favor of Moore and Sittler would preclude a judgment against the Martell State Bank" was advanced by *amici curiæ* and not by plaintiff. Neither can I agree with the conclusion of the majority that in overruling the motion for a rehearing this court "adhered to its former decision" on that matter. In the first place this court in its first opinion merely stated some rules of law; it made no decision of that matter. In the second place, assuming such a decision, in the second opinion (138 Neb. 907) this court did not adhere to it. This court was there presented with and *considered* the contention that we erred in construing the action as one in tort. What did we decide in the second opinion? "The rules of law set forth in the opinion are applicable to plaintiff's cause of action, *based on a breach of the bailment agreement.*" That statement was made "to avoid confusion as to the nature of the action." Hence, by the second opinion we recognized the action as one for the "breach of a bailment agreement" and reaffirmed rules of law applicable thereto.

It is not shown that rules of law applicable to an action for the breach of a bailment contract require the dismissal of the cause of action against the bailee because employees of the bailee, unnecessary parties, are dismissed. Even the defendant in its brief does not contend that those

rules are applicable to the issues presented. The majority make no such contention. The rule is stated in 6 Am. Jur. 435, sec. 355, as follows: "The bailor may also proceed against joint defendants in an action *ex contractu,* but if he does so, it is the general rule that in order to recover, a cause of action must be established against all those joined. This rule is subject to an exception where one defendant gives in evidence matter in bar, of which he, but not others of the defendants, may take advantage, *and also where one is joined as defendant who is an unnecessary or improper party.* Thus, a clerk of the bailee, without interest in the bailment, falls within the latter exception, and a bailor has been allowed to recover against the bailee only upon a declaration charging joint liability after stipulating for dismissal of the action against such a clerk." The case there largely relied upon is *Mayer v. Brensinger,* 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196. In that case the plaintiff alleged that he rented and placed a considerable amount of cash in a safety deposit box. When he returned to get it, it was gone. The question of ordinary care in its preservation was an issue. Plaintiff joined the owner of the safe deposit boxes *and his clerk.* The proof showed that only the owner was liable, and also that the clerk, if any one, was guilty of negligence and that he was manager and had charge of the vaults. Upon motion of the defendants the suit was dismissed as to the clerk and went to judgment against the owner who alone was liable. The court held, quoting the third and fourth paragraphs of the syllabus:

"If an action is dismissed as to one joint defendant, and judgment is rendered against the other without amendment of the complaint, there is a variance, to take advantage of which on appeal the defendant must specifically point out the objection in the trial court, and give the plaintiff an opportunity to amend.

"The rule that in a joint action *ex contractu* a dismissal as to one joint defendant effects a discontinuance of the entire action so as to render a judgment against the remaining defendant or defendants erroneous is sub-

ject to the exception that it does not apply when the defendant against whom the dismissal was had was not a necessary or proper party." (72 Am. St. Rep. 196.)

What then, in justice to the parties, should be done in this situation?

The majority dismiss all that part of the first opinion leading up to and holding that instruction No. 4 was erroneous and the contention that a new trial was intended by the decision on that feature of the case, with the statement that there "was no necessity to pass upon the correctness of instruction No. 4." The majority hold that "the final judgments in favor of Moore and Sittler are a bar to a recovery against the bank," and that having been decided, it becomes the "law of the case" and that a judgment for the bank must be entered. I cannot agree that such a judgment was entered, but, if entered, then it was clearly erroneous.

The majority, having started out with the proposition that this is an action "for the breach of a bailment contract," wind up by affirming a judgment for the defendant as having been "sued for tort."

What then is the rule where a previous decision is announced containing an admittedly inapplicable statement of law and the case is remanded generally and comes to us on a second appeal? This proposition was squarely before this court in *City of Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, wherein the second paragraph of the syllabus is as follows: "An appellate court, on a second appeal of a case, will not ordinarily reexamine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may reexamine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect."

In the body of the opinion it is stated: "It needs but a

moment's reflection to show that there is *no adjudication by the expression of an opinion on a point of law where no judgment is entered* in accordance with that opinion but the cause is *remanded generally.* The only thing adjudicated is that there was error in the record, and that the whole case should be relitigated. * * * It is true that it is the duty of the trial judge to follow the directions of the appellate court, but when the case comes again before the appellate court, the question is not, did the trial judge proceed according to its former opinion, but were his rulings correct in law. To enforce erroneous rulings, simply because the appellate court had directed the error, would be to pervert the law and sacrifice justice to the technicalities of practice."

The opinion next commented on the fact that appellate courts have the right to overrule their own decisions in different cases, which, the writer stated, amounted to an admission that in the previous case they had done an injustice which they could not remedy. He then said: "If the doctrine contended for is to prevail here, then it follows that the only instance in which the court is not permitted to correct its mistakes, or refuses to do so, is also the only instance where the mistake can be corrected without injustice. * * * To hold that it is bound to follow in a given case an erroneous decision formerly rendered in the same case would be to hold that, although the court believes the law to be otherwise, it will make a special law for the particular parties and the particular case before it, contrary to the general law—to substitute what it is pleased to call 'the law of the case' for the law of the land, for the law which every member of the court is sworn to administer. * * * We think that ordinarily the court is justified in refusing to reexamine questions of law once passed upon, and that it is only where it clearly appears that the former decision was erroneous that this should be done. It is, however, now clearly established that the former opinions in this case were erroneous and the court should correct the error."

I submit that that is what should be done now in the instant case. The *Foxworthy* case has been repeatedly cited and followed by this court. In *State v. Farrington*, 86 Neb. 653, 126 N. W. 91, it is said: "The correct rule is announced in the opinion of Mr. Commissioner Irvine in *City of Hastings v. Foxworthy*, 45 Neb. 676; that is to say, if a judgment of a lower court is reversed and the cause is remanded generally, the appellate court, upon a second appeal, may reexamine the law and correct an error committed in the first opinion; but, if the cause was first remanded with directions to the inferior court to enter a specific judgment, that court has no discretion, but must obey the mandate."

To correct this error it is not necessary to disturb the first opinion in its analysis of the cause of action as a contract action, in its statement of the contention of the parties, nor in its discussion and determination that instruction No. 4 was erroneous. It is necessary only to hold that, when the opinion and the supplemental opinion are properly construed and interpreted, they announce the conclusion that the judgment is reversed and the cause remanded for the error in instruction No. 4, and while not expressly stated in the supplemental opinion, that part of the original opinion which stated that the defendants were tort-feasors and which dealt with the liability of "a banking corporation when sued for tort" was of necessity set aside and withdrawn when the decision was clarified and a recognition given to the fact that plaintiff's action was based on a breach of a bailment agreement.

This court in the second appeal of *Cerny v. Paxton & Gallagher Co.*, 83 Neb. 88, 119 N. W. 14, held that, "Where the error preceded the verdict, and the verdict is a general one, there must be a new trial upon all the issues of fact." As to the *Cerny* case, the defendant says: "If the only matter contained in the opinion in this case would have been the error of the trial court in giving instruction No. 4, and the reversal was solely because of that error, then the case of *Cerny v. Paxton & Gallagher* would be

controlling." See, also, *Sowerwine v. Central Irrigation District,* 91 Neb. 457, 136 N. W. 44; *Bliss v. Live Stock Nat. Bank,* 124 Neb. 880, 248 N. W. 645; *Parish v. County Fire Ins. Co.,* 137 Neb. 385, 289 N. W. 765. In *Missouri, Kansas & Texas Trust Co. v. Clark,* 60 Neb. 406, 83 N. W. 202, this court said: "When a judgment is reversed for an error occurring at the trial, the cause must necessarily be tried again."

So here in the first appeal the judgment was reversed and the cause remanded because of the prejudicial error in instruction No. 4. The cause should "necessarily be tried again" unless the parties or the court by proper procedure dispose of it otherwise. In the instant case in the first appeal the judgment was reversed and remanded. The mandate placed it again on the docket for trial or for such other proceedings as may properly be taken in a case having that status.

The judgment of the trial court should be reversed and the cause remanded.

EVERETT PICKENS, APPELLANT, V. MARYLAND CASUALTY COMPANY, APPELLEE.

2 N. W. (2d) 593

FILED FEBRUARY 27, 1942. No. 31298.

1. **Insurance.** A contractors' public liability policy, which by its terms does not cover an accident unless it shall occur upon premises owned by or under the control of the assured, or on the public ways immediately adjacent thereto, does not cover an accident which took place more than eight miles from assured's operating location.
2. ———. In construing terms used in a policy of insurance where no ambiguity exists, they will be considered in their usual and ordinary sense.
3. ———. The words "immediately adjacent," used in contractors' public liability policy, construed to mean contiguous or adjoining.
4. ———. A public liability policy insuring automobile accidents upon premises owned by or under the control of the assured, or

on the public ways immediately adjacent thereto, is not enlarged as to its coverage provisions by describing the assured's location of operations as "near Plattsmouth, Nebraska."

5. **Estoppel.** It is essential to an estoppel *in pais* that there be a false representation or concealment of material facts without the knowledge or means of knowledge of the person alleged to have been misled, made with the intent that it should be acted upon, and actually relied upon by such person to his prejudice. If any of these elements do not exist, an estoppel cannot be applied.
6. **Insurance.** A clause in a public liability policy that the insurer will defend suits for personal injuries brought against the insured although they may be wholly groundless, false or fraudulent is generally construed to obligate the insurer to defend only suits upon claims for which it has assumed liability under the policy.

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

Lloyd E. Peterson and *John L. Mattox,* for appellant.

Herbert E. Story and *John H. Roper, contra.*

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

CARTER, J.

Plaintiff sues to recover a judgment against the Maryland Casualty Company for the sum of $2,160 to reimburse plaintiff for $2,000 attorney's fees and $160 expenses incurred by him in the defense of a personal injury action, an obligation which plaintiff alleges the defendant company assumed by the issuance of a public liability policy to the plaintiff. The trial court found for the defendant and plaintiff appeals.

The record shows that on September 2, 1938, one Frank Krejci, while operating a truck one-half mile north of the city of Plattsmouth, became involved in an accident with an automobile driven by one George Moore. An action was commenced by Moore against plaintiff and Krejci to recover damages for the resulting injuries. It appears that Krejci had hauled a load of rock from plaintiff's quarry to

Ft. Crook, and on his return trip had met with the accident with the Moore car. The quarry was seven miles south and a mile and a half east of the scene of the accident. The evidence shows that the rock was being hauled by Krejci as an independent contractor in a truck owned by his wife and used with her consent. On April 4, 1939, Moore filed his action against plaintiff and Krejci and on May 29, 1939, plaintiff notified defendant that he was tendering the defense of the case to it under the terms of the public liability policy he held with the defendant company. On June 19, 1939, the defendant company refused to assume the defense of the case on plaintiff's behalf for the reason that it involved no liability within the terms of the policy. Plaintiff then employed counsel, who successfully defended his case, and he now seeks to recover from the defendant the attorney's fees and expenses necessarily expended in the defense of the case.

The general insuring agreements of the policy provide in part as follows: "This policy does not cover: * * * (5) any accident caused directly or indirectly by any automobile vehicle or by any draught or driving animal or other vehicle owned or used by the assured or by any employee of the assured in charge of any such vehicle or animal, unless such accident shall occur upon premises owned by or under the control of the assured, or on the public ways immediately adjacent thereto and provided such premises are specifically described in Item III (a) of the schedule hereof;" Item III (a), referred to in the foregoing provision, is as follows: "The operation and locations covered,—data relative to and analysis of premium,— and special conditions, stipulations, exceptions and limits of liability governing the insurance under this policy,—are as follows: Schedule (a) Location of Operations: Near Plattsmouth, Nebraska."

A proper interpretation of the applicable provisions of the policy necessarily requires an understanding of the meaning of the words "upon premises owned by or under the control of the assured, or on the public ways imme-

diately adjacent thereto." Clearly, the accident which was the source of this litigation did not occur upon the premises owned by or under the control of the assured. It took place more than eight miles from the place of defendant's quarrying business on a public highway completely disconnected from plaintiff's place of work. *National Optical Co. v. United States Fidelity & Guaranty Co.*, 77 Colo. 130, 235 Pac. 343. But it is urged that it was on a public way at a point immediately adjacent to premises owned by or under the control of the assured.

The word "adjacent" ordinarily means "lying near, close or contiguous." Webster's New International Dictionary. It does not always import a physical contact with something else, as does the word "adjoining." "But, when qualified by the adverb 'immediately,' it necessarily means 'contiguous' or so close to the other object as to be almost in contact with it." *City of Lawrenceburg v. Maryland Casualty Co.*, 16 Tenn. App. 238, 64 S. W. (2d) 69. And in discussing the use of the words "immediately adjacent," the court in *Long v. London & Lancashire Indemnity Co.*, 119 Fed. (2d) 628, said:

"We think the words 'immediately adjacent,' as used in the insurance policy under construction, have the same natural significance as the words 'immediately adjoining.' Unless such construction be adopted, the word 'immediately' in the present context would have no practical effect. Its express use must not be disregarded. If the insurance company had intended to cover an accident on ways adjacent to the insured premises, there would have been no occasion for using the qualifying word 'immediately' in conjunction with the word 'adjacent.' But, inasmuch as the word 'adjacent' has been actually qualified by the word 'immediately,' the two words used conjunctively must receive a reasonable interpretation. If policy coverage had been intended despite intervening space, the insurer would have used some such expression as 'closely adjacent,' or 'nearly adjacent.' * * *

"As above stated, the words 'immediately adjacent' in

the present context are, in our opinion, synonymous with the words 'immediately adjoining.' The *locus quo* of the accident was not on a way immediately adjacent to the premises of the assured. There was, therefore, no policy coverage."

We conclude that the accident which occurred more than eight miles from plaintiff's quarrying business did not take place on a public way immediately adjacent to premises owned by or under the control of the assured.

Plaintiff contends, however, that the provisions of Item III (a) of the policy hereinbefore quoted, and adopted by reference as a part of the general insuring agreement just discussed, changes the meaning so that liability exists if the accident happened on a public way immediately adjacent to the city of Plattsmouth. The most that can be said is that the policy protected plaintiff against damages for accidents occurring upon premises owned by or under the control of the assured, or on the public ways adjacent thereto, which said premises are located near Plattsmouth, Nebraska. For us to say that the words "near Plattsmouth, Nebraska," when used as descriptive of the location of operations, amounted to an enlargement of the insurance risk specifically limited in the general insuring agreements of the policy would require us to deviate from ordinary usage of common words and give to them a meaning clearly not intended by the parties. The policy herein involved is known as a contractors' public liability policy. The coverage is limited, in so far as accidents caused by automobile vehicles are concerned, to the operating premises, or the public ways immediately adjacent thereto. By showing the location of the quarry operations to be "near Plattsmouth, Nebraska," we cannot say that this has the effect of creating additional liability under the policy.

Plaintiff attempts to invoke the rule against defendant to the effect that, where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different con-

sideration; that he will not be permitted to mend his hold.

The basis for this contention is that plaintiff notified defendant's agent of the commencement of the action and requested the insurer to conduct the defense. In replying to the letter, defendant denied that it was covered by the provisions of the policy and quoted the provision of the general insuring agreements hereinbefore set out, except that the reference to Item III (a) was inadvertently referred to as Item IV (a). The error was so patent that it can in no way prejudice the rights of defendant.

It is further contended that the placing of Item III (a) on the front page of the policy and including therein the words "near Plattsmouth, Nebraska," operated as an estoppel against the defendant setting up that part of the general insuring agreements pleaded as a defense. We are unable to agree with plaintiff on this point. Essential elements of an estoppel are absent. It is urged that, if plaintiff relied upon the apparent meaning of Item III (a) as it appeared on the front page of the policy and that if he had not been misled by it, he would have procured insurance which would have protected him in a case such as the one brought against him. In the first place, plaintiff knew that the front page of the policy did not constitute the whole contract. Certainly, he knew that Item III (a) did not constitute the insuring clause. The policy is couched in plain language and if plaintiff did not read it, it is his fault and not that of the defendant. A mere failure to read an insurance contract cannot become the basis for an estoppel *in pais*. The defendant did not induce plaintiff to change his position or to fail to do some act that he would have otherwise done. The record shows that a rider was obtained on October 16, 1937, which provided that all of plaintiff's operating locations were to be covered by the policy. This is evidence that plaintiff had knowledge of the restrictions in the policy, or he would not have requested the rider. If plaintiff relied only upon the first page of the policy he could not have been misled, for there is no automobile coverage shown on the first page. The only automobile cov-

erage in the policy is that shown in the quoted provision which plaintiff claims he did not know about. It does not appear that defendant did anything with intent to deceive, or that plaintiff was destitute of convenient means of acquiring knowledge of the true agreement, or that he relied upon it to his detriment. We are obliged to say that there are no facts established which would support an estoppel *in pais*. *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218; *State v. Burrows*, 136 Neb. 691, 287 N. W. 178.

Plaintiff claims that there is an ambiguity in the policy. We think the language is plain and that no ambiguity exists. The courts will not read an ambiguity into plain language in order to construe it against the one who prepared the contract.

Plaintiff also claims that he is entitled to recover in this action under a clause in the general insuring agreements, by which defendant agreed to defend in the name of the assured any suit for personal injuries filed against him "although such suits, proceedings, allegations and demands may be wholly groundless, false or fraudulent." Clauses of this nature have been generally construed to obligate the insurer to defend suits, even though groundless, false or fraudulent, upon those claims only for which it has assumed liability under the policy. *Brodek v. Indemnity Ins. Co.*, 292 Ill. App. 363, 11 N. E. (2d) 228; *Lumbermen's Mutual Casualty Co. v. McCarthy*, 90 N. H. 320, 8 Atl. (2d) 750; *United Waste Mfg. Co. v. Maryland Casualty Co.*, 85 Misc. 539, 148 N. Y. Supp. 852, affirmed in 169 App. Div. 906, 153 N. Y. Supp. 1148. As the accident out of which this litigation arose was not covered by the policy, defendant was under no obligation to defend.

The interpretation placed upon the insurance contract by the trial court was correct and the judgment for the defendant is affirmed.

AFFIRMED.

ANNA MAY JONES, ADMINISTRATRIX, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

2 N. W. (2d) 624

FILED FEBRUARY 27, 1942. No. 31227.

1. **Trial.** Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover.
2. **Evidence.** Circumstantial evidence cannot be said to be sufficient to sustain a verdict or to require submission of a case to a jury depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
3. **Trial.** Where undisputed physical facts demonstrate that a collision out of which injuries arose was not caused by negligence of a defendant, the evidence is not sufficient to support a verdict in favor of the plaintiff, and in such event a verdict should be directed for the defendant.
4. ———. If but one inference may be arrived at in the minds of reasonable men from an examination of the physical facts, then that inference must be accepted, but if with equal force and propriety an opposite inference or inferences may be drawn the question becomes one for the jury.
5. ———. Physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact, unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics or mathematics.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed in part and reversed in part.*

William A. Stewart, Jr., William H. De Parcq and *Arnold C. Forbes*, for appellant.

L. R. Doyle, George B. Dent, Jr., T. F. Hamer, G. C. Holdrege, W. J. Schall and *T. M. Hewitt, contra.*

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

YEAGER, J.

Two actions here are consolidated for appeal. The cases were tried together in the district court on like issues and the same evidence.

Anna May Jones, administratrix of the estates of Lorraine Anna May Menke, deceased, and Leora Anna May Menke, deceased, is plaintiff and appellant in both cases, and Union Pacific Railroad Company, a corporation, and Louis H. Wunderling are defendants and appellees. The actions are for damages for the deaths of the two decedents on account of claimed negligence on the part of the defendants and each of them. A trial was had which resulted in a directed verdict in favor of the defendant Union Pacific Railroad Company, hereinafter referred to as railroad, at the conclusion of plaintiff's evidence, and which resulted in a directed verdict in favor of the defendant Wunderling at the conclusion of all of the evidence. From this action of the trial court the plaintiffs have appealed. They assign numerous errors as ground for reversal.

These two cases grew out of an accident which occurred at about 4:30 p. m. on October 4, 1939, on United States highway No. 30, otherwise known as the Lincoln highway, at a point about two miles east of Gothenburg, in Dawson county, Nebraska. The highway is paved, has two lanes and extends generally east and west. The highway is to the north of and parallels the right of way and tracks of the defendant railroad east of Gothenburg to the scene of the accident and beyond that point. The accident was the result of a collision between a Ford automobile driven by Carold H. Jones, the husband of Anna May Jones and stepfather of the two decedents, and a Chevrolet truck driven by the defendant Wunderling. In the accident the two decedents were almost if not instantly killed.

In her petitions Anna May Jones, who will be referred to hereinafter as the plaintiff, substantially set forth that

the automobile in which she and the decedents were riding was traveling eastward from Gothenburg, and that at some point near that city it entered an area of dense smoke which came from a fire on the right of way of the defendant railroad, which fire had been started by the employees of the said defendant for the purpose of burning off the right of way, and had been allowed to burn during the entire afternoon. The fire was on the south side of the highway, and a wind from the southwest carried the smoke across the highway. After the automobile in which plaintiff was riding had penetrated the smoke for some distance, and while the said automobile was on the right of the center line of the highway, it collided with a Chevrolet truck loaded with coal operated by the defendant Wunderling going in the opposite direction. Plaintiff says that the accident was occasioned by the negligence of the two defendants.

The negligence attributed to the defendant railroad summarized is as follows: (1) In starting the fire, (2) in permitting the fire to spread and get beyond control, (3) in failing to provide adequate employees to control the fire, (4) in failing to warn travelers of the condition created, and (5) in failing to adopt reasonable means to prevent the spread of the fire and the blowing of smoke across the highway.

The negligence attributed to the defendant Wunderling likewise summarized is as follows: (1) In negligently entering the area covered and concealed by smoke without keeping a proper lookout for other traffic on the highway, (2) in failing to slacken his speed and to operate his truck at a reasonable rate of speed, (3) in failing to have his truck under proper control, (4) in failing to give warning of his approach and the movements of his truck, (5) in negligently operating his truck on the left or wrong side of the highway, and (6) in operating his truck at the time and place in question at a wrongful and unlawful rate of speed.

The defendant railroad filed a general denial, and for further answer alleged that the collision was caused by the

negligence and carelessness of Carold H. Jones and of the plaintiff.

The defendant Wunderling also filed a general denial, and for further answer alleged that the collision was caused by the negligence of Carold H. Jones and the plaintiff. He set forth numerous specifications of negligence on the part of Jones and the plaintiff, but we do not deem it necessary to set them forth here.

The replies were general denials.

The several motions for directed verdicts were predicated and sustained on the ground that plaintiff had failed to make proof of any charge of negligence on the part of the defendants, or either of them, which was the proximate cause of the accident. In this connection we will first direct our attention to the defendant railroad.

A careful examination of the bill of exceptions discloses no direct evidence either that any agent or employee of the defendant railroad set the fire in question or knew of its existence. There is no direct evidence that any such employee or agent was in the vicinity of the fire from its beginning until after the happening of the accident. Plaintiff attempted to prove the setting of the fire circumstantially, but on the foundation laid for her circumstantial evidence she was prevented from so doing. Her evidence disclosed that while the fire was in progress some men were seen on the railroad tracks in the vicinity of the fire. They were in working clothes but were not working, and there was no evidence in any wise connecting them with the defendant company. She offered to prove that at points several miles distant employees were burning off the right of way, and also that it was the custom to burn off the right of way at the time of year in question. This was not permitted by the trial court. She did show that at Gothenburg, which city was some two miles to the west of the fire, several employees were engaged in the service of the defendant railroad at all times, and that the area was practically level and the view unobstructed. She also showed that section crews worked east and west out of Gothenburg. She did not show

that the fire was observed from Gothenburg or that the section crew or crews saw or observed the fire or that they had worked eastward from Gothenburg on that day. She showed that fire and smoke were observed in this vicinity at least as early as 1:30 in the afternoon, and that it probably was not abated until after the accident.

This is a summary of the evidence and of proffered evidence which plaintiff urges that the jury should have been allowed to consider in determining the question of whether or not the defendant railroad set the fire, permitted its spread, failed to control it and failed to warn travelers concerning it.

As to the men observed on the tracks, no support to plaintiff's burden of proof may be found in this circumstance. Sufficient is not shown to justify an inference that these men were employees of the defendant railroad. If inferences may be drawn at all, an equally justifiable inference is that they were not. In such situations the applicable rule is that where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff has not sustained his position by a reliance alone on the inference which would entitle him to recover. *Blid v. Chicago & N. W. R. Co.*, 89 Neb. 689, 131 N. W. 1027; *Katskee v. City of Omaha*, 110 Neb. 380, 193 N. W. 752; *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N. W. 445.

On the record the question of setting, and knowledge of the existence of, the fire must respond to the same rule as is applicable to the men observed on the tracks. If it may be inferred that the employees of the defendant railroad set the fire and knew of it, on the proved facts it may with equal force and propriety be inferred that they did not.

The proffered evidence of other fires set on the right of way many miles distant and a custom of burning of the right of way in the fall was properly rejected. It would have had no value whatever since it had no connection with the fire in question. As observed in *Hovell v. The Evergreens*, 242 N. Y. 216, 151 N. E. 212, this is a *non sequitur*.

The evidence falls short of that required by the rule of sufficiency for the submission of cases to a jury on circumstantial evidence as laid down in the decisions. The rule has been stated as follows: "Circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." *Anderson v. Interstate Transit Lines, supra; Bixby v. Ayers,* 139 Neb. 652, 298 N. W. 533.

It is suggested in the arguments that the employees of the defendant at Gothenburg by the exercise of ordinary care should have seen and known of the fire before the accident. In the state of the record no such inference or presumption may be indulged. The plaintiff made no inquiry of any employee as to his knowledge of the existence of the fire. She adduced no evidence that any employee in the regular line of duty had a view of the scene of the fire. No evidence was adduced to the effect that the fire or smoke could be seen from the vicinity of the activities of the employees of the defendant railroad. In fact, no facility, structure or place of employment in Gothenburg was specifically located with relation to the fire.

The court did not err in the rejection of the testimony offered in support of the plaintiff's cause of action.

The plaintiff urges in her brief that the smoke must be considered as the proximate cause of the accident, and in support of her position cites certain language contained in the first opinion in *Anderson v. Byrd,* 132 Neb. 588, 272 N. W. 572. In the light of the theory on which plaintiff pleaded and tried her cases, with a failure of proof of essential elements of negligence, we do not find it necessary to discuss or determine this question. If it were necessary to make such a determination, in the light of the described patent condition we observe no reason for departing from the conclusion reached in the opinion on rehearing. *Anderson v. Byrd,* 133 Neb. 483, 275 N. W. 825. There the court

said: "We necessarily conclude that the smoke in the case at bar was a condition and not a proximate cause of the accident. The proximate cause of the collision was the driving of the truck on the wrong side of the road. The position of the truck as it was driven over the highway was a direct cause which continued unbroken by any other efficient intervening cause up to and including the very instant that the accident occurred, and without which cause there would have been no collision between the two motor vehicles."

The plaintiff complains that she was not permitted to prove that, as a part of the condition of fire and smoke, flames or tongues of fire were blowing over and onto the paved highway from the south as the automobile in which she was riding was passing along. When she was so restricted by the ruling of the court, she offered an amendment to her petition to include this in a description of her cause of action. This offer was rejected. The offered amendment added nothing to the cause of action, hence its rejection was proper; but since the plaintiff complained of smoke which resulted from a fire, we think that she should have been permitted to give a full and complete description of the fire which produced the condition of which complaint was made. She was unduly restricted in this regard, but the restriction in the light of other findings could not conceivably have prejudiced plaintiff in relation to her action against this defendant.

We find that the motion of the defendant railroad for a directed verdict in its favor was properly sustained in both cases.

Our attention now turns to the defendant Wunderling. The important question here is one of fact. We are required to determine the question of whether or not there is sufficient evidence of negligence on the part of the defendant Wunderling to require that the case should be submitted to a jury for its decision and determination.

The evidence discloses that the plaintiff entered the area of smoke from the west and defendant from the east, that they did so knowingly and voluntarily and that they trav-

eled in it for a considerable distance, that at the time of the accident a view ahead was difficult if not impossible. The driver of plaintiff's automobile at that time could not see ahead of his car. The defendant says he could see the middle stripe in the highway, but did not see the other automobile until it came within five feet of him. Plaintiff's driver says he had reduced his speed at the time of the accident to four or five miles an hour. The defendant says he had reduced his speed to 20 miles an hour or less. Both cars were lighted. Plaintiff and plaintiff's driver say that their automobile was traveling to the south of the center line of the highway. The defendant says he was driving to the north of the center line. The front ends or some points near the front ends of the two vehicles came into contact and collision. After the collision the automobile in which plaintiff was riding was on the south side of the center facing in a northerly direction. The defendant's truck was on the same side, 50 to 60 feet farther west, facing in a southwesterly direction and was off the paving to the south. Obviously the two came together at some point near the center line. The testimony of the witnesses on this important point as will be observed is diametrically in opposition. Defendant Wunderling contends that there are physical facts which added to his testimony conclusively show that the accident occurred to the north of the middle line, thus showing that he was guilty of no negligence proximately causing the accident, and at the same time showing that the accident was proximately caused by the negligence of the driver of the automobile in which plaintiff was riding.

The physical facts to which attention is directed are marks on the highway which defendant insists show the location of the collision. To the east of what was probably the point of collision there were skid marks approximately 70 feet in length. These marks were a foot or a foot and one-half north of the center line and practically straight. Following the marks was a gap of from 20 to 25 feet where there were no marks. Following the gap there was another mark starting 8 or 10 inches north of the center line and

extending in a semicircle across the center line to the south and leading up to the left front wheel of the Ford. This mark was a scratch in the pavement. Defendant Wunderling assumes that these marks were made by his truck in its movements after the collision. He deduces therefrom substantially that he was traveling on his right side of the highway, and the automobile in which plaintiff was riding came across the middle line and struck the truck breaking the left front, and that this, coupled with the momentum of his truck, carried the truck across the center line over onto the south side.

The rule is that, where undisputed physical facts demonstrate that a collision out of which injuries arose was not caused by negligence of the defendant, the evidence is not sufficient to support a verdict for the plaintiff, and in such case a verdict should be directed for the defendant. *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514. Properly interpreted this rule is just another application of the principles of and weight to be given to circumstantial evidence in actions for damages for negligence. In other words, if but one inference may be arrived at in the minds of reasonable men from an examination of the physical facts, then that inference must be accepted, but if with equal force and propriety an opposite inference or inferences may be drawn the question becomes one for the jury.

Physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact, unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics or mathematics. If they fall short of this test, then they are to be considered by the jury along with all the other facts and circumstances proved. See *Dodds v. Omaha & C. B. Street R. Co.,* 104 Neb. 692, 178 N. W. 258; *Spiro v. St. Louis Transit Co.,* 102 Mo. App. 250, 76 S. W. 684; *Blakeslee's Express & Van Co. v. Ford,* 90 Ill. App.

137; *Holden v. Pennsylvania R. Co.*, 169 Pa. St. 1, 32 Atl. 103; *Kalman v. Pieper*, 158 Wis. 487, 149 N. W. 203; *Quigley v. Naughton*, 100 App. Div. 476, 91 N. Y. Supp. 491; *Hill v. Keezer*, 115 Me. 548, 101 Atl. 356; *Mutch v. San Diego Electric Ry. Co.*, 39 Cal. App. (2d) 327, 102 Pac. (2d) 1100; 3 Am. Jur. 451, sec. 891; Annotation, 21 A. L. R. 141; 1 Elliott, Evidence, sec. 39.

We are unable to say, on this conflicting evidence and the ascertained physical facts, that reasonable minds could not draw different conclusions as to the proximate cause of this accident. In this light the issue of negligence raised by the petition and the answer was one for determination by the jury.

The defendant Wunderling seeks to apply the comparative negligence rule to this case. This rule has no application. The plaintiff has sued in her representative rather than in her personal capacity. Whether or not the negligence, if any, of the driver of the automobile in which she was riding might be attributed to her or whether or not she was negligent herself are beside any question presented. Her negligence or accountability for negligence could not be attributed to the two deceased children. It is not so contended.

We hold that the action of the district court in sustaining the motions of the defendant Wunderling for a directed verdict at the close of all of the evidence was erroneous.

The judgments of the district court as to the defendant railroad are affirmed. The judgments as to the defendant Wunderling are reversed and the causes remanded for a new trial.

AFFIRMED IN PART AND REVERSED IN PART.

On motion for rehearing, the following supplemental opinion was filed July 10, 1942. *Rehearing denied.*

YEAGER, J.

On further consideration we have concluded that the portion of the opinion which holds under the circumstances that as to the plaintiff and the defendant, Wunderling, the

comparative negligence rule has no application should be withdrawn, and this is accordingly done.

It is felt that there should be a continued adherence to the rule as laid down in *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917. There it was stated: "But in an action by the father for his own benefit to recover for the pecuniary injury which he has suffered by reason of the death of the child, his own negligence contributing to the death will defeat his recovery."

In so adhering to this rule our purpose is only to say that the comparative negligence rule has application.

Under the comparative negligence rule the evidence in this case is not sufficient to permit this court to say as a matter of law that plaintiff was guilty of negligence, or of contributory negligence in a degree that would prevent a recovery against the defendant Wunderling.

This conclusion in no wise changes the ultimate conclusion arrived at in the original opinion. Otherwise, the original opinion is adhered to and the several motions for rehearing are overruled.

REHEARING DENIED.

FRANK MAGNER ET AL., APPELLEES, V. VINCENT B. KINNEY, COMMISSIONER OF THE NEBRASKA STATE DEPARTMENT OF LABOR, APPELLEE: FIDELITY STORAGE & VAN COMPANY, INC., APPELLANT.

2 N. W. (2d) 689

FILED MARCH 6, 1942. No. 31214.

1. **Master and Servant.** "A strike is cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms." *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 20 L. R. A. n. s. 315.
2. ———. Under the facts disclosed by the record, the cessation of work by the employees of the appellant herein in September, 1938, was the result of a strike as thus defined.

3. **Statutes.** The term "stoppage of work," as employed in our unemployment compensation law, having been substantially adopted from the English National Insurance Act of 1911, and having received a settled construction by the English authorities charged with the administration of the English act long prior to the adoption thereof by this state, the rule of construction applicable at the present time is that a state by adopting a statute of another state adopts the construction which has been given the statute so adopted by such other state; and, in the absence of judicial decision determining the construction and effect of such foreign statute, the practical interpretation given to it by those whose duty it was to apply and administer it affords the best means of ascertaining its true construction; and such construction will be followed, unless it be clear that such officers have misinterpreted it.
4. **Master and Servant.** The technical meaning of the term "stoppage of work," as used in our statute referred to, is a substantial curtailment of work in an employing establishment, not the cessation of work by the claimant or claimants.
5. ———. The facts established by the record disclose that, as a result of a labor dispute which developed into and continued as a strike, a substantial "stoppage of work" in the business of the employer was occasioned, which is effectual to deny claimants unemployment benefits under the terms of our unemployment compensation law.

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

Swarr, May & Royce and *James M. Paxson,* for appellant.

David D. Weinberg and *John E. Sidner, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and FALLOON and ELLIS, District Judges.

ELLIS, DISTRICT JUDGE.

This is a proceeding under our "Unemployment Compensation Law" (Comp. St. Supp. 1939, secs. 48-701 to 48-724, inclusive), which will be hereinafter referred to as the "Act," in which the appellees, Frank Magner, Harry H. Snook and G. A. Wolff, seek to obtain unemployment compensation benefits from the department of labor of this state, to be

charged against the reserve account of the appellant herein, their former employer. In the district court appellant defended against claimants' demands, insisting that claimants' unemployment was due to their own "stoppage of work" and their own voluntary act of striking because of a labor dispute; that unemployment benefits should be denied by reason of claimants' failure to appeal their original claims for unemployment compensation filed by them on January 3, 1939, which, after due investigation, had been denied on the ground that the claimants' total unemployment was due to stoppage of work which existed because of a labor dispute in the establishment in which they were last employed; also because of claimants' failure and refusal to accept reemployment, and furthermore because of claimants' continued participation in the strike, and the fact that there was still a very considerable and substantial loss of business at the plant of appellant, from which we are asked to infer from the record that it evidenced a stoppage of work in part at least. The trial *de novo* in the district court for Douglas county on appeal from the order and finding of the "Appeal Tribunal," as provided by the Act, resulted in a decision adverse to appellant herein and from that order this appeal is prosecuted.

In this proceeding the district court adjudged "that no stoppage of work existed on May 8, 1939, the date plaintiffs' claims were filed, because of a labor dispute at the establishment at which plaintiffs were last employed. The court is of the opinion, and so finds, that the term 'stoppage of work,' which appears in subsection (d) of section 48-705, Comp. St. Supp. 1939, refers to an existing condition at the former place of employment on the date of the claims and not to the original cause of any claimant's unemployment." The district court set aside the decision of the "Appeal Tribunal" and allowed benefits to the claimants.

It is conceded that, so far as length and terms of employment by defendant Fidelity Storage & Van Company, Inc., are concerned, each of the plaintiffs is entitled to the unemployment benefits under the Act, unless disqualified by

the restrictions contained in section 5 of the Act. Comp. St. Supp. 1939, sec. 48-705.

But a preliminary to further consideration of the matters presented by this record is the contention on the part of the claimants that we have here a case where the employees are the subjects of a "lockout" by the employer; and the contention on part of the employer that we are here dealing with a "strike" instituted and carried on by these men. It is conceded that claimants are all members of Local No. 554, which is the Truck Drivers' Union.

From the evidence it appears that prior to June, 1938, this union had an existing labor contract covering terms and conditions of employment with the Nebraska Truckers Association, to which the Fidelity Storage & Van Company belonged, and of which the firms and organizations pursuing a similar vocation in Omaha and vicinity were members. Negotiations had been going on between the representatives of the parties to this contract with reference to an extension and modification of this contract and were in progress in June, 1938, at the time that contract, according to its terms, expired. These negotiations continued until September, 1938, at which time the undisputed evidence is that all parties were in accord except as to the issue of the "closed shop" demanded by the union. In these negotiations the local drivers and their union were represented by several individuals. In early September, 1938, these representatives went to Indianapolis and had a conference with Mr. Tobin, head of the International Union, with which Local Union No. 554 was affiliated. From that city a telegram was sent by the representatives of the drivers' union to the Nebraska Truckers Association giving the operators a 42-hour strike notice. The service of this strike notice was a requirement under the terms of the contract between the parties which by its terms expired in June, 1938. The evidence in the record is without substantial contradiction that on or about September 13, 1938, or Monday following the delivery of the Indianapolis telegram, all "union men" then employed by the Fidelity

Storage & Van Company, including the three claimants herein, without further individual demand on or protest to their employer, quit their employment and thereafter failed to report for duty as was customary. Upon this occasion claimants were not discharged or directed to remain away from their usual places of employment by their employer. But it also appears that since the date of this cessation of work by its employees the business houses and premises of the Fidelity Storage & Van Company have been continuously picketed by members of Union No. 554, and while claimants herein did not "picket" the business and premises of their former employer, they did participate in the picketing of other organizations against whom this same strike order was directed. Claimants also admit that since the strike order was issued they were paid strike benefits a number of times from their union organization during the continuance of this labor dispute.

The nature of the claim of plaintiffs herein that a "lockout" existed is disclosed by the following testimony of claimant Snook: "To explain that I'll go back to around the first of June of 1938. At that time there was trouble at the Watson Transfer Company and one afternoon Mr. Koller (manager of the Fidelity Storage & Van Company) called the employees on the second floor of the building and he told us (he didn't tell me personally), or rather he told the drivers to put the trucks in the garage and leave them sit there until this thing was settled; that he didn't want his trucks smashed up. I believe those were the words that were used. Then he told us to go home; that's my recollection of it."

This is also testified to by claimant Wolff as follows: "I can't tell you that unless I start back in June, 1938. In June Koller told us to take the trucks in on Friday noon. He said he didn't want his trucks torn up because Watson's had struck. We went down Saturday and Monday mornings, but Koller said nothing doing, and Monday night we had a meeting at the hall. They said they were going to negotiate on a contract for thirty days until about the first of

July, but we kept working until the 9th day of September. We weren't working under contract during that time. * * * Q. You did continue to work until September, 1938? A. Yes."

The interruption of work in June, 1938, appears to have been for not more than three days and work had been practically continuous thereafter until September. It is obvious that a claim of a "lockout" in September, 1938, based upon what occurred in June, 1938, as the facts relating thereto appear in the evidence in this case, cannot be sustained.

We understand, in labor disputes, to "lockout" is "to withhold employment from (a body of employees) as a means of bringing them to accept the employer's terms." Webster's New International Dictionary (2d ed.) 1450. Where a temporary suspension of work occurs due to the dangers of destruction or damage to which the employer's property would otherwise be exposed and no measures are taken except such as are reasonably required to insure the safety of the same, such action taken by the employer cannot be deemed a "lockout."

A "strike" is ordinarily defined as the "act of quitting work; specif., such an act done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer; a stoppage of work by workmen in order to obtain or resist a change in the conditions of employment." Webster's New International Dictionary (2d ed.) 2496. See *People v. Tepel,* 3 N. Y. Supp. (2d) 779; *Iron Molders' Union v. Allis-Chalmers Co.,* 166 Fed. 45, 20 L. R. A. n. s. 315; *Farmers Loan & Trust Co. v. Northern P. R. Co.,* 60 Fed. 803; *Keith Theatre v. Vachon,* 134 Me. 392, 187 Atl. 692; Restatement, Torts, sec. 797; *Philip Henrici Co. v. Alexander,* 198 Ill. App. 568.

In short, "A strike is cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms." *Iron Molders' Union v. Allis-Chalmers Co.,* 166 Fed. 45, 20 L. R. A. n. s. 315.

In view of the evidence as an entirety, the conclusion is inescapable that we are here considering a "strike" and not a "lockout."

The next question for our consideration is the challenge to the interpretation given by the district court to the words of the statute, section 48-705: "An individual shall be disqualified for benefits * * * (d) For any week with respect to which the commissioner finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed: Provided," etc. The district court construed this language to mean "that the term 'stoppage of work,' which appears in subsection (d) of section 48-705, Comp. St. Supp. 1939, refers to an existing condition at the former place of employment on the date of the claims and not to the original cause of any claimant's unemployment." In other words, the technical meaning of the term, "stoppage of work," as used in our disqualification clause, is a substantial curtailment of work in an establishment, not the cessation of work by the claimant or claimants.

The language of our unemployment compensation law quoted above was a substantial reenactment of the English National Insurance Act of 1911. See Statutes 1-2, Geo. V., ch. 55, sec. 87, which was amended in 1924 by section 4 (1), ch. 30, Statutes 14-15, Geo. V. This language, it appears, had received a settled construction by the English authorities charged with the administration of this English act long prior to the adoption of it by ourselves.

The well-established rule of construction applicable to this Nebraska enactment, under these circumstances, is that a state by adopting a statute of another state adopts the construction which has been given the statute so adopted by such other state. And, "In the absence of any judicial decision determining the construction and effect of a foreign statute, the practical interpretation given to it by those whose duty it was to apply and administer it affords the best means of ascertaining its true construction; and such

construction will be followed, unless it be clear that such officers have misinterpreted it." *United States v. Sherebeck*, 27 Fed. Cas. 1062. See, also, 59 C. J. 1033.

It appears that the English statutes heretofore referred to provided for no judicial review and therefore have not been construed by the courts of England. However, the construction of the term, "stoppage of work," as made by the district court for Douglas county, is in entire harmony with the well-settled construction of these words as embodied in the original English statute by the English officials whose duty it was to apply and administer it. This construction is accordingly accepted by this court.

The following evidence is without substantial contradiction: All truckers who belonged to the Nebraska Truckers Association (of which the Fidelity Storage & Van Company was one) had a contract with the drivers union "last year" relating to wages, terms and conditions of employment. This contract expired in June, 1938. When the contract expired negotiations were opened to modify the contract, and there was an agreement between union officials who represented claimants herein and the truckers association that the old contract and its terms should remain in force pending negotiations. These negotiations continued until in September following, when disagreement over the demand of the employees for a "closed shop" contract resulted in the strike order of September 13, 1938. It is obvious that a labor dispute existed between these parties from and after June, 1938. This ripened into a strike in September, 1938. The Act does not require consideration of the demands, negotiations and other events which preceded the final rupture, except for the purpose of determining whether they constituted a labor dispute.

Having determined that claimants' unemployment arises out of a labor dispute, the principal and disposing test of the claim for benefits is whether the unemployment is due to a "stoppage of work" at the place of employment where last employed.

The phrase as used in the disqualification clause, subsec-

tion (d), refers to the effect upon the employer's operations produced by the labor dispute or, in other words, to resulting unemployment. Subject to its exceptions, it declares disqualification of a class or group whose unemployment is the result of the curtailment or stoppage of the employer's operations. It does not refer to the cessation of work by the individual employee or employees. The disqualification is is not personal, but rather for a period of time—the duration of the stoppage.

A labor dispute may produce a stoppage or curtailment of work in an employing establishment in three ways: (1) The cessation of work by all or part of the employees; (2) the cessation of work by a part of the employees may disable the employer from utilizing the services of other employees; (3). it may diminish patronage by customers or the public of the employing establishment and thereby produce a compensating unemployment of workers. In either event the resulting unemployment is due to a stoppage of work because of the labor dispute. Obviously, if those leaving work are immediately replaced, or if the dispute does not otherwise interfere with production or operation and these are not diminished, there is no stoppage of work and hence no disqualification.

While we agree in principal with the definition of "stoppage of work" adopted by the district court in the present case, we are unable to agree with the application of that definition to the facts presented by the record.

Where there is a resulting curtailment of work, when is it substantial? Substantial stoppages of work have been held to exist where seven out of fifty-five men were on strike (N. J. Bd. Rev. BR-15 L 1939); where operations were resumed with three-fourths of the normal crew (Or. Referee's Dec. No. 38-RA-149, June, 1938); and where there was a 20 per cent. decrease of production (N. J. Bd. Rev. BR-65 L 1939). In the instant case the evidence establishes not only the abandonment by the strikers of their employment with Fidelity Storage & Van Company in September, 1938, but thereafter a definite and continued inter-

ference with its business and employees occasioning a decrease of the total business transacted by it in excess of 30 per cent.

In view of the situation outlined, as a result of this labor dispute which developed into and continued as a strike, a substantial "stoppage of work" was occasioned which is effectual to deny claimants benefits under the express terms of our unemployment compensation law.

We do not find it necessary to consider other matters urged. It follows, therefore, that the district court erred in the judgment entered herein, and it is hereby reversed and the cause remanded.

REVERSED.

EBERLY, J., dissenting.

From the facts detailed in the record in this case, most of which are recited in the majority opinion, the following are to be kept in mind: The appellees, Magner, Snook and Wolff, were employees of the appellant, Fidelity Storage & Van Company, Inc., and members of Local Union No. 554, the Truck Drivers' Union, a labor organization. So far as length and terms of employment are concerned, each was entitled to unemployment benefits under the terms of the Nebraska unemployment compensation law, unless disqualified by the restrictions contained in section 5 of that act (Laws 1937, ch. 108). On September 9, 1938, due to a labor dispute between the representatives of the Fidelity Storage & Van Company and the labor union, of which appellees were members, these claimants voluntarily left their work and, because of a denial of their demands for a "closed shop," thereafter for a certain period, and to an extent, participated in a strike called by that union. On January 3, 1939, appellees filed their claims for unemployment benefits, which were denied. On May 8, 1939, claimants again filed claims for unemployment benefits, which form the basis of the proceedings finally determined by the opinion adopted herein. Appellant's brief informs us that "The Union continued to picket and harass appellant (Fidelity

Storage & Van Company) until in August, 1939, when it apparently abandoned the strike."

The history of the enactments of the unemployment compensation law in Nebraska includes the following: The adoption of chapter 108, Laws 1937, approved with an emergency clause April 30, 1937. The adoption of chapter 56, Laws 1939, an amendatory enactment adopted with an emergency clause and approved June 5, 1939. The adoption of chapter 2, Laws 1940, Extraordinary Session, and approved with an emergency clause January 12, 1940; and the adoption of chapter 94, Laws 1941, approved with an emergency clause May 27, 1941.

It would seem that the causes of action here involved are for benefits accruing under the unemployment compensation law of 1937, on which suit was commenced on May 8, 1939, and would be in no manner affected by the provisions of the amendatory statute adopted and approved June 5, 1939, or any amendatory statute enacted subsequent thereto. Comp. St. 1929, sec. 49-301.

It would follow, therefore, that the terms of the unemployment compensation law of 1937 are exclusive and controlling in this case notwithstanding the provisions of section 19, ch. 108, Laws 1937. The conclusion follows that the reference to Comp. St. Supp. 1939, contained in the majority opinion, should be read in the light of that fact.

The legislative intent evinced by this enactment is the creation and establishment of a statutory trust fund in the manner directed, to be administered for the benefit of unemployed labor by statutory agencies designated, subject to and upon conditions as set forth therein. In effect, it vested employee beneficiaries with a cause of action to secure their rights thereunder for each successive week of unemployment suffered. And section 5, in effect, vested the employer with certain specific defenses as to the demands of such employees which, if sustained, resulted in the disqualification of such employees, but only for definite periods, from receiving benefits under the terms of the act. These included, among others, disqualification for benefits, "(a)

For the week in which he has left work voluntarily without good cause," etc. "(c) If the commissioner finds that he has failed, without good cause, either to apply for available, suitable work, * * * or to accept suitable work when offered him," etc. "(2) * * * (d) For any week with respect to which the commissioner finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed." It will be noted that these several defenses (as well as the others set out in section 5) thus created by statute are separate, distinct, and not inconsistent one with the other.

As to legal remedies which the foregoing legislation may necessarily imply, it may be said that under our Civil Code we have, "but one form of action," which we call a "civil action." Comp. St. 1929, sec. 20-101. And when, as here, a special or general act vests a right of action without specifying the mode of proceeding, as far as may be consistent with such statute and practicable under the Civil Code, "the proceedings shall be conducted in conformity thereto." Comp. St. 1929, sec. 20-2226.

Recurring to the Civil Code we find the applicable provision to the present controversy is that the employer, a defendant, "may set forth in his answer as many grounds of defense * * * as he may have." Comp. St. 1929, sec. 20-812. See *Maier v. Romatzki*, 95 Neb. 76, 144 N. W. 1036; *Equitable Life Assurance Society v. Wert*, 102 Fed. (2d) 10.

In the absence of statute, an enlightened public policy would dictate that disputes and also agreements between employer and employee should be determined promptly and fully, to the end that turmoil be ended, production be continued, and public interest be advanced. The nature of the relations here involved necessitates the application of equitable principles in determination of the issues which may arise in the trial of a controversy thus created. And where the defenses provided for by section 5 of our unemployment compensation law (1937) have been raised by the employer and issues taken thereon by the employees, it follows that

upon due proof adduced the several issues should be fully and finally determined and further and future disputes and delays avoided. Parties are entitled to this as a matter of right. *Sutherland v. Rose,* 47 Barb. (N. Y.) 144.

The situation clearly invokes the equitable rule that, "The decree should respond to all the pleadings and determine all the issues." 21 C. J. 670. See, also, authorities collated in notes 8 and 9, 21 C. J. pp. 670-672.

This jurisdiction has long been committed to this principle which was announced by Sullivan, J., in *Clark v. Neumann,* 56 Neb. 374, 76 N. W. 892: "The findings and decree in an action in equity should respond to all the material issues presented by the pleadings."

These principles are applicable and controlling in the instant case. The pleadings and proof liberally construed clearly establish that claimants voluntarily left their work without good cause, unless the refusal of the employer to grant their demands for a "closed shop" may be deemed "good cause." The evidence is undisputed that negotiations between the truck drivers and the employer which had continued from June, 1938, to September, 1938, had succeeded in eliminating every controversy between them save the issue of the "closed shop." The parties were otherwise in entire accord when on the latter date claimants, with the rejected claim for a "closed shop" as the sole reason for their action, voluntarily quit work. The same question is substantially presented and enters into the controversy as to whether claimants have "failed, without good cause, * * * to accept suitable work when offered" to them. This question the terms of the statute by fair implication answer with definiteness and certainty. At the very least the parties to this litigation are entitled to have this matter determined, and the controversy as an entirety settled as of the date of the institution of the proceedings, that their right to enjoy each successive weekly benefit as it ripens and accrues may not be delayed or interfered with. In principle it cannot be gainsaid that a tribunal administering relief in accord with equitable principles is possessed of power, and

is enjoined with the duty, when it has acquired jurisdiction, to consider and determine all rights of the parties relating to the subject-matter, and to enter a decree that will finally determine them, to the end that multiplicity of suits may be avoided and litigation may cease. In the instant case the principles of equity should be carried out by the determination of all the issues actually presented and tried by the parties to the proceeding. Thus only may claimants know their rights and the administrators of this act be enabled to perform their duties with promptness and correctness in the distribution of the benefits intended.

This conclusion has added force when we reflect that the adjudication as made by the majority opinion based upon the sole ground that because of an existing strike a "stoppage of work" exists which operates to disqualify claimants has no force and potency after such "strike" has ceased and the "stoppage of work" has ended. *In re Steelman,* 219 N. Car. 306, 13 S. E. (2d) 544.

After such event the parties to this litigation will necessarily have to recur again to the provisions of section 5 to determine the questions of disqualification then existing. These questions, subject to the time limitations, will necessarily include whether claimants "left work voluntarily without good cause." Such questions should have been determined in the present proceeding, but the majority have postponed their decision to the uncertain future when evience may be hard to secure and recollections are not vivid. Obviously, at best, we thus have another instance of compelling unnecessary litigation, of justice delayed, which results all too often in justice denied. I, therefore, dissent from the disposition made of this case by the majority opinion, as a job lacking in full performance, and a repudiation of the solemn duty enjoined on this court of awarding relief full, complete and final.

MESSMORE, J., concurs in the dissent.

JENNIE RETZLAFF, APPELLANT, V. DANIEL T. DICKINSON ET AL., APPELLEES.

2 N. W. (2d) 922

Filed March 13, 1942. No. 31357.

Workmen's Compensation. A workman who is injured while working on the residence property of his employer is not an employee, within the terms and provisions of the workmen's compensation act.

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

Spillman & Ptak, for appellant.

Frederick M. Deutsch and *Kelsey & Kelsey, contra.*

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

SIMMONS, C. J.

This is an appeal from the judgment of the district court denying plaintiff the benefits of the workmen's compensation act.

Defendant Bockelman was the owner of two improved farms, a business and a residence property in Pierce, all of which he rented. He also owned a residence property in Norfolk where he made his home. He decided to move the house and barn from the residence property in Pierce to one of his farms and remodel it and remove his home thereto. That he did. The operation of moving and remodeling took some weeks. Defendant's sole income came from the rental of these properties, which he looked after, to the extent necessary, and collected rents as owner. He never had moved or remodeled other property and had no intent to do so.

Bockelman contracted with one Dickinson to move the house and barn. Dickinson employed George Retzlaff, husband of the plaintiff, to assist him. While the barn was being moved, Retzlaff was injured and subsequently died. Dickinson did not carry compensation insurance, nor did Bockelman require him to do so.

Section 48-116, Comp. St. 1929, provides: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this article." It is the plaintiff's contention that because defendant Bockelman did not require Dickinson to carry workmen's compensation insurance the defendant thereby became an employer under the act. It will here be assumed, but not decided, that that contention is correct.

Section 48-106, Comp. St. 1929, provides: "The provisions of this act shall apply to the State of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer." Plaintiff contends, first, that Bockelman's trade, business and vocation was that of owning, renting and caring for real estate; and, second, that during the period of this operation of moving and remodeling this property that constituted the appellee's regular trade, business and vocation. The record clearly establishes that defendant was moving and remodeling this property to make it his home.

Plaintiff's contentions cannot be sustained. Since this appeal was perfected this court decided the case of *Burkholder v. Clark,* 140 Neb. 590, 300 N. W. 839. The cases are somewhat similar. We there held that an employee, working on the residence property of his employer, was not injured in the usual course of the trade, business, profession or vocation of his employer, within the meaning of the compensation act, and compensation was denied. The case is controlling here. It is clear that plaintiff's husband was not an employee "in the regular trade, business, profession or vocation" of the defendant. See *Kaplan v. Gaskill,* 108 Neb. 455, 187 N. W. 943. The judgment is affirmed.

AFFIRMED.

WILLIAM PALMER, APPELLEE, V. ELMER SCHABER, APPELLANT.

2 N. W. (2d) 923

FILED MARCH 13, 1942. No. 31267.

1. Appeal. In an action at law the findings of the district court on issues tried have the effect of a verdict, where a jury is waived by the parties.
2. ———. Where the evidence supports the findings and judgment of the district court on the issues tried in an action at law, the judgment will be affirmed on appeal, there being no error in the proceedings.

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

Mark J. Ryan, for appellant.

H. D. Addison and *Burr R. Davis, contra.*

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

ROSE, J.

This is an action to recover the remainder due on the purchase price of a horse. Plaintiff alleged that he sold the horse to defendant November 23, 1938, for $50, delivered it the next day, received $10, and that defendant refused upon demand to pay the remainder of the purchase price —$40.

In addition to a general denial of unadmitted allegations in the petition, defendant pleaded in defense:

"He admits that he attempted to purchase a horse from plaintiff but alleges the fact to be that said purchase was made in the nighttime and he had no opportunity to see the horse; he relied absolutely upon the warranty and statements of the plaintiff to the effect that said horse was sound in every way, and thereupon defendant agreed to pay $50, and paid plaintiff the sum of $10 thereon, and later took the horse home. At the first opportunity of examining said horse in the daytime he discovered that said horse was not sound, but unsound, crippled and lame, and had dizzy spells,

was unable to walk or trot straight, besides being a stallion, which makes said horse of no value to defendant herein."

Upon a trial of the case in the county court of Wayne county there was a judgment in favor of plaintiff for $40. Defendant appealed to the district court where the judgment was the same as in the county court. Defendant appealed to the supreme court.

In the district court the parties waived a jury and the trial resulted in favor of plaintiff and against defendant for $40. It is a settled rule that findings of the district court in an action at law, where a jury is waived, have the effect of a verdict.

On appeal it is argued on behalf of defendant that the findings and judgment below are clearly wrong under the evidence and should be reversed. The evidence as a whole is found sufficient to support findings that plaintiff did not make the warranties and statements upon which defendant relies for a defense and that defendant examined the horse before he made his purchase. There is no error in the proceedings.

AFFIRMED.

FRANK W. POWER, APPELLANT, V. FEDERAL LAND BANK OF OMAHA, APPELLEE.

2 N. W. (2d) 924

FILED MARCH 13, 1942. No. 31274.

1. **New Trial.** A motion for a new trial must be filed at the same term of court at which the verdict or decision was rendered, and except for newly discovered evidence shall be within three days thereafter, unless unavoidably prevented. Comp. St. 1929, sec. 20-1143.
2. ———. Ordinarily, there is a presumption that the judgment was entered on the date of its rendition, but if these dates are different, then the date of its rendition alone is to be considered, in determining the time within which a motion for a new trial must be filed.

3. ———. The provision of the statute which provides when a motion for new trial shall be filed is not directory merely, but wholly mandatory.
4. Appeal. This court is reluctant to deprive a litigant of a hearing on the merits of his case, but unless the provisions of the statute intended to prevent unnecessary delay are enforced, litigation might continue interminably.
5. New Trial. The words "unavoidably prevented" in section 20-1143, Comp. St. 1929, are not intended to cover an unusual press of other law business, but mean circumstances entirely beyond the control of the moving party.
6. Appeal. "The general rule is that the dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed or attempted to be appealed from." *Dunterman v. Storey*, 40 Neb. 447, 58 N. W. 949.

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

Kenneth S. Wherry and *G. E. Price*, for appellant.

Jean B. Cain and *Franklin L. Pierce, contra.*

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

PAINE, J.

This case comes before the court at this time on the argument of a motion by the appellee to affirm the judgment of the district court, on the ground that the motion for a new trial was filed more than three days subsequent to the rendition of the judgment in that court.

The transcript in this case discloses that this was an action brought by Frank W. Power against the Federal Land Bank, in Richardson county, Nebraska, for damages in the sum of $10,000, alleging a contract made with the plaintiff by two of the agents of the bank, whereby the plaintiff was to buy, and the defendant to sell, certain real estate for $6,400, and upon which contract, the plaintiff paid $2,000, cash payment required therein, and later the defendant notified the plaintiff that the bank would not convey the real estate described in said agreement, and for this refusal of

the bank to carry out said agreement the suit was brought.

The answer of the Federal Land Bank set up several defenses thereto, and claimed that said matter had theretofore been litigated and a judgment had been entered for the defendant and against the plaintiff, and that said judgment is a final judgment, and that the plaintiff is barred from prosecuting this new action, and prays that it be dismissed with prejudice.

For a reply the plaintiff denied that the action is identical with the issues presented in case No. 10333, and alleges that that case was not a bar to the present case.

On May 15, 1941, at 9:00 a. m., the case came on for trial to a jury, and continued for two days. At the close of the evidence, defendant moved the court to direct the jury to return a verdict in favor of defendant. Judge Falloon sustained the motion, and on said 16th day of May, 1941, the jury returned a verdict, as instructed by the court, for the defendant, and thereupon it was ordered, adjudged, and decreed by the court that the plaintiff have and recover nothing, and that defendant recover of plaintiff its costs in the sum of $80.90, said order being signed by the court. Down at the bottom thereof appears the filing mark of the clerk, "Filed May 20, 1941 Fred C. Zorn, Clerk of District Court."

Thereafter and on May 23, 1941, the plaintiff, by his attorneys, Kenneth S. Wherry and G. E. Price, filed motion for a new trial. On May 27, 1941, the defendant Land Bank filed motion to strike from the files said motion for a new trial, for the reason that it was not filed within the time required by law.

On June 10, 1941, plaintiff's attorneys moved the court that the motion for a new trial filed May 23 be considered by the court as having been filed within the time required by the statute, for the reason that plaintiff was unavoidably prevented from filing such motion prior to May 23.

This motion is supported by the affidavits of both of the plaintiff's attorneys. G. E. Price sets out that on Thursday night, May 15, he had a long distance call from St. Paul, Minnesota, to meet the head of a law firm in Lincoln on Sat-

urday, May 17, and that, because of the urgency of the injunction proceeding in Minnesota, his entire time was spent in preparation of the Minnesota case. There is also attached the affidavit of Kenneth S. Wherry, saying that the court sustained the motion for a directed verdict on May 16, on which day the jury were directed to return a verdict; that on May 18 he was called by telephone by the city marshal of Sabetha, Kansas, stating that in making an arrest he had shot and killed a person, and employing the said Wherry to attend a hearing on Monday, May 19, for which reason he secured G. E. Price to attend court at Pawnee City in his place on May 19, and on the 20th he was unexpectedly called to Omaha on important personal matters; on May 21 he was engaged the entire day in the United States district court at Lincoln; that the clerk of the district court informed him that the judgment dismissing the action had not been entered and spread upon the records of the clerk's office until the date of May 20, and therefore he filed a motion for new trial on May 23.

On June 10 said matters were argued to the trial court, and Judge Falloon entered an order, in which he recited that Kenneth S. Wherry and G. E. Price represented the plaintiff and Jean B. Cain represented the defendant, and the matter was fully argued to the court, whereupon the court overruled the motion of defendant to strike plaintiff's motion for a new trial from the records; that plaintiff's motion for a new trial is overruled; that plaintiff's motion for an order authorizing his motion for a new trial to be considered as having been timely filed is also overruled, as the court finds that the reasons given by plaintiff's attorneys in their affidavits for not timely filing the plaintiff's motion for a new trial are not sufficient to bring them within the "unavoidably prevented" provision of the statute.

Because the ruling upon this motion will dispose of a case where the transcript and bill of exceptions have already been filed in this court, we will discuss the reasons which lead us to this decision.

The statute provides in section 20-1143, Comp. St. 1929, that the motion for new trial must be made at the same term that the verdict or decision was rendered, and except for newly discovered evidence shall be made within three days after the verdict or decision was rendered, unless unavoidably prevented.

In *Ames v. Parrott,* 61 Neb. 847, 86 N. W. 503, Dean Pound, then commissioner of this court, had before him a case in which the findings of the court were dated April 3, a motion for new trial filed April 6, and the judgment journalized on April 10, and counsel argued that the motion was of no effect because it was filed four days prior to the entry of the judgment. Dean Pound says that there is a clear and well-established distinction between the rendition and the entry of a judgment, and there is a presumption that the judgment is entered on the date of its rendition, but where the record shows these dates to be different the date of its rendition alone is to be considered. To the same effect are *Carmack v. Erdenberger,* 77 Neb. 592, 110 N. W. 315; *Young v. Estate of Young,* 103 Neb. 418, 172 N. W. 49; *Heeter v. Nisi,* 134 Neb. 209, 278 N. W. 271; *Summers v. Chisholm,* 89 Neb. 324, 131 N. W. 610.

In *Nebraska Nat. Bank v. Pennock,* 59 Neb. 61, 80 N. W. 255, a motion for a new trial was filed on the fourth day after the decision was rendered, and it was contended that, as the clerk did not enter the judgment on the journal of the trial court until the day after it was rendered, the motion was in time. The opinion says that this provision of the statute is not directory merely, but wholly mandatory, and a motion for a new trial filed out of time is of no avail and cannot be considered unless an earlier filing was unavoidably prevented, and that the statute reads that the motion shall be filed within three days after the verdict or decision was rendered, and not three days after the clerk has spread the decision upon the court records.

In the case of *Murten v. Garbe,* 93 Neb. 589, 141 N. W. 146, the court adjourned *sine die* on the next day after the verdict was rendered, and the counsel was called out of

town during the night on law business, and did not return until after court had adjourned. An affidavit was filed by him, showing that he fully believed, from the amount of business apparently before the court, that the court would be in session at least one day longer than it was; that the business calling him out was of great importance, and necessitated immediate attention, and that the motion was prepared before the term adjourned *sine die*, but was not filed. It is said: "This court is very reluctant to deprive a litigant of a hearing upon the merits of his case, but unless the provisions of the statute, which are intended to prevent unnecessary delay in the administration of justice, are enforced by the court, it will be within the power of any litigant to continue the litigation almost without end."

A verdict was rendered in an important case on May 26, and May 29 was Sunday, and should be excluded, but May 30 was Memorial Day, a legal holiday for the purposes of negotiable instruments, so the motion for new trial was filed on Tuesday, May 31. This court held that there is no statute preventing the clerk from filing a motion for new trial on Memorial Day, and the motion for new trial was rightly stricken from the files by the trial court as being filed too late. *Tully v. Grand Island Telephone Co.*, 87 Neb. 822, 128 N. W. 508.

Plaintiff's counsel, in their affidavits and in their brief, present to this court a single case upon which they rely as absolutely controlling. It is the case of *Dobesh v. Associated Asphalt Contractors*, 137 Neb. 342, 289 N. W. 369, which first appeared in this court in 137 Neb. 1, 288 N. W. 32, in which a *per curiam* opinion strikes the transcript from the files, under section 20-1912, Comp. St. 1929, because it was not filed with the clerk of this court within the time prescribed by law for taking appeals. This case again appears in 137 Neb. 342, 289 N. W. 369, in which an opinion written by Judge Carter vacates the order of dismissal, and permits a correction of the record, and the filing of a supplemental transcript, for the reason that the judgment entered May 8 was filed and spread on the journal on May 15, the same day the motion for new trial was filed.

This *Dobesh* case was presented to this court solely on the question, as stated in the opinion, that the appeal was dismissed because the transcript did not show facts sufficient to give this court jurisdiction on appeal, due to a mistake in the preparation of the transcript, and our opinion and the syllabus paragraph all indicate that the question all relates to the time of filing the transcript, which is clearly set out in section 48-174, Comp. St. Supp. 1941, which provides that such appeal shall be perfected within 30 days from the entry of judgment by the district court. This holding and disposition of the case was not determinative of the question of the filing of a motion for new trial.

The substance of the affidavits filed by plaintiff's counsel discloses that they were exceedingly busy practitioners, and were interrupted in their handling of this case by new matters of considerable importance arising just at that time, for which reason they were unavoidably prevented from filing the motion for new trial within the three days as required by statute. The question is, whether the press of business which delayed them in filing this motion will meet the requirements of the statute.

"The words 'unavoidably prevented' are equivalent in meaning to circumstances beyond the control of the moving party, and do not excuse mere neglect." *Roggencamp v. Dobbs,* 15 Neb. 620, 20 N. W. 100.

In the case at bar, it clearly appears that one of these two attorneys could have filed this motion for a new trial within time, by the exercise of ordinary care and caution, if they had placed it ahead of other things which they did accomplish during those days, and if that is true then it cannot be said that its filing was unavoidably prevented, as provided by the statute. See *Miller v. Banner County,* 127 Neb. 1, 254 N. W. 669; *Hoover v. State,* 126 Neb. 277, 253 N. W. 359.

This court is precluded from reviewing alleged errors occurring at the trial where the motion for a new trial was filed more than three days from the date the decision was rendered by the district court. Therefore, the appeal will

be dismissed without an examination upon its merits. See *Dunterman v. Storey*, 40 Neb. 447, 58 N. W. 949. This requires an affirmance of the judgment appealed from.

AFFIRMED.

W. T. DISS, ADMINISTRATOR, APPELLANT, V. STATE BANK OF HOLDREGE, APPELLEE.

3 N. W. (2d) 89

FILED MARCH 13, 1942. No. 31304.

1. **Limitation of Actions.** Where a certificate of deposit is issued by a bank, to mature in six months, with interest, and shortly thereafter such bank is placed in receivership, the receiver, by contract with another bank, sells to it all of the remaining assets of the failed bank, the latter bank to assume all the liabilities of the failed bank, such contract being approved by a court of competent jurisdiction; a claim filed with the guaranty fund to cover certain deposits, among which is the one in suit, and more than 15 years after the certificate of deposit matured the administrator of the depositor's estate presents the certificate for payment and it is refused; he then brings an action, setting forth the contract as made between the receiver of the bank in which the deposit was placed originally and the bank to which the assets were sold, and praying that the latter bank pay the amount of the certificate, with interest, the petition is one involving a cause of action on a contract for the benefit of a third person, and a demurrer thereto, setting out that the statute of limitations bars a suit on the contract, for the reason that more than five years have elapsed since the contract was consummated, was properly sustained by the trial court.
2. **Pleading.** Where a demurrer to a petition is sustained and the action dismissed, and plaintiff elects to stand on the petition and declines to plead further, subsequently files a motion for a new trial, and thereafter files an application to have the dismissal of his original petition set aside, and requests permission to file an amended petition, which substantially changes the original claim or cause of action, the former being based on a contract for the benefit of a third person, and the amended petition containing a cause of action setting up that defendant is a trustee for the benefit of the plaintiff as the personal rep-

resentative of a deceased person, it is proper for the court, under such circumstances, to overrule the application to file such amended petition, the same not being an amendment as contemplated by section 20-852, Comp. St. 1929.

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

Anderson, Storms & Anderson, for appellant.

Davis & Stubbs, James N. Ackerman and *Wilber S. Aten, contra.*

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

MESSMORE, J.

The administrator of the estate of Amil Anderson, also known as A. Anderson, deceased, brought this action against the defendant, a banking corporation. The petition alleges that the Citizens State Bank of Holdrege, a corporation, on December 22, 1923, received of Amil Anderson a deposit in the sum of $632.22, and issued to him a certificate of deposit. Appearing therein is the following language:

"A. Anderson has deposited in this Bank Six Hundred Thirty Two and 22.....Dollars payable to the order of self in current funds on the return of this Certificate properly indorsed with interest at 4 per cent. per annum if left 6 months.

"Nov. 30, 1923.

"No interest after maturity.

"Not subject to check."

The Citizens State Bank was placed in receivership December 23, 1925. The receiver entered into a contract with defendant bank, under the terms of which the defendant assumed all liabilities of the Citizens State Bank. Among such liabilities was the time certificate of deposit mentioned above. A copy of the contract attached to the petition discloses that the receiver "agrees to sell, assign, transfer, set over and convey to the" defendant "all the right, title and interest of the Citizens State Bank," in and to the assets and

property, naming the aggregate amount. Items of cash on hand and due from banks, bills receivable and accrued interest, overdrafts, real estate, furniture and fixtures, and rights under stock liabilities are described in the contract. In addition it provides that the defendant shall assume the liabilities of the Citizens State Bank; then the liabilities are listed. The contract further provides that the defendant shall file a claim with the receiver against the depositors' guaranty fund of the state, and through the device of the receiver's certificates shall procure cash with which to pay the defendant bank a sum equal to the amount of the difference between the liabilities assumed by the defendant and the value of the assets taken over by it from the receiver. The contract was approved by the district court, and the issuance of receiver certificates was authorized in accordance with the provisions of the contract. There was also filed, in accordance therewith, by the defendant bank a claim in receivership for the full amount of all the deposits, including the certificate of deposit of the decedent, A. Anderson. The claim was approved by the district court, and there was paid to defendant the amount of money specified in its claim, including the certificate of deposit mentioned.

On October 28, 1939, Amil Anderson died. December 2, 1939, the certificate of deposit was presented to the defendant bank and payment refused; it was also refused on February 10, 1941. The petition prays for a judgment against the defendant for the amount of the deposit and interest at 4 per cent. from December 22, 1923. To the petition a demurrer was filed under section 20-205, Comp. St. 1929, setting out that the statute of limitations barred the action, for the reason that more than five years had elapsed since the contract was signed. The demurrer was sustained. Plaintiff, electing to stand on his petition, appeals from the ruling on the demurrer to this court.

The deposit, for which the certificate of deposit was issued, was made December 22, 1923; left for a period of six months, not subject to check, and no interest to be paid after maturity. The interest was to be 4 per cent. at the

end of the six-month period, when the certificate was properly indorsed. Obviously, it was a time deposit wherein the bank agreed to pay interest on the amount left for a period of six months. The plaintiff contends that the certificate must be returned properly indorsed, and that it had not been, in which event the certificate remained, with the interest in full force and effect. With this contention we cannot agree. The specific language of the certificate of deposit is plain. It matured more than 15 years prior to the time it was presented for payment by the administrator of the estate.

The plaintiff contends that the Citizens State Bank received the deposit; the bank failed, and in receivership proceedings the state of Nebraska had, out of and through its guaranty fund, paid the defendant the amount of the deposit with which to pay A. Anderson for the amount so deposited by him in the Citizens State Bank; that, therefore, a trust fund is created and it is not barred by the statute of limitations.

An analysis of the petition discloses that the action was one at law and involved a contract between the receiver of the Citizens State Bank and the defendant, wherein the Citizens State Bank sold to the defendant the assets of the business, which the receiver was winding up, and the defendant was to assume the liability of the old business of the Citizens State Bank, among which appears the time certificate of deposit. It is obvious that there was simply a promise by the defendant bank to assume the liabilities of the Citizens State Bank. There was no trust agreement pleaded, and the contract does not show that defendant bank promised to hold any fund or specific property as trust property, or that any amount was specifically set aside with which to pay the certificate of deposit, and no part of the assets was earmarked to be set aside as a trust fund for any particular use. All the defendant bank agreed to do was to assume the liabilities as appearing in the agreement.

After the demurrer was sustained, the plaintiff declined

to plead further and judgment of dismissal was entered. Plaintiff filed a motion for a new trial and subsequently filed an application to have the dismissal set aside, and prayed that he be granted permission to dismiss his motion for a new trial and to file an amended petition. The amended petition, which plaintiff sought to file, was based on his contention, as previously stated, that defendant bank held the funds, evidenced by the certificate of deposit, in trust for the depositor, or his personal representative.

Section 20-852, Comp. St. 1929, provides in part: "The court may * * * after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, * * * when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The petition to which the demurrer was filed predicates the action on a contract described therein for the benefit of a third person and does not plead facts upon which there could be based a recovery for the beneficiary of a trust from the defendant as trustee. The amended petition substantially changes the cause of action and is separate and distinct from the cause of action as stated in the original petition.

This court in *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504, 77 N. W. 1094, held, under circumstances similar to those presented in the instant case, that the trial court very properly refused to permit the amended petition to be filed. We conclude that section 20-852, Comp. St. 1929, does not contemplate that the court shall permit an amended petition to be filed under the circumstances here presented, where such amended petition substantially changes the claim to one separate and distinct from that presented in the original petition to which the demurrer was sustained.

For the reasons given in this opinion, the demurrer was properly sustained, and the court properly refused to permit the amended petition to be filed.

AFFIRMED.

CLARENCE M. PETERSON, APPELLEE, V. I. G. CHRISTENSON, DOING BUSINESS UNDER THE TRADE-NAME OF GAGE COUNTY HATCHERY, APPELLANT.

3 N. W. (2d) 204

FILED MARCH 20, 1942. No. 31339.

1. **Workmen's Compensation.** "Whether the deceased was an employee or an independent contractor cannot be decided by a hard and fast rule. The relationship can only be established by a consideration of the facts and circumstances of the case." *Prescher v. Baker Ice Machine Co.*, 132 Neb. 648, 273 N. W. 48.
2. ———. "An independent contractor usually enters into a contract to do a specified piece of work for a specific price; makes his own subcontracts; employs, controls, pays and discharges his own employees; furnishes his own tools and materials; and directs and controls the execution of the work." *Prescher v. Baker Ice Machine Co.*, 132 Neb. 648, 273 N. W. 48.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Chambers, Holland & Locke, for appellant.

Vasey & Mattoon, contra.

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

SIMMONS, C. J.

This is a workmen's compensation case. It presents the sole question, was the plaintiff an independent contractor or an employee of the defendant? Trial was had to one judge of the compensation court who held that plaintiff was an independent contractor and dismissed plaintiff's petition. Rehearing was waived and an appeal was taken to the district court and trial had. That court held he was an employee. The question is now presented to this court subject to the statutory provision that the judgment of the district court may be set aside only upon the ground "That the findings of fact are not conclusively supported by the evidence * * * and if so found, the cause shall be considered *de novo* upon the record." Comp. St. Supp. 1941, sec. 48-174.

The facts are not difficult nor in serious dispute. Plaintiff is a "cement finisher and common laborer." Defendant had a business building which he was redecorating. There was a small piece of plaster off on the inside and also a few places outside under the marquee that needed patching. Defendant says plaintiff came by and suggested that he (plaintiff) plaster these places. Plaintiff says that as he was passing the building the defendant asked him to do the plastering. In any event, plaintiff agreed to return the next morning and do the job. Nothing was said as to pay, etc. The next morning plaintiff came to the job with his tools. Defendant asked what materials were necessary. Together plaintiff and defendant went to the lumber yard, got the materials, which were charged to the defendant, and returned to the building. Defendant furnished a stepladder, bucket and water. Plaintiff mixed the materials. Defendant told plaintiff to do the inside job first, which he did. He then went outside, and while working there the ladder slipped, and plaintiff got some lime in his eye. A friend suggested a first aid remedy which was applied. Defendant then advised plaintiff to go to a doctor, naming him; he was not known to plaintiff. Plaintiff went to the doctor and was treated. Plaintiff did not agree to pay and did not pay the doctor. The record does not show who agreed to pay the doctor or whether or not he was paid. The amount of his bill was stipulated.

Plaintiff had previously done work for the defendant for which he submitted bills and was paid on the basis of a certain amount an hour. Plaintiff says he expected to submit a similar bill for this work, but had not done so at the time of the trial. Plaintiff did not finish the job nor have it finished. The job, had it been completed, would have taken about one and one-half hours to perform.

Defendant argues that an employer, under such circumstances as these, ought not to be responsible under the compensation act. That is not a question for the court but for the legislative body to decide.

The statute is broad. Leaving out language not necessary

here, an employer is defined as one "who is engaged in any trade, occupation, business or profession * * * and who has any person in service under any contract of hire, express or implied, oral or written * * *." Comp. St. 1929, sec. 48-114. An employee is defined as "Every person in the service of an employer" as above described under such a contract.

This court has on a number of occasions undertaken to define an independent contractor as distinguished from an employee. In *Petrow & Giannou v. Shewan,* 108 Neb. 466, 187 N. W. 940, we said: "The issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from all the facts in the case. There is no single test by which that determination can be made. An independent contractor is generally distinguished as being a workman who is independent in his employment; one who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of his work. He is not in such a case a servant of his employer; nor can he be controlled by the employer in the manner of doing the work, except to the extent that the employer has the right to give such directions as may be found necessary to insure compliance with the contract."

Again, in *Reeder v. Kimball Laundry,* 129 Neb. 306, 261 N. W. 562, we quoted with approval the following from a text: "The true test of a 'contractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. * * * In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own subcontracts, employs, controls, pays and discharges his own employees, furnishes his own material and directs and controls the execution of the work. Where these conditions concur there is, of course, no difficulty in determining his character as

such. It is only where one or more of them is lacking that a question arises. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it."

Again, in *Prescher v. Baker Ice Machine Co.*, 132 Neb. 648, 273 N. W. 48, we said:

"Whether the deceased was an employee or an independent contractor cannot be decided by a hard and fast rule. The relationship can only be established by a consideration of the facts and circumstances of the case. *Showers v. Lund*, 123 Neb. 56, 242 N. W. 258. An independent contractor usually enters into a contract to do a specified piece of work for a specific price; makes his own subcontracts; employs, controls, pays and discharges his own employees; furnishes his own tools and materials; and directs and controls the execution of the work. As we said in the case of *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562, where these conditions concur, there is no difficulty in determining his character as such. It is only when one or more of these conditions do not exist that a question arises.

"The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified piece of work for a specific price."

This last above quoted sentence is an apparent restriction of the rule announced in the preceding statement and in prior decisions. It is modified to the extent necessary to harmonize with our prior holdings.

We have repeatedly stated the rule that whether the workman was an employee or an independent contractor cannot be decided by a hard and fast rule. The relationship can only be established by a consideration of the facts and circumstances of the case. See *Petrow & Giannou v. Shewan, supra; Showers v. Lund*, 123 Neb. 56, 242 N. W. 258; *Cole v. Minnick*, 123 Neb. 871, 244 N. W. 785; *Standish v. Larsen-Merryweather Co.*, 124 Neb. 197, 245 N. W. 606; *Schou v. Village of Hildreth*, 127 Neb. 784, 257 N. W.

70; *Reeder v. Kimball Laundry, supra; Lowe v. Chicago Lumber Co.*, 135 Neb. 735, 283 N. W. 841.

There is, of course, no one fact upon which the decision turns, but we may get some aid in reaching the right conclusion by reference to some of the things which enter into the determination of whether a workman is an independent contractor or an employee.

There was no specific agreement as to the compensation to be received. However, one may properly be implied from the previous relationship between the plaintiff and the defendant, testified to by the plaintiff and not denied by the defendant. The evidence supports a holding that there was an implied condition of the contract that plaintiff was to be paid for his labor at the rate of 65 cents an hour. The amount of his compensation would depend upon, not the completion of the job, but the length of time required to perform the job. This is indicative of an employee status. *Showers v. Lund, supra.*

The amount of work to be done was clearly understood by both parties. The fact that no price was set upon the work is indicative of an employee relationship. Nothing was said when the employment was agreed upon as to who was to furnish the material to be used. There was nothing unusual in the kind of material necessary. The defendant personally took the plaintiff to the lumber yard to purchase the material and deliver it to the premises. The defendant directed the execution of the work to the extent of instructing plaintiff to do the inside work first, for a reason that was of benefit to the defendant. Plaintiff, a skilled workman, did the work as he thought it ought to be done. There is no evidence that defendant was ignorant as to how the work should be done, or directed it to be done otherwise. In the only instance where the evidence shows that defendant directed plaintiff as to the manner of doing the work, plaintiff obeyed defendant's instructions. "The right to supervise and direct the work, if found to exist in the employer, indicates that the workman is an employee." *Cole v. Minnick, supra.* Here de-

fendant shows that he had the right and did direct the work so far as determining what part should be done first. The fact that defendant did not tell plaintiff "what tools to use or how to use them" does not alter the situation. *Cole v. Minnick, supra.* Defendant stresses the fact that plaintiff was a skilled workman and seems to conclude that a different rule should apply when determining whether or not a skilled workman is an employee than applies to an unskilled workman. It is true that a skilled workman may be employed because of his particular ability to go ahead and do work for which he has been trained. That fact implies an understanding that he should do the work according to his skill, with less or no direction, but it does not change him from an employee to a contractor.

There is no evidence here as to the defendant's right to discharge the plaintiff. The very meagerness of the job probably made that unnecessary.

Defendant argues that the case of *Petrow & Giannou v. Shewan, supra,* is controlling on its facts and statements of the law and if followed would result in a judgment for the defendant. We do not agree. It may be pointed out that in the *Petrow* case the parties themselves apparently construed their status as that of independent contractors. The contrary conclusion is indicated in the instant case. There defendant looked to plaintiff to complete the job; here he did not. There the plaintiff furnished a substitute to complete the job; here he did not. Here the defendant sent the plaintiff to a doctor of defendant's choice. That may have been the act of a good Samaritan, but it is likewise an act consistent with the status of an employer liable to an employee under the compensation act. There defendant did not understand the manner in which plumbing should be done. Here there is no indication that defendant did not understand the manner in which plastering should be done, but on the contrary that knowledge is indicated in the selection of a materialman and the securing of material. There control was not exercised; here it was. There plaintiff was to furnish the materials.

Here defendant furnished the materials. The cases are not analogous on the facts and indicate the reason for the rule that each case must be determined on its own facts and circumstances.

We are in accord with the conclusion reached by the trial court. The plaintiff is allowed an attorney's fee of $100 for the service of his attorney in this appeal.

The judgment of the trial court is

AFFIRMED.

MAX M. BARISH, APPELLANT, V. CHRYSLER CORPORATION ET AL., APPELLEES.

3 N. W. (2d) 91

FILED MARCH 20, 1942. No. 31193.

1. **Contracts.** Any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice. And where, by the terms of a contract, it is specified that either party may terminate the agreement at any time, such termination may likewise be had as stipulated and upon the conditions in such contract contained.
2. **Torts.** One who causes intended or unintended harm to another by refusing to continue a business relation with him, terminable at his will, is not liable for that harm.
3. **Monopolies.** Under the Junkin Act, recovery is limited to damages for injuries "in his business or his property." Injuries to corporate business are not injuries to the business of an officer or stockholder within the meaning of that act, and for such injuries only the corporation may pursue the statutory remedy.
4. ———. Under the circumstances of this case, there can be no recovery for future profits to accrue to corporate stockholders or future salaries to accrue to corporate officers, as elements of damage in a tort action, after the due termination and cancelation by the corporate parties thereto of the contracts, whose continued existence furnishes the sole basis of the same.

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

Webb, Beber, Klutznick & Kelley, Loyal G. Kaplan and *Harold R. Lebens*, for appellant.

Crofoot, Fraser, Connolly & Stryker, Fred N. Hellner and *Kennedy, Holland, De Lacy & Svoboda, contra.*

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

EBERLY, J.

This is an action for tort brought by Barish in the district court for Douglas county, against the defendants named to recover treble damages under the Junkin Act of Nebraska, for injuries in his business and property by reason of the results of a conspiracy declared unlawful by the terms of that enactment referred to, and alleged to have been participated in by the defendants. At the close of plaintiff's evidence, the trial court, upon the several motions of the defendants, directed the trial jury to return a verdict for the defendants, and dismissed plaintiff's petition, and later also overruled plaintiff's motion for a new trial. The plaintiff appeals.

It may be said that among the facts established by the pleadings and the evidence are the following: The defendants Chrysler Corporation and Dodge Brothers Corporation are automobile manufacturers engaged in the manufacture of automobiles and the distribution of same throughout the United States, through representative dealers. At the times involved herein Barish-Sanders Motor Company, a Nebraska corporation, was the dealer possessed of the usual franchise and was handling the products of the defendants "Chrysler" and "Dodge" in Omaha and vicinity. The plaintiff Barish was the president and general manager of Barish-Sanders Motor Company, and actively engaged in the management of its business. He owned 75 shares of common stock of Barish-Sanders Motor Company. There was also outstanding $30,000 of preferred stock issued by the company last named, which was owned by Ben Sanders and the Hubbell family of Des Moines, Iowa, who also owned the remaining 125 shares

of the common stock. The board of directors of Barish-Sanders Motor Company, at all times involved herein, was Max M. Barish, plaintiff, Ben Sanders and James Hubbell. Sanders and the Hubbells were owners of a majority of the stock of a Des Moines, Iowa, company which was engaged in the same business at that place that was being carried on by Barish-Sanders Motor Company at Omaha. The defendants Commercial Credit Company, a Nebraska corporation, and Commercial Credit Company, a Delaware corporation, are engaged in the business of purchasing retail and wholesale commercial paper from automobile distributors and dealers, and also in the business of financing automobile transactions. They were affiliated organizations. The Chrysler Corporation also entered into a direct dealers agreement with Barish-Sanders Motor Company covering the sale and distribution by the latter of Dodge and Plymouth motor products in Cass, Douglas, Washington and Sarpy counties in Nebraska, and in Harrison county, Iowa. This contract is usually termed a "franchise" in the trade, and contains stipulations as to the rights and duties of all the parties to the same with reference to the subject-matter of the agreement. It provided, among other things, for "Termination without Notice" for various reasons, such as an attempted assignment by the direct dealer, its bankruptcy or receivership. It also provided for "Termination Upon Cessation of Proper Representation," if in the opinion of the Chrysler Corporation the direct dealer shall have ceased proper representation in his territory, the company to immediately notify the dealer in writing of such termination. It also provided for "Termination by Notice" as hereinafter set forth; and for "No Liability on account of Termination" as later stated in this opinion.

The foregoing agreement was executed in writing February 19, 1936, and was in effect at all times involved in this litigation. It was signed on behalf of Barish-Sanders Motor Company by the plaintiff, as "M. M. Barish, Pres." On October 15, 1936, the Barish-Sanders Motor Company

became a "Parts Wholesale Dealer" in the Dodge division of the Chrysler Corporation, under the terms of a contract then executed by it which also contained provisions similar to and substantially identical with its automobile franchise contract executed February 19, 1936, with reference to termination thereof.

These contracts are strictly corporation contracts, and as such binding only upon the corporate entities that are the makers thereof, and necessarily subject to all the limitations therein expressed. It follows that causes of action in the nature of tort arising from, growing out of, or pertaining to the obligations or duties created or declared thereby are necessarily limited in scope by the terms thereof.

The relations between the Chrysler Corporation and the two Commercial Credit Companies, defendants, were substantially created and fixed by the terms of a written contract entered into between it and the Commercial Credit Company, a Delaware corporation, effective January 1, 1935, and which remained in full force during the entire period covered by the events involved in the present suit. The Commercial Credit Company, a Nebraska corporation, was an affiliate company of the Delaware corporation of that name, and also a beneficiary of the contract last referred to. So far as involved in the present litigation, it may be said that this contract evidenced an agreement that the Chrysler Corporation would, "by proper means, to encourage, endorse, promote, recommend, develop and endeavor to bring about the use by its dealers of the financing plans and facilities of Commercial Credit in connection with the sale by its dealers of Chrysler cars on a time payment plan basis * * * . (b) To mention in advertising and in radio broadcasts that Commercial Credit is the finance company approved and recommended by Chrysler. (c) To furnish a letter of recommendation, facsimiles of which Commercial Credit may use in advertising and on its finance charts and plans."

In consideration thereof, the Commercial Credit Com-

pany, a Delaware corporation, agreed to pay the Chrysler Corporation for such services not less than a minimum of $150,000 for each calendar year. This agreement also provided that the Commercial Credit Company, a Delaware corporation, might cause the contract to be performed by any or all of its affiliated companies, and that this contract should be for the benefit of all of the same.

It must be obvious that the success of the Chrysler Corporation under the set-up heretofore detailed was wholly dependent on the number of its automobiles sold and the amount of its products disposed of by the Barish-Sanders Motor Company. As a matter of necessary precaution, it was the adopted business policy of the former to keep in close touch with the business transacted by the latter; to aid, advise, and cooperate with the latter to the end that the interests of both, if possible, be advanced. In the event that the relation between these parties should become unsatisfactory for any reason, the contracts above referred to contemplated that either party thereto could at his own option terminate the same without liability for damages to the other. In line with this policy thus outlined, representatives of Chrysler Corporation and of the Barish-Sanders Motor Company discussed each year the prospective sales for the coming year and agreed upon quotas which the dealer believed represented the number of automobiles he could sell in his territory. It appears that Barish-Sanders Motor Company did not sell its quota of cars in 1936 or 1937. In fact, it did not sell as large a percentage of its quota as did the Sanders Motor Company at Des Moines, Iowa, and fell far below average sales of Plymouth and Dodge cars throughout the nation. Also, the Barish-Sanders Motor Company which had been financing with the Commercial Credit Company, because of difficulties arising which culminated about September 16, 1937, after full concurrence by its board of directors, concluded to quit and did cease doing business thereafter with the Commercial Credit Company, of which the latter was duly notified. It would accomplish no good result to detail the attempts to secure an adjust-

ment of these matters of difference. Suffice it to say that in legal effect the Chrysler Corporation determined, in view of the situation then prevailing, to exercise the rights reserved under the express terms of the two franchise contracts hereinbefore referred to, and to cancel and bring the same to an end. However, after duly advising the other contracting party of this conclusion, it extended to the Barish-Sanders Motor Company the opportunity of selling its business and property employed therein to its best advantage, and for which purpose it assisted and cooperated to effect that result.

On November 11, 1937, Messrs. Maxson, Mitchell and Jones, as purchasers, met the owners and representatives of the Barish-Sanders Motor Company at Omaha, Nebraska. Their negotiations resulted in the purchase of the motor company by these three men for an agreed consideration of $70,000. This sale contract was in writing, duly executed by the parties thereto, and accomplished the purchase by the sale and transfer of all stock, common and preferred, of the Barish-Sanders Motor Company to the three purchasers named, in consideration of the $70,000 by them paid. In addition, it was agreed as part of such sale that some trucks, inventoried at $2,043, were to be retained for the benefit of the old stockholders, and the purchasers also agreed to pay all taxes assessed against the property of the Barish-Sanders Motor Company so purchased. The stock transfer made was complete, absolute and without reservation except as above stated and included all stock owned by Barish. On November 15, 1937, a written agreement expressly terminating the Chrysler Corporation direct dealer agreement with Barish-Sanders Motor Company was duly executed, the plaintiff Barish signing for the motor company. On December 3, 1937, by mutual consent, the "parts wholesale agreement" between the Chrysler Corporation and the Barish-Sanders Motor Company was terminated and canceled by a written instrument which was executed in a manner identical with the contract terminating the direct dealer agreement.

It also appears that the consideration received was duly apportioned to and received by the selling stockholders of the Barish-Sanders Motor Company, and that thereupon the purchasers as owners of the stock went into possession of this company and became the owners of all of its properties, rights and credits of every description. On November 20, 1937, at a meeting presided over by Max M. Barish, plaintiff, after the transfer of stock to Maxson, Mitchell and Jones had been duly made, by unanimous consent of all stockholders in interest, the name of the corporation was changed to "Maxson-Mitchell, Inc." Max M. Barish continued with the Barish-Sanders Motor Company, after the change of name, during the remainder of the month of November and also December, assisting the purchasers thereof in the conduct of its business. On April 29, 1938, he instituted the present action for himself and strictly in his individual capacity.

In this matter the following constitutes the certain basis of our consideration. We are here dealing strictly with two inter-corporation contracts. No one is affected by their terms except the corporate parties thereto. Officers and stockholders of the corporations involved could not possibly be affected thereby except indirectly through the medium of corporate stock ownership and the rights and powers derived therefrom.

In consideration of the Junkin Act, under the terms of which this action purports to be brought, this court unanimously announced the proposition that in business such as here involved, "A person may do business with whomsoever he desires. He may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice." *Hompes v. Goodrich Co.*, 137 Neb. 84, 288 N. W. 367.

We have repeatedly announced, in substance, this rule, "That contracts for the performance of services or for the continuous furnishing of commodities are, when the contract itself specifies no period of duration, terminable, upon reasonable notice, at the will of either party." *Smith v.*

Bailey, 105 Neb. 754, 181 N. W. 926. See, also, *State v. Employers of Labor*, 102 Neb. 768, 169 N. W. 717; *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46.

In the instant case the parties have expressly agreed, in both contracts in issue, as follows:

"It is agreed that either party may terminate this agreement with or without cause at any time upon not less than fifteen (15) days' nor more than twenty (20) days' written notice to the other party either by personal delivery or by registered mail to the last known address. * * *

"It is agreed that neither party shall be liable to the other for damages of any kind on account of termination of this agreement with or without notice as provided herein * * *."

These stipulations are valid and binding upon the parties to these contracts and those claiming by, through, or under them. Indeed, the parties to these contracts by their subsequent valid agreements of cancelation and termination thereof admit the contractual validity of these engagements, and their acts so performed must be upheld. *Warren-Scharf Asphalt Paving Co. v. Laclede Construction Co.*, 111 Fed. 695. Without reference to the legal effect of these express stipulations as to the terminability of these written obligations, the common-law rule is that, in the absence of a business charged with a public interest or facts involving similar principles, which do not appear in the present case, "One who causes intended or unintended harm to another by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm," so occasioned. Restatement, Torts, sec. 762. See, also, *Smith v. Bailey, supra; State v. Employers of Labor, supra.*

Obviously, there can be no recovery under the facts in this case against the Chrysler Corporation because of its exercise of its contractual rights or its enforcement of the contractual obligations of the two contracts here involved.

True, the plaintiff sues as an individual in tort, but in

order that his cause of action be deemed sustainable, it must be found in some manner to arise out of the express terms or necessary results of the two contracts between the Chrysler Corporation and the Barish-Sanders Motor Company. Plaintiff's rights must be deemed wholly derivative, because he is neither a party to the contracts nor affected thereby except as a stockholder or officer of the corporation that made the contracts here in issue. But an individual stockholder or officer of a corporation cannot personally maintain an action for damages for a conspiracy which is claimed to violate the Junkin Act when, as here, the evidence conclusively shows that all conduct as well as contracts of the defendants, challenged by this suit brought, involve a corporation or corporate rights. He can be entitled to no rights, remedies or relief because of the existence of these contracts, except by or through the rights of the actual parties thereto. *Ploog v. Roberts Dairy Co.*, 122 Neb. 540, 240 N. W. 764; *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 37 S. Ct. 509; 7 Thompson, Corporations (3d ed.) 593, sec. 5595.

So too, under our Junkin Act, recovery is limited to damages for injuries "in his business or his property." Thus, injuries to corporate business are not injuries to the business of an officer or stockholder in the corporation within the meaning of the Junkin Act and for such injuries only the corporation may pursue the statutory remedy. Loss of a corporate office and salary incident thereto is not "injury to business or property" within the meaning of the statute. Nor is the impairment of the value of plaintiff's shares in the corporation, nor loss of prospective dividends thereon, "injury to business or property" as those terms are employed in the statute here involved. *Gerli v. Silk Ass'n*, 36 Fed. (2d) 959; *Westmoreland Asbestos Co. v. Johns-Manville Corporation*, 30 Fed. Supp. 389; *Corey v. Boston Ice Co.*, 207 Fed. 465; *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 37 S. Ct. 509; 7 Thompson, Corporations (3d ed.) 593, sec. 5595.

Then again, it appears that the plaintiff sold his stock

prior to the commencement of the present action, and it does not appear that demand was made upon the motor company which must be deemed to possess and own the cause of action, if such cause exists, which plaintiff now seeks to allege in his own behalf. But, he parted with ownership of the stock before the institution of the present action. It follows that he could make no legal demand on the corporation to institute this proceeding nor maintain it in his own behalf. Again, his action, though allegedly set forth as a tort, of necessity must arise out of, or flow from, the contracts which are both subject to cancelation upon fifteen days' notice, and which were both actually terminated by mutual agreement of the parties thereto. Under the circumstances of this case there can be no recovery for future profits or future salaries, as an element of damages in a tort action, after the due termination and cancelation by the parties thereto of the contracts, whose continued existence furnishes the basis of the same. *James Poultry Co. v. City of Nebraska City*, 135 Neb. 787, 284 N. W. 273; *Ploog v. Roberts Dairy Co.*, 122 Neb. 540, 240 N. W. 764; *White Sewing Machine Co. v. Shaddock*, 79 Ark. 220, 95 S. W. 143; *White Co. v. American Motor Car Co.*, 11 Ga. App. 285, 75 S. E. 345; *Standard Motor Co. v. Shockey*, 139 Md. 127, 114 Atl. 869; *State v. Trimble*, 295 Mo. 667, 247 S. W. 119; *Kilker v. Ford Motor Co.*, 39 S. Dak. 293, 164 N. W. 57.

It appearing that there can be no recovery in this action upon the theory presented by the plaintiff, the other questions presented by the record are, in effect, moot and unnecessary to the determination of this case.

It follows that the judgment of dismissal entered by the district court in this case is correct, and it is

AFFIRMED.

LOUIS LANGE, APPELLEE, V. DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLANT.

3 N. W. (2d) 194

FILED MARCH 20, 1942. No. 31326.

1. **Workmen's Compensation.** On appeal to this court in a workmen's compensation case, findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong.
2. ———. If medical evidence indicates that a somewhat permanent condition of disability might be removed, or such disability lessened by an operation, the fact that the employee has been willing to have such operation performed, but the defendant has not availed itself of this offer, may be considered in awarding compensation.

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

Walter R. Johnson, Attorney General, and *Herbert T. White,* for appellant.

Thomas E. Dunbar, contra.

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

PAINE, J.

This is a workmen's compensation case, in which the judge of the compensation court entered an award for 18 weeks, from which award plaintiff appealed to the full compensation court, which increased the award, from which the department of roads and irrigation appeals to the district court, and then to this court.

Plaintiff, a single man, 47 years of age, was employed as a common laborer by the defendant, and while climbing from an empty gravel car to a full one he had an accident, and felt a strain along the edge of his ribs and sternum. He says it was as if something pulled or snapped.

The written report of Dr. J. W. Brendel, of Avoca, is exhibit No. 10, and sets out that the accident occurred April 24, 1940; that the injured man said he hit his side against a car in crossing from one car to another, and bruised his side, and he taped the side.

The counsel, at the beginning of the trial before the full compensation court, stipulated as follows:

"It is hereby stipulated by and between the plaintiff and the defendant, by his and its attorney, that the accident complained of by the plaintiff, and alleged in his petition, occurred adjacent to the village of Avoca in Cass county, and that the initial hearing before Judge Lawrence F. Welch, was had in Nebraska City, Otoe county, Nebraska, by agreement and stipulation of the parties filed in this cause; and that the rehearing is being held in Cass county, also by stipulation and agreement of the parties, irrespective of the original hearing having been stipulated at Otoe county, Nebraska.

"It is further stipulated by and between the parties that the accident complained of by plaintiff, without admission as to the extent of the injuries on the part of the defendant, occurred during the course of the employment of the plaintiff by the defendant, Department of Roads and Irrigation for the State of Nebraska, and that the alleged accident arose out of and in the course of his employment by the defendant."

While he complained of pain, he went back to work in a day or so, but they gave him a new task, the lightest work on the job, of holding up a flag ahead of an oil sprayer, which he continued to do intermittently until the job was completed, about the 26th of May, 1940. He tried to get work on farms, and worked a few days in the oat harvest, for the county commissioners would not give him anything, and, as his attorney says, "he had to eat."

Plaintiff filed a petition in the compensation court in July of 1940, and had a hearing before Judge Welch in October, 1940, who entered a finding that there had been a 50 per cent. disability from the date of the accident until the date of the hearing, and found there was disability after that time, and allowed him 50 per cent. disability for 18 weeks, that is, from about May to September. From that award the plaintiff appealed to the full compensation court, and after a trial they entered an award, finding he had a 50

per cent. temporary disability, and then in addition they allowed him a 30 per cent. permanent disability for a period of 282 weeks from September 28, 1940, and from that award the state appealed to the district court, which entered the same award as given in the compensation court, from which the state promptly appealed.

The question before this court resolves itself simply to the question: Was the award excessive for the admitted accident and injury plaintiff received?

The plaintiff's chest was examined in the trial, and there is a hard lump, or tumor, at the junction of the ninth rib, more pronounced when he is lying down than standing. This is about two inches by an inch and a half in size, and is movable. In addition, there is a grating sensation, which can be felt when his arm is moved in a certain position.

This injury of the cartilage is very slow to heal, and will not disappear by taping, or other external treatment, and surgery offers the only cure. One doctor testified that a small section of this mass should be taken out and a pathological examination made to determine whether one is dealing with an osteochondroma, or a chondroma. It is also necessary to determine whether a nerve is pinched in the tumor mass, which would account for the pain. Testimony was to the effect that his present percentage of disability is 50 per cent. permanent.

A large number of medical witnesses were called, and those called by the defendant admitted the separation of a rib at the costochondral junction, which has an overgrowth of callous, and that in time this callous may eventually be absorbed. Some of these doctors said they could not detect any grating sound upon movement, and that it should not disable the plaintiff from working at this time.

The defendant insists that, while plaintiff has a little lump, still the skin slides over it, showing that it is not attached to the skin, and that the award was excessive for a slight injury to a breastbone; that the mere fact that he has been unable to obtain any employment does not warrant the award made.

The defendant cites several authorities to the effect that "An award for compensation cannot be based upon possibility, probability, speculation or conjecture. Unless it is established by sufficient evidence that claimant has incurred a disability arising out of and in the course of his employment, he cannot recover." *Milton v. City of Gordon,* 129 Neb. 888, 263 N. W. 208. See *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Hoffman v. Great Western Sugar Co.,* 125 Neb. 302, 250 N. W. 70.

In our opinion, the following statement, made by Judge Eberly in *City of Fremont v. Lea,* 115 Neb. 565, 213 N. W. 820, applies: "This appeal, thus made, is now to be heard and determined subject to the limitations of the doctrine heretofore adopted and repeatedly announced by this court: 'On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong.' *American Smelting & Refining Co. v. Cassil,* 104 Neb. 706. See, also, *Tragas v. Cudahy Packing Co.,* 110 Neb. 329; *Simon v. Cathroe Co.,* 106 Neb. 535."

It is also to be noted that the plaintiff has offered to subject himself to surgical treatment at the expense of the defendant to see if his condition could be relieved. This offer has not been accepted.

There is no question from the evidence that the plaintiff is, for many kinds of heavy lifting, disabled, and therefore, in his present condition, not able to perform the usual duties of a common laborer. It is also possible that, by a simple operation, the lump of cartilage might be removed, or a nerve, if any is embedded therein causing pain, might be released. There is also a possibility that by surgery a firm union might be brought about between the end of the rib and the sternum.

If these are the facts, it would be usual for the employer to demand that the employee submit to an operation. Many such cases are set out in *Simmerman v. Felthauser,* 125 Neb. 795, 251 N. W. 831. See, also, *National Mutual Casualty*

Co. v. Lowery, 136 Tex. 188, 148 S. W. (2d) 1089; *Orlandini v. Volpe Coal Co.,* 145 Pa. Super. 129, 20 Atl. (2d) 870; *Delafield v. Maples,* 2 So. (2d) (La. App.) 704.

The statute in Nebraska reads as follows: "If the injured employee refuses or neglects to avail himself of medical or surgical treatment furnished by the employer except as herein and otherwise provided the employer shall not be liable for an aggravation of such injury due to such refusal and neglect." Comp. St. Supp. 1941, sec. 48-120. However, in the case at bar the employee has been ready and willing to submit himself to such an operation, and it has not been done. The plaintiff is not able to pay for an operation which might remedy his disability.

The trial court found that the award on rehearing entered by the full compensation court is fully supported by the evidence and affirmed by the court, and that the plaintiff's attorney was entitled to an attorney's fee in the district court in the sum of $75. This award is for the sum of $10.97 a week for 18 weeks, beginning May 26, 1940, on account of temporary total disability, and further, that the plaintiff shall recover the sum of $3.29 a week for a period of 282 weeks from and after September 28, 1940, on account of a 30 per cent. partial permanent disability of the body as a whole, in addition to an allowance of $6.75 for Dr. W. C. Kenner, and $6 to St. Mary's Hospital, both of Nebraska City.

There being no error in the record, the judgment of the lower court is affirmed, with an allowance to the plaintiff of an attorney's fee of $100 in this court.

AFFIRMED.

STATE, EX REL. RAYMOND H. WALKER, APPELLANT, V. BOARD OF COMMISSIONERS FOR EDUCATIONAL LANDS AND FUNDS ET AL., APPELLEES.

3 N. W. (2d) 196

FILED MARCH 20, 1942. No. 31295.

1. **Pleading.** A general demurrer admits the truth of all material facts well pleaded, and the intendments and inferences that fairly and reasonably may be drawn therefrom.
2. **Schools and School Districts.** All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, are by the terms of the Constitution trust funds and the state is the trustee thereof.
3. **States.** The state as trustee of public property and funds cannot be sued without its consent.
4. **Constitutional Law.** A constitutional provision is not self-executing if it indicates a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the Constitution is directed to the legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect.
5. ———. While there is a solemn and sacred obligation on the part of the state imposed by the Constitution to replace shortages in the permanent school fund, the constitutional provision fixing the obligation not being self-executing, the courts are without power to compel performance of the obligation.

Appeal from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Sterling F. Mutz, for appellant.

Walter R. Johnson, Attorney General, and *Edwin Vail, contra.*

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

YEAGER, J.

As pleaded in the petition, this is an action by the state of Nebraska on relation of Raymond H. Walker, plaintiff and appellant, against the board of commissioners for educational lands and funds and the individual members of the

board, and the state board of equalization and assessment and the individual members of this board, defendants and appellees.

The petition sets forth that Raymond H. Walker is a resident, inhabitant, citizen and taxpayer of the state of Nebraska and of the public school district of the city of Lincoln; that he has children of school age attending the public schools, and that the action is brought on behalf of the said Walker and all others similarly situated, and all public school districts which are beneficiaries of the permanent school trust fund of the state of Nebraska.

The petition sets forth that demand was made upon the attorney general that he institute the action, but such demand was refused.

The action as pleaded is, first, to require the board of commissioners for educational lands and funds to make accounting of the permanent school trust fund of the state, in which fund it is charged that shortages exist, and then certify such shortages to the state board of equalization and assessment; and, second, that mandamus issue requiring that the said state board of equalization and assessment make provision for a levy of taxes to take care of and replace the shortages in the permanent school trust fund. Known shortages in the amount of $269,824 were alleged which with interest would amount to $668,542.28. It was further alleged that the known and the unascertained shortages would exceed $2,000,000, all of which occurred prior to the incumbency of the individually named defendants.

To the petition the defendants separately demurred. The ground of the demurrers was that the petition did not state facts sufficient to constitute a cause of action. The demurrers were sustained and, the plaintiff, having elected to stand on his petition, the petition was dismissed. From this dismissal the plaintiff has appealed.

To an understanding of the matter presented, an examination of certain constitutional provisions relative to the creation of the board of commissioners for educational lands

and funds, its functions, and the accumulation and creation of the lands and funds to be administered by the board and also the matter of title to such lands and funds is required. It is necessary further to examine certain enactments of the congress of the United States.

On May 30, 1854, an act of congress was approved, the purpose of which was to permit the organization of the territories of Nebraska and Kansas. Section 16 of the act (10 U. S. St. at Large, p. 283) is as follows: "And be it further enacted, that when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same." As will be observed, sections sixteen and thirty-six of each township, were to become school-lands after survey and before organization. After organization into territories or states the lands were to become school-lands of the territories or states.

By act of congress, approved April 19, 1864 (13 U. S. St. at Large, p. 47), which was the act enabling Nebraska to gain statehood, sections sixteen and thirty-six of each township were granted to the state for support of common schools, except in cases where sales had been made, and in that event other lands equivalent in area, in subdivisions of not less than quarter-sections, were granted in lieu of the lands sold (sec. 7). Further, by the act it was provided that 5 per cent. of the proceeds of sales of all public lands lying within the state which had been or would be sold by the United States prior to or subsequent to the admission of Nebraska into the Union, less incidental expenses, should be paid to the state for the support of the common schools (sec. 12).

Nebraska was admitted into the Union on March 1, 1867, and assumed the privileges and duties of statehood, including those imposed by the congressional enabling acts which

included the acceptance of the lands and funds for the support of the common schools of the state.

For the evident purpose of preserving and protecting the lands and funds thus granted to the state by congressional act, there was written into the Constitution of 1866, or the first Constitution, the following provision: "The principal of all funds arising from the sale, or other disposition of lands or other property, granted or intrusted to this state for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations. The legislature shall make such provisions by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state." Const. 1866, art VII, sec. 1.

By the adoption of the Constitution of 1875 the Constitution of 1866 was amended with regard to school-lands and funds, their uses, and supervision and control thereover. The pertinent provisions are sections 1, 2, and 3, art. VIII, and they are the following:

"The governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings shall, under the direction of the legislature, constitute a board of commissioners for the sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of school funds in such manner as may be prescribed by law.

"All lands, money, or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance.

"The following are hereby declared to be perpetual funds for common school purposes, of which the annual interest or income only can be appropriated, to-wit: First.

Such per centum as has been, or may hereafter be, granted by congress on the sale of lands in this state. Second. All moneys arising from the sale or leasing of sections number sixteen and thirty-six in each township in this state, and the lands selected, or that may be selected in lieu thereof. Third. The proceeds of all lands that have been, or may hereafter be, granted to this state, where, by the terms and conditions of such grant, the same are not to be otherwise appropriated. Fourth. The net proceeds of lands and other property and effects that may come to the state, by escheat or forfeiture, or from unclaimed dividends, or distributive shares of the estates of deceased persons. Fifth. All moneys, stocks, bonds, lands, and other property, now belonging to the common school fund."

No material change is found in the Constitution of 1920 in so far as the subject under inquiry here is concerned.

The personnel of the board of commissioners for educational lands and funds has been changed by constitutional amendment, but the functions have not been changed. The present constitutional membership of the board consists of the governor, the secretary of state, the treasurer, the attorney general and the superinendent of public instruction.

The theory of the plaintiff's petition is, and he alleges, that the board of commissioners for educational lands and funds is trustee of the permanent school-lands and funds, and it is charged with the duties and responsibilities of administering the lands and funds, of accounting to the state board of equalization and assessment of shortages in funds, to the end that that board may make provision for levy and assessment of taxes to replace such shortages, and of accounting to the plaintiff and all others similarly situated. In his presentation here the plaintiff has sought to abandon that phase of his action which would require an accounting to the state board of equalization and assessment. This present attitude dispenses with the necessity of considering in this opinion the pretended cause of action and prayer for relief against the state board of equalization

and assessment. This board and its members by this position of the plaintiff are no longer in the case. The ruling on their demurrer is conceded to be proper.

Coming then to the demurrer of the remaining defendants, we start with the legal proposition that the demurrer admits the truth of all material facts well pleaded, and the intendments and inferences that fairly and reasonably may be drawn therefrom. *American Water-Works Co. v. State,* 46 Neb. 194, 64 N. W. 711; *Van Horn v. Lincoln Sales Outlet Co.,* 127 Neb. 301, 255 N. W. 36; *Thurston County v. Farley,* 128 Neb. 756, 260 N. W. 397.

Of the material facts alleged that must be accepted here as true is the allegation that there are shortages in the permanent school fund in the approximate amount of $2,000,000. It is obvious that years ago appropriate steps should have been taken to replace, in a proper manner, these shortages if they in fact existed, for at least two reasons; first, the common schools of the state were entitled to the use of the income therefrom; and, second, it is unjust that the entire burden shall now be impressed on generations far removed from the period or periods when the shortages occurred.

Also the alleged fact that these funds are trust funds must be accepted as true. They are trust funds by virtue of the 1920 Constitution, art. VII, sec. 9. The pertinent portion of this section will be quoted later herein.

The plaintiff alleges that the board of educational lands and funds is the trustee. In the main the general demurrer of the defendants is directed to the proposition raised by this allegation. They assert in support of their demurrer that the state is the trustee and that the board is but an administrative agency whose function it is to administer the trust on behalf of the state according to law. In support of this position attention is called to the terminology of section 9, art. VII of the Constitution, *supra,* which is as follows: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state,

and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished * * *."

This constitutional provision clearly demonstrates that the state is the trustee of educational lands and funds and that the defendants are in no sense trustees. *State v. Bartley,* 41 Neb. 277, 59 N. W. 907.

What then is the effect of this action? The defendants urge substantially that this is an action against the state, though nominally against one of its administrative agencies and the membership of the agency, and consequently cannot be maintained by the plaintiff herein.

Obviously, in view of the position we must take under the terms of the Constitution with regard to allegations of trusteeship of the school-lands and funds, this contention of the defendants must be sustained. There being no trusteeship in the board or its members, and the state being the trustee, and the action being for an accounting by the trustee, the petition sets forth an action against the state for an accounting, though nominally otherwise.

If this were an action to compel state officers to perform a purely ministerial duty imposed by law, there is no reason why it could not be maintained. *State v. Savage,* 64 Neb. 684, 90 N. W. 898; *State v. Bartley, supra.* This, as has been pointed out, is not such an action. The state as trustee of public property and funds cannot be sued without its consent. *Smith v. Reeves,* 178 U. S. 436, 20 S. Ct. 919; *Shoemaker v. Board of Commissioners,* 36 Ind. 175; *Bow v. Plummer,* 79 N. H. 23, 104 Atl. 35; *Pacific Livestock Co. v. Cochran,* 73 Or. 417, 144 Pac. 668; *McClellan v. State,* 35 Cal. App. 605, 170 Pac. 662; *California Securities Co. v. State,* 111 Cal. App. 258, 295 Pac. 583. The Nebraska cases of *State v. Bartley, supra,* and *State v. Savage, supra,* while not being directly in point, support this view.

There is another and perhaps even more cogent reason why this action may not be maintained. Section 9, art. VII of the Constitution, *supra,* provides that the state shall

supply all losses which shall in any manner accrue to the school funds. The Constitution, however, does not prescribe means or a method of carrying into effect this imposed obligation; hence, this provision is not self-executing.

A comprehensive definition of constitutional provisions which are not self-executing is the following from 16 C. J. S. 98, sec. 48: "Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the Constitution is directed to the legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect."

It is clear that legislation is necessary to carry into effect a restoration of the losses in the permanent school fund. No existing law is found providing a means or method of raising necessary revenue to replace losses in the fund in case any are discovered, and neither is there any law requiring a ministerial ascertainment of information relative to losses and the furnishing of such information to the legislature or to some other department of government.

In the vein and somewhat in paraphrase of some of the language used in the opinion in *State of Alabama v. Schmidt*, 232 U. S. 168, 34 S. Ct. 301, the state of Nebraska received and accepted these public school-lands as a gift, and by the adoption of the constitutional provisions relating thereto considered this a solemn and sacred obligation imposed on its public faith. The obligation is an honorary one which the courts are powerless to enforce. To perform its sacred obligation, to redeem its pledge, if the allegations of fact contained in the petition of the plaintiff with reference to shortages in the permanent school fund are true, it is the duty of the legislature, long neglected, to make provision for and to ascertain the shortages in the fund, and further by appropriate legislation to take the steps necessary to raise revenue to restore the fund to its proper condition.

The demurrers of the defendants were properly sustained, and the judgment of the district court was correct and is

AFFIRMED.

JOSEPH F. KUCERA, APPELLANT, V. VILLAGE OF PRAGUE, APPELLEE.

3 N. W. (2d) 201

FILED MARCH 27, 1942. No. 31352.

1. **Workmen's Compensation.** "Where any finding of fact, upon which the award of the district court in a workmen's compensation case depends, is not conclusively supported by the evidence, it is our duty on appeal to consider the entire cause *de novo* upon the record." *Schmidt v. City of Lincoln,* 137 Neb. 546, 290 N. W. 250.
2. ———. "Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased or terminated as alleged." *Metropolitan Dining Room v. Jensen,* 126 Neb. 765, 254 N. W. 405.
3. ———. Evidence examined, and *held* insufficient to support the judgment of the trial court that the disabilities suffered by Joseph F. Kucera have decreased and diminished since the original award of compensation in this cause.

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

Joseph L. Pallat and *Lawrence F. Welch,* for appellant.

H. A. Bryant, contra.

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

EBERLY, J.

This is an appeal in a workmen's compensation proceeding to secure a modification of a previous award made and entered in the Nebraska workmen's compensation court on September 19, 1938, in a case wherein Joseph F. Kucera

was plaintiff and the Village of Prague was defendant. In this cause it was duly adjudged and determined that on or about January 10, 1937, plaintiff was in the employ of the defendant village, as a light and water commissioner; and while so employed on that date, and while engaged in the performance of his duties as such employee, and in the course of the regular business of the defendant, plaintiff sustained personal injuries in an accident arising out of and in the course of his employment; that, while attempting to take a volt reading from a ladder, the ladder slipped and coming down from the ladder plaintiff came in contact with an electric wire containing 2,000 volts, knocking plaintiff to the ground, causing burns to both hands and injuring his neck; and that the nature and extent of these accidental injuries were such as to entitle plaintiff to the benefits as provided by the Nebraska workmen's compensation law. Further, as a result of these accidental injuries, plaintiff has been temporarily totally disabled from January 10, 1937, to and including the date of this hearing (September 19, 1938) and still continues to be temporarily totally disabled. Also, that plaintiff's wages at the date of accident were $23.08 each week and sufficient to entitle him to compensation payments at the rate of $15 a week. And it was therefore ordered, adjudged and decreed that the plaintiff have and recover of and from the defendant the sum of $15 each week from and after January 10, 1937, for a period not to exceed, however, 300 weeks, or until this award is modified as provided by law. No appeal was ever prosecuted from the judgment and no attempt was made to modify the same until in December, 1940, the Village of Prague filed in said cause in the Nebraska workmen's compensation court an application for modification of award because of decrease of incapacity, alleging substantially that plaintiff had fully recovered from the injury, if any, alleged to have been received by him on January 10, 1937; and that plaintiff now suffers no disability whatsoever by reason of such injuries, and that such award should be vacated and set aside. To this application plaintiff filed his

answer, taking issue with the allegations of defendant's application, and also his cross-petition alleging total permanent disability and that he has been totally and permanently disabled since January 10, 1937, and praying that the present award be in all things confirmed, and the court make further provisions for plaintiff on the basis of permanent total disability as by law provided, to be effective after expiration of the present award, and for other relief. On March 14, 1941, this cause came on for hearing before Charles E. Jackman, a judge of the workmen's compensation court, upon the several applications for modification of the award. Evidence was introduced and a hearing had, at the conclusion of which, by an order entered April 30, 1941, it was determined "that the plaintiff is totally and permanently disabled to perform the duties of his trade," and awarded $15 a week for the period of 300 weeks after such injury "as and for compensation for temporary total disability; and thereafter the sum of ten and no/100 ($10) Dollars each week, for the remainder of plaintiff's natural lifetime," and other relief. Thereupon the defendant waived rehearing and gave notice of appeal to the district court for Saunders county. On May 12, 1941, defendant filed in such district court its application for modification of award in writing, in substance as presented to the Nebraska workmen's compensation court. On July 19, 1941, plaintiff filed his answer thereto, taking issue with the allegations of defendant's application, together with his application for modification on the basis of total permanent disability. On September 25, 1941, after due hearing, a judgment was entered in such district court finding "that the total disability of the plaintiff, Joseph F. Kucera, brought about by said injury, has ceased and determined, and that he is now able to perform the duties of his trade, or of some useful and gainful occupation, and that said employee suffers now a partial disability only by reason of said injury," etc. The judgment entered on this finding by the district court embraced the following: "That the appellee, Joseph F. Kucera, shall have and recover of and from the appellant,

Village of Prague, Nebraska, the sum of Fifteen and No/100 ($15) Dollars each week for the remainder of three hundred weeks from and after the 10th day of January, 1937, and for which compensation payments have not been made, as and for compensation for partial disability because of said injuries and thereafter all liability of the Village of Prague Nebraska, to said employee shall cease and determine; that the penalty payments to said Joseph F. Kucera be, and the same hereby are, denied; that the Village of Prague pay to Doctor B. F. Ewing, Omaha, Nebraska, the sum of Two Hundred Fifty-four and 75/100 ($254.75) Dollars, medical expenses incurred in the treatment of said employee."

From this award made and entered in the district court, plaintiff Kucera appeals, and defendant village files a cross-appeal.

Thus, we have here presented under section 48-142, Comp. St. 1929, and determined in this proceeding in the district court: (1) An application by the defendant for modification of award because of alleged decrease of incapacity; (2) issues joined thereon by claimant, and also an application in the latter's behalf for a modification of award because of increase of his incapacity.

The determination made by the district court is challenged by appellant on the grounds: (1) That the district court erred in finding that the plaintiff is only partially disabled; (2) the trial court erred in not assessing the waiting time period penalty of 50 per cent., amounting to $362.50.

Such determination is also challeged by defendant, appellee, on the ground that the district court erred in requiring the payment of $15 a week for the remainder of the 300 weeks from the date of the injury.

In the light of the entire record presented on this appeal, we find the controlling principle to be: "Where any finding of fact, upon which the award of the district court in a workmen's compensation case depends, is not conclusively supported by the evidence, it is our duty on appeal to con-

sider the entire cause *de novo* upon the record." *Schmidt v. City of Lincoln,* 137 Neb. 546, 290 N. W. 250.

In the instant case both parties participate in this proceeding as petitioners for modification of the award as finally made by the district court. It follows that to the extent of this modification sought each is clearly within the terms of the rule: "Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased or terminated as alleged." *Metropolitan Dining Room v. Jensen,* 126 Neb. 765, 254 N. W. 405.

In the application of the foregoing rule, in *Huff v. Omaha Cold Storage Co.,* 136 Neb. 907, 287 N. W. 764, this court announced the conclusion: "Before recovery may be had for an increase of incapacity due solely to the injury, within the meaning of subdivision (b) sec. 48-142, Comp. St. 1929, as amended, the plaintiff must prove by a preponderance of the evidence that there now exists a material and substantial change for the worse in plaintiff's condition, a change in circumstances that justifies a modification, distinct and different from that for which an adjudication has been previously made."

Turning now to the evidence to be considered in the light of the doctrines of the foregoing cases, it is obvious that the occurrence of the serious accident which constitutes the source of plaintiff's claim cannot be questioned. It was determined originally by the Nebraska workmen's compensation court in an opinion unappealed from. From the evidence it appears that such accident included the fracture of the bones of plaintiff's neck and the subsequent ankylosing of the two vertebrae affected by the injury. Thus, the actual occurrence of the injuries involved is established objectively and beyond a reasonable doubt, but when we proceed to the question of the natural effect of these injuries so suffered and arising out of and in the course of his employment, we enter the field of sharply conflicting evidence. It would add nothing to the value of this opinion

to set forth the contradictory statements in the record. But, giving due consideration to each item of testimony introduced by the parties, we find that the petitioner, Village of Prague, in view of the burden of proof, has not established by a fair preponderance of all the evidence that the disability of Joseph F. Kucera, as found and determined by the Nebraska workmen's compensation court in its order and judgment of September 19, 1938, wherein it determined him to be temporarily totally disabled, has decreased or diminished since the making of the said original award; that, therefore, such disabilities continue and still exist, and claimant is entitled to the compensation originally awarded. It further appears from the record that the plaintiff Kucera has not established by a preponderance of the evidence that the disability resulting from the accident involved in this case and his incapacity resulting therefrom at the date of this hearing may properly be classed as total permanent disability. The order of the district court directing that defendant pay to Dr. B. F. Ewing, of Omaha, Nebraska, the sum of $254.75, is in all respects approved and incorporated in the judgment of this court. We find that in this proceeding, in view of the record presented, plaintiff Kucera is not entitled to assessment of penalties prayed for.

It is therefore ordered that the judgment of the district court for Saunders county entered on the 25th day of September, 1941, in this cause, and the order and judgment entered by the Nebraska workmen's compensation court on the 30th day of April, 1941, each be in all respects canceled, reversed, and set aside; further, that the award made and entered by the Nebraska workmen's compensation court on the 19th day of September, 1938, be reinstated, approved, and affirmed, and that plaintiff be entitled to have and recover the compensation therein provided. The costs of this action are to be taxed to the Village of Prague.

REVERSED.

ENA F. LIPPINCOTT, APPELLEE, V. HARVEY R. LIPPINCOTT, APPELLANT.

3 N. W. (2d) 207

FILED MARCH 27, 1942. No. 31241.

1. **Divorce: Appeal.** "An appeal lodged in this court from a decree rendered in a suit for divorce suspends such decree and brings the case here for trial *de novo*, and the marital relations continue unchanged until a final determination of such appeal is had." *Westphalen v. Westphalen*, 115 Neb. 217, 212 N. W. 429.
2. ———. "There are three parties to a marriage contract—the parties marrying and society—so, the doctrine of estoppel concerns not only the parties to the marriage contract, but also the public. The contract cannot be dissolved either by agreement or by collusive proceedings in court." *Hopkins v. Hopkins*, 174 Miss. 643, 165 So. 414.
3. ———. A judgment of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject-matter of the suit or of the person of defendant, without violating the full faith and credit clause of the federal Constitution.
4. ———. Courts generally have permitted foreign divorce decrees to be impeached "for want of jurisdiction," when other judgments could not have been similarly attacked, because of reluctance to permit foreign courts to fix the marital status of resident citizens, and because of the peculiar character of the marriage relation.
5. **Marriage.** The Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage, or its dissolution, in the states. *Andrews v. Andrews*, 188 U. S. 14, 23 S. Ct. 237.
6. **Divorce.** A state has authority over its citizens concerning the marriage tie and its dissolution, and will not allow them to perpetrate a fraud by temporarily sojourning in another state and there procure a decree of divorce without acquiring a legal residence therein.
7. ———. When a wife fraudulently secured a divorce in Nevada, after remaining there less than a week, and both parties thereto were at all times legal residents of Nebraska, such divorce is absolutely void for lack of jurisdiction.
8. ———. Ordinarily, if a wife instituted such proceedings on her own initiative, and obtained a void decree of divorce in Nevada, she would be estopped from setting up its invalidity in Nebraska, but if she was under the duress, domination, and compulsion of her husband, and he was present at all times, plan-

ning and guiding each step, employing and paying the attorneys and witness, then there arises an estoppel against an estoppel which sets the matter at large.

9. ———. There has never been any attempt by this court to fix any rule which would relieve the trial judge of a patient, detailed study of every fact and circumstance relating to each case as it comes on for the allowance of alimony.

10. ———. "Although it has been said that permanent alimony in some measure represents compensation to the wife for the husband's breach of his marital obligations, the generally accepted view is that its function is to provide support to the wife." 27 C. J. S. 937, sec. 228.

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

Dryden, Dryden & Jensen and *J. L. Grimm,* for appellant.

Mothersead & York and *Lewis F. Shull, contra.*

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

PAINE, J.

This is an appeal by the defendant from a decree granting a divorce and alimony.

On April 5, 1940, plaintiff filed a petition for divorce, alleging that they were married October 30, 1921, at Gering, and that ever since said date the parties have been residents of the state of Nebraska; that at the time of their marriage plaintiff was 18 years of age and defendant 21; that neither possessed any property, but by hard work and their joint efforts they accumulated property; that defendant's mother was an invalid at the time of the marriage, and plaintiff at once entered the household of defendant's father, his brother, then 10 years of age, and his sister, 13 years of age, and in addition to performing all the duties of a farm wife, such as raising a garden, taking care of the poultry and dairy products, she cared for defendant's invalid mother, who died the following summer after their marriage; that the plaintiff looked after the brother and sister of defendant, and

cooked for as high as 25 or 30 men in threshing time, that she has assisted defendant to get contracts for threshing, that she has herded sheep, assisted in putting up hay, and by her joint efforts the defendant is now a man of large wealth and means, and owns several productive farms in Scotts Bluff county and Buffalo county, together with a large amount of personal property, and that plaintiff is without means of any kind; that she has conducted herself as a proper and dutiful wife, but defendant has treated her cruelly, because of his quick, ungovernable temper, as a result of which the plaintiff has become sick and ailing. It is further charged that the defendant is now living in a state of open adultery, and plaintiff prays that she be given the care and custody of the two sons, and an absolute divorce and suitable support money and alimony.

The defendant on October 28, 1940, filed his second amended answer, admitting the marriage of the parties, the birth of the children, and denying the other allegations therein.

Defendant for further answer denies that plaintiff and defendant are now husband and wife, and alleges the fact to be that on February 26, 1937, in the district court for Clark county, Nevada, the plaintiff upon her petition secured a decree of absolute divorce, which decree has never been appealed from, modified, or vacated, and is now in full force and effect; that to obtain this divorce the plaintiff employed her own counsel, submitted herself to the jurisdiction of the court in Nevada, secured her own corroborating witness, in accordance with the statutes of Nevada, many sections of the Nevada law being set out in full in the second amended answer, and in accordance with said law plaintiff established her residence at 506 Seventh street, in Boulder City, Nevada, at which place she had her residence from January 2, 1937, up to and including February 27, 1937; that she employed as her attorneys Noland & Noland, of Las Vegas, Nevada, who filed her petition and filed the appearance and waiver of the defendant, in which he entered his voluntary appearance; that on February 26, 1937,

plaintiff was examined by her attorney, and testified that she had lived in Boulder City for more than six weeks, and testified to various other allegations tending to prove extreme cruelty on the part of the defendant, and that the plaintiff secured as a corroborating witness one J. T. Franklin, of Boulder City, who testified as her witness, and said he had known the plaintiff since January 2, 1937, and that she had resided in one of his apartments continuously since January 2, 1937; that after the plaintiff had secured the decree of divorce in Nevada, as herein set out, the defendant married one Virginia Lippincott at Salt Lake City on November 4, 1937, and that at all times since the divorce was granted the plaintiff has held herself out as the divorced wife of defendant to friends, neighbors and relatives, and has many times called at the residence of the defendant and his present wife, Virginia Lippincott, and stated at all times that the decree of divorce secured by her in Nevada was valid and in full force and effect; that some time in the year 1937, relying upon the divorce secured by the plaintiff in Nevada, the defendant entered into a property settlement with the plaintiff, and they have at all times operated under said property settlement with reference to the provisions for the support of the plaintiff and sons who were the issue of said marriage; that defendant has complied with all the terms and provisions of said property settlement, has paid all sums of money thereunder, and purchased property for the plaintiff in accordance with said property settlement, and has at all times relied upon the Nevada decree of divorce and the terms and conditions of the property settlement; alleges that the plaintiff is now estopped to question the validity of said Nevada divorce decree, and that the Nebraska court is without jurisdiction to try the validity of said divorce for the reason that, under the terms and provisions of section 1, art. IV of the Constitution of the United States, this court is required to give full faith and credit to the judicial record of the district court for Clark county, Nevada, with reference to said divorce, and is without jurisdiction to decree a divorce in Nebraska, the same being *res judicata*.

Defendant charges that since April 18, 1940, the plaintiff has failed and refused to abide by the provisions of the property settlement made in 1937; that she has failed to require the attendance of the two minor sons in school; that she has failed to deliver the custody of the two sons to the defendant, in accordance with the property settlement, and has removed them from the jurisdiction of the district court for Scotts Bluff county, and that she has threatened to perform certain acts, the intent of which is to ruin this defendant, both financially and socially, in the community where he resides; wherefore, the defendant prays that the petition be dismissed, and that the terms of the property settlement be enforced, and that the defendant be awarded the care and custody of the two minor sons.

The plaintiff for a reply to the second amended answer denies each allegation therein not herein specifically admitted, and alleges that neither of the parties has at any time ever been a resident, citizen, or inhabitant of the state of Nevada; that on February 26, 1937, and for many years prior thereto, plaintiff was under the complete domination and control of the defendant, and unable to resist the demands of defendant in any particular whatsoever; that upon defendant's insistence the plaintiff accompanied the defendant to the state of Nevada, intending to stay there for a period of six weeks to comply with his demands and orders that she obtain a divorce from him; that upon arrival in the state of Nevada defendant procured counsel and falsely represented that the plaintiff was a resident of the state of Nevada, and had been for six weeks; that in truth the plaintiff had been present in the state of Nevada for less than 96 hours, but the counsel which defendant employed filed a petition for divorce, to which the defendant entered a voluntary appearance, and that the defendant procured the services of a witness to falsely swear that the plaintiff had been a resident of the state of Nevada for more than six weeks; that the defendant was present in the courtroom, heard all of the testimony, and that the purported decree of divorce was and is absolutely void, because both the plain-

tiff and the defendant were nonresidents of the state of Nevada, and were residents of the state of Nebraska, and said court had no jurisdiction to enter said decree, all of which was well known to the defendant, who informed the plaintiff after the divorce was procured that it was void, and immediately transported the plaintiff to her home in the state of Nebraska, and that he insisted upon and did live with the plaintiff as his wife, claiming that said decree was null and void.

The plaintiff alleges that an alleged property settlement was entered into in contemplation of a divorce, but that the defendant has refused to recognize or comply with the same.

Plaintiff alleges that the property settlement was obtained when she was under the influence and control of the defendant, and that it was drafted by his attorney; that she had no independent advice from any attorney, and signed only upon the insistence of the defendant, and alleges that the same did not then, and does not now, represent a fair and proper division of the joint property of the parties, and does not properly and adequately provide for the maintenance of the plaintiff and her minor sons.

The trial in the case at bar, upon the pleadings herein briefly set out, began on December 5, 1940, several recesses were taken, and on January 22, 1941, another recess was taken because of the sickness of the defendant, and the trial of the case was further continued.

On March 11, 1941, the trial court entered a decree, finding that the plaintiff was a resident of Scotts Bluff county at the commencement of the action; that two sons were the issue of said marriage, and that the younger son, Dale L., died since the commencement of this action, and that Harvey R. is a minor of the age of 18 years.

The court finds in the said decree that the property standing in the name of the defendant is the result of the joint work of plaintiff and defendant. The court finds that some time prior to 1936 the defendant became enamored of Virginia Lippincott, a married woman, and carried on illicit

relations with her, as a result of which conduct the plaintiff in the spring of 1936 commenced an action in Scotts Bluff county for separate maintenance, after filing which action she remained in hiding to avoid the defendant until the evening before the hearing was to occur; that on said evening he discovered her and induced her to go with him that night to the city of Cheyenne, Wyoming, from which city the next morning he induced her to call up the defendant's attorney and request that the suit for separate maintenance be dismissed; that in February, 1937, the defendant transported the plaintiff to the city of Las Vegas, Clark county, Nevada, where she intended to remain for six weeks and file a petition for divorce; that the defendant thereupon engaged an attorney to prepare the petition, and demanded that she sign the same, and that the defendant, in carrying out his scheme, procured the attendance of a witness who falsely testified that the plaintiff had resided in the state of Nevada for more than six weeks, and because of said false representations a purported decree of divorce was entered; thereupon defendant transported the plaintiff back to Nebraska, and subsequent thereto insisted upon and continued marital relations with her.

The court also finds that at the time of the commencement of this action the defendant was living in a state of adultery with Virginia Lippincott, and further finds that the testimony of the defendant that he transported the plaintiff to Las Vegas, Nevada, leaving Scotts Bluff county between Christmas and New Year's, 1936, is false and untrue, and that there is clear and satisfactory evidence that the plaintiff was in Las Vegas only some three or four days prior to the entry of the decree of divorce; that a proper division of the real estate in Scotts Bluff county is to award the plaintiff some 320 acres thereof, with all taxes and assessments paid up to and including the year 1940, and to assign to the plaintiff a certain school-land contract, with all payments due to date paid, but subject to all future payments upon said school-land contract. The court further finds that plaintiff should have the care, custody and control of the

minor son, Harvey R., with the right of the defendant to visit him at reasonable times and for a reasonable length of time.

The district court in said decree, as conclusions of law, finds: (1) That the court has jurisdiction of this action; (2) that the purported decree of divorce in the district court for Clark county, Nevada, is and was at all times absolutely void; (3) that the plaintiff is entitled to a divorce in this action, and to the custody of the minor son; (4) that the plaintiff is not estopped to set up the invalidity of the purported decree of divorce in Clark county, Nevada. The decree grants plaintiff an absolute divorce, and directs that the real estate hereinabove set over and assigned to the plaintiff is to be free of any claims of the father and stepmother of the defendant for payment of annuities or insurance policies, and to so guarantee the faithful carrying out of all terms of the decree the said plaintiff is given a lien against all other real estate of the defendant in Scotts Bluff county. The defendant is restrained and enjoined from molesting the plaintiff, or interfering with her personal liberty, and she is awarded an attorneys' fee of $2,500, to be paid to her attorneys, Mothersead & York.

The defendant sets out several issues in his brief, two of them being as to the validity of the Nevada divorce and whether the plaintiff is not estopped from questioning this divorce which she secured on February 26, 1937. The defendant insists that the property settlement signed by the parties on February 8, 1937, before the Nevada divorce was secured, should be binding upon the plaintiff. The question is presented as to the jurisdiction of the district court for Scotts Bluff county to try the case at bar. Defendant claims that the attorneys' fee allowed to the plaintiff, of $2,500, is excessive.

The evidence and exhibits make up seven volumes in the bill of exceptions, and while it is impossible to review the evidence in this opinion, a few facts will be briefly set out. Plaintiff's father was one of the pioneers of Scotts Bluff county, and she went to school in the winters, and worked

out some summers. In the summer of 1920 she commenced working in the home of Henry Lippincott, father of the defendant, his wife being an invalid.

Plaintiff and defendant were married October 30, 1921, and the plaintiff was compelled to do all the work in the family of her father-in-law and his children, and wait on the mother, who died in the spring of 1922. Harvey, Jr., was born November 27, 1922, and Dale L. was born April 17, 1925. The plaintiff first discovered that her husband was enamored of the wife of his cousin, Vance Lippincott, some time in the year 1926, when they visited them at Hastings, after which Vance Lippincott moved to Grand Island.

This affair continued until in May of 1936, when Virginia Lippincott and her mother came to Scottsbluff and she asked the plaintiff if she would not give her husband a divorce. The plaintiff went to Gering that night and stayed at the hotel, and the next day, May 20, 1936, she filed her suit for separate maintenance in the district court for Scotts Bluff county, but did not ask for a divorce. Plaintiff claims that she was afraid to remain in Scotts Bluff county because of the defendant, and immediately left for South Dakota with her mother, and they only returned the night before the hearing was set in her suit for separate maintenance, and just as they drove up in front of a tourist camp in Scottsbluff the defendant drove up in his car and insisted that plaintiff go with him at once to Morrill and talk over with her father the suit for separate maintenance, but her father was not at home, and so they drove on to a hotel in Cheyenne that night, and then drove to Denver, and on this trip he insisted that she telephone an attorney to dismiss her separate maintenance suit, which she did. Defendant took her back to his home in Scotts Bluff county, where she remained.

In the fall of that year plaintiff moved to Greeley, Colorado, and rented a house and put the two boys in school there, the defendant driving over frequently. About this time Virginia Lippincott and her husband moved to California. After a few months defendant insisted that plain-

tiff return to their home in Scotts Bluff county, and she got a boarding place for the boys at Mrs. Burkett's in Greeley and came back and lived in Scotts Bluff county until the fore part of February, 1937, and he discussed having her get a divorce on many occasions during this time.

On February 8, 1937, defendant's attorney, J. L. Grimm, drew up a property settlement, which both parties signed, and a few days thereafter the defendant took the plaintiff and her sister Blanche and started for California. They stayed over night in Greeley, Colorado, to visit the boys, and finally reached Las Vegas, Nevada, and stopped there from some time in the morning until afternoon, each of the parties seeing attorneys to ask about the divorce laws of Nevada. The same afternoon they left Las Vegas and drove to Parker Dam, south of Boulder Dam, where plaintiff's cousin was working, saw him about midnight, and drove from there to Canoga Park, Los Angeles, reaching there about 9:30 Sunday morning. On Tuesday morning defendant left and drove to Oakland, California, to visit Virginia. Plaintiff visited with several relatives, and on Saturday the defendant returned from Oakland and they planned to start back to Nevada on Monday, but that being February 22d, and a holiday, they waited over so the defendant could get an expected letter from Virginia at the post office, and the next day, February 23, they started for Las Vegas. There were four in the car, plaintiff's sister and her cousin and plaintiff and defendant.

The evidence of the plaintiff as to her stay in Los Angeles is supported by exhibits Nos. 12, 13 and 14, found in volume 4, being letters written by the plaintiff to her sons in Greeley, Colorado, the envelopes being postmarked Canoga Park, California, February 16, 1937, February 18, and one February 21, the latter being postmarked in Los Angeles.

On February 24 the defendant consulted his attorneys, the firm being Noland & Noland, being a man and his wife, and on Thursday, February 25, he took plaintiff to see them. The defendant had coached her just what to say, and she told the attorneys falsely that she had been in Nevada for

six weeks, and was getting a divorce from her husband, who lived at Provo, Utah, where he was employed in a lumber yard, where they had moved after they were married.

Dan V. Noland, a lawyer of Las Vegas, Nevada, employed by the defendant, testified by deposition that the defendant consulted him about his wife securing a divorce, and about a week later came back and brought the plaintiff, and that all of the arrangements were made by the defendant for the plaintiff to secure a divorce, and that he considered that he was attorney for the defendant, who was his client, at all times, although he refused to answer whether the defendant had paid him, as he said it was a confidential communication, thereby claiming privilege on the ground that he was attorney for the defendant. He testified that the plaintiff paid him nothing.

Defendant's exhibit No. 26 is a certified copy of the court records in the district court for Clark county, Nevada, relating to the divorce of plaintiff against defendant, being No. 7362.

Plaintiff's complaint, filed February 25, 1937, alleges that she has been for six weeks prior to that day an actual *bona fide* resident of Clark county, Nevada; alleges the marriage of the parties at Gering, Nebraska, the birth of the two children, and alleges that these two sons are in the custody of their father, who resides in the state of Utah; alleges that there is no community property, and then sets out an allegation of extreme cruelty, and prays for a divorce. Defendant filed his voluntary appearance and waiver.

The decree of divorce was entered on February 26, 1937, and is exceedingly brief, and is signed by William E. Orr, district judge, and recites that plaintiff appeared as witness, allegations of the complaint found true, and absolute decree of divorce granted.

Evidence of plaintiff, as taken by the Nevada court reporter, sets forth in detail the testimony of the plaintiff, in which she swore that she came to Boulder City, Nevada, January 2, 1937, and had lived there continuously ever since, and had lived in the northern part of the state of

Nevada the fall before for about two weeks. She swears that she did not come to Nevada with the intention of getting a divorce, but to find work, and intends to make it her home indefinitely; that the two sons as a result of the marriage are living with their father at Provo, Utah, and that it is agreeable that they remain in his custody; that they are in school at Provo. She testified that he had treated her cruelly, which made her nervous; said he would use profanity at her, and nag her for anything, such as cutting the bread a little too thick, all of which made her nervous, and she left him and could not return and be happy.

J. T. Franklin was the witness called, and swore that the plaintiff had been in continuous use of one of his apartments since January 2, 1937; that she had been there all of that time, and that he had seen her during the daytime.

Defendant's evidence is entirely different from plaintiff's, and is to the effect that plaintiff remained in Las Vegas the time required, and that he wrote her letters there in care of a tavern. This evidence lacks any support in the testimony of other witnesses.

Plaintiff's exhibit No. 5 is an airmail letter, signed "Virginia," on letterhead of Golden West Hotel, Reno, Nevada, postmarked in Reno, March —, 1937, and addressed to defendant at Lyman, Nebraska. It described how she just walked out on her husband, leaving a note for him when she left Oakland with her daughter.

Defendant's exhibit No. 103, found in volume 6 of the bill of exceptions, is the marriage certificate of Harvey R. Lippincott, of Shelton, to Virginia Lippincott, of Hastings, Nebraska, the ceremony being performed by John A. Harter, a bishop in Salt Lake City, Utah, on November 4, 1937, in the presence of two witnesses.

"An appeal lodged in this court from a decree rendered in a suit for divorce suspends such decree and brings the case here for trial *de novo,* and the marital relations continue unchanged until a final determination of such appeal is had." *Westphalen v. Westphalen,* 115 Neb. 217, 212 N. W. 429.

The defendant presents, as his first proposition of law, that where plaintiff commenced an action for divorce in Nevada, and defendant entered his voluntary appearance, and a decree was entered, and where both of said parties relied upon the validity of said decree, and the party against whom the decree was taken, relying on said decree, remarried, entered into a property settlement with his former wife, and complied therewith, then the party taking said decree is estopped to deny or question the validity of the divorce decree in a collateral proceeding in Nebraska.

Defendant cites many cases in support thereof, the first one holding: "Where, in an action in the court of another state for divorce, both parties voluntarily appear, and submit to the jurisdiction, they are bound by the judgment, and cannot avoid it in a collateral proceeding in this state by proof that when the action was brought and judgment rendered neither of them was a resident in that state, and that both were residents in this state." *In re Ellis' Estate,* 55 Minn. 401, 56 N. W. 1056. See, also, *French v. French,* 74 Misc. 626, 131 N. Y. Supp. 1053, and many other cases in annotation, 39 A. L. R. 697.

In *Stevely* v. *Stevely,* 254 App. Div. 743, 4 N. Y. Supp. (2d) 69, the husband who had procured in Mexico a decree of divorce from his first wife, without either being present or resident in Mexico, was not allowed to set up the invalidity of such divorce in defense to an action by his second wife for separate maintenance. See annotation, 122 A. L. R. 1324; *Fisher v. Fisher,* 162 Misc. 775, 295 N. Y. Supp. 451; *Nathan v. Nathan,* 150 Misc. 895, 270 N. Y. Supp. 551.

But, in *McDermott v. McDermott,* 252 App. Div. 875, 299 N. Y. Supp. 956, the court held that the husband was entitled to procure a judgment of divorce in New York, despite the fact that he had participated in procuring a void foreign decree, subsequent to which the wife entered into an alleged marriage.

"There are three parties to a marriage contract—the parties marrying and society—so, the doctrine of estoppel concerns not only the parties to the marriage contract, but

also the public. The contract cannot be dissolved either by agreement or by collusive proceedings in court. *Gurley v. Gorman,* 137 Miss. 210, 102 So. 65. Can appellant rely on estoppel when he, and he alone, is responsible for the facts that constitute the estoppel? We think not. An estoppel against an estoppel destroys each other. 10 R. C. L. 841, sec. 146; 21 C. J. 1110; *Barringer v. Dauernheim,* 127 La. 679, 53 So. 923. Lord Coke expressed it in this language: Two estoppels destroy each other, or 'set the matter at large,' note to 5 Ann. Cas. 845." *Hopkins v. Hopkins,* 174 Miss. 643, 165 So. 414.

"A judgment of divorce rendered in another state or country may be collaterally attacked by showing that the court was without jurisdiction, either of the subject-matter of the suit or of the person of the defendant, without violating the full faith and credit clause of the federal Constitution. In fact it has been said that courts generally have permitted foreign divorce decrees to be impeached 'for want of jurisdiction,' when other judgments could not have been similarly attacked, because of reluctance to permit foreign courts to fix the marital status of resident citizens, and because of the peculiar character of the marriage relation. The collateral impeachment may be made by extrinsic evidence." 27 C. J. S. 1300, sec. 335.

In the case at bar, an examination of the evidence in the bill of exceptions leads to the conclusion that, while the plaintiff, concerning many matters, including the education of her sons, had a mind of her own, yet when it came to her intimate relations with the defendant she was always under his domination and control. When Virginia asked her to give defendant a divorce, she at once decided definitely to leave her husband that very night, and the next day she filed an action for separate maintenance, and went to South Dakota and remained, and only returned the night before the trial; but that night the defendant found her, immediately took her to Cheyenne, and at once induced her to dismiss her suit and resume marital relations.

The whole plan of the Nevada divorce was the work of

the defendant, who alone had a motive to secure one. He took her there, he hired the attorney, all with the intention of complying with the provisions of the Nevada law, but when he secured a witness who would falsely testify to the jurisdictional question of residence, it was the defendant's idea to save the expense and delay of waiting for the required time to elapse, and to secure a divorce by remaining only three or four days. It does not estop the plaintiff from showing the Nevada divorce to be void for lack of jurisdiction, because she was a most willing tool in her husband's hands, and told the perjured story he had coached her to tell; it simply convinces one of his complete domination of the plaintiff in such matters.

The question which must be decided is this: Was the Nevada divorce void, or voidable, or legal?

The case of *Andrews v. Andrews*; 188 U. S. 14, 23 S. Ct. 237, is frequently cited as a foundation case on this point. It was decided January 19, 1903, coming up on error from the supreme court of Massachusetts. The plaintiff and defendant each claimed to be the lawful widow of Charles S. Andrews, and each petitioned to be appointed administratrix of his estate. Andrews married Kate in Boston in 1887. In 1890 she sued for separate maintenance, which was dismissed when a property settlement was entered into. In the summer of 1891 Andrews went to South Dakota, and on November 19, 1891, filed petition for divorce. The wife, Kate, received notice and appeared by counsel, and filed an answer, denying that he was a *bona fide* resident of South Dakota, or that she had deserted him. Later she withdrew her appearance in the suit, and on May 6, 1892, the decree was granted, and he at once returned to Massachusetts, where he resided until his death in October, 1897.

On January 11, 1893, he married Annie in Boston. She was in ignorance of any illegality of the South Dakota divorce, and at his death there were two children living by this last marriage. The Massachusetts court held under an applicable statute that the decree rendered in South Da-

kota was void, and that his first wife, Kate, was entitled to administer his estate.

It was held that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage, or its dissolution, in the states. It was further held that Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and had authority to prohibit them from perpetrating a fraud by temporarily sojourning in another state and procuring a decree of divorce without acquiring a *bona fide* domicile, and that the due faith and credit clause of the United States Constitution does not require the enforcement of the South Dakota decree in the state of Massachusetts.

In *Hollingshead v. Hollingshead,* 91 N. J. Eq. 261, 110 Atl. 19, it is held that a decree of divorce by a foreign state between parties domiciled in this state is absolutely void for lack of jurisdiction. It is argued that, even if the Nevada decree is invalid, she is estopped from setting that up, since it was she herself who instituted the proceedings and obtained the decree in Nevada. Ordinarily, this would be true, but if she had been under duress or compulsion to obtain such divorce, an estoppel would arise against such estoppel. 14 Cyc. 822; *United States Fidelity & Guaranty Co. v. Ettenheimer,* 70 Neb. 147, 99 N. W. 652. In *Holt v. Holt,* 77 Fed. (2d) 538, we have a case referred to many times. The plaintiff and defendant were students, and married in Baltimore in February, 1931, and separated three months later. On June 11 the husband left in an automobile, arriving in Reno on June 20, and on August 3, being the day after the expiration of the six weeks' residence, he filed complaint for divorce. A written notice was mailed the wife in Baltimore, and on August 18 she arrived with her sister in Reno by auto, and her husband's attorney prepared an answer, denying his residence in Nevada and his allegations of cruelty. The husband entertained her right royally in Reno, and she left on the 21st, and on the 25th the husband, with his landlady as a witness, secured a

decree of divorce, and the next day he left Nevada, and has never returned.

In September, 1932, the wife brought suit in the District of Columbia for a limited divorce with alimony, and alleged that she had resumed marital relations with her husband in Reno, became pregnant thereby, and suffered a miscarriage, all of which the husband denied. The trial court held that the Nevada decree was entitled to no faith and credit in the District of Columbia, and that the wife was entitled to a limited divorce with alimony.

Upon appeal it was held that the Nevada decree was invalid, because neither party was ever legally domiciled in that state, and because of the collusion of the parties in the Nevada proceeding, in that her answer filed in that court was obtained by fraud of her husband, and therefore was without effect. See 27 C. J. S. 644, sec. 76; *Estate of Bruneman,* 32 Cal. App. (2d) 606, 90 Pac. (2d) 323; 109 A. L. R. 1018, for exhaustive annotation on estoppel.

In regard to the award of alimony in the case at bar, the district court gave plaintiff approximately a half-section of improved land in Scotts Bluff county, and also required defendant to assign to her a school-land contract, all land to be free and clear of encumbrance, with taxes paid for the year 1940.

In this brief defendant's counsel sets out all of the defendant's assets and liabilities as claimed by the defendant, showing the average valuation placed on the land by the witnesses, making a total value for his real estate in Scotts Bluff county of approximately $50,000. In addition, his personal property in Scotts Bluff county is estimated at $4,650, and the cash surrender value of his life insurance policies at $4,235, $400 of personal property in Buffalo county, $200 cash in the bank, or a total of approximately $59,485. In addition, he owns valuable real estate in Buffalo county, against which there is a mortgage of $23,970.28 and taxes on this land of $550; he owes for machinery and irrigation pump some $4,800 or more, and it is claimed that he owes the mother of Virginia the sum of $8,360. Defendant claims

he is required to pay his father $500 a year under the terms of a declaration of trust, his father transferring certain real estate to him about the time of his first marriage, and also to pay $300 a year for life to his stepmother, and he also agreed to pay the premiums on life insurance policies on the life of his father of $243.10 a year, and he claims these payments under the declaration of trust with his father are liens against the land in Scotts Bluff county. Defendant's father is 66 years of age, and would have a life expectancy of ten years, which would require payments of $8,917.20.

The defendant argues strenuously that, if all of these debts and obligations are properly charged against the assets of the defendant, it leaves him with a net worth of but $22,309.51 at the time of trial, and claims that the real estate given to the plaintiff as alimony had a fair cash value at the time of trial of $25,479.

Against this evidence, the plaintiff submits exhibit No. 149 on page 1205 of volume 7 of the bill of exceptions, which was finally received without objection, and which is an application for a loan made by defendant to the Production Credit Association, which sets out an itemized list of all of the defendant's assets and liabilities, and it shows his net worth on December 9, 1935, was $82,690.34.

Even if it is admitted that his net worth was $82,690.34 on December 9, 1935, it would require a patient investigation to carry all these items down and ascertain defendant's net worth as of the date of the decree, March 11, 1941. This is especially true when the statement shows such items as 5,000 head of lambs, listed as worth $35,000; 4,000 bushels of barley, $1,600; 3,000 bushels of oats, $900; 300 tons of alfalfa, $1,800; 4,600 bushels of corn, $2,760. Doubtless all of this personal property was sold years before this decree was entered, and as to whether these items were sold at a loss or a profit would be a matter of careful investigation for the trial court with the assistance of counsel.

Again, at the time of the trial the defendant had $200 cash on hand, while in this financial statement of 1935 he had cash in the bank of $10,000 and good notes due him of $2,000.

The court must also consider the defendant's earnings since the date of the alleged Nevada divorce, and how much, if any, the plaintiff has assisted in earning whatever property the defendant may have accumulated since that date. On the other hand, the defendant has paid to the plaintiff a large number of payments at the rate of $100 a month, and has bought her a bungalow in Scottsbluff, and placed the title in her name, which may have a value of between $4,000 and $5,000 at this time, and while by this decision the Nevada divorce is found to be absolutely void, and she remains his legal wife up to the date the decree granted by the district court for Scotts Bluff county becomes final and effective, yet all of these payments made to her during the period of time between the alleged Nevada divorce and the granting of the Scotts Bluff divorce should be taken into consideration by the district court in granting her alimony in the case.

This court has held that the amount of alimony granted to a wife varies from less than one-fourth of the value of the property to one-half of the value of the property, and many of the Nebraska cases were reviewed in *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771, and in 18 Neb. Law Bulletin, 316, and it is said that there has never been any attempt by this court to fix any rule which would relieve the trial judge of a patient, detailed study of every fact and circumstance relating to each case as it comes on for the allowance of alimony.

This court is satisfied, from an examination of the assets as shown in the evidence, that the award to plaintiff of the large amount of land, including the home place, in Scotts Bluff county, free and clear of all encumbrance, was a larger award than seems to be justified by the evidence which is now before this court, and the same can be said of the amount of the attorneys' fees awarded to the plaintiff's counsel, in the sum of $2,500.

It is found by this court that the alleged Nevada divorce was absolutely void, and of no force and effect. It is further found that the decree of divorce entered in Scotts

Bluff county is valid, and amply justified by the evidence, and is hereby affirmed.

It is found that the amount of the award of alimony to plaintiff and her attorneys' fees are greater than justified by the evidence now before the court. The cause is therefore remanded to the district court to take additional evidence as to the fair value of all the property owned by the parties as of the date of entering the decree, the sources from which it came, the assistance the wife rendered in the accumulation thereof, if other relatives of defendant have definite legal claims on the husband or his property for support that may be considered.

"Although it has been said that permanent alimony in some measure represents compensation to the wife for the husband's breach of his marital obligations, the generally accepted view is that its function is to provide support to the wife." 27 C. J. S. 937, sec. 228.

This court admits that, when additional evidence has been taken, it may then appear that the amount of alimony granted should be increased or decreased, but the trial court must have before it many additional facts to enable it to ascertain the exact financial standing of the parties as of the date the decree was granted in the case at bar, and then award such permanent alimony as the law and the evidence fully warrants under all the circumstances.

It is further ordered that each party pay his own costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART.

ROGER BRENNAN v. STATE OF NEBRASKA

3 N. W. (2d) 217

FILED MARCH 27, 1942. No. 31148.

1. **False Pretenses.** "In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud." *Ketchell v. State*, 36 Neb. 324, 54 N. W. 564.

2. ———. "To constitute the crime of obtaining money under false pretenses, the pretense or pretenses relied on must relate to a past event or an existing fact; any representation or assurance in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute." *Cook v. State*, 71 Neb. 243, 98 N. W. 810.
3. ———. In a prosecution for false pretenses, it is proper to consider the conduct of the defendant, as well as the equivocal language used by him, in determining whether or not the false pretense relates to an existing fact. Evidence in the instant case examined and *held* to be sufficient, within the meaning of the statute, to justify submission to the jury of the question of defendant's intention, by his conduct and language, of a false pretense and the reliance thereon.

ERROR to the district court for Morrill county: CLAIBOURNE G. PERRY, JUDGE. Opinion on motion for rehearing of case reported in 140 Neb. 277. *Former judgment of reversal vacated and judgment of district court affirmed.*

A. J. Kinnersley and *Martin W. Dimery*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

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

MESSMORE, J.

This case was previously reported in 140 Neb. 277, 299 N. W. 525, and is now pending on motion for rehearing.

Defendant (plaintiff in error) was charged in an information with felonious intent to cheat and defraud L. D. Ott, by pretending and representing to Ott that the defendant was the owner of a promissory note in the sum of $110.43, given by Ott to Vern M. Bottom, in payment of a life insurance premium, and further pretending that he was authorized to collect the note and entitled to receive part of the proceeds as such part owner, and that if Ott would pay the face of the note defendant would cancel and surrender the note to Ott. Relying upon these representations, Ott paid the face of the note.

The record discloses that on November 1, 1939, Vern M. Bottom, of Scottsbluff, Nebraska, a life insurance agent, together with Roger Brennan, the defendant, with whom he worked at times in procuring insurance business, sold to L. D. Ott an insurance policy. For payment of the first year's premium on the policy Ott gave a promissory note, made payable to Vern M. Bottom. Bottom called "about the payment of the note," and payment was not made. Later, the defendant called about payment of the note. Ott paid him and asked him when he would receive the note. The defendant said "he would send the money to Mr. Bottom and have him send the note down." Payment was requested in two checks; defendant "wanted it" that way; "He said he wanted $50 that day; he would send the other up to Mr. Bottom." The checks were paid out of Ott's account in the bank. Ott requested of defendant a receipt, and one was given "as payment for note dated Nov. 1st, 1939, given to Roger Brennan and V. M. Bottom for insurance." The note was not returned to Ott, nor a refund made.

In our previous opinion we held:

"A representation, assurance or promise made in relation to a future transaction, however false and fraudulent it may be, does not constitute an element of the offense of obtaining money, goods, chattels or real property by false pretenses.

"Reliance by the owner of property upon a promise by the accused to do something in the future does not constitute a crime under the act."

The foregoing is a correct statement of the law, if we add, provided reliance is *alone* upon a false or fraudulent representation as to a future transaction, or a promise of something to be done in the future.

The question presented is the sufficiency of the evidence to sustain a conviction of the offense. While it is true that Ott said, on cross-examination, that he relied upon the statement made by the defendant that Bottom had the note and he would secure it, and that was all he relied upon, this statement must be considered in the light of all the evidence

and of the immediately preceding questions and answers: Defendant said he "wanted $50 that day; he would send the other up to Mr. Bottom." This evidence, on direct examination, is indicative of the fact that defendant represented that he had an interest in the note to the extent of $50. He went further: He gave a receipt for payment of the note, "given to Roger Brennan and V. M. Bottom for insurance," which indicates that he had an interest in the note.

Analyzing the transaction: The defendant, by the representations made with reference to the note, obtained for himself from Ott $50. Ott received no benefit from it. There is evidence indicating a purpose on the part of defendant, in going to see Ott, to cheat and defraud him out of $50 by pretending to him that he had a right to collect the note, had the amount divided into two checks, gave a receipt for the same, and represented that he would send a part of the money to Bottom, who would send the note to Ott.

Other evidence in the record relates primarily to an accounting, as between Bottom and the defendant, and to a trade made, wherein Bottom was to have all of the commission from the sale of insurance to Ott by paying Brennan money on another insurance contract. This evidence is purely collateral to the evidence with reference to the offense. The evidence of Ott must be considered in its entirety, to determine the effect and purpose of the representations made by defendant with reference to his interest in the note, and whether or not such representations were made and relied upon by Ott. The fact that representations as to future transactions were made and relied upon also does not dispose of the false and fraudulent representation made as to an existing fact. The following authorities are pertinent to the questions presented:

"In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud." *Ketchell v. State*, 36 Neb. 324, 54 N. W. 564; reaffirmed in *Thompson v. State*, 112 Neb. 389, 199 N. W. 806.

"To constitute the crime of obtaining money under false

pretenses, the pretense or pretenses relied on must relate to a past event or an existing fact; any representation or assurance in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute." *Cook v. State,* 71 Neb. 243, 98 N. W. 810. See, also, *Mason v. State,* 99 Neb. 221, 155 N. W. 895.

On the question of reliance on the represented fact, it is not necessary that there shall have been reliance solely on the pretended fact which is the basis of the prosecution. A reliance on the pretended fact, coupled with a reliance upon other facts, does not have the effect of defeating the prosecution. *Wax v. State,* 43 Neb. 18, 61 N. W. 117.

On the question of reliance on pretense, Ott was asked: "Did you believe that he was the owner or part-owner of the note and entitled to collect it? A. Well, I presumed so; yes." On cross-examination the witness was asked: "Now, Mr. Brennan when he came out there and had you give him those two checks—he told you he would secure the note—did he tell you who had it? A. He said Mr. Bottom had the note. Q. And he would secure it for you and have it returned to you? A. Yes. Q. And you relied upon that? A. I relied upon that. Q. And that is all you did rely on, is that right? A. Yes."

It will be noted that the basic subject of these questions on cross-examination was possession of the note as distinguished from ownership. It was artfully followed by a return, in two questions, to the general subject of reliance. The answers to these two questions may not be accepted conclusively as an intention, on the part of the witness, to negative the assumption of ownership in the defendant already expressed by the witness. For the purpose of review, where we are not permitted to weigh, but only to determine, the existence of evidence, it is the duty of this court to reject this statement with reference to reliance as an absolute negative. We are further required to hold that the meaning of these responses, along with other responses, in the light of the entire evidence, was a question for determination by the jury.

If we are to adopt the view that "false pretenses," as used in the statute on which this prosecution is grounded, is dependent upon specific representations as to present or past fact and specific statement as to reliance on such represented fact, the proofs in this case should be held to be insufficient. This is neither the language nor the purpose of the statute, and none of our decisions limits the definition to specific representation, although specific representation has been the basis of the charge in most, if not all, of our reported cases. In the light of the statute and of reason, there is as much basis for a holding that one may be just as guilty of false pretenses by acts and the use of equivocal language as by unequivocal statements.

We conclude that what defendant said and did was sufficient evidence of false pretenses, within the meaning of the statute, to justify the submission of that question, defendant's intention, and the question of whether or not Ott relied on the pretenses, to the jury.

The verdict of the jury and judgment thereon are affirmed, and our former decision is herein vacated and set aside.

AFFIRMED.

SIMMONS, C. J., dissenting.

I cannot agree with the majority opinion.

There appears to be no dispute among us on the law. The addition to the rules made in the majority opinion, "provided reliance is *alone* upon a false or fraudulent representation as to a future transaction, or a promise of something to be done in the future," merely gives emphasis to what has already been stated. By the same token it gives emphasis to the undisputed sworn testimony of the complaining witness that "reliance" was "alone" upon a promise by the defendant "of something to be done in the future," to wit, to get the note from Bottom and return it to Ott. Ott's testimony, as to what he relied upon and "all he relied upon" is not an "isolated" statement in evidence. It is *all the evidence* that was produced on that proposition. This sentence alone in the majority opinion proves the error of the final conclusion.

"To constitute the crime * * * (the opinion states) the pretense or pretenses relied on must relate to a past event or an existing fact * * *." The opinion deals much with pretenses. But the question in this case is not what pretenses were made, but *what false pretenses of "past events or existing facts" were relied upon* by the complaining witness? The error of the majority opinion is that it discusses pretenses and representations and overlooks the necessity that there be proof of reliance on those pretenses. The majority opinion states, and it is the fact, that the complaining witness says that *"all that he relied upon"* was the defendant's promise to secure the note and return it to the witness. After reciting Ott's testimony the majority opinion argues that an opposite answer could have been, should have been, and in effect was given and puts a conclusion in the mind of the witness contrary to his sworn testimony and contrary to the only testimony in the record.

The majority opinion holds that there is evidence in the record of statements of existing facts made by the defendant. Assuming that to be so, where is the evidence that the complaining witness relied upon those statements? He does not say that he relied upon them; he says what was the only statement he did rely upon and what he says he relied upon was not a statement either of "a past event or an existing fact." Brennan made two statements of existing facts to Ott as sworn to by Ott. (1) He, Brennan, wanted $50. (2) Bottom had the note. Both of these statements were true. The majority opinion now affirms a conviction, not upon false pretenses that were relied upon, but upon pretenses that could have been relied upon, *but were not* according to the sworn testimony of the state's complaining witness.

The majority opinion next says: "The defendant, by the representations made with reference to the note, obtained for himself from Ott $50." That is the conclusion made by this court. Where is the evidence to support it? It is not quoted. The evidence is that the representation and the only representation made which got him the money was a

representation that he would get the note and return it to Ott. Even the majority opinion does not claim that that proves the essential element of the offense. The question is, what false representations or pretenses as to a "past event or an existing fact" were made by the defendant by which he "obtained for himself" the $50? Assuming that false representations were made, did he obtain the $50 on those representations? The record denies it without dispute. Ott says he obtained the money because he, Ott, relied on the defendant's promise to get the note and return it and that is *all he did rely upon. Ott ought to know.* He paid the money.

The majority opinion further says: "Analyzing the transaction: The defendant, by the representations made with reference to the note, obtained for himself from Ott $50. Ott received no benefit from it. There is evidence indicating a purpose on the part of defendant, in going to see Ott, to cheat and defraud him out of $50 by pretending to him that he had a right to collect the note, had the amount divided into two checks, gave a receipt for the same, and represented that he would send a part of the money to Bottom, who would send the note to Ott."

I call attention to the fact that the *only* representation here claimed by the majority opinion is that the defendant "would send a part of the money to Bottom, who would send the note to Ott." That relates to a future transaction and is "not within the meaning of the statute." Even the majority opinion does not question that conclusion. The whole labor of the opinion is to try to get away from that fact. Yet here, in "analyzing the transaction," it is admitted.

The majority opinion further says: "The evidence of Ott must be considered in its entirety, to determine the effect and purpose of the representations made by defendant with reference to his interest in the note, and whether or not such representations were made and relied upon by Ott." This quotation again raises the question, who knows what Ott "relied upon?" He heard and considered Brennan's statement "in its entirety;" he knows the "effect" it had on him

and he testifies whether or not such representations were relied upon by him, and he says what he "relied upon." By what power does this court say that he was wrong and does not know what he relied upon and that this court does know what Ott *in his mind* relied upon?

The opinion next says: "The fact that representations as to future transactions were made and relied upon *also* does not dispose of the false and fraudulent representation made as to an existing fact." Assuming that "false and fraudulent representations were made as to an existing fact," that does not constitute all the essential elements of the crime; that "does not dispose" of the law that pretenses of "a past event or existing fact" *must be relied upon.* Incidentally, those representations do not have to be "disposed of," but they do have to be relied upon before the offense is committed. Where is the evidence that Ott relied upon them? The opinion quotes no such evidence for the very obvious reason that *there is no such evidence* to quote. There is no "also" evidence in this case as to reliance upon false and fraudulent representations of "an existing fact." There is a specific denial of "also" evidence.

The majority opinion next says: "A reliance on the pretended fact, coupled with a reliance upon *other facts,* does not have the effect of defeating the prosecution." But again the majority opinion comes face to face with the fact that the complaining witness testified that there were no "other facts" that he relied upon. Labor as it will, the majority opinion cannot escape that undisputed, uncontradicted fact of record. The mere assertion of "also" evidence and "other facts" cannot wipe out the sworn testimony of Ott that there was no such reliance.

What is the rule? "It is not sufficient that there is a false pretense; the owner of the property must rely on it; the pretense must be an effective cause in inducing the owner to part with his property. Therefore, if the owner has knowledge of the truth or does not believe the pretense, *or although believing it, yet parts with the property on some other inducement,* or investigates it and parts with the property, re-

lying entirely on the results of his investigation, the offense has not been committed." 25 C. J. 599. "As a general proposition, to establish the crime of obtaining property by false pretenses, it must be shown that the misrepresentation *was relied upon* by the party to whom it was made, and that it deceived him. In other words, the operation of the representation must be established." 22 Am. Jur. 457, sec. 25. 2 Wharton, Criminal Law (11th ed.) sec. 1441, says: "Where, in Massachusetts, one of the representations proved was that the defendant gave a false name, and where the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods, it was held to have been the duty of the court, either at the time or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant. The same view generally obtains, it being held that there must be causal relation between the pretense and the transfer."

The opinion further quotes a leading question by the state's able prosecutor: "Did you believe that he was the owner or part-owner of the note and entitled to collect it? A. Well, I presumed so; yes." Ott refused to say "Yes" that he "believed" the facts put to him by the state. He "presumed so," and *that presumption is not shown to have been based upon anything which the defendant said or did.* Ott does not say that he relied upon the facts which he "presumed" to be true. Even though he believed what he presumed to be true, yet if he parted "with the property on some other inducement (here the promise to get and return the note) * * * the offense has not been committed." 25 C. J. 599, *supra,* supported by adjudicated cases from a large number of jurisdictions. A conviction for the felony of obtaining money on false pretenses is affirmed because a complaining witness "presumed" something to be true when he says he relied upon an entirely different promise than the "presumed" facts in parting with his money. Ott, by his testimony, eliminated any possible conclusion that he relied upon what he "presumed" to be true. Ott ought to know. He paid the money.

The majority opinion then quotes the testimony of the complaining witness as to what he relied upon and "all he did rely on." This is not "equivocal language" as syllabus point three indicates. The majority opinion then appears to indicate that this court thinks the state's witness did not know what he was talking about, and that this court knows what the answers should have been, and that his answers "may not be accepted conclusively as an intention * * * to negative the assumption of ownership in the defendant." These questions were not asked and the answers were not given to show "an intention, on the part of the witness, to negative (or assert) the assumption of ownership." The questions were asked to determine what the complaining witness relied upon (an essential element in the crime); the questions were clear and the answers clearly and unequivocally stated the fact, and the state did not examine further into that matter. How then can the evidence as to *reliance* be rejected because this court has an idea that the witness had some "intention" as to "the assumption of ownership?" If this statement with "reference to reliance" is to be rejected as an "absolute negative," then where is the evidence that shows that Ott relied upon any statement of the defendant? There is none. Let me repeat, Ott ought to know what he relied upon. He paid the money. Does he know what he relied upon, or do we know what he should have relied upon and *nunc pro tunc* make our views his reliance?

I have examined a number of the cases cited in the texts. The nearest one to the present situation dealing with the question of reliance is that of *State v. Eudaly,* 188 S. W. (Mo.) 110. There the defendant was prosecuted for obtaining certain personal property by means of false pretenses. One of the questions presented was upon what statements of the defendant did the prosecutrix rely in parting with her property. Questions and answers of the prosecuting witness are set out in the opinion as follows: "Q. Now, why did you give him this property? A. Well, he said he didn't want to trade unless he could have possession of it by Satur-

day, and he assured me that he would get the title to his property for me. Q. Is that what induced you to do it? A. Yes, sir. Q. Did you rely upon that? A. Yes, sir." The similarity of the questions and answers in the above and instant cases should be noted. It will be noted that there was no specific exclusion of reliance on other statements as there is in the instant case. The Missouri supreme court held that the reliance "was more upon the promises" and said:

"It is too well settled to justify the citation of authorities that the alleged false pretense must be relied upon and be the effective cause in inducing the other party to part with his property. It is equally well established that a mere promise to do something, relating as it does to a future event, is not within the statute; otherwise our jails and prisons must be greatly enlarged. * * *

"While it is not our province to weigh conflicting evidence, it is our duty to consider the whole record in determining whether there is sufficient evidence to sustain a verdict. It is our opinion that the evidence in this case is not sufficient to disclose either a criminal intent on the part of the defendant, or that the prosecutrix relied upon defendant's statement of ownership in parting with her property. Her remedy lies in a civil action where the issues are altogether different, and where questions all decisive here are of little importance." The supreme court of Missouri reversed the judgment and discharged the defendant.

In *People v. Tompkins*, 1 Parker Cr. Rep. 224 (being a decision of the supreme court of New York), it appears that one Nathan agreed to sell Tompkins 100 shares of stock deliverable and payable the following day. On the next day before transferring the stock Nathan sent for a check and received for answer the statement that Tompkins had sent his check to be certified and would send it to Nathan in ten or fifteen minutes. Relying upon this promise Nathan transferred the stock to Tompkins. The offense charged was that Tompkins by means of false pretenses cheated and defrauded Nathan out of the stock. That court said:

"Upon this state of things, it is perfectly apparent that

Nathan's reliance was upon the promise, that a check would be sent in ten or fifteen minutes, and not solely on the fact that Tompkins had sent his check to be certified. And nothing can be better settled than the rule, that such a promise is not a false pretense under the statute.

"To constitute the crime under the statute, two things are essential: A false representation as to an existing fact, and a reliance upon that representation as true. Both these ingredients are wanting in this case; for the reliance evidently was mainly on the promise to send the check. This in no respect constitutes the crime."

The majority opinion further says: "In the light of the statute and of reason, there is as much basis for a holding that one may be just as guilty of false pretenses by acts and the use of equivocal language as by unequivocal statements." I shall not now quarrel with that statement, provided it is limited to the previous holdings that those acts and facts "must relate to a past event or an existing fact" *and be relied upon.* But again, where is the evidence that they were relied upon?

The net of the majority opinion is that the jury had the right to find that Ott, the state's complaining witness, relied upon pretenses which he, Ott, in unequivocal and undisputed evidence swears that he did not rely upon. This court has no right to brand Ott as an inartful perjurer in order that it may brand Brennan as a felon. This opinion affirms the conviction by rejecting the evidence of the state's only witness on an essential element of the crime and substitutes in lieu thereof this court's construction of the evidence which it thinks would have sustained a conviction had Ott relied upon it, when he swears he *did not.* This court has no right to put conclusions in the mind of a witness that the witness denies were there. Ott, and Ott alone, knows what he relied upon. It is what Ott relied upon, not what the jury or this court think he *might* have relied upon, that determines the question of guilt or innocence.

A conviction of the crime charged cannot be sustained on this record.

PLATTE VALLEY BANK, APPELLANT, V. FRANK W. LEMKE ET AL, APPELLEES: FEDERAL LAND BANK OF OMAHA ET AL., INTERVENERS, APPELLEES.

3 N. W. (2d) 396

FILED APRIL 10, 1942. No. 31183.

1. **Contracts.** Where one party to a business transaction uses language to which it attaches a certain meaning, and that meaning is known to the other party and no objection is made thereto, the language will be construed according to the meaning of the party using it, and it will not be given a secret, different meaning which the other party attached to it, particularly when to do so would lead to a patently false result.
2. **Fraud.** "To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; that he relied on and acted upon it, and was thereby injured." *Scovel v. Isham*, 113 Neb. 238, 202 N. W. 869.
3. **Action.** The doctrine of laches cannot be invoked to defeat justice. It will be applied only where the enforcement of the right asserted will work injustice.
4. ———. Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties.

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

Charles H. Slama and *Peterson & Devoe*, for appellant.

Barry & Kanouff, *Franklin L. Pierce* and *Edward J. Tangney*, *contra.*

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

SIMMONS, C. J.

Two actions brought by plaintiff were consolidated for trial in the district court and on appeal here.

One action was to foreclose a real estate mortgage securing a promissory note for $776 dated May 24, 1934. The second action was to foreclose a chattel mortgage securing a promissory note for $2,682 dated May 24, 1934. The defendants' answers in these actions presented the issues, among others, that there was no consideration and a failure of consideration; that the notes and mortgages were fraudulent and void; and that the mortgage sued on was demanded and accepted in direct violation of the act of congress under which the Federal Land Bank and Federal Farm Mortgage Corporation were created and against public policy and void.

The Federal Land Bank and Federal Farm Mortgage Corporation intervened and alleged substantially facts recited later herein; and prayed that the action be dismissed with prejudice, the notes and mortgages be ordered surrendered and canceled, held void and of no effect, and that plaintiff be enjoined from asserting any claim against the defendants thereon. Plaintiff for answer to the petition in intervention and reply to defendants' answer set out its theory of the transaction and averred its proper conduct and right to recover.

Trial was had and the court found "generally for the interveners and against the plaintiff; that the allegations of interveners' petitions of intervention are true; that the notes and mortgages described in plaintiff's petition are fraudulent and void; and that plaintiff has no cause of action against the defendants on said notes and mortgages, or either of them." Plaintiff's petitions were dismissed with prejudice; the notes and mortgages were ordered surrendered and canceled and plaintiff was enjoined from asserting any claim thereon against the Lemkes. Plaintiff appeals.

The facts of these cases may be summarized as follows: In October, 1933, defendant Lemke was the owner of a quarter-section of land in Saunders county, an undivided one-third interest in a 27-acre tract, and personal property. The quarter-section of land was mortgaged to an insurance

company for $10,000; payments of interest were in default, and the mortgage subject to foreclosure. Lemke also owed the plaintiff some $6,800 represented by different notes and secured by a chattel mortgage on the personal property, by a real estate mortgage junior to the insurance loan on the quarter-section, and by a real estate mortgage on the undivided interest in the small tract. Lemke also owed a lumber company some $1,900 secured also by a junior mortgage on the quarter-section. Lemke was unable to meet his obligations.

One Emil E. Wolf was cashier and representative of the plaintiff throughout these transactions. He also appears to have represented the lumber company. Wolf was pressing Lemke for payment and suggested that Lemke apply for a federal farm loan in the sum of $5,000. Lemke testified that Wolf told him they (Lemke's creditors) would have to take what they could get. Lemke applied for the loan, reciting in the application that his indebtedness to the bank "can be compromised and interest thrown off." Later, in November, 1933, Lemke, at Wolf's suggestion, applied for $15,500. Later, Wolf told Lemke that he could get $14,000 and "it had to pay all debts." Wolf tried to get the land bank to raise this to $15,000. By letter dated February 24, 1934, the land bank notified Wolf that the amount of $14,000 recommended (namely $9,000 land bank and $5,000 land bank commissioner loans) had been reconsidered and no changes made in the amounts, "conditional that the proceeds of both loans pay in full all of applicant's indebtedness."

Lemke testified that early in March Wolf told him that the land bank would not increase the loan; advised Lemke to accept the $14,000 loan; and said that the bank and the lumber company had agreed on how much each was to get, that his notes to the bank were past due and the banking department would not allow them to be carried that way, that it would take several months for the new loan to go through; and asked for new notes and mortgages, which Lemke and wife signed with the amounts in blank. Wolf

testified that Lemke agreed to give new notes for the balance. This Lemke denies. Wolf testified that he took the new notes and mortgages "after the loan was negotiated." Wolf further testified that the notes and mortgages in suit were signed, acknowledged and delivered, with amounts filled in, on the date shown on their face, to wit, May 24, 1934, which was the day the transaction was closed except as hereinafter set out.

The land bank and commissioner mortgages were executed on April 20, 1934, and acknowledged before Wolf as a notary. The abstracts were extended, the requirements of the land bank announced, and on May 24, 1934, the new loan was ready to close in the office of the land bank representative at Wahoo. Wolf delivered to the land bank releases of all the recorded mortgages and the bank's notes marked "paid May 24, 1934." Lemke also gave them an affidavit that the proceeds of the land bank loans paid his indebtedness in full. At that time a detailed affidavit was submitted to Wolf for signature; he demurred to signing it, but on the following day executed and delivered the affidavit to the land bank referring to the $6,800 indebtedness to his bank, to the mortgage securing it, to the lumber company note and mortgage, and specifically stating "that the said mortgages, and each of them, the terms and conditions thereof, are fully satisfied and that said mortgages, and each of them, are released and discharged of record. And further affiant says that the sum of $6,800 mentioned in said application as owing to the Bank of Morse Bluff (predecessor in name of plaintiff bank) is fully paid and satisfied." The land bank was not then advancing cash on its loans but delivering its bonds. An order for the delivery of the bonds to the plaintiff bank was then issued. It further appears that the bonds were not actually delivered to plaintiff bank but a month or so later plaintiff bank received credit from an Omaha bank. The plaintiff bank, however, ran credits through to Lemke as of May 24 indicating that they knew at that time how much they would receive on the bonds. On July 6, 1934, six and one-half weeks later, the chattel and real estate mortgages here in suit were placed of record.

Lemke testified that all of his debts to the plaintiff bank were to be paid and satisfied from the proceeds of this loan and that Wolf agreed to that basis of settlement. The facts of the transaction support that testimony, although Wolf testified that he told Lemke that neither he nor the lumber company would so accept the payment. However, it is undisputed that the land bank at all times considered that its loan was to pay all of Lemke's debts; that it would not have made the loan under any other condition; that it did not know of the new notes and mortgages to plaintiff bank and would not have closed the loan had it known of those instruments; that it issued the order for delivery of the bonds only after receiving Wolf's affidavit that the indebtedness to his bank was paid and acted in reliance thereon; and that Wolf knew that to be the position of the land bank. Wolf, however, took the land bank money with an undisclosed intention to hold Lemke for the balance. He was asked on cross-examination: "Q. And you knew that the Federal Land Bank loan would not go through and the Platte Valley Bank would not receive the cash or bonds turned over to it if Mr. Roberts or the Federal Land Bank knew you had taken renewal notes? A. I didn't think anything about that. * * * Q. Well, you didn't at any time tell Mr. Roberts or the Federal Land Bank that you had taken new notes and mortgages? A. They didn't ask me." On re-cross-examination he testified: "Q. Then as far as Lemke was concerned you intended to collect the balance of his indebtedness all the time? A. Yes, sir."

Wolf testified that the original indebtedness was paid by the proceeds of the land bank loan, "some checks for hogs" and "the balance by giving new notes." He was asked: "Q. And at the time you made this affidavit you were still claiming that Mr. Lemke was indebted to you for the amount of the notes in suit? A. He was by renewal; yes."

On behalf of the land bank the evidence shows that, if the plaintiff's claim is established and the foreclosure of the chattels allowed, Lemke will be unable to continue his farming operations and unable to meet his obligations to the bank.

One other bit of evidence should be mentioned. In the winter of 1938-1939 Wolf attempted to get Lemke to sell his land to one of the lumber company men. Lemke refused. Wolf testified that at that time Lemke said he would not receive enough from the sale to pay the land bank, the plaintiff bank and the lumber company. Lemke denies this latter statement.

The net of this transaction is, if plaintiff's position is to be sustained, that it has received a part of the proceeds of the land bank loan and a reinstatement substantially to its prior position as a secured creditor of the Lemkes.

Plaintiff vigorously assails the finding and decree of the trial court. Plaintiff argues that, in order for a representation to be fraudulent, one of its essential elements must be a statement of fact which is untrue; that the Wolf affidavit of May 25, 1934, was true; that the bank's interest in and claim against the property had been extinguished and satisfied by the acceptance of a part of the proceeds of the loan together with the notes and mortgages which are involved in this suit. This argument ignores the statement in the last sentence of the affidavit "that the sum of $6,800 * * * is fully paid and satisfied." Such refinement in the meaning of language and secret construction of words will not be accepted when it leads to a patently false result. This record is replete with evidence that Wolfe knew the construction which the land bank put upon the words used in the correspondence and affidavit, and he knew that they thought he agreed with them in that construction. "Paid in full" as used in this record meant that the debt was extinguished in fact and not paid by "renewal" notes and mortgages, secretly secured, the enforcement of which would result in a nullification of the condition upon which the loan, to Wolf's knowledge, was made. The affidavit was prepared and submitted to him. Wolf knew that the loan would not be consummated if the affidavit was not signed. Wolf desired that the loan be made. He signed the affidavit without questioning the construction. He accepted the money which the affidavit helped him to secure. He cannot now success-

fully assert that the language had a different meaning than that intended by the land bank. Section 20-1217, Comp. St. 1929, provides that, "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

Plaintiff next argues, that even though there were false representations, interveners cannot recover because they have not been damaged. This court has said: "To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; that he relied on and acted upon it, and was thereby injured." *Scovel v. Isham*, 113 Neb. 238, 202 N. W. 869.

Plaintiff argues that interveners may foreclose and in due time secure a sale of the property, and plaintiff says it will bid in the property up to $16,000 and therefore interveners are not damaged. Interveners parted with their money on the faith of plaintiff's representations. That they have been injured, and will be injured if plaintiff prevails, is amply demonstrated by this record.

Plaintiff next urges that interveners are guilty of laches. We shall not determine the question of whether or not this issue was properly presented by the pleadings. The notes upon which plaintiff sues are dated May 24, 1934, payable one year thereafter. Plaintiff is a commercial banking corporation. It alleges that it has obligations legally binding and payable and secured by mortgages. Yet this record establishes that the plaintiff waited four and one-half years or until November, 1939, before it attempted either by personal solicitation or court action to collect the alleged debt. During that time it permitted the statute of limitations to operate against action on one note arising out of this same transaction. It knew the facts of this transaction. It has not changed its position. Can it be heard in a plea of laches

against the defendants and interveners? We think not. "The doctrine cannot be invoked to defeat justice, and it will be applied only where the enforcement of the right asserted would work injustice." 21 C. J. 214. The defense of laches is not favored. It is only in those cases where the party has been guilty of inexcusable negligence in enforcing a right that the rule has been applied. *Langdon v. Langdon*, 104 Neb. 619, 178 N. W. 178. Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties. *Geiss v. Trinity Lutheran Church Congregation*, 119 Neb. 745, 230 N. W. 658; *Schurman v. Pegau*, 136 Neb. 628, 286 N. W. 921.

The judgment of the trial court is

AFFIRMED.

GAETANA TARASCIO ET AL., APPELLEES, V. SAMUEL MANCUSO, APPELLANT.

3 N. W. (2d) 400

FILED APRIL 10, 1942. No. 31268.

1. **Payment.** "A payment or other performance by a third person accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it." Restatement, Contracts, sec. 421.
2. ———. "Where money is paid to another under the influence of mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payor that the fact was untrue, an action will lie to recover it back." *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.*, 105 Neb. 321, 180 N. W. 588.

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

Thomas E. Conley and *George Evens*, for appellant.

Samuel P. Caniglia, contra.

Morsman & Maxwell and *Kennedy, Holland, DeLacy & Svoboda, amici curiæ.*

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

SIMMONS, C. J.

This is an action brought to declare a mortgage null and void. Defendant by cross-petition prays for the foreclosure of the mortgage. The trial court held that the mortgage was null and void, canceled it of record, and gave plaintiffs a judgment of recovery for all payments made within the period of the statute of limitations.

Defendant on appeal assigns many errors, but by argument confines the question to that of whether or not the note and mortgage are enforceable obligations. We determine that question.

September 24, 1927, the defendant entered into a contract to sell to Andrea and Gaetana Tarascio a residence property in the city of Omaha for $1,500 payable $20 monthly. By 1933 the Tarascios were indebted to the defendant in the amount of approximately $1,400, payments were delinquent, and defendant was insisting upon payment or foreclosure. After discussing the matter with Mr. Tarascio, defendant went to the office of the Home Owners Loan Corporation to see what could be done about refinancing. The result was that on August 11, 1933, Mr. Tarascio made application for a loan at the instigation of the defendant. This application recited the indebtedness to the defendant of $1,400 and in addition delinquent taxes. Defendant testified, in effect, that upon his first call to the Home Owners Loan Corporation office he was told he could take a second mortgage. However, it appears that this statement was made to him in this first conversation when he was asking about the "rules" and before any application was submitted to the Home Owners Loan Corporation by the Tarascios and before that corporation had made any investigation of the property or the condition of the debtor. We find no reference to any subsequent discussion or mention of a second

mortgage and the Home Owners Loan Corporation has no record of any such notice or understanding.

However, there was received in evidence a "loan agreement" on a Home Owners Loan Corporation form, which referred to the property, to the amount due on the loan, and to the delinquent payments and unpaid taxes. Written in a blank space on the form are these words: "I will accept $685 in full settlement." Immediately thereunder is the signature of the defendant. Defendant testified that he signed this on August 13, 1933, two days after the application was made.

There is no direct evidence as to how the $685 was arrived at. However, defendant offered the Tarascio application for a loan in evidence without qualification. On the application after a reference to the "Mancuso balance, $1,400" in writing are the figures "685"; below that "Ins. 25.00; tax 125.00; reprs. 200.00." These figures total $1,035.

It further appears that the total loan finally approved by the Home Owners Loan Corporation was $1,040. The settlement sheet dated December 14, 1933, shows "advanced to lien holders Samuel Mancuso" bonds and accrued interest total $661.72, cash $16.78, total $678.50 "Paid to mortgagee." Other disbursements including taxes, repairs $200, expenses of the loan, etc., total $361.50.

December 20, 1933, Mr. and Mrs. Tarascio executed, acknowledged and delivered a mortgage to the defendant to secure a note "of even date" for $840 (the note is dated December 22, 1933), reciting that it was subject to a first mortgage in favor of "Home Owners Loan Corporation." The Home Owners Loan Corporation had no knowledge of this note and mortgage.

December 26, 1933, the defendant signed a "Lien holder" receipt to the corporation reciting that he had received "authorization for delivery of Home Owners Loan Corporation bonds in the amount of $661.72 and $16.78 in cash in full payment of amount due the undersigned as lien holder in the matter of the loan of Andrea Tarascio and Gaetana Tarascio * * * refunded by the above corporation."

The next day, December 27, 1933, the mortgage in question was recorded. The defendant as of January 1, 1934, furnished the Tarascios a statement showing that he figured that there was due $1,418.09 on the contract. He then discounted the $650 in bonds to their "present day value at the rate of $83.50" and arrived at a balance due him of $850.77 shown on the statement as $840 second mortgage and $10.77 "Balance still remaining due." There is no question but what the note and mortgage in this action were given for the amount which the defendant calculated would still be owing to him after he received and discounted the Home Owners Loan Corporation bonds.

There is also evidence in the record that the regulations of the Home Owners Loan Corporation provided in effect that a second mortgage for any unpaid balance could not be taken in a refinancing operation without the approval of the home office. There is no evidence that this regulation was brought to the attention of the defendant. We do not rest the decision in any way upon that feature of the case, and it will not be discussed.

It is patent from this record, and we so find, that defendant agreed to accept $685 in full settlement of the indebtedness on the property. The loan settlement of December 14, 1933, showed that the defendant would receive bonds of the face value of $650. He calculated "present day value" of these bonds at $542.75 and determined that the Tarascios still owed him $840. He then required the Tarascios to execute and deliver the note and mortgage involved in this action. He did not advise the Home Owners Loan Corporation of that fact. Having that in his possession he then accepted from and receipted to the Home Owners Loan Corporation for the delivery of said bonds "in full payment of the amount due" him "as lien holder in the matter of the loan * * * refunded" by the corporation. He then recorded his mortgage and over a period of years collected on the note it was given to secure.

The rule is stated in Restatement, Contracts, sec. 421: "A payment or other performance by a third person, accept-

ed by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it." The illustration is: "A owes B a liquidated undisputed debt of $100. C pays B $50 in satisfaction of A's debt, and A accepts the payment as satisfaction. The payment, being made by a third person, discharges the debt."

"As heretofore shown, the prevailing rule is that an accord and satisfaction between the creditor and a stranger is available as a defense to the debtor if adopted and ratified by him. The question therefore arises as to whether part payment by a stranger may operate as a valid accord and satisfaction. The view that such a part payment may so operate is another well-settled exception to and method of circumventing the general rule as regards part payments of liquidated demands, and it is settled that if part payment is made by a third person at the request and with the authority of the debtor, and is received by the creditor in full satisfaction, there is a good accord and satisfaction, as the creditor receives a benefit in securing the payment by such third person; otherwise, due to the financial condition of the debtor, he may not have been able to secure payment of any part of the debt." 1 Am. Jur. 247, sec. 55. "It cannot be doubted that if what is given by the stranger is accepted in satisfaction by the creditor and his act is authorized or subsequently ratified by the debtor there will be a complete accord and satisfaction of the debt or demand." 1 C. J. 535. See, also, 1 C. J. S. 482, sec. 12. "Payment by a third person of a sum less than the amount due, with the understanding that it shall be in full satisfaction thereof, is a valid accord and satisfaction, and no action will lie against the debtor to recover the balance. In such case there is a new consideration from a new party, and the general rule that the receipt of a smaller sum is not a good accord and satisfaction of a larger one does not apply." 1 C. J. 545.

In *Chicago, R. I. & P. R. Co. v. Brown,* 70 Neb. 696, 97 N. W. 1038, this court held: "An accord, even between the plaintiff and a third party, as to the subject-matter of an

action, and a satisfaction moving from such third party to the plaintiff, are available in bar of the action, if the defendant has authorized or ratified the settlement."

It necessarily follows that the debt of the Tarascios to the defendant represented by the note and mortgage was fully satisfied by the payment to the defendant from the Home Owners Loan Corporation.

Defendant also assigns as error the judgment against him for the recovery of payments made by plaintiff which are not barred by the statute of limitations. This court has held: "Where money is paid to another under the influence of mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payor that the fact was untrue, an action will lie to recover it back." *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.*, 105 Neb. 321, 180 N. W. 588. See 48 C. J. 759; 10 C. J. S. 1011, sec. 467 h; 8 Am. Jur. 495, sec. 854.

Under the facts of this case, the judgment of the trial court allowing a recovery of payments made was proper.

The judgment of the trial court is

AFFIRMED.

JAMES W. MURPHY, TRUSTEE, APPELLANT, V. OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE.

3 N. W. (2d) 403

FILED APRIL 10, 1942. No. 31308.

1. **Payment.** "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it." Restatement, Contracts, sec. 421.
2. **Contracts.** Under the facts set out in the opinion, it is held that the notes and second mortgages given to secure them are the valid obligations of the mortgagors.

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

S. L. Winters, for appellant.

Morsman & Maxwell, contra.

Kennedy, Holland, DeLacy & Svoboda, amici curiæ.

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

SIMMONS, C. J.

Plaintiff sues to cancel some 18 notes and the mortgages securing them, given to the defendant by 18 several mortgagors, and for an accounting and to recover amounts paid thereon. The trial court dismissed the plaintiff's petition. Plaintiff appeals.

Plaintiff sues as assignee of the claims of the several mortgagors. He alleges in effect that each of the 18 mortgagors were indebted to the defendant on notes secured by mortgages; that they were delinquent in their payments and facing foreclosure; that the mortgagors applied to the Home Owners Loan Corporation (hereinafter called the corporation) to refinance their loans; that the defendant agreed with the corporation to accept certain amounts in full payment of their indebtedness; that defendant, "in violation of its agreement * * * and without the knowledge and consent" of the corporation, required the mortgagors, and they "reluctantly agreed," to execute to defendant notes and mortgages for additional amounts to those which defendant had agreed to accept from the corporation, before defendant would complete the transaction; and that the corporation in reliance upon the defendant's promise to accept the lesser amount loaned to the mortgagors the amount fixed in the agreements.

Defendant by answer admitted the original indebtedness of the mortgagors to it, the application to the corporation for new loans, and the second mortgages given to it; and alleged that they were freely executed and taken by the defendant with full knowledge of the corporation. Defend-

ant further as to each mortgage set out the payments that had been made to it and pleaded the statute of limitations.

There were three parties to the transactions resulting in the refinancing of each of these loans—the mortgagors, the defendant, and the corporation.

The procedure followed in these cases was generally as follows: When a home owner desired to refinance his loan with the corporation, he consulted with the defendant and the defendant determined whether or not it would accept bonds of the corporation in payment of the amount owing to it. If so, it advised the corporation of that fact on a form furnished by the corporation entitled "Mortgagee's Consent to Take Bonds." So far as these 18 loans are concerned, such a consent agreement was signed in every instance and taken by the borrower to the corporation or sent to the corporation. The corporation then determined its course. In the 18 cases here involved the corporation was obviously unwilling to make full refunding in its bonds. The evidence is that it advised the defendant of what it would do and consultation was had. The defendant then determined what it would do. The corporation determined the conditions and the amount of the loan it would make. Where the conclusion was reached by the defendant that it would take payment of a part of its debt in the corporation's bonds and some or all of the remainder in a note secured by a second mortgage, the borrower was advised of that fact and the second mortgage was made, executed and delivered to the defendant by the borrower, *and the corporation was advised of that fact.* In 15 of the 18 cases here involved there is indorsed on the "Mortgagee's Consent to Take Bonds" (which had been given to the corporation prior thereto and was in its possession) an agreement of the defendant to accept corporation bonds for a stated part of the debt owing it "and second mortgage" for a stated amount.

In 17 of the 18 cases here involved (including the three not covered by indorsements on the "Mortgagee's Consent") the defendant by separate letters wrote the corporation, referring to its offer to advance a stated amount in

bonds, and advised the corporation that the borrower had given it a second mortgage, stating the amount thereof, the monthly payments, the interest rate; that the defendant's mortgage recited that it was subject to a mortgage to the corporation and would not be filed for record until after the corporation's mortgage was recorded. In some of these letters the defendant demonstrated the amount of reduction that would be had by the borrower in his stated monthly payments. In the one instance where such a letter does not appear in the record the indorsement appears upon the "Mortgagee's Consent" whereby the defendant agrees to accept a stated amount in bonds and a stated amount by "second mortgage."

In every instance the mortgages by the borrowers (the plaintiff's assignors) to the corporation are dated *subsequent* to the letters and indorsements above referred to by which the corporation was notified that defendant had taken second mortgages for a determined amount in addition to the bonds it expected to receive from the corporation.

After the new mortgages to the corporation and the defendant had been made (and in 16 of the 18 cases after the mortgages to the corporation had been recorded) the defendant in each of the 18 cases executed a receipt to the corporation, on its form "of authorization for delivery of Home Owners Loan Corporation bonds in the amount of $——, accrued interest on bonds $—— and $—— in cash in full payment of amount due the undersigned as lien holder in the matter of the loan of ———, refunded by the above corporation." (In each instance the blanks were filled in for the particular loan.) The plaintiff offered these receipts in evidence. The defendant objected that they were immaterial. The trial court sustained the objection. Plaintiff assigns that as error. In order that we may have the entire factual condition before us, we will consider that the receipts are in evidence for whatever value they may have in reaching a conclusion in the situation presented by this record.

Certain other facts should be mentioned. Early in the

history of the corporation and before any of these 18 cases had gone beyond the initial stages, the defendant by letter inquired of the corporation as to the taking of second mortgages and was advised, through channels, by the corporation's general counsel, that the corporation had "no means of preventing" it; that if the corporation could not advance the full amount of the indebtedness the "mortgagee may take a second" for the excess, the corporation's managers having been instructed, however, "not to negotiate such loans unless the second mortgage * * * is so arranged * * * that the home owner may reasonably be expected" to meet his obligations. The plaintiff introduced rules, regulations and instructions which he claims superseded this letter, about which more will be said later.

While all of them did not testify, it is a fair conclusion that the borrowers (plaintiff's assignors) were all in financial difficulty; that they might not have known of the indorsements on the "Mortgagee's Consent" agreements nor of the receipts by which the defendant received the corporation bonds. It, however, is clearly established that they all knew they were refinancing their delinquent indebtedness on their homes; that the corporation had a first mortgage, the amount thereof, and that the proceeds (after agreed deductions) were to be paid to the defendant; that the defendant had a second mortgage, the amount thereof, and that they were obligated on both mortgages which they had executed in payment of the prior indebtedness to the defendant.

These transactions were all handled in the Omaha office of the corporation. It is clear that the corporation, so far as its officers in its Omaha office are concerned, before the mortgages to it were executed, had full knowledge of the fact that defendant had taken these second mortgages, that they cooperated with the defendant in working out the problem of the delinquent mortgagors (plaintiff's assignors) and accepted their mortgages and paid out their bonds and cash and closed the transaction with full knowledge of the fact that the borrowers had executed and delivered these new

obligations and securities to the defendant. In three of these cases after the transactions were closed the corporation asked the defendant to waive its priority rights under its second mortgage in order that advances might be made for the reconditioning of the property.

A considerable part of the evidence in this record came from the files of the corporation and was produced by the officer in charge. He testified that "tons" of their records had been destroyed and that there was nothing in the file which he had in court showing that the corporation consented to the second mortgage. The record establishes that there was no fraud, no duress, no overreaching, no secrecy, no collusion, no withholding of information, and no misleading information. It shows a full disclosure of facts, the open fair dealing of all parties at arms' length and in good faith. There is no merit in plaintiff's contention that defendant violated its agreement with the corporation, nor did it act without the knowledge and consent of the corporation. On the contrary, it kept its agreements and made full disclosures to the corporation and acted in good faith.

In *Tarascio v. Mancuso, ante,* p. 225, 3 N. W. (2d) 400, released herewith, we cited with approval Restatement, Contracts, sec. 421, that "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it." We rest this decision on this sound principle of contract law, which is not only an authority in its own right, but has had the approval of other recognized authorities. 6 Williston, Contracts (Rev. ed.) 5224. See *Grouf v. State Nat. Bank of St. Louis,* 76 Fed. (2d) 726, where the rule was applied to a payment made "in part satisfaction." See, also, *MacDonald v. Williams,* 121 W. Va. 580, 5 S. E. (2d) 528. Applying that rule to the instant case, the defendant (creditor) accepted the corporation's bonds in partial satisfaction of its claims, and in accordance with the terms on which the third person offered them. The original debt of the borrowers (plaintiff's assignors) was discharged to that extent but not beyond that limitation.

Other jurisdictions have decided similar situations upon the basis of public policy. In doing so they have arrived at the same conclusion that we do on the basis of principles of contract law. See *Bay City Bank v. White,* 283 Mich. 267, 277 N. W. 888; *Ridge Investment Corporation v. Nicolosi,* 15 N. J. Misc. 569, 193 Atl. 710; *Ganchoff v. Bullock,* 234 Wis. 613, 291 N. W. 837; *Dayton Mtg. & Investment Co. v. Theis,* 62 Ohio App. 169, 23 N. E. (2d) 511; *Shiver v. Liberty Building-Loan Ass'n,* 16 Cal. (2d) 296, 106 Pac. (2d) 4; *Lavery v. Rizza,* 126 Conn. 132, 9 Atl. (2d) 819.

A number of appellate courts have held that "secret" second mortgages given in refinancing arrangements with the Home Owners Loan Corporation are void and unenforceable. Many of these are collected in *McAllister v. Drapeau,* 14 Cal. (2d) 102, 92 Pac. (2d) 911. However, that court cited *Bay City Bank v. White, supra,* and *Ridge Investment Corporation v. Nicolosi, supra,* "that second liens taken by the creditor with the full knowledge of the H.O.L.C. are valid," and that the two classes of cases are "not in conflict." The superior court of Pennsylvania in *Anderson v. Horst,* 132 Pa. Super. 140, 200 Atl. 721, took the same position, as did the supreme court of New Jersey (by quotation) in *Markowitz v. Berg,* 125 N. J. Eq. 56, 4 Atl. (2d) 410. See, also, *Keystone Bank v. Booth,* 334 Pa. St. 545, 6 Atl. (2d) 417. The supreme court of Michigan recognized the distinction in *Meek v. Wilson,* 283 Mich. 679, 278 N. W. 731, and *Geel v. Valiquett,* 292 Mich. 1, 289 N. W. 306. Likewise, Connecticut in *Lavery v. Rizza, supra,* and Wisconsin in *Ganchoff v. Bullock, supra.* See *Dayton Mtg. & Investment Co. v. Theis, supra; Schram v. Welton,* 35 Fed. Supp. 889; *Johnstown Bank v. Runnels,* 65 Ohio App. 504, 30 N. E. (2d) 709; *Local Federal Savings & Loan Ass'n v. Harris,* 188 Okla. 214, 107 Pac. (2d) 1012. Other elements, not involved here, enter into some of the decisions, but where the question is presented which we are here considering the courts have preponderately held that, where there has been a full disclosure to the Home Owners Loan Corporation of the taking of the evidences of debt and the second mortgages

to secure them, and the Home Owners Loan Corporation has, with knowledge of that fact, consummated its new loan, the new evidence of debt and security to the original mortgagee are valid and enforceable.

There remain two matters for determination. The receipt form used here is substantially the same as that used in *Tarascio v. Mancuso, supra,* wherein we held that the legal effect of the receipt, under the facts of that case, was the payment of the debt evidenced by the second mortgage. In the *Tarascio* case the defendant had agreed with the corporation to accept part payment of his debt as payment in full; he made no reservations of the right to take a note and "second mortgage" for the balance of his debt; he made no disclosure to the Home Owners Loan Corporation of the fact that he had taken and held the second mortgage; he accepted the bonds of a third party as payment in full of his obligation and we enforced the legal effect of his act.

Here, as in the *Tarascio* case, the receipts must be construed in the light of what preceded their issuance. Here, there was an agreement to accept bonds plus a note secured by a second mortgage in payment of the existing debt; here the mortgagor knew that he was to have two smaller obligations where before he had had one larger obligation; here, the third party, advancing its bonds to refund the debt, knew that the second mortgage had been given and paid out its bonds with full knowledge of that fact. The defendant clearly signed the receipt as payment in full of that part of its claims for which it had agreed to accept bonds, to wit, that part not represented by the new note and second mortgage. The whole transaction leading up to the issuance of the receipts for the bond orders in these cases requires that the receipts for the bonds be construed as being payment in full of all that part of the debt referred to therein not represented by the new obligation and second mortgage securing it. The new obligations and second mortgages securing them remain valid subsisting obligations so far as these receipts are concerned.

There were introduced in evidence, over objection, many

of the instructions, rules, and regulations of the corporation. Most, if not all, of them will be found set out several times in the cases cited herein. There is disagreement as to what these various documents mean, upon whom and when they were applicable. Plaintiff contends that they should be construed that the consent of the corporation to the giving of the second mortgage was necessary; that only the state manager could consent for the corporation; and that without the consent of the state manager the mortgages are null and void. For instance, plaintiff quotes one rule that "In the closing of loans the final approval must be made personally by the state manager." From that and other provisions he argues that knowledge of the second mortgages had by the officers of the corporation who handled the loan, negotiated its terms, prepared the papers and paid out the corporation's bonds and funds was not sufficient to give validity to the second mortgages, and that validity depended upon the approval of the state manager. Other courts, whose decisions we have examined, have not so construed the rules and regulations, nor applied the rule for which plaintiff contends. We shall not attempt to chart a path through these various documents to determine that question.

There is no proof that the state manager did not give his consent to these second mortgages. The evidence is that there was nothing in the file which the witness had in court to show that he consented. This, fairly interpreted, means that the witness found no written instrument in the files which he construed to state that fact. This does not establish a lack of consent of the state manager (assuming but not deciding that officer's consent to be necessary). There is no showing that the testimony of the *then* state manager could not be secured. This record does not contain the settlement sheets or other evidence upon which the state manager acted. In the absence of evidence to the contrary, we assume that the responsible officials of the corporation performed their duties properly and as required by law. Assuming again, as plaintiff contends, that personal approval of the

state manager was necessary before the loans could be closed, then that personal approval is established by the evidence that the loans were closed. Certainly in approving the loan the state manager, in order that he act intelligently, had to have knowledge of the preliminary proceedings in the negotiating of the loan, including the showing, contained in the record *in every instance,* that the defendant had taken a second mortgage for a part of its claim. Under these circumstances, approval of the corporation's loan carries with it consent to and approval of the second mortgage.

The public policy argument is that it was the primary purpose of the congress in creating the corporation to save homes to home owners. With that statement all of the decisions agree. However, the congress likewise recognized the rights of the creditor, as did the corporation. He could not be compelled to accept less than his debt, nor to accept the corporation's bonds unless he elected to do so. That was a public policy in accord with sound contract law and constitutional principles.

In these instances the debtors, the creditor and the corporation, working together, solved the problem of the debtors. The contracts by which that was done are valid.

The judgment of the district court is

AFFIRMED.

WILLIAM E. JOHNSON, APPELLANT, V. RAY C. JOHNSON, AUDITOR, ET AL., APPELLEES.
3 N. W. (2d) 414

FILED APRIL 10, 1942. No. 31296.

1. **Officers.** A public officer must perform all the duties of his office for the compensation allowed by law and if none is authorized the services are gratuitous.
2. **States.** The lieutenant governor of Nebraska is not entitled to the emoluments of the governor's office on account of the governor's absence from the state unless the absence creates a disability which prevents the governor from holding the office.

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

Davis & Stubbs and *James N. Ackerman,* for appellant.

Walter R. Johnson, Attorney General, and *Edwin Vail, contra.*

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

ROSE, J.

This is a proceeding instituted by William E. Johnson, lieutenant governor, to collect a claim of $1,386.68 in emoluments for performing the duties of governor at enumerated intervals during the biennium beginning January 5, 1939, while R. L. Cochran, governor, was absent from the state. Each officer had previously drawn his full salary for the entire biennium, but plaintiff claims the right to additional compensation, making his salary equivalent to that of the governor, for periods during which the governor was absent from the state. The governor did not abdicate his office temporarily while absent but was in communication with his private secretary therein and could have returned to the state capitol within 24 hours. The governor's absences were occasioned by public duties or by personal business or recreation and did not interfere with public interests beyond mere delay, if any, in official action.

By duly-verified voucher in proper form reciting absences, dates and proportionate shares of the salary for the office of governor, plaintiff presented his claim to the auditor of public accounts and demanded a warrant on the state treasurer for payment. The auditor refused to approve any part of the claim and the secretary of state joined in that decision. There was an appeal to the district court for Lancaster county where William E. Johnson was plaintiff and the state of Nebraska, Ray C. Johnson, auditor, and Frank Marsh, secretary of state, were defendants.

In the district court defendants resisted the claim as one not authorized by law. At the trial below there was no ma-

terial dispute over the facts which were stipulated by the parties. From a judgment in favor of defendants, plaintiff appealed to the supreme court.

The claim of the lieutenant governor is based on the following provisions of the Constitution:

"In case of the death, impeachment and notice thereof to the accused, failure to qualify, resignation, absence from the state, or other disability of the governor, the powers, duties and emoluments of the office for the residue of the term or until the disability shall be removed shall devolve upon the lieutenant governor." Const. art IV, sec. 16.

Under these provisions it is argued on behalf of plaintiff that the framers of the Constitution intended to provide additional compensation for the lieutenant governor for service performed by him as governor during the absences of the governor from the state; that during such absences the lieutenant governor was *de jure* governor; that the powers, duties and emoluments of the governor devolved on the lieutenant governor during the former's absences. These propositions are argued at length with references to court decisions and text-books. In ruling on the claim of plaintiff, other provisions of the Constitution should be considered under the Nebraska system of government. The salary of the governor is fixed by the Constitution at $7,500 a year. Const. art. XVII, sec. 3. The salary of the lieutenant governor is twice the salary of a state senator. Const. art. XVII, sec. 3. The governor and lieutenant governor shall receive such salaries as are provided by law. Const. art. IV, sec. 25. The salary of a state officer was intended for a qualified and acting incumbent of a particular office. The salary fixed by the Constitution for the compensation of the governor and appropriated by law for that purpose was never meant to shuttle between the governor and the lieutenant governor.

The constitutional provisions upon which plaintiff relies for the allowance of his claim deal with disabilities "in case of the death, impeachment and notice thereof to the accused, failure to qualify, resignation, absence from the state, or

other disability of the governor." These are all disabilities within the meaning of the Constitution. Death, failure to qualify and resignation are permanent disabilities. Impeachment is a disability at least until trial and acquittal and permanent in the event of conviction. Absence from the state is a permanent disability if the governor abandons the office and becomes a nonresident, but mere temporary absence from the state for the performance of official duty or for recreation or for business of a personal nature not interfering with the interests of the public does not vacate the office of governor and instate the lieutenant governor therein with all the powers, duties and emoluments thereof. "Absence from the state," to entitle the lieutenant governor to the emoluments of the office of governor, is an absence amounting to a permanent disability or to a temporary disability creating a vacancy or to a disability which prevents the governor from holding the office. A governor does not lose his office by stepping over the boundary line of the state for a purpose or for a time that does not disqualify him from holding the office. During such an interval the lieutenant governor does not become governor. The Constitution does not provide for two governors at the same time. When the lieutenant governor performs duties in the executive office during a temporary, nondisqualifying absence of the governor, he still acts as lieutenant governor and his compensation during such an interval is the lawful salary for that officer. In Nebraska a public officer must perform all the duties of his office for the compensation allowed by law and if none is authorized the services are gratuitous. *State v. Meserve,* 58 Neb. 451, 78 N. W. 721; *State v. Eskew,* 64 Neb. 600, 90 N. W. 629; *Nuckolls County v. Peebler,* 65 Neb. 356, 91 N. W. 289; *O'Shea v. Kavanaugh,* 65 Neb. 639, 91 N. W. 578; *Power v. Douglas County,* 75 Neb. 734, 106 N. W. 782; *Frasier v. Dundy County,* 115 Neb. 372, 213 N. W. 371.

If the lieutenant governor was the *de jure* governor during the intervals enumerated in his claim, with all the powers, duties and emoluments thereof, as argued by counsel, he was, during those periods, clothed by the Constitution with powers as follows:

"The governor shall have power to remove any officer, whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy." Const. art IV, sec. 12.

Under this authority, the lieutenant governor, while temporarily performing executive duties, if a *de jure* governor in the office of governor during the latter's absence, could have removed all the appointees of the governor for cause and could have filled their places with appointees of his own selection. By virtue of the same authority, if *de jure* governor, he could have taken possession of the governor's mansion. In construing a provision of the Constitution, statesmanship should be imputed to the framers thereof, if permissible, rather than absurdity. When the purposes of the constitutional provisions under consideration are considered with other provisions throwing light on the same subjects, the more reasonable and better interpretation is the one adopted by defendants.

In this view of the law the claim in issue was properly disallowed by the auditor of public accounts, by the secretary of state and by the district court.

AFFIRMED.

DOUGLAS CALLAHAN, ADMINISTRATOR, APPELLANT, V. GATHER F. PREWITT, APPELLEE.

3 N. W. (2d) 435

FILED APRIL 10, 1942. No. 31302.

1. **Automobiles.** When a driver of a truck, proceeding at 30 miles an hour, sees a rapidly oncoming car, driving on one side and then the other of the center line of the road, the driver of the truck is negligent if he steadily proceeds in the center of the road and a collision occurs because the oncoming car was not left sufficient room on either side to pass the truck.
2. ———. The negligence of a truck driver is not excused by the sudden emergency rule, when he deliberately drives in the middle of the road, across a bridge which is in safe condition for

travel from one side to the other, and of ample width for two cars to pass, and thus leaves insufficient room for an approaching car to pass on its proper side.

3. **Evidence.** "Spontaneous exclamations, uttered impulsively, and so closely connected with the transaction as to exclude the idea that they were made with deliberation and purpose, are properly admitted as *res gestæ* evidence." *Roh v. Opocensky*, 126 Neb. 518, 253 N. W. 680.

4. ———. Statements made to the sheriff and others by a defendant in an automobile collision case, from a half-hour to an hour after the accident, when he has had ample time to realize the seriousness of the situation because of the death of the driver of the car with which the defendant collided, were improperly admitted as *res gestæ* statements.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Reversed.*

Morrow & Miller, for appellant.

Frank L. Glebe, Mothersead & York and *Lewis F. Shull, contra.*

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

PAINE, J.

This action was brought by Douglas Callahan, as administrator of the estate of Otto H. Doerfler, deceased, against Gather F. Prewitt, defendant, for death by alleged wrongful act, under section 30-809, Comp. St. 1929. The jury returned a verdict for the defendant, and plaintiff appeals.

The petition, which was filed January 13, 1940, alleged generally that on December 15, 1939, at about 10 o'clock p. m., Otto H. Doerfler was driving a Dodge automobile east towards Morrill, on highway No. 26 in Scotts Bluff county; that Gather F. Prewitt, defendant, was driving west in a V-8 truck, with semitrailer, with a Wyoming license; that they were approaching a bridge upon said highway about one mile west of Morrill; that Doerfler was driving on the south side of said highway, but the defendant negligently drove his truck to the left of the center of said highway, and

so close to the left or south side of the highway that it was impossible for the automobile driven by Doerfler to pass said truck upon said bridge, and as a result thereof there was a head-on collision, in which Otto H. Doerfler received injuries from which he immediately died.

It is further alleged that the defendant was negligent in the operation of the truck, in that for some time prior to the collision he was driving said truck to the left or south side of the center of said highway, and failed and refused when approaching Doerfler to turn said truck to the right side, and failed to yield one-half of said highway to the said Doerfler, or yield sufficient space to permit Doerfler to drive past said truck upon said bridge, and that said negligence of the defendant was the direct and proximate cause of said collision and of the death of the said Otto H. Doerfler.

The petition further alleges that Otto H. Doerfler died intestate, a resident of Scottsbluff, and on January 9, 1940, plaintiff, Douglas Callahan, was appointed administrator of his estate by the county court; that at the time of his death Otto H. Doerfler was 42 years of age, in good health, and engaged in business in Scottsbluff, earning approximately $400 a month. The deceased left surviving him his widow, 40 years of age, and five minor children, all of whom were dependent upon him for support. It is alleged that, because of the death of the said Otto H. Doerfler, his next of kin have been deprived of his earnings and support, and have been damaged in the sum of $50,000, and the automobile driven by Doerfler, valued at $600, was so badly broken and damaged in the accident that it was worthless.

The amended answer was, first, a general denial, and then specifically denied that Doerfler was in good health, but on the contrary alleged that he was in poor health, and that he had previously suffered a loss of vision of one of his eyes; denied that said Doerfler was earning $400 a month at the time of his death, and alleged that he had no earning capacity at that time; denied that the automobile driven by Doerfler was of the reasonable value of $600.

For further answer defendant alleged that said accident

was caused solely by acts of negligence of the said Otto H. Doerfler; that the defendant was without fault; that the proximate cause of the alleged damages to the plaintiff was not through any negligence of defendant, but that said Doerfler was negligent in that he was driving his automobile at an excessive rate of speed; that he did not have his car under proper control; that he failed and neglected to observe the defendant and his truck, as he should have done and could have done; that said Doerfler was negligent in that he failed to keep on the right side of said highway; that he drove on the north side of said highway just before said collision, thereby forcing defendant to pull toward the center of said highway in an attempt to avoid a head-on collision with said automobile; that said Doerfler immediately prior to said accident was not keeping a proper lookout; that he was not in proper condition to drive said car at the time of the accident, for the reason that he had defective eyesight, and for the further reason that because of the use of intoxicating liquors his mental faculties had been dulled and his judgment impaired. Wherefore, defendant prays that the petition of plaintiff be dismissed with prejudice.

The trial of the cause commenced on December 17, 1940, and on December 21 was submitted to the jury, and after three hours' deliberation the jury returned a verdict, finding for the defendant.

The plaintiff sets out some 32 errors relied upon for reversal, many of them relating to the giving and refusing to give certain instructions. Some of the errors relate to the improper admission of *res gestæ* evidence, and these as well as certain other errors will be discussed.

The testimony shows that on the night of the accident it was cold and windy, the wind blowing from the west. It was a very dark night, and the highway was dry at this particular place, according to the testimony of the officers. Defendant Prewitt was driving a semitrailer-truck, and he had eight tons of baled hay on the trailer, and was going west at about 30 miles an hour. The Doerfler car was coming from the west towards the east. The defendant testified

that Doerfler was coming very fast, but did not fix exactly the speed at which he was coming, but one witness said the Doerfler car flashed by their car, and one said to the other, "He can't do that to us," and so they (Merle Beverness and Donald Nash) took out after him to try and catch up with him; that they tried for several miles, and could not overtake him, and that they were just about 300 yards behind him at the time the accident happened. The collision occurred on a bridge which is one and a quarter miles west of Morrill.

Sheriff Morgan testified that he was called to the scene of the accident, and picked up the county attorney, Frank Glebe, and went right out; that Cecil Rhoades, a policeman from Scottsbluff, and two state highway patrolmen, Smith and Brown, were there, also many others, when he arrived at about 10:55 p. m.

The sheriff gave the measurements of this bridge, as follows: 32 feet 9 inches long, 20 feet 4 inches wide; that the center white strip is painted across the bridge, and extends down the highway in both directions from the bridge. His measurements indicate that on the bridge this center white strip is off center a few inches at the east end of the bridge, being 9 feet 6 inches from the south side and 10 feet 5 inches to the north rail of the bridge.

Exhibits Nos. 1 to 10 are large, clear photographs, showing the exact situation of the car and the big truck loaded with baled hay on the bridge after the collision. These exhibits show definitely that the truck was proceeding exactly in the middle of the highway across the bridge, with the white strip exactly under the center of the truck, and it was impossible for any car to pass the truck on either side while the truck was crossing this bridge. The Doerfler car was on its proper side of the road when it attempted to go by the truck, and wedged itself into the truck in a head-on collision. The defendant admitted this in the answer he made on cross-examination to question No. 2062: "Q. So, in other words, what you did was to block the road so he couldn't get past you at all without a wreck? A. Yes, it turned out that way."

The defendant contended that when he first saw the Doerfler car they were about 550 feet apart, and Doerfler was driving on the wrong side of the road, but defendant did not pull over clear to the right, or pull over clear to the left of the center line, but continued right down the middle of the road; in other words, it appears that he did the only thing he could do to insure that an accident would occur.

The defendant contends that a motorist suddenly confronted with an emergency requiring instant decision is not necessarily negligent in pursuing a course which deliberate judgment might prove to be wrong, citing *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689; *Oakes v. Gregory,* 133 Neb. 407, 275 N. W. 607; *Moses v. Mitchell,* 139 Neb. 606, 298 N. W. 338.

But can this sudden emergency rule be invoked to justify a motorist in violating the law by turning his vehicle to the left of the center of the road in front of an oncoming motor vehicle?

Section 39-1139, Comp. St. Supp. 1941, provides generally that a driver of a vehicle upon highways of sufficient width shall drive the same upon the right half of the highway unless it is impracticable to drive on such side of the highway, except when overtaking and passing another vehicle, and section 39-1141, Comp. St. Supp. 1941, provides that "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible."

This court has said that "Driving an automobile in the center of a public bridge 16 feet wide, which is in a safe condition for travel from one side to the other, thus forcing the driver of an approaching automobile to run his car against a railing to prevent the two vehicles from colliding, is evidence of negligence." *Hook v. Kempf,* 125 Neb. 79, 249 N. W. 89.

"An automobile driver may not violate the rules of the road, and then invoke the doctrine of sudden emergency to relieve himself from liability to another who is injured as a

result of his violation of such rules." *Simonson v. Huff*, 124 Wash. 549, 215 Pac. 49. See, also, *Bolton v. Wells*, 58 N. Dak. 286, 225 N. W. 791.

This rule is concisely stated in *Kelly v. Gagnon*, 121 Neb. 113, 236 N. W. 160, as follows: "Conduct which would otherwise be negligence cannot be excused on the ground that the actor made a mistake of judgment, unless the judgment exercised was that which an ordinarily careful and prudent man would have exercised under the same circumstances." See, also, *Lloyd v. Calhoun*, 78 Wash. 438, 139 Pac. 231; *Hamilton v. Carpenter*, 49 Idaho, 629, 290 Pac. 724; *Mahoning Savings & Trust Co. v. Kellner*, 131 Ohio St. 69, 1 N. E. (2d) 616.

The law is well settled that a party driving an automobile lawfully, upon his proper side of the highway, who observes an approaching car, has no right to assume that the driver of the oncoming car will violate the law in passing. See *Belik v. Warsocki, supra; Bainter v. Appel*, 124 Neb. 40, 245 N. W. 16.

The serious grounds for reversal in this case are founded upon the admission of many statements made by defendant to parties gathered around the scene of the accident, many of which were made over an hour after it occurred.

The defendant himself testified that, while driving, when he first paid attention to the Doerfler car approaching, it swerved from side to side, and he said to his brother, "What in the world is that fool going to do?" No objection was made to this, but it is cited as an example of a proper *res gestæ* statement.

"Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be re-

ceived as testimony to those facts." 3 Wigmore, Evidence (2d ed.) 738, sec. 1747.

But, after the accident, and Doerfler was found to be dead in his car, the defendant talked to many persons, and many of his remarks were admitted over objections.

Harold Smith, of the state highway patrol, testified that defendant told him the man drove like he was drunk. Sheriff Morgan testified to statements that the defendant made nearly an hour after the accident, and over proper objections, touching the *res gestæ* character, such as this: "He was going west—said he was going west and the car was coming from the west and he thought the car was going to turn north and he pulled over to the south, and met him on the bridge."

"A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation." *Tongue v. Perrigo,* 130 Neb. 564, 265 N. W. 737. See, also, *Suhr v. Lindell,* 133 Neb. 856, 277 N. W. 381.

"Spontaneous exclamations, uttered impulsively, and so closely connected with the transaction as to exclude the idea that they were made with deliberation and purpose, are properly admitted as *res gestæ* evidence." *Roh v. Opocensky,* 126 Neb. 518, 253 N. W. 680.

In the recent case of *Bowers v. Kugler,* 140 Neb. 684, 1 N. W. (2d) 299, a judgment was reversed, and we said:

"The ruling of the trial court in the case at bar, in admitting as part of the *res gestæ* the declaration giving the opinion of the driver of the transport, was prejudicial error."

"Although there are some exceptions, a statement of a mere conclusion or opinion is not ordinarily admissible as a part of the *res gestæ,* which should be confined to declarations which relate to provable facts. 22 C. J. 469; *Field v. North Coast Transportation Co.,* 164 Wash. 123, 2 Pac. (2d) 672, 76 A. L. R. 1114; 1 Jones, Evidence (4th ed.) 630, sec. 344; *Wert v. Equitable Life Assurance Society,* 135 Neb. 654, 283 N. W. 506."

Without setting out many other similar statements admitted over objections, we believe that many, if not all, of reported conversations with defendant were statements he made after he had had time to think the matter all over, and to anticipate a possible lawsuit, and certainly he realized the position he was in, and his hearsay statements were clearly objectionable, and it was a prejudicial error to admit them for the jury to consider.

Other alleged errors in giving and refusing instructions are not discussed, as such errors, if any, will doubtless not occur in a second trial.

For reasons stated, the verdict and judgment are set aside and the cause is remanded for a new trial.

REVERSED.

IN RE ESTATE OF JOHN BREMER.
LENA BREMER ET AL., APPELLEES, V. HENRY BREMER, APPELLANT.
3 N. W. (2d) 411

FILED APRIL 10, 1942. No. 31301.

1. **Wills.** The county court having exclusive jurisdiction of the probate of wills (Comp. St. 1929, sec. 27-503), after admitting a will to probate and after the time for appealing from the decree has passed, may admit to probate a codicil to the same will, written on the back of the same leaf upon which the will was written, if such codicil escaped attention and was not passed upon at the time of the probate of the original will, where there is no statutory bar to such action.
2. **Estoppel.** Estoppel does not arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake.
3. **Wills.** Where the evidence is insufficient to submit the case to the jury on undue influence, it is not error on the part of the trial court to refuse to do so.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed.*

Charles Dobry and *H. G. Wellensiek,* for appellant.

Cleary, Suhr & Davis, contra.

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

MESSMORE, J.

The county court admitted to probate a codicil to a will. On appeal to the district court the decree and judgment of the county court were affirmed; hence this appeal.

The will of John Bremer, deceased, dated September 21, 1921, left to his son, the appellant, $1,000, and the rest, residue and remainder of his property to his wife, Lena Bremer, with certain qualifications in event of her remarriage; if she did not remarry, at her death the property to go to his daughter, Matilda. There was also a 5-dollar bequest to a daughter of his wife. When the will was made, the testator's estate was valued at between $20,000 and $25,000. The executrix was his second wife, married to him in 1900.

The testator died May 17, 1939. May 23, 1939, the petition to probate the will was filed. The will was admitted to probate June 21, 1939. Subsequently, a codicil to the will was discovered on the back thereof. The effect of the codicil was to change paragraph 2 of the will, lessening from $1,000 to $10 the bequest to the appellant. February 13, 1940, a petition was filed in the county court of Hall county for the probate of the codicil. To the petition the appellant filed objections, alleging it was not executed in manner and form as required by law; that at the time of the execution of the codicil the testator did not have the mental ability and testamentary capacity to execute the same; that it was procured through undue influence practiced by the widow and her daughter; that appellant had not been informed of the codicil of the will at the time the will was admitted to probate; that a copy of the will was furnished him which did not contain the codicil, and that, relying thereon, he made no objections to the will, waived his right to contest the same, and that, by reason of the acts of the appellees, they were estopped from offering said codicil for probate.

Appellant contends that the court erred in admitting the codicil to probate, for the reason that it could not be admitted to probate until the decree admitting the will to probate was vacated and set aside, citing in support of this contention *In re Bronson's Estate,* 185 Wash. 536, 55 Pac. (2d) 1075, 107 A. L. R. 238.

In the *Bronson* case there were filed at the same time a will and a codicil modifying its terms. A petition to probate the will was filed; the codicil was not mentioned. The majority opinion of the court determined the case on the point that the petitioner did not comply with the statute, which gave him one year in which to petition for the vacation or modification of the judgment, and, having failed to follow the statutory remedy provided for the rectification of mistakes, and having made no attempt to set aside the decree admitting the will to probate, the decree must stand as entered. Three judges of the Washington court dissented, on the ground that the technical provisions of the statute should not bar the admission to probate of the codicil.

The case of *Couchman v. Couchman,* 104 Ky. 680, 47 S. W. 858, is cited. In that case the court said: "The attempt to set aside a probated will, therefore, by proving a later one, or by attaching to it a codicil with inconsistent provisions, is a contest of the validity of the former will." The court held: "The judgment probating a will in the county court is final and conclusive, except it be vacated, reversed or annulled by some one of the modes provided by the statute." The *Couchman* case apparently supports the appellant's contention. There is nothing in the evidence in the instant case to disclose that the codicil was not executed according to law.

The record discloses that at the time of the testator's death his property had decreased in value. He owned an 80-acre tract in Hall county, subject to a 2,000-dollar mortgage, and 146 acres adjacent to the Platte river, mortgaged for $1,500; also certificates secured by a mortgage in the amount of $2,000, sold for $1,347, and a small amount of live stock. The testator had lived with his present wife for

38 years. The appellant was more than 50 years of age, a competent, capable and successful man in his business. Conditions had changed at the time the codicil was made from those prevailing when the will was executed, and the codicil reflects the testator's intention as to the proper distribution of his property and objects of his bounty under the changed circumstances.

In the case of *Waters v. Stickney,* 12 Allen (Mass.) 1, 90 Am. Dec. 122, a will and codicil were executed according to law. Some years after the will was probated, the executor presented for probate a codicil written on the back of the will. There was no fraud shown nor want of diligence. The court said: "The mistake may have been occasioned by inattention or oversight of the counsel or the testifying witness, or possibly of the judge." The decree of probate admitting the codicil was sustained. In the instant case, the time element was much less, being 11 months, and not violative of any statute which would bar the probate of the codicil.

As stated in *Schultz v. Schultz,* 10 Grattan (Va.) 358, 373, 60 Am. Dec. 335: "A man's last will must not of necessity be confined to one testamentary paper. It may consist of several different testamentary papers, of different dates, and executed and attested at different times."

In *Bowen v. Johnson,* 5 R. I. 112, 73 Am. Dec. 49, the question presented was whether or not a subsequent will, made and admitted to probate in another state, could be filed and recorded in the state of Rhode Island without first revoking the probate of a prior will of the same testator, made by a court of probate in Rhode Island. The lower court ruled that the direct proceedings should be first instituted to revoke the probate of the earlier will and the letters granted by the probate court of Rhode Island. The decree of the lower court was reversed. The supreme court of Rhode Island said (p. 120): "Now it would seem to be quite congruous with the statute mode of conferring this power of revoking the old probate, to wit, as incidental to the power of taking probate of the later will when discovered, for the

court to exercise this power of revocation, as incidental to the new grant of probate, rather than to make it necessarily the subject of preliminary and separate action. * * * Notice of the petition for the probate, or for filing and recording of the new will, must necessarily be given to the parties interested under the old one; and the prayer of such a petition incidentally involves the revocation of the probate of the will of prior date, so far as such will conflicts with the provisions of the will of later date."

The county court has original and exclusive jurisdiction of the probate of wills. Comp. St. 1929, sec. 27-503. In consideration of the jurisdiction vested in the county court, coupled with the facts, that there was no fraud shown nor want of diligence, and the mistake in not discovering the codicil may have been occasioned by inattention or oversight of counsel, or the judge, and such mistake was inadvertently made, not negligently or wilfully, and the codicil was presented for probate within the time when no statutory provision would bar it, we conclude that the reasoning in the case of *Waters v. Stickney, supra,* and cases cited supporting appellees' contention are applicable, with the exception noted, rather than the reasoning in *Couchman v. Couchman, supra,* and cases supporting appellant's contention.

The appellant pleads estoppel. There is nothing in his pleadings or in the proof offered to show that he actually had any grounds upon which to contest the will, or that he was misled to his injury, or suffered a loss of substantial character, or was induced to alter his position for the worse in some material respect. "Where no available right is parted with and no injury suffered there can be no estoppel *in pais.*" 21 C. J. 1137.

The appellant contends that he parted with an insurance policy, in his father's name, payable to appellant, in the amount of $500, for funeral expenses. There is no competent evidence to show that the proceeds of the policy ever belonged to appellant, or to indicate that he consented to the insurance payment because of his ignorance of the codicil,

or that the widow or daughter knew of the existence of the codicil, or to connect those circumstances. There is no evidence to indicate that they procured appellant's consent. He went direct to the secretary of the insurance company and signed over the insurance to pay the funeral expenses. There is nothing in the proof to show that the widow or daughter concealed from the appellant something of which they had knowledge. All of the parties, and the court as well, at the time of the probate of the will, were ignorant of there being a codicil.

In 21 C. J. 1123, it is said: "Knowledge of the truth as to the material facts represented or concealed is generally indispensable to the application of the doctrine of equitable estoppel," and further (p. 1125): "No estoppel arises where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake." The evidence of undue influence is insufficient to take the case to the jury.

For the reasons given, the decree and judgment of the county court admitting the codicil to probate are

AFFIRMED.

DONALD S. KRAUSE ET AL., APPELLANTS, V. FRANK L. SWANSON ET AL., APPELLEES.

3 N. W. (2d) 407

FILED APRIL 10, 1942. No. 31266.

1. **Contracts.** There being no declaration of legislative purpose or policy in the Home Owners Loan Act with regard to agreements to take second mortgages after completion of Home Owners Loan Corporation first mortgages, no public policy may be drawn from the act, the effect of which would be to nullify or render void such agreements or second mortgages executed pursuant to such agreements.
2. **United States.** Regulations promulgated under the Home Owners Loan Act which are for the guidance and control of the agents and agencies of the Home Owners Loan Corporation in making loans have no force or effect beyond the agents or agencies to which the regulations are directed.

3. **Payment.** "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it." Restatement, Contracts, sec. 421.
4. **Mortgages.** Where a person honestly owes a debt, and ought, in equity and good conscience, to pay it, there is a sufficient consideration for the execution of a note and mortgage given for payment of the debt.
5. ———. A moral obligation to pay a preexisting legal debt is a good consideration for the execution of a note and mortgage in its payment.

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

R. B. Hasselquist and *Gilbert P. Hansen,* for appellants.

Brown, Crossman, West, Barton & Fitch, contra.

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

YEAGER, J.

This is an action in equity by Donald S. Krause and Jeanette Krause, plaintiffs and appellants, against Frank L. Swanson and Lenore Beveridge Swanson, defendants and appellees, the purpose and prayer of which is to cancel and set aside a promissory note and second mortgage. After trial in the district court, a decree was entered denying the relief prayed by the plaintiffs. From this decree the plaintiffs have appealed.

The substantial facts on which the action is based are the following: On January 21, 1933, the defendant Lenore Beveridge Swanson was the owner of the south 44 feet of the north 88 feet of lots 8 and 9, block one (1), Comer's addition to the city of Omaha, Douglas county, Nebraska. On this date she sold this real estate on land contract to the plaintiffs for $3,400. The terms of the contract called for an initial payment of $250 with payments thereafter at the rate of $30 a month. The interest rate was 6 per cent. per annum. At the time of sale the Omaha Loan & Building Asso-

ciation held a first mortgage on the premises. Within a short time plaintiffs defaulted in their payments under the terms of the contract, and in payment of taxes which they were required to pay by the terms of the contract. After default the plaintiffs, with consent of defendant Lenore Beveridge Swanson, sought a refinancing loan from the Home Owners Loan Corporation, which corporation will be hereafter referred to as H. O. L. C. Finally on September 20, 1935, a loan was consummated from H. O. L. C. in the amount of $2,977.60, which was based on an appraised value by H. O. L. C. of $3,722. Prior to the making of the loan the defendant Lenore Beveridge Swanson executed a "Mortgagee's consent to take bonds" on a form supplied by H. O. L. C., which contained the following provisions:

"Being informed that application to refund above indebtedness has been made to Home Owners Loan Corporation under the provisions of the Home Owners Loan Act of 1933, as amended, the undersigned hereby offers and consents, if said refunding can be consummated, to accept in full settlement of the indebtedness above set forth the aggregate sum of $2,505.48 in bonds, par value, of the Home Owners Loan Corporation, in accrued interest thereon, and in cash necessary for adjustment not exceeding $25, and thereupon to discharge all claims of the undersigned against said property.

"The undersigned represents that he will not require of the applicant any second mortgage or other instrument evidencing any portion of the aforesaid obligation or the payment of any money or any other additional consideration except only as follows: None."

To complete the transaction the defendant Lenore Beveridge Swanson transferred title to the plaintiffs by warranty deed. This defendant accepted and receipted for the bonds specified in the consent and liquidated her mortgage to the Omaha Loan & Building Association. The receipts from refinancing were less than the amount owing by plaintiffs to defendant Lenore Beveridge Swanson under their contract. After the refinancing through H. O. L. C., plaintiff Donald S. Krause and defendant Lenore Beveridge

Swanson agreed on the amount of $450 as the difference, and which difference they agreed represented an indebtedness by plaintiffs to defendant Lenore Beveridge Swanson. On October 21, 1935, the plaintiffs executed and delivered to the defendant Frank L. Swanson their promissory note for $450, representing the difference between the balance due on the contract and the avails to defendant Lenore Beveridge Swanson from the H. O. L. C. loan. This note bears interest at 7 per cent. per annum and is payable in instalments of $30 each six months. The note was secured by a second mortgage on the real estate involved herein.

As ground for reversal the plaintiffs claim that this note and mortgage are void for reasons (1) that they were without the knowledge and consent and made in secrecy from the H. O. L. C., (2) that a promise to execute them was compelled by the defendants, (3) that the agreement and release between the H. O. L. C. and the defendant Lenore Beveridge Swanson released and discharged the plaintiffs from the mortgage debt, and (4) that the taking of the promissory note and second mortgage was contrary to the laws of the United States and the Home Owners Loan Act of 1933, and the rules and regulations promulgated thereunder.

Factually we find no difficulty with any of the propositions set forth. It is true that the promissory note and second mortgage were without the knowledge and did not have the consent of H. O. L. C. The evidence does not support the claim that plaintiffs were compelled to promise to execute or to execute the note and mortgage. The evidence of plaintiffs does indicate that defendant Lenore Beveridge Swanson insisted upon payment in cash, or a note and second mortgage, for the difference between the bonds and the balance due on the land contract before execution of the consent to take bonds, while defendants' evidence is to the effect that she insisted upon cash which was never paid to her. It is beyond dispute that plaintiff Donald S. Krause offered cash, or cash and a second mortgage.

The proposition that the taking of the promissory note was violative of the federal laws pertaining to the Home

Owners Loan Act of 1933 is without any foundation whatever. An examination of the act fails to disclose anything even remotely bearing upon the question of further encumbering real estate after H. O. L. C. loan thereon. Moreover, the plaintiffs do not attempt to point out wherein the agreement to take a second mortgage is violative of the act. They ground their position on the proposition that the agreement *violates the spirit of the act, denotes bad faith, is against public policy, and the note and mortgage so given are void. Cook v. Donner,* 145 Kan. 674, 66 Pac. (2d) 587.

With no purpose expressed and no statement contained from which it may be reasonably implied that the national congress intended to abridge, if it constitutionally could, the right of an owner to encumber real estate further after the placing of a loan thereon by the H. O. L. C., it is difficult to understand how it may be said that an agreement such as the one under consideration here is violative of the spirit of the Home Owners Loan Act. It is equally difficult to understand, in the light of an entire lack of declaration of a legislative purpose or policy with regard to agreements for or the taking of second mortgages, how a public policy may be found growing out of the act of sufficient force and effect to nullify and render void such agreements or second mortgages. On this proposition we arrive at the same conclusion as did the Arkansas court in *McMillan v. Palmer,* 198 Ark. 805, 131 S. W. (2d) 943.

Coming now to the rules and regulations promulgated under the Home Owners Loan Act without setting them out, examination discloses that the ones called to our attention are plainly rules for guidance and control of the agents and agencies of H. O. L. C. in the making of loans. In the connection with which we are here concerned the regulations specify when the agents and agencies may and may not agree that second mortgages may be taken by the holders of mortgages which are liquidated by the H. O. L. C. loans. The regulations do not express or imply any force or effect upon or against persons or agencies other than those of H. O. L. C.

The next question to be considered is the effect of the mortgagee's consent to take bonds in the light of the facts and circumstances disclosed by the record. The record discloses that the plaintiff Donald S. Krause urged defendant Lenore Beveridge Swanson to execute the consent. At a conference at the home of defendants, at the insistence of plaintiff Donald S. Krause it was executed. Defendants testified that plaintiffs were at that time to pay the difference between the value of the bonds and the balance due on the land contract in cash, and that no second mortgage was contemplated. Donald S. Krause says that he agreed to pay in cash if he could, and if he could not then a portion in cash and for the difference a second mortgage would be given. The testimony of Donald S. Krause finds some corroboration in letters written by him to Lenore Beveridge Swanson. In the view we take of this situation the necessity does not arise to weigh the evidence of the parties against each other on this disputed question of fact. The instrument was plain and unambiguous. Lenore Beveridge Swanson was disturbed by the language of the instrument. She called her husband to advise with him with reference to it and after having his advice she executed the consent, and either mailed it or permitted Donald S. Krause to take it for delivery to H. O. L. C. She testified that Donald S. Krause was at the time to pay to her in cash the difference between the bonds and the balance on the land contract, which he did not do. Nevertheless, there is no evidence that she protested then or later the delivery of the instrument to H. O. L. C.

Under this state of the facts and the authorities on this question, we hold that by virtue of the execution of mortgagee's consent to take bonds the debt represented by the land contract was, upon the completion of the H. O. L. C. loan, extinguished. The rule as stated in Restatement, Contracts, sec. 421, is as follows: "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it." 6 Williston, Contracts (Rev. ed.) 5224; *Grouf*

v. State Nat. Bank of St. Louis, 76 Fed. (2d) 726; *MacDonald v. Williams,* 121 W. Va. 580, 5 S. E. (2d) 528; *McAllister v. Drapeau,* 14 Cal. (2d) 102, 92 Pac. (2d) 911; *Bealkowski v. Powers,* 310 Ill. App. 662, 35 N. E. (2d) 386. See, also, the following cases released herewith: *Platte Valley Bank v. Lemke, ante,* p. 218, 3 N. W. (2d) 396; *Tarascio v. Mancuso, ante,* p. 225, 3 N. W. (2d) 400; *Murphy v. Omaha Loan & Bldg. Ass'n, ante,* p. 230, 3 N. W. (2d) 403.

Attention is now directed to the contention of defendants that under the evidence, notwithstanding the legal extinction of the debt by virtue of the execution of the mortgagee's consent to take bonds and the completion of the H. O. L. C. loan, the note and second mortgage are valid, binding and fully enforceable. The defendants urge in support of this contention that the moral obligation of the plaintiffs was a sufficient consideration for the note and second mortgage given 31 days after the closing of the H. O. L. C. loan.

That there was a moral obligation which was recognized by Donald S. Krause is beyond question. He testified specifically that at the time the instruments were executed he had a moral obligation to pay and further at the time of the trial the same moral obligation existed, and further that even until some time in the year 1939 he considered the obligation legally binding.

In *Fourth Nat. Bank of Cadiz v. Craig,* 1 Neb. (Unof.) 849, 96 N. W. 185, is found the following statement: "The fact that appellants honestly owed the debt, and ought, in equity and good conscience, to pay it, was a sufficient consideration for the execution of the note and mortgage in suit, even if, for some ulterior reason, Walter Craig might have lost his right of action. The principle is well settled that a moral obligation to pay a preexisting legal debt is a good consideration for the execution of a note and mortgage in its payment." This rule is supported by numerous authorities, and we think that the principles announced therein are sound and are applicable to the situation presented by the record in this case. See *Park Falls State Bank v. Fordyce,* 206 Wis. 628, 238 N. W. 516; *Estate of Smith,* 226 Wis. 556,

277 N. W. 141; *Estate of Schoenkerman*, 236 Wis. 311, 294 N. W. 810; *McMillan v. Palmer, supra.*

We conclude, therefore, that the decree of the district court should be, and it is

AFFIRMED.

J. A. KING, APPELLANT, V. CASS COUNTY, APPELLEE.
3 N. W. (2d) 449

FILED APRIL 17, 1942. No. 31333.

Appeal. "Where a jury is waived in a law action, the case is tried to the court, and the final judgment rests upon findings by the court, in order that errors of law occurring at the trial may be considered by this court, the district court's attention must have been called to them by a motion for a new trial." *Drainage District v. Dawson County Irrigation Co.*, 140 Neb. 866, 2 N. W. (2d) 321.

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

C. S. Wortman, for appellant.

Walter H. Smith, contra.

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

SIMMONS, C. J.

Plaintiff filed his claim against the defendant for $200, being the value of land alleged to have been taken by the defendant and damages for the moving of a fence in the widening of a public road. The county commissioners disallowed the claim. Plaintiff appealed. No pleadings were filed in the district court except the transcript of the proceedings before the county commissioners. A jury was waived and trial had to the court. The case proceeded as one for damages against the county. The defense of the county was that the land so taken was a part of the public road as a result of action taken when the road was opened in the year 1880.

The trial court found against the plaintiff and dismissed his cause on June 9, 1941. August 25, 1941, plaintiff gave notice of appeal and on September 2, 1941, filed an appeal bond. September 17, 1941, the parties filed a stipulation of facts which the trial court allowed and settled as a bill of exceptions.

Plaintiff on appeal assigns as error that the judgment of the trial court is contrary to law, violates the due process clause of the Constitution and is contrary to the evidence. A motion for a new trial was not filed.

Section 20-1143, Comp. St. 1929, provides that the motion for a new trial, subject to certain exceptions not here presented, shall be made within three days after the decision was rendered. This provision has been held to be mandatory. *Miller v. Banner County*, 127 Neb. 1, 254 N. W. 669. In full accord with a long line of decisions of this court we recently held: "Where a jury is waived in a law action, the case is tried to the court, and the final judgment rests upon findings by the court, in order that errors of law occurring at the trial may be considered by this court, the district court's attention must have been called to them by a motion for a new trial." *Drainage District v. Dawson County Irrigation Co.*, 140 Neb. 866, 2 N. W. (2d) 321.

The judgment of the district court is accordingly affirmed.

AFFIRMED.

EDWIN A. BOELL, APPELLANT, V. EDWARD C. OVERBAUGH, APPELLEE.

3 N. W. (2d) 439

FILED APRIL 17, 1942. No. 31297.

1. **Principal and Agent.** Agency may be proved by circumstantial evidence.
2. **Parent and Child.** Evidence in an action by a husband to recover damages for the wrongful act of defendant in causing the death of plaintiff's wife *held* sufficient to support a verdict that the administrator of decedent's estate acted as agent of plaintiff with

authority from the latter in making a previous settlement of plaintiff's claim.

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

Frank A. Peterson, for appellant.

Chambers, Holland & Locke, contra.

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

ROSE, J.

This is an action to recover damages for death by wrongful act. Edwin A. Boell, plaintiff, alleged in his petition that his wife, Augusta Boell, was fatally injured June 2, 1940, and died July 4, 1940, as the result of an automobile collision caused by the gross negligence of Edward C. Overbaugh, defendant. Plaintiff's claim consists of the following items: Necessary medical treatment and hospital care of wife, $804; burial expenses, $550.50; lost services, companionship and consortium, $10,000; total, $11,354.50.

In an answer to the petition defendant pleaded that Harold M. Boell, son of plaintiff and administrator of the estate of Augusta Boell, deceased, acting also as the agent of plaintiff with the latter's knowledge, acquiescence and consent, procured and executed a settlement for $2,408.50, a sum paid by defendant to the administrator and agent as full, final and complete payment of all damages sustained by plaintiff and by the estate of his deceased wife as a result of the automobile accident pleaded in the petition and that the settlement was approved by the county court of Lancaster county. The reply to the answer was a general denial.

Upon a trial of the cause the jury rendered a verdict in favor of defendant and from a judgment of dismissal plaintiff appealed.

The determining question on appeal is the sufficiency of the evidence to prove the agency of the son to settle the claim of his father for the items of damages enumerated in the petition.

Harold M. Boell, a son of plaintiff and administrator of the estate of his deceased mother, testified in substance that he had no authority from his father to settle the latter's personal claim against defendant whose wrongful act caused the death of plaintiff's wife. Plaintiff testified to the same effect. The son and administrator testified also that the latter acted alone for decedent's estate in negotiating for and in making the settlement. In addition to direct evidence of the character indicated, defendant admitted in open court responsibility for the death of plaintiff's wife and the parties stipulated that the charges of $804 for medical treatment and hospital care and of $550.50 for burial expenses were reasonable.

Counsel reviewed the testimony on the issue of the son's agency, quoted law applicable thereto from the standpoint of plaintiff, and came to the conclusions that the alleged agency of the son was disproved and that there was no evidence to support the verdict in favor of defendant. The position of plaintiff may be stated as follows: Two causes of action arose after the injury of Augusta Boell, June 2, 1940, and her death, July 4, 1940—one in favor of her husband for loss of her services and companionship and for medical, hospital and burial expenses, and the other in favor of the administrator of her estate for losses thereto under the statute creating a cause of action for death by wrongful act. Comp. St. 1929, secs. 30-809, 30-810, Lord Campbell's Act. In this connection it was strenuously argued, as directly stated by both father and son on the witness-stand, that the administrator had no authority to settle the cause of action for personal losses of plaintiff and that the son, as administrator, acted alone for the estate of his deceased mother in settling the cause of action against defendant for causing her death.

The direct testimony of father and son did not necessarily control the decision. Agency may be proved by circumstantial evidence. *Martin v. Hutton,* 90 Neb. 34, 132 N. W. 727. The trial judge and the jury had before them the entire case, including the witnesses, their testimony and documentary

evidence. The interests of the parties in the result of the litigation were open to the scrutiny of the triers of fact. One-third of the net proceeds of the claim of the administrator, under the Lord Campbell's Act, in the event of recovery, would be distributable to plaintiff and the other two-thirds to his four children. Plaintiff, therefore, was vitally interested in the claim of the administrator against defendant. Defendant admitted in the case at bar his responsibility for the wrongful act that caused the death of plaintiff's wife and he would naturally be interested in one settlement for his entire liability therefor. Self-interest would obviously prompt defendant to avoid a settlement which would prevent one lawsuit only and invite another.

In submitting to the jury the issue of the agency of the son to settle his father's personal claim against defendant, the district court necessarily considered the evidence sufficient to support a verdict in favor of defendant, and the jury so found, notwithstanding direct evidence to the contrary. Juries are often required to determine issues where there is circumstantial evidence on one side and direct testimony of witnesses on the other, even in criminal prosecutions involving the death penalty. The record in the case at bar contains evidence tending to prove the following facts or proper inferences from established facts and circumstances:

Plaintiff was 70 years of age and his son, Harold M. Boell, 36. They resided four or five blocks from each other in Lincoln. July 10, 1940, six days after the death of the wife of plaintiff, he applied to the county court by petition for the appointment of his son Harold as administrator of her estate. The latter was appointed as such August 5, 1940. After negotiating for months with defendant for a settlement of the liability created by his wrongful act, and after conferring at frequent intervals with the county judge in regard to offers made, the administrator applied to the county court for permission to settle the controversy for $2,408.50. The application described the fatal accident and stated in part:

"It is the contention of the administrator that the accident resulted from the negligence of the said Edward C. Overbaugh, and the said Edward C. Overbaugh denies that he was in any way negligent or contributed to the death of Augusta Boell.

"Your petitioner would further show unto the court that Edward C. Overbaugh has offered to pay as a compromise settlement of said disputed matter the sum of $2,408.50 in full settlement and satisfaction of said disputed claim."

The administrator assured the county court when the application was under consideration that the settlement was agreeable to the members of the family—the heirs-at-law, including plaintiff. No one said the administrator was settling the claim only as far as he could do so in that capacity. When the settlement was made, the items for expenses of medical care, hospital and burial were taken into consideration. Harold M. Boell, before and after the death of his mother, saw his father "practically every day or every other day." The county court, after taking evidence and after finding that the settlement was for the best interests of the estate, ordered:

"That said administrator be and he is hereby empowered to execute and give to Edward C. Overbaugh a good and sufficient release; releasing and discharging the said Edward C. Overbaugh of and from any and all claims, demands and controversies of every nature whatsoever existing or to exist as a result of an automobile accident which occurred * * * on the 2d day of June, 1940, resulting in the death of Augusta Boell."

The administrator on November 14, 1940, signed and acknowledged the settlement authorized by the county court and in it recited:

"I further release and discharge the said Edward C. Overbaugh from any and all claims for medical expense, hospital expense or any other expense incurred by the said Augusta Boell as a result of said automobile accident."

Plaintiff admitted in effect on cross-examination that he met and talked to his son frequently from July 4, 1940, until

the settlement was made; that he knew his son was negotiating for a settlement; that he knows his son got the money for the expense of care and burial; that plaintiff did not pay the bills therefor and does not have any of the money collected for them. Though plaintiff applied for the appointment of an administrator a few days after the death of his wife, there is nothing in the record to show that he made any demand for the loss of her services and for the expenses of care and burial until after damages for the wrongful act of defendant had been settled and paid to his son. These expenses, consisting of two items aggregating $1,354.50, are in the hands of the administrator. Plaintiff refused to accept this fund and sued defendant January 17, 1941, to recover these same items of expenses, notwithstanding the previous settlement signed by the administrator and approved by the county court under the circumstances indicated. Though neither the application for authority to make the settlement nor the judicial order to make it mentioned specifically the expenses for care and burial, both of those documents made it clear that the settlement made and approved discharged defendant "from any and all claims, demands and controversies of every nature whatsoever existing or to exist as a result of an automobile accident which occurred * * * on the 2d day of June, 1940, resulting in the death of Augusta Boell." This necessarily included two of the items for which plaintiff sued after the settlement had been made and approved. There is nothing in the record to indicate that the relations between father and son were not intimate and confiding as prompted by natural impulses during the entire period covered by the negotiations or that the settlement as made was tainted by fraud. On the entire case, when viewed from every standpoint on appeal, the conclusion is that the jury, upon consideration of the evidence and inferences from established facts and circumstances, were warranted in finding that the son acted as the authorized agent of his father in making the settlement pleaded in defense of plaintiff's claim. Having reached this conclusion on the controlling issue in the case, error prejudicial to

plaintiff has not been found in the record.

AFFIRMED.

PAINE, J., dissents.

MASSMAN CONSTRUCTION COMPANY, APPELLANT, V. NEBRASKA WORKMEN'S COMPENSATION COURT ET AL., APPELLEES.
3 N. W. (2d) 639

FILED APRIL 17, 1942. No. 31287.

1. **Prohibition.** Prohibition is derived from the common law and is essentially and wholly a proceeding at law. Courts of equity do not issue writs of prohibition.
2. **Injunction.** An injunction to stay proceedings at law is not properly directed against the court or statutory tribunal before which the matter is pending, but solely against the parties to such proceeding.
3. ———. Since such injunction acts upon the parties to the cause and not upon the court or tribunal in which such action is pending, neither the judge or judges thereof, nor the attorneys therein, should ordinarily be made parties to the suit.
4. **Workmen's Compensation.** Where the Nebraska workmen's compensation court in an action pending before it is empowered by statute to do full and complete justice to the parties involved and to the matter in dispute, courts of equity will not interfere.

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

Thomas E. Dunbar, for appellant.

Frank M. Coffey, Frank A. Dutton and *Carl Sanden, contra.*

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

EBERLY, J.

This is an application by plaintiff, appellant herein, for a temporary and permanent injunction, and appears to have been prosecuted by it under and pursuant to sections 20-1062 to 20-1080, Comp. St. 1929, a part of our Civil Code.

The action was commenced by the filing of a petition on January 4, 1939, in the district court for Otoe county by the Massman Construction Company, a corporation, as plaintiff, against "Nebraska Workmen's Compensation Court; Frank M. Coffey, Presiding Judge of the Nebraska Workmen's Compensation Court; Charles E. Jackman, Judge of the Nebraska Workmen's Compensation Court; Lawrence F. Welch, Judge of the Nebraska Workmen's Compensation Court; Carl F. Belk; and Frank A. Dutton, attorney for Carl F. Belk, defendants." This petition contains copies of each of the motions, applications, petitions, answers, and special appearances hereinafter mentioned and referred to, which are expressly made a part thereof, and in addition aptly and fully alleges and pleads: (1) The official character of the defendant members of the Nebraska workmen's compensation court; (2) that the defendant Belk on or about July 23, 1935, filed in the Nebraska workmen's compensation court his petition for relief against the plaintiff herein because of certain physical injuries received by him while in the employment of plaintiff, and arising out of and in the course of the same. Issue was duly joined by plaintiff herein on the allegations of such petition and trial was had by and before one of the judges of the compensation court on August 29, 1935, and a temporary award dated October 11, 1935, was entered in favor of Belk. Plaintiff in this action paid Carl F. Belk thereon the sum of $510. Thereafter on October 18, 1935, an application for rehearing of said award before the entire court, as provided by law, was filed by the Massman Construction Company. Before such rehearing was ever had, and while said application therefor was pending, Carl F. Belk, on February 11, 1936, filed a request and motion for dismissal, and moved the Nebraska workmen's compensation court to make and enter an order in the cause for the dismissal of any and all claims or awards for benefits to which he might be otherwise entitled under the Nebraska workmen's compensation act, and acts amendatory thereof, arising out of the accident for which recovery was sought in and by the petition heretofore re-

ferred to, which was filed July 23, 1935, in said court. The Nebraska workmen's compensation court, on February 11, 1936, entered an order in the cause sustaining such motion and finally dismissing the same. Thereupon, for and in lieu of the cause of action so dismissed, defendant, Carl F. Belk, commenced an action against this plaintiff in the district court for Otoe county, Nebraska, under the Seaman's Act (41 U. S. St. at Large, 1007, ch. 250, sec. 33, 46 U.S.C.A. sec. 688), alleging as the basis of his claimed recovery a claim for $30,000 damages for the same injuries on and for which such Belk originally, on July 23, 1935, filed his petition against this plaintiff in the Nebraska workmen's compensation court. Plaintiff filed its pleading in said cause taking issue with the claims of defendant Belk, and upon trial thereof in the district court a judgment was made and entered in that court in favor of this plaintiff and against Belk, and finally dismissing his cause and denying a recovery therein. On Belk's appeal taken to the supreme court of Nebraska, such judgment was in all respects affirmed (*Belk v. Massman Construction Co.*, 133 Neb. 303, 275 N. W. 76), and upon his application to the supreme court of the United States for review a writ of certiorari was denied. *Belk v. Massman Construction Co.*, 303 U. S. 641, 58 S. Ct. 647.

It further appears that thereafter on May 25, 1938, Carl F. Belk, and his attorney Frank A. Dutton, "did file a petition for compensation alleging the same injuries referred to in his original petition" filed in the Nebraska workmen's compensation court on July 23, 1935. Issue was joined in that cause by the plaintiff herein by its answer in writing which raised, "among other things, the defense of the statute of limitations," and challenged the jurisdiction of the Nebraska workmen's compensation court to now hear and determine said cause. But the defendants, Nebraska workmen's compensation court and the judges thereof, ordered a hearing on the above last mentioned petition and answer, to be held at the court house in Nebraska City, Otoe county, Nebraska, on January 5, 1939, commencing at 9 o'clock a. m. Further, the Nebraska workmen's compensation court and

the judges thereof, defendants herein, and especially by order of Frank M. Coffey, presiding judge thereof, caused plaintiff to be served with notice of a purported rehearing in the first mentioned action for compensation, which had been finally dismissed by order of such compensation court by its order duly entered in said cause on February 11, 1936. Plaintiff avers that each of said orders last referred to were unwarranted in law and made and entered without jurisdiction, and that the Nebraska workmen's compensation court is wholly without authority or jurisdiction to proceed further therein, but will do so unless enjoined. Also, "that the defendant, Carl F. Belk, for the reasons herein stated, had abandoned his said case and claim for compensation originally filed by him, and this plaintiff is threatened with a multiplicity of suits and will be placed at great inconvenience and expense unless said Nebraska workmen's compensation court, the judges thereof, and the defendant, Carl F. Belk, and his attorney, Frank A. Dutton, are enjoined from proceeding with said rehearing." This plaintiff further avers that, by reason of the premises set forth in its said petition, "this plaintiff is without an adequate remedy at law and will suffer irreparable injury and denial of the equal protection of the law." To this petition this plaintiff added the following prayer:

"Wherefore, plaintiff prays that the court restrain and enjoin and prohibit said defendants, and each of them, from proceeding with the purported rehearing in the case of Carl F. Belk vs. this plaintiff, in the Nebraska workmen's compensation court, and from proceeding to hear the second case on the second action for reasons herein, as threatened by said defendants, and as alleged in plaintiff's petition, and that pending hearing on a temporary injunction that a restraining order issue and be entered herein restraining and prohibiting defendants herein, and each of them, from proceeding further on any purported rehearing until this injunction case can be heard upon its merits, and that upon a restraining order issuing herein that there be a rule fixed for hearing and to show cause why a temporary injunction

should not issue and at and within the time provided by law, and that during such time the defendants be restrained from any rehearing, and hearing the second action filed in said compensation case, and that upon final hearing, a writ of prohibition issue against defendants and that said defendants be perpetually enjoined and prohibited from such acts, and for such other and further relief as to this court may seem just and equitable."

Upon this petition, and affidavit in support thereof, and a bond conditioned as required by order of the district court for Otoe county, that court on January 4, 1939, made and entered a restraining order "restraining the defendants from proceeding on any rehearing in the case of Carl F. Belk vs. Massman Construction Company, a corporation, in the Nebraska workmen's compensation court."

Thereafter demurrers were filed to said petition, and motions to dissolve the restraining order were made, all of which were overruled by the district court, and the restraining order was continued in force. Thereupon answers were filed by all defendants, all of which, among other defenses, challenged the contention that the plaintiff possessed no adequate remedy at law. To these separate answers the plaintiff filed replies putting the allegations thereof in issue. On April 28, 1941, the district court for Otoe county entered its final judgment herein finding "generally upon the record, pleadings and evidence for the defendants," and further "ordered that the writ of prohibition be and hereby is denied, the restraining order is dissolved and this suit is dismissed at plaintiff's costs." From the order of the district court overruling its motion for a new trial, the plaintiff, Massman Construction Company, appeals.

The action instituted and prosecuted by the plaintiff, especially in view of the issues presented for trial therein, is clearly an equitable action for injunctive relief. The addition to the prayer of a request for granting the issuance of a "writ of prohibition" is wholly ineffectual to alter or change the fundamental character of the proceeding.

True, in Nebraska, we have held that "The district courts

of this state have ample powers to administer, in proper cases, the remedy which a writ of prohibition affords." *State v. Barney,* 133 Neb. 676, 276 N. W. 676. See, also, *City of Lincoln v. Nebraska Workmen's Compensation Court,* 133 Neb. 225, 274 N. W. 576. This resulted from the legislative adoption of the common law of England, which was effective to adopt as part thereof the procedure of prohibition as it anciently existed at common law, and vested our district courts with original jurisdiction to administer the same. *State v. Barney, supra.* But "prohibition" is essentially and wholly a proceeding at common law. And it is even held that, "It seems that proceedings upon a petition for a writ of prohibition must be considered as on the common-law side of a court having both common-law and equity powers." *Smith v. Whitney,* 29 L. Ed. 601 (116 U. S. 167, 6 S. Ct. 570).

It is quite the general rule that, "An injunction will not be granted when relief may be obtained * * * by a writ of prohibition." 32 C. J. 66.

The general rule also obtains that, "Courts of equity do not issue writs of prohibition." 21 Standard Ency. of Procedure, 814.

The plaintiff having instituted and prosecuted this case in the district court as an equitable action, and, after a complete hearing as such was had thereon, now seeks strictly a common-law relief therein, which a court of equity in the exercise of its equitable powers may not grant, and which, if originally presented as a case for original relief, such court, as a court of equity, would have no jurisdiction to entertain. It would seem within the reasons of the rule announced by the supreme appellate court of New York, as follows: " 'The opinion in this court, in *Mann v. Fairchild* (2 Keyes, 106, 111 *et seq.*), is that, "if a party brings an equitable action, even now, when the same court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds, or fail, even though he may prove a good cause of action at law on the trial." See, also, *Heywood v. Buffalo,* 14 N. Y. 534, 540.' " *Loeb v.*

Supreme Lodge, Royal Arcanum, 198 N. Y. 180, 91 N. E. 547.

It follows, in view of the nature of the litigation then before it, that the action of the district court in refusing the issuance of a writ of prohibition in this cause is approved.

There remains for our consideration the denial by the district court of plaintiff's prayer for an injunction and the dismissal of that action. In the instant case the Nebraska workmen's compensation court and the several judges thereof were made defendants officially, and the relief sought was that they might be enjoined as a tribunal created by law and as individual members thereof. Belk and his attorney were also made parties defendant, but no action was as to them enjoined save and except participation in the proceedings which the Nebraska workmen's compensation court was enjoined from holding. This constituted an error. The general rule in equity, applicable and controlling, is: "It is well understood that injunction to stay proceedings in courts of law is not directed against the court itself, but against the parties to the proceeding." Lewis & Spelling, Law of Injunctions, 184, sec. 86.

A more extended statement of the principles involved in and controlling the instant litigation is the following:

"In injunction, as in other suits, equity acts *in personam.* In the exercise of its power to restrain judicial proceedings in other courts or tribunals, courts of equity proceed not upon any claim of right to interfere with or control the course of proceedings in other tribunals or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination, but upon the theory that having jurisdiction of the persons of those involved, it may compel them to do or to refrain from doing whatever the equities of the case may require. An injunction decree or order restraining actions or proceedings in another court or quasi-judicial body is directed only to the parties. It is not addressed to the court or other tribunal and is in no sense a prohibition on it in the exercise of its jurisdiction." 28 Am. Jur. 381, sec. 191.

Further, with reference to restraining proceedings at law an authority has stated the controlling rule as follows:

"Since the injunction acts upon the parties to the cause and not the court, neither the judge of the court in which the cause is pending, nor the attorneys, should be made parties defendant to a suit to enjoin an action at law, though all the parties interested in the action at law are necessary parties." 13 Standard Ency. of Procedure, 31. See, also, *Shaw v. Goodman,* 135 Ga. 230, 69 S. E. 173; *Ely v. Lowenstein,* 9 Abb. Pr. n. s. (N. Y.) 37; *Kircher v. Pederson,* 117 Wis. 68, 93 N. W. 813; *Hastings v. Belden,* 55 Vt. 273.

Again, "An injunction will not be granted to restrain an official in the exercise of his official functions; the writ lies only against suitors in the proceedings before him." *Stone v. King-Hodgson Co.,* 140 Ga. 487, 79 S. E. 122.

It is obvious that the plaintiff is entitled to no relief against the Nebraska workmen's compensation court, or against the official members thereof or any of them; and that Frank A. Dutton as attorney for Carl Belk, defendant, was improperly made a party defendant in said cause, and the plaintiff is not entitled to receive and recover any relief against him. While, under the peculiar facts in this case, it may be a serious question whether an equitable cause of action is pleaded against defendant Belk, still we prefer to put our decision of that issue on the basis that, in the application of the rule that equity will withhold its injunctive relief where it appears that the remedy at law is plain, adequate and complete, it may where such is the case refuse to grant an injunction to restrain judicial proceedings. There is no occasion for equity's interference where the Nebraska workmen's compensation court in the action before it does, and is empowered to do, as full justice to the parties and to the matter in dispute as can be done in equity. If the controversy is such as would be decided by a court of equity upon grounds equally available at law, or before the compensation court, the usual legal action will not be enjoined when the ground upon which the injunction is sought may be interposed as a defense to such legal action.

Unquestionably, every matter upon which the plaintiff relies to support its equitable action in the instant case may be properly considered as a defense in the proceeding before the compensation court, and entitled to such weight as under the law it may rightfully have and possess.

It follows that the judgment of the district court in this cause refusing the issuance of the injunction by plaintiff prayed for, and dismissing its equitable action, was in all respects correct, and is

AFFIRMED.

IVAN HANSEN V. STATE OF NEBRASKA.

3 N. W. (2d) 441

FILED APRIL 17, 1942. No. 31282.

1. **Assault and Battery.** If competent evidence was offered that a half-hour before the fight the complaining witness had threatened to assault the defendant, it was improper to exclude such evidence.
2. **Criminal Law.** It is the duty of the trial judge to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in his charge to the jury, but also on the examination of witnesses or otherwise during the course of the trial.
3. ———. Such partial remarks must be avoided by the trial judge, for it is a well-known fact that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal cases.
4. ———. Positive declarations made by the trial court in an emphatic, argumentative, or sarcastic manner cannot be dislodged from the minds of the jury by later reading a formal instruction that the jury are the sole judges of all questions of fact.
5. ———. Comments, if any, which a trial judge may add to his rulings upon objections to the introduction of evidence must always be fair to the accused, judicial, and dispassionate, and not present the picture of the case out of focus.
6. ———. Section 29-2308, Comp. St. 1929, providing that no judgment in a criminal case shall be set aside for error as to any matter of pleading or procedure if this court shall consider that no substantial miscarriage of justice has occurred, does not prevent a reversal of a conviction by this court if the defendant has

not had a fair trial because of questionable rulings upon the admission or rejection of evidence.

ERROR to the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Reversed.*

A. B. Wallace, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Herbert T. White, contra.*

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

PAINE, J.

The defendant was convicted of assault to do great bodily injury, and sentenced to one year in the penitentiary, and brings error proceedings to this court.

Complaint was filed in the county court for Boyd county on December 9, 1940, charging that Ivan Hansen did on December 7, 1940, unlawfully, intentionally and feloniously assault, strike and wound John Quest, with the intent then and there to inflict great bodily injury upon the person of John Quest, contrary to the statutes in such case made and provided and against the peace and dignity of the state of Nebraska. The defendant waived preliminary hearing, and was bound over to the district court, bail being fixed in the sum of $1,000.

To the information filed in district court, the defendant entered plea of not guilty, and his trial in the district court was set for March 17, 1941.

On March 19, 1941, the jury returned a verdict of guilty as charged in the information, but recommended that, as this appears to be the first major offense, the court exercise leniency in pronouncing sentence.

A brief summary of the evidence shows that this assault occurred in Naper, a town of less than 200 population in Boyd county, near the South Dakota line, on a Saturday night. John Quest was the manager of the small light plant, and was 59 years of age, blind in one eye, wore glasses, and weighed about 200 pounds.

Ivan Hansen (commonly called "Swede"), the assailant, was 38 years of age, over 6 feet tall, and weighed nearly 215 pounds. These parties had known each other for 24 years, and have had minor difficulties down through the years, so that it can be said "bad blood" existed between them. The defendant said that trouble started between them in 1929. Further trouble developed when defendant was running a liquor store in Naper.

John Wentz testified for the state, and was the only witness who saw the affair from beginning to end. He saw the defendant come into the crowded pool hall and talk to Quest for five or ten minutes. He testified that the defendant looked "kind of wild," started for the door, and said, "Come on, John," and so the witness thought something out of the ordinary was about to happen, and followed along behind the two principals. The defendant started off toward the light plant, Quest following him. Suddenly the defendant hit Quest, and kicked him, and he went down, and he kept kicking him after he went down. Witness testified that he grabbed defendant, and told him he would kill him if he kept kicking him, and that the defendant answered, "That's what I want to do, to kill that son-of-a-bitch for the last three years." Others came out and finally pulled the defendant away from Quest.

Dr. R. E. Kriz testified that about midnight John Quest was brought to his office in Lynch by two or three men; that Quest was irrational, had been badly beaten up, his left eye was blacked, he had several teeth loose, one was knocked out, a swelling back of his right ear, bruises on the jaw, a marginal fracture of the fibula of the right leg. Two days later, when he called to see Quest at his home in Naper, he discovered that he also had the sixth and seventh ribs broken on the right side. He treated all these injuries, and told the injured man to stay in bed for ten days or two weeks, but does not know whether he did or not, as he only saw him once at his home after his injuries.

The defendant makes no objection to the instructions given the jury, but charges 62 errors of the court in the con-

duct of the trial in the district court. It is charged that the court erred in ruling upon evidence, and refusing to permit evidence of previously communicated threats, also in refusing to admit evidence leading to the immediate provocation of the assault and prior trouble between the parties. In addition, it is repeatedly charged that the trial judge made improper remarks in the presence of the jury that tended to highly discredit the defendant and his witnesses and the defendant's evidence before the jury, and that, because of this prejudicial conduct, the accused did not have a fair trial, such as is guaranteed him under the law of Nebraska.

Among the many errors set out by counsel for the defendant, we will consider only a few, alleged to be the most serious.

On cross-examination of John Wentz, he was asked: "Q. 194. Had you ever heard Quest—you didn't hear Quest that night in the pool hall razzing the fellows around the card tables, did you? Mr. Brennan (county attorney): Objects to this as improper cross-examination. The Court: Haven't you covered all that; this man says he didn't hear one word they said; isn't that enough? Mr. Wallace: He was right there beside him? The Court: He told you that; he sat on the chair beside Quest, and then Quest was over by the stove and he didn't hear one word that was said there. That ought to cover it. Defendant excepts." It is insisted that, as this was the principal witness for the state, the remarks of the court tended to impress the jury with the conviction that the court thought the witness was telling the truth, and that there were no prior threats and difficulties, and that if there were any they were not material, and the above action by the court was an uncalled for limitation on cross-examination when an attempt is being made to bring out the facts, and no such limitation was placed upon the prosecution by the court, and it is further objected to on the ground that it was instructing the jury orally.

The same witness was asked on cross-examination by defendant's counsel: "Q. 195. Are you in or out of the beer taverns quite often? Mr. Brennan: Objects as immaterial.

The Court: What has that got to do with this case? Let's try this case. Mr. Wallace: There is lots of things to be shown here. The Court: The fact that a man goes in a beer tavern a lot of times—he told you he was sober and wasn't drinking; he's told you all about that. Now if he went in there every time he was in town would not change the facts in this case any. Sustained. Defendant excepts." Defendant argues that the court erred in sustaining the objection to this preliminary question to show prior difficulties between the parties in the presence of this witness, and the remarks of the court do not reflect the evidence, as the witness testified that he had been drinking, and were prejudicial as implying that defendant was not attempting to bring out the true facts.

The witness had made this answer on cross-examination before the court's remark: "I might have drank a glass of beer, I don't know."

On cross-examination of complaining witness: "Q. 754. Was you thumbing your nose at Hansen in the pool hall that night of December the 7th? The Court: That wouldn't be any excuse for an assault. You will have to try this lawsuit, Mr. Wallace, right down to where it belongs. Defendant excepts." Counsel argues that this was an undue restriction on cross-examination and an oral instruction that prior threats and difficulties were immaterial.

On direct examination of Clarence Andersen this question was propounded to him: "Q. 856. Did you hear him that evening—did you hear him make any remark about that he had a great mind to whip him? Mr. Brennan: Moves the court to strike the question as leading and very suggestive. The Court: Sustained. The question will not be regarded by the jury, you will absolutely pay no attention to it, gentlemen. Defendant excepts."

After the witness Clarence Andersen had testified that he heard John Quest on evening of the alleged assault make remarks in regard to Ivan Hansen in beer tavern, he was asked the following questions: "Q. 859. Just tell the court what was said. The Court: Was this before the fight? A. Yes,

sir. The Court: How long? A. I couldn't swear to that. The Court: About how long? A. I imagine probably a couple of hours anyway. The Court: I will not permit it then; and the jury will disregard the question. And I may say further there is no foundation for this question. Defendant excepts. Q. 860. Now how close can you fix that remark that he said? The Court: He already fixed it—two hours before. Q. 861. You fix the time at about 9 o'clock? The Court: You are wasting time this morning; you have one ruling, which ought to be sufficient. I have said that would not be permitted. Defendant excepts. Mr. Wallace: The defendant offers to prove by this witness that about a half an hour before the fight he was in the beer tavern in Naper, Nebraska; that Mr. *Benson* (Hansen) was present, and that the complaining witness said at that time that I am a great mind to whip that white livered son-of-a-bitch; referring to Hansen; and this witness will testify that some one talked him out of doing it at that time; and that said statement was made loud enough for others to hear the remark; and that Ivan Hansen was close enough to hear it, and he seemed to pay no attention to it. The Court: That will not be allowed. Defendant excepts."

On direct examination the defendant testified that he had had prior difficulties with the complaining witness, and he was asked the following questions: "Q. 956. Now did you have some words with him one time in regard to a liquor store, when you were running a liquor store in Naper? A. Yes. Q. 957. What was the occasion for that? Mr. Brennan: Objects as incompetent, irrelevant and immaterial; no foundation laid, and it doesn't constitute a defense in this case. The Court: That was a long time before December 7, 1940? A. Yes. The Court: Sustained. Defendant excepts. Q. 958. I want to go back to the very first, my idea is to start from the first of it. Now when was the first time he ever threatened you? How far back was that? Mr. Brennan: Objects as incompetent, irrelevant and immaterial, and no foundation laid. The Court: Sustained. Defendant excepts. Q. 959. Did he annoy you in regard to the

matter of your liquor store, and did you have words between you on that? Mr. Brennan: Objects as incompetent, irrelevant and immaterial; no foundation laid, and no defense in this case. The Court: Sustained. I might suggest Mr. Wallace, that we try this lawsuit. Defendant excepts. Mr. Wallace: How far can I go back if the court wants it that way? I would like to show some preliminaries leading up to this night; that is my idea of trying this lawsuit. The Court: I will have to rule on the evidence as it comes out. Q. 960. You and Mr. Quest had had some trouble very recently before this had you not, Mr. Hansen? A. Yes. Mr. Brennan: Objects as incompetent, irrelevant and immaterial, and no foundation laid. The Court: Sustained."

Further in the direct examination of the defendant, referring to a conversation he had with the complaining witness in the same beer hall a few nights before, he was asked: "Q. 1063. Did Mr. Quest make a statement there that night in regards to whipping you, or doing something to you, after eleven? Mr. Brennan: Objects as incompetent, irrelevant and immaterial, and no foundation laid; and no defense in this case. The Court: Sustained, and the jury will disregard the question absolutely. Defendant excepts. Mr. Wallace: The defendant offers to prove by this witness that a night or two before the fight that they was in the pool hall, him and John Quest, and some other parties, playing a game of cards, and that Quest made statements at that time for all of them to stick around there was a bounty on Swedes after 11 o'clock, implying he was going to whip Hansen after 11 o'clock. Mr. Brennan: Objects to this offer as being incompetent, irrelevant and immaterial, and no proper foundation laid, and no defense to this case. The Court: Sustained. Defendant excepts."

After a half dozen more questions relating to complaining witness making loud remarks against defendant a night or so before in this same pool hall, the court sustained another objection, and then added: "The Court: Now Mr. Wallace, you are flying right in the face of the rulings of this court deliberately; you are trying to put in evidence after I have

ruled it out. I don't know how much longer I am going to permit this. I have permitted you to make a lot of offers and I have heard them all, and I have tried to be patient. What Mr. Quest said a week before, if anything was said, had nothing to do with this affair that night out back of the pool hall. I have told you what the law was the best I could. I don't think you ought to pursue this line of questioning any further." Defendant's counsel excepted to these remarks of the court, then made a complete offer to prove.

In our opinion, if competent evidence was offered that a half-hour before the fight the complaining witness had threatened to assault the defendant, it was improper to exclude such evidence. See *People v. Tillman,* 132 Mich. 23, 92 N. W. 499.

"Evidence of the relations existing between accused and the person injured, prior to the crime, is admissible." 16 C. J. 546.

"It is competent to show the state of feeling of a witness when called to testify, for the purpose of giving the jury all the facts necessary to a full and fair consideration of his evidence, and enable them to determine the degree of credit to be accorded thereto." 28 R. C. L. 615, sec. 204. See, also, *State v. Kenstler,* 44 S. Dak. 446, 184 N. W. 259.

"In order to determine who was the aggressor, evidence of previous difficulties between the parties may be considered. * * * And where the state has introduced evidence of a previous difficulty between the prosecutor and defendant, the latter may show that the prosecutor was the aggressor in the previous affair." 5 C. J. 787.

The several rulings of the trial court which we have set out in this opinion are but a few of the 62 such instances set out at length in the defendant's brief, and indicate the general trend and character of the court's comments. Some of the comments made light of defendant's evidence, and gave full credence and weight to the evidence in opposition thereto.

A few courts have followed the federal courts in holding that the trial judge has the right to comment on the weight

of the evidence. See *State v. Hauptmann,* 115 N. J. Law, 412, 180 Atl. 809; *People v. Burlingame,* 257 Mich. 252, 241 N. W. 253.

California in 1934 amended its Constitution (art. VI, sec. 19) to permit such instructions, and in the same year New Mexico gave the trial judge right to comment on the evidence by court rule 70-106. See annotation, 113 A. L. R. 1308.

"The judge should, during the course of the trial, refrain from remarks that are calculated in any way to influence the minds of the jury. This includes remarks to counsel touching the management of the case and reflecting on their conduct, as well as those touching the character of the witnesses and the value of their testimony; and, if the remarks so made are material and improper, they may be prejudicial. Accordingly, if properly excepted to and brought into the record, they may work a reversal of the case on that ground. * * * The fact that prejudicial remarks as to the evidence were addressed to counsel, in the presence of the jury, and not to the jury does not destroy their prejudicial character." 26 R. C. L. 1026, sec. 27.

As a general rule, "It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury * * * but also on the examination of witnesses and otherwise during the course of the trial. The trial judge should not deny the existence of any fact bearing on the innocence of accused, or make any remark or inquiry in the presence of the jury concerning matters of fact at issue which indicates his opinion as to such facts." 23 C. J. S. 349, sec. 993.

"The court interrogated a witness, and in sustaining an objection interposed by defendant remarked: 'Owing to the objection, the question may be withdrawn on the objection of counsel for the defense. If the counsel for the defense objects to securing information, we want the objection sustained.' The defendant argues earnestly that the remark was prejudicial to his rights. It seems to us that in the respect noted the court erred. If the information sought was

material the objection should have been overruled. In any event the remark was out of harmony with the spirit that should prevail in the trial of a defendant for a capital offense. Such an observation would scarcely fail to cause an intelligent jury to believe that in the opinion of the court the defense was seeking to conceal material testimony, and the remark was therefore prejudicial to the accused. It is well known to those who are familiar with jury trials that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal actions. For this reason, among others, the court should avoid even the appearance of partiality as between the parties. The court's inadvertence is evident, and the objectionable remark was unwarranted." *Kraus v. State,* 102 Neb. 690, 169 N. W. 3.

The jury are often so influenced by a casual and unintended statement of the court that thereafter they fail to exercise their own judgment independently, and to this extent the defendant loses his privilege of a fair trial by the jury.

On the other hand, positive declarations, made in an emphatic, argumentative, or sarcastic manner by the court cannot be dislodged from the minds of the jury by a later instruction that they are the sole judges of questions of fact.

As has been said repeatedly, any comment the court makes, in addition to ruling on an objection to the introduction of evidence, must always be fair to the accused, judicial, and dispassionate, and not present the picture of the case out of focus.

The fact that, in the case at bar, the jury in their verdict recommended that the court exercise leniency indicates that the feeling shown by the court towards the accused was recognized by the jury.

The state urges that we carefully consider that part of section 29-2308, Comp. St. 1929, reading as follows: "No judgment shall be set aside * * * or judgment rendered in any criminal case on the grounds of misdirection * * * or for error as to any matter of pleading or procedure if the supreme court, after an examination of the entire cause,

shall consider that no substantial miscarriage of justice has actually occurred." This section is considered at length in 13 Neb. Law Bulletin, 181, in which it was said: "This of course does not mean that every case must be affirmed merely on a showing of guilt of the defendant. * * * The statute does not do away with rights granted to defendants by the Constitution. Further than that it would seem to guarantee the defendant a fair trial. Apparent technicalities may prevent a fair trial in particular cases and defendants should be allowed to show that they have so prevented."

This court has heretofore said, in reversing a conviction: "During the course of a jury trial, it is considered improper for a trial judge to support his rulings by making significant remarks in reference to the evidence to the jury. *Goldman v. State,* 128 Neb. 684, 260 N. W. 373.

After carefully considering the prejudicial errors in this record, we have reached the conclusion that the defendant was not given a fair trial, as required by law, and the sentence is hereby set aside and the judgment reversed, and a new trial ordered.

REVERSED AND REMANDED.

ROSE, J., dissents.

HAROLD W. GLISSMANN, APPELLANT, V. F. H. BAUERMEISTER ET AL., APPELLEES: HENRY C. GLISSMANN ET AL., APPELLANTS.

3 N. W. (2d) 555

FILED APRIL 17, 1942. No. 31387.

1. **Appeal.** In perfecting appeals in civil cases from the district court to the supreme court, it was formerly a jurisdictional requirement, under section 20-1912, Comp. St. 1929, that the transcript be filed within three months of the entry of the final order in the district court, but under the new law (Comp. St. Supp. 1941, sec. 20-1912) it is provided that the filing of the transcript is not jurisdictional.
2. ———. Under the new law passed by the last legislature, being section 20-1912, Comp. St. Supp. 1941, it is provided that, if

appellant files a notice of intention to prosecute an appeal in the district court, with a deposit of the $20 required by law in appeals to the supreme court, within three months after entry of the final order, such appellant has perfected the jurisdictional requirements for an appeal.

3. ———. Section 20-1912, Comp. St. Supp. 1941, provides that "Within the same period of three months the appellant or appellants shall file in the supreme court a transcript certified by the clerk of the district court, containing the judgment, decree or final order sought to be reversed, vacated or modified." The failure to file such transcript within three months is ground for dismissing said appeal, when no valid and sufficient excuse is shown for the failure to file the same. Inexcusable negligence will not warrant the filing of a transcript out of time.

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

Samuel L. Winters and *Gordon A. Nicholson,* for appellants.

Gray & Brumbaugh, contra.

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

PAINE, J.

This cause came on to be heard before this court by the argument of a motion of Serena E. Grabow and John J. Grabow, defendants, to dismiss the appeal of Harold W. Glissmann, plaintiff, upon the ground that a transcript of proceedings had in the district court, and from which this appeal was taken, was not filed in this court within the period of three months from the entry of the order by the district judge.

This is the first case coming before this court involving the new statute on the question at issue. Under the law as set out in section 20-1912, Comp. St. 1929, a transcript must be filed in the supreme court within three months from the rendition of the judgment, or decree, or final order, or within three months from the overruling of a motion for a new trial. It further provided that the filing of such transcript

was the act which conferred jurisdiction in said cause upon the supreme court, and under this law, the filing of the transcript being made after three months, this court would not acquire jurisdiction.

The legislature of Nebraska of 1941 amended this section to change the entire procedure of bringing a case to the supreme court, as shown in section 20-1912, Comp. St. Supp. 1941. This amended section, so far as it applies to the case before us, provides that, within three months from the making of a final order or the overruling of a motion for new trial, a notice of intention to prosecute such appeal shall be signed by the appellant or his attorney, and such notice of intention to appeal shall be filed in the office of the clerk of the district court, with the deposit of the docket fee of $20, required by law in appeals to the supreme court. It is further provided that, after such docket fee and notice of appeal have been filed in the office of the clerk of the district court, the supreme court shall have jurisdiction of the cause, and after an appeal has been so perfected it cannot be dismissed without notice, and no step other than the filing of such notice of appeal and deposit of such docket fee shall be deemed jurisdictional, and the clerk of the district court shall forthwith forward the docket fee and a certified copy of the notice of appeal to the supreme court, which shall forthwith docket such appeal.

Such amended section further provides that the appellant shall file a certified transcript with the clerk of the supreme court within three months, and that neither the form nor substance of the transcript shall affect the jurisdiction of the supreme court.

It is thus to be seen that under the new law the filing of the notice of appeal and the depositing of the docket fee with the clerk of the district court constitute the only jurisdictional steps to get a case into the supreme court.

It is therefore clear that the filing of the transcript in this case, which was not filed on February 5, 1942, but was filed on February 18, presents not a jurisdictional question, but simply one of procedure in the court.

This case was decided in an opinion released April 18, 1941, and found in 139 Neb. 354, 297 N. W. 617, and this opinion was supplemented by a further opinion, disposing of all matters involved, released in this court July 3, 1941, and found in 139 Neb. 362, 299 N. W. 225.

The matter came on before the district court for Douglas county, together with an application for an order to stop payment of moneys paid into court by the appellant and an application for a stay of proceedings by the appellant, and objections of Serena E. Grabow and John J. Grabow in resistance of said motion, and moving the court to obey the mandate of the supreme court, and to forthwith pay to Serena E. Grabow $3,106.17 that had been theretofore paid to the clerk of the court by the Happy Hollow Club, Inc., and other sums as directed in the judgment of this court, and thereupon a hearing was had on all such matters on November 4, 1941, and a final order was entered by the district judge, denying the application of the appellant, and directing Robert Smith, clerk of the district court, to pay out certain sums of money in accordance with the decision of this court, and to pay the same, without any further order or direction of the court, to Serena E. Grabow upon her signing said docket therefor.

Thereupon, a supersedeas bond was filed by the appellants in the sum of $4,000, which bond was approved by the clerk of the district court on November 4, 1941.

On November 26, 1941, there was filed in the office of the clerk of the district court for Douglas county notice of intention to appeal, signed by Harold W. Glissmann, Henry C. Glissmann and Tena E. Glissmann, by their attorneys, Samuel L. Winters and Gordon A. Nicholson. This notice of appeal and supreme court docket fee of $20, which was forwarded to the clerk of this court and filed by him on November 28, 1941, gave the supreme court jurisdiction of the case.

On February 9, 1942, there was filed in this court motion of appellees, Serena E. Grabow and John J. Grabow, to dismiss the appeal because of the failure and neglect to file the transcript in this court within three months from the entry

of the order, which was entered on November 5, 1941.

In opposing said motion to dismiss, there is the affidavit of Henry C. Glissmann and the affidavit of Samuel L. Winters, his attorney, filed March 5, 1942, being three days after the motion was argued in this court, but consent having been given by this court that such affidavits might be immediately filed.

The affidavit of Samuel L. Winters sets out that promptly upon the announcement of the judgment of the district court on November 4, 1941, notice of appeal was filed and $20 costs in the supreme court was deposited with the clerk of the district court for Douglas county; that thereupon Samuel L. Winters, attorney, instructed Henry C. Glissmann, his client, to order a transcript from the clerk of the district court of the proceedings, but that said client misinterpreted his attorney's instructions, and ordered from the court reporter a bill of exceptions of the evidence that was offered before District Judge Dineen in support of the objections which had been filed in opposition to carrying out the order; that at some time later such attorney found out that Henry C. Glissmann, his client, had made a mistake, and in checking up the record found out that February 4 was the last date for the filing of the transcript with the supreme court, and thereupon requested the clerk of the district court to prepare a transcript forthwith, but such clerk at first claimed that, three months having gone by, they would have no authority to prepare the transcript, but later clerks in his office were directed to prepare the transcript, which was done, and said transcript was filed in this court as of February 18, 1942.

In the affidavit filed in this court March 5, 1942, by Henry C. Glissmann, one of the litigants, it is set out that he is acting for his son, Harold W. Glissmann, the plaintiff, and that his attorney, Samuel L. Winters, instructed him to go with Attorney Nicholson, who was associated with Samuel L. Winters in trying the case, and fix up a notice of appeal and deposit the $20 in the clerk's office, and order a transcript of proceedings; that in pursuance of such instructions the af-

fiant and Attorney Nicholson went to the clerk of the district court and filed the notice of appeal and paid the $20 docket fee, and then Attorney Nicholson instructed the affiant to go to the court reporter and get a transcript of the evidence and proceedings had in that court, and affiant followed such instructions, and that later, when it was discovered that the transcript had not been prepared, it was then February 5, and Miss Darr, in charge of transcripts, said that one day had gone by and the time had expired, but that the matter was taken up with Miss Ryan, and then with Robert Smith, the clerk, and that Samuel L. Winters, the attorney, then showed the new statute to Robert Smith, and that finally an order was given for preparing the transcript, which was done after the three months had expired.

In the opinion of this court in the case of *Power v. Federal Land Bank, ante,* p. 139, 2 N. W. (2d) 924, in which a motion for a new trial was not filed within three days, this court held that press of other law business on the part of attorneys would not be considered as an excuse for not filing the motion for new trial.

In the case at bar, we feel that, between the instructions given their client, Henry C. Glissmann, by two competent attorneys, in some way the client misunderstood the instructions from his counsel, and ordered the bill of exceptions from the court reporter instead of a transcript from the clerk of the district court, and that this mixup and failure to secure a transcript was an error which could easily have been discovered by either attorney calling the office of the clerk of the district court by telephone and asking whether the proper transcript was being prepared, and discovering at once, and in ample time to correct, the mistake which was being made.

We said in *Power v. Federal Land Bank, supra,* that this court is reluctant to deprive a litigant of a hearing on the merits of his case by disposing of the case on a motion, but in the case at bar we cannot overlook the records in this court, showing that six opinions have already been handed down in the last ten years on various phases of the matters

in litigation, to wit: (1) *Bauermeister v. McDonald,* 124 Neb. 142, 247 N. W. 424, being case No. 28271, decided in 1932; (2) *Glissmann v. McDonald,* 128 Neb. 693, 260 N. W. 182, No. 29205, decided in 1935; (3) *Glissmann v. Happy Hollow Club,* 132 Neb. 223, 271 N. W. 431, No. 29870, decided in 1937; (4) *Glissmann v. Orchard,* 139 Neb. 344, 297 N. W. 612, No. 30934, decided in 1941; (5) *Glissmann v. Bauermeister,* 139 Neb. 354, 297 N. W. 617, No. 30935, decided in 1941; (6) *Glissmann v. Bauermeister,* 139 Neb. 362, 299 N. W. 225, No. 30935, decided in 1941.

Under all the circumstances, and considering that the excuses set forth in the affidavits have little merit, we have reached the conclusion that the motion to dismiss this appeal should be sustained on the ground that the affidavits filed do not give a valid and sufficient excuse for failing to file the transcript within three months, as provided by law. Motion to dismiss the appeal sustained.

APPEAL DISMISSED.

EMANUEL COOK, APPELLEE, V. MADALINE COOK, APPELLANT.
3 N. W. (2d) 450

FILED APRIL 17, 1942. No. 31264.

1. **Divorce.** "In an action for a divorce on the ground of adultery, it is not always necessary to show the overt act; the charge may be sufficiently proved by the evidence of such circumstances as will lead a just and reasonable man's mind to the conclusion of guilt." *Stackhouse v. Stackhouse,* 88 Neb. 184, 129 N. W. 257.
2. ———. Evidence examined, the substance thereof stated in the opinion, and *held* to sustain the judgment.

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

Anson H. Bigelow, for appellant.

Shrier & Shrier, contra.

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

MESSMORE, J.

In the district court for Douglas county plaintiff was granted an absolute divorce from the defendant, who was found guilty of adultery. Plaintiff was also awarded the care, control, maintenance and education of the six minor children. One other child, 20 years of age, was married and lived at home. The defendant was granted $75 permanent alimony, payable $7.50 a month, and attorney fees to her counsel. She prosecutes an appeal to this court.

The record is voluminous, and we shall set forth in this opinion only such evidence as we deem necessary for a consideration of the case, in so far as the charge of adultery is concerned.

Plaintiff and defendant were married in 1920. At the time he was 23 years of age and she a girl of 17. To this marriage were born seven children, and the marriage relation lasted for 22 years. Plaintiff started in life as a laborer and for 17 years last past has been employed as a fireman in the city of Omaha, with an earning capacity of $140 a month.

The charge of adultery centers around one Orville Brooks, who first went out with the defendant in December of 1938. In all he testified to some 30 "dates" he had with her. Before testifying, he was admonished by the court that he could stand on his constitutional right and not testify, if any of his testimony would incriminate him. He asserted that he was prepared to testify. On or about January 2, 1939, he went with the defendant to a house on Twenty-third street between Clark and Seward in Omaha, where he stayed with her for two or three hours, and he testified that he had sexual intercourse with her. He further testified that he was with her in a cab; they started talking about different things. "We were going away together, with each other. And we kissed about a couple of times in the cab. She was going to run off and leave her children." Subsequently, in February, 1939, they were together in a house known as the Parker house, and on the third night, he testified, he took her to a room in the house and had sexual intercourse with

her. He further testified that on one other occasion he took her to his apartment for the same purpose, and at another time she sent a cab for him; he arrived at her house, where she was clothed in house pajamas, and "she had me button them up her back." On some of these occasions he furnished liquor for both of them.

With reference to the incident at the Parker house, his mother called the husband of the defendant, telling him that her son was a parolee and was with the plaintiff's wife, and she desired to break up this relationship. The plaintiff proceeded to the Parker house, saw his wife alight from a cab and go into the house. He subsequently knocked at the door; she had hidden from him; Brooks was not there. The plaintiff did not inquire about his wife but asked about Brooks, who arrived after plaintiff had left. On occasions mentioned, it appears that the defendant would send taxicabs for Brooks.

The corroborating evidence consists of the testimony of a taxicab driver, that he delivered a message from the defendant to Brooks, to meet her, and that he was to take Brooks to 2734 Caldwell street; that he picked up both Brooks and defendant in his cab from that address at from 11 to 11:30 p. m. Brooks' testimony is further corroborated by the testimony of defendant's witness, Grant Parker, who resides at the address above mentioned, where Brooks introduced to him and others the defendant as Mary Smith, she making no protest, and that she was hidden in the kitchen when her husband called.

There appears in the record a letter, written to one Harry Denton, living close to the residence of plaintiff and defendant, in which she wrote: "Wait at home tonight for me about 8 o'clock. But call me please anyway no one is home but me so I'll be listening." A police officer, a member of the morals squad, testified that he and another officer one night parked a car some distance ahead of defendant; that she solicited a man; they put out the lights on their car, and she approached and solicited them; that she was placed

under arrest and charged with soliciting and fined one dollar and costs, and the fine was remitted.

Defendant in her testimony denied the charges and denied relationship of any kind with Brooks, but charged and insinuated that her husband was morally indiscreet. Her testimony with reference to her relations with Brooks, her presence at the Parker house and her conduct generally is not impressive. She had, of course, at one time been a good mother, but by her own conduct she brought about the disgraceful and sordid situations described in the record and her present physical condition. The record does not disclose that plaintiff was to blame in any respect for these conditions. With reference to his financial circumstances, he was indebted to the extent of some $1,750, and these debts had to be paid out of his wages. In addition thereto, he was awarded the custody of the six minor children. We deem it unnecessary to detail other evidence as to the relationship of these two parties during their married life.

The defendant produced the testimony of medical experts as to her present physical condition, disclosing that she is badly in need of medical attention. She asserts that such condition was brought about by the marriage relation and the number of children she had borne and raised. She bases her case almost entirely on the proposition that it is the duty of the plaintiff to obtain and pay for her physical rehabilitation, to enable her to reestablish herself as a loving wife and mother. We conclude that such request is without merit under the circumstances.

This court has held: "In an action for a divorce on the ground of adultery, it is not always necessary to show the overt act; the charge may be sufficiently proved by the evidence of such circumstances as will lead a just and reasonable man's mind to the conclusion of guilt." *Stackhouse v. Stackhouse,* 88 Neb. 184, 129 N. W. 257.

Upon a reading of this record, we believe it is sufficiently proved thereby as to lead to the conclusion arrived at by the trial judge in rendering a decree in favor of the plaintiff and in finding the defendant guilty of adultery.

In the present state of the record, we are driven to the conclusion that the judgment and decree of the trial court should be and are hereby

AFFIRMED.

OTOE FOOD PRODUCTS COMPANY, APPELLANT, V. GEORGE CRUICKSHANK, APPELLEE.
3 N. W. (2d) 452

FILED APRIL 17, 1942. No. 31344.

1. **Workmen's Compensation.** Where an employee sustains a personal injury by an accident arising out of and in the course of his employment, which injury destroys the sight of his right eye for industrial purposes, although with extra artificial means the vision of such eye might be restored to nearly normal, but not to such extent that he would have coordination of both eyes even with the glass correction, he is entitled to compensation for the loss of an eye, under section 48-121, Comp. St. 1929.
2. ———. Where an employer alleges that a second injury, other than one suffered by the employee in the course of his employment, constituted the proximate cause of the loss of sight of the employee's right eye, such allegation is affirmative, and the employer has the burden of proving the same with reasonable certainty, and, by his failure to so prove, compensation will be based upon the injury received by the employee in the course of his employment.
3. ———. Evidence examined and *held* to sustain the award.

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

Lloyd E. Peterson, for appellant.

Thomas E. Dunbar, contra.

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

MESSMORE, J.

This is a compensation case. The employer alleged in its petition in the workmen's compensation court and in the

district court that the employee suffered an injury to his right eye, for which he was paid compensation for temporary total disability and medical expenses; that the employee is claiming compensation benefits for the permanent total loss of vision in his right eye by reason of the injury. The employer then pleaded a second injury to the employee's right eye, the details of which are shown in a statement of the evidence. The employee's answer in the district court alleged that in the course of his employment he sustained an injury to his right eye, causing permanent total loss of vision. The compensation court granted an award of $15 a week for 125 weeks from and after February 27, 1939. This award was affirmed by the district court and from its judgment the employer appeals.

The record discloses that the employee had been employed by Otoe Food Products Company since 1930. At the time of the accident in question he was head fireman in charge of boilers, and on October 14, 1937, while in the course of his employment, a gland on a pump had broken and he was repairing it. He attempted to remove it with a center punch, and a piece of steel lodged in his right eye. The next morning he notified the employer of the accident and was requested to go to a physician for treatment, which he did. He later went to a specialist who treated him for some period of time. He developed a traumatic cataract on his eye, which began to show up October 19, 1937, and on or about January 23, 1939, he underwent an operation for removal of the cataract. According to the expert's testimony this operation consisted of making "an incision in the front part of the eye with a small splinter knife for the purpose of opening up that eyeball wide enough to permit the cataract to be withdrawn. The incision is made in the edge of the cornea in an eye; looking straight at an eye that incision would follow the upper part of the curve of the colored part of the eye where it joins the white of the eye and it would occupy about a little less than one-half of the circumference of the cornea." After the operation the incision was sutured, and the employee remained in the hospital until the fifth

day. On January 28, 1939, a test of the percentage of vision in the right eye was taken. It showed 90 per cent. vision with glass correction. His eye was bandaged; he then went to his home to convalesce and shortly thereafter, while he was sitting in a chair, his wife was playing with a small son, who lassoed her with a rope around her ankles, causing her to fall; she extended her arm, striking the employee in his bandaged eye with her hand. He suffered pain, his eye became inflamed; he went immediately to the doctor, who advised removal of the eye, but this was not done.

The medical testimony of the attending physician showed that the employee's eye had a puncture wound through the front part of the eye a little above and toward the temple from the center of the pupil, and that the puncture would have penetrated far enough to injure the crystalline lens, which lies one-eighth of an inch back in the eye, back of the cornea; that the cataract was caused by the trauma. After the operation, as heretofore described, the doctor testified, the employee's vision was limited to the perception of light, and he was not able to count his fingers. His vision was one-tenth of 1 per cent. after the original accident on October 14, 1937, and from such time until the removal of the cataract it was less than one-tenth of 1 per cent. and continued that way until January 23, 1939, the date of the operation; therefore, the vision in the one eye was 90 per cent. corrected with glass. The attending physician in October, 1939, examined the employee, who could count his fingers and had about 80 per cent. vision with correction with plus 13 lens, which is like a magnifying glass 3/16 of an inch thick.

In August, 1940, at the time of the trial, the real condition as to vision was about the same, a trifle less than 80 per cent. with correction, and without correction was practically zero. Another expert examined the employee's right eye and found it was aphacic, with some scarring in the limbus of the eye cornea; that there existed a surgical coloboma of the right iris; that there were some thick capsular remains in the right pupillary space; that there had been surgical removal of the crystalline lens, and when such lens

is removed there is "an imperfect field of vision, and a very small amount of vision with the applying of lens to the eye," approximately 3/400, as recorded on Snellen charts, so that, after removal of the cataract, there would have to be applied some mechanical means of refraction. The doctor testified that the second accident to his eye had not changed employee's condition with reference to vision; that the employee had peripheral vision, but not to the extent he would have had, had he not been injured; that without the aid of glasses he had no industrial vision. He also testified that the employee sees centrally with the injured eye alone, and, with the use of lens and considering the two eyes together, he still has industrial loss of vision in the right eye, since it is impossible to use the two eyes together when a heavy lens is required before the injured eye; that with the assistance of glass the employee still would not have coordination. The operating surgeon also testified to lack of coordination under the circumstances.

The employer called a specialist who referred to an especially constructed lens now being perfected for industrial purposes, like a telescopic lens, only in the reverse, to reduce the retinal image so that it fits the one on the opposite side. He testified that with a size lens, as described by this expert, the vision of employee's right eye could be corrected to 97 per cent. normal, and, in his opinion, with the aid of glasses there would be full coordination of both eyes. All of the experts agreed that without the aid of glasses the vision in the right eye for industrial purposes is gone. We deem the foregoing a sufficient statement of the medical testimony.

The employer's contention is that the employee suffered a second accident which constituted the proximate cause of the loss of vision, if any, of his right eye, and that such accident was not suffered in the course of his employment. This is an affirmative allegation, the burden of proof being on the employer to prove the same with reasonable certainty. The medical experts were unable to determine the degree of disability, if any, caused by the second accident, as distinguished from the first accident, or just how much, if any, the sec-

ond accident contributed to the loss of vision of the employee's right eye. It was not wilfully or negligently brought about through any conduct of the employee, and he in no manner contributed to it. We conclude, under the circumstances, that the employer's contention that the second accident constituted the proximate cause of the loss of vision of the employee's right eye is without merit.

The next question presented by the employer,—and one of first impression in this state,—is whether or not the compensation law of Nebraska contemplates that the court may take into consideration, in determining the loss of vision of an eye or eyes, the fact that vision may be restored or corrected, in part or in whole, by the use of glasses. In this connection, it is pointed out that, with the exception of the payments made for temporary total disability in the instant case, and some book work which he performed for a short period of time, the employee worked at his usual vocation at the same wages he received prior to the time of the accident, and the employer cites the case of *Washington Terminal Co. v. Hoage,* 79 Fed. (2d) 158, wherein the court said:

"The intention of the law is to provide compensation for loss or disability in earning power and not indemnity or damages for injury to a member of the body. It is consistent with the purpose of that act that the disability of an employee resulting from an injury to his eyes should be considered with reference to the benefit resulting from the use of glasses.

"It is true that the authorities are not uniform upon this question, partly owing to differences in the controlling statutes. But we think that the greater weight of authority is with the view above expressed."

Without setting forth the authorities from the different states which have passed upon this question, a review of the decisions of several states discloses that California, Connecticut, Florida, Indiana, Maine, Nevada, New York, Ohio, Rhode Island, Tennessee, Texas and Massachusetts rate eye losses with correction, and many of these states have com-

pensation laws that specifically require or permit the rating of eye losses with correction. The states of Colorado, Delaware, Georgia, Idaho, Illinois, Kansas, Maryland, Minnesota, Missouri, North Carolina, Oklahoma, Utah, Virginia, Washington and West Virginia rate eye losses without correction. North Dakota, Oregon, Vermont, Wisconsin, and the United States show rating arrived at with or without correction. New York particularly, Pennsylvania and Michigan take the view that glasses may be taken into consideration. Cases, however, are determined upon the statutory enactment of the particular state. Many of these statutes provide for payment only when there is loss of earning power.

The most formidable decisions cited by the employer in support of its contention follow:

In *Cline v. Studebaker Corporation,* 189 Mich. 514, 155 N. W. 519, the court held: "However, for the partial loss of the sight of claimant's eye, which could be minimized by the use of glasses, so that no diminution of earnings took place, and no impairment of his earning capacity appeared from the testimony, the board was not authorized to award compensation * * * though without glasses he had only ten per cent. of normal vision but fifty per cent. with them."

In *Bochecchio v. Charnin Contracting Co.,* 209 App. Div. 619, 205 N. Y. Supp. 350, the court held: "Where the loss of vision may be corrected by the use of glasses no award for the defect should be made." And in *Frings v. Pierce Arrow Motor Car Co.,* 169 N. Y. Supp. 309 (182 App. Div. 445), it was held: "Where an employee lost the lens of an eye, but could see by use of an artificial lens, if he did not use the good eye at the same time, and could continue his work without loss in wages, there was no 'loss of an eye,' nor 'loss of use of an eye,' within workmen's compensation law."

In the case of *Foster v. Schmahl,* 197 Minn. 602, 268 N. W. 631, the court held that, in "determining the extent of injuries occasioned to the vision as the result of an industrial accident, 'correction by glasses' may be taken into consideration."

Contra, the most pertinent decisions in support of the employee's contention are as follows:

The Minnesota court in the case of *Butch v. Shaver,* 150 Minn. 94, 184 N. W. 572, held: "Where an employee sustains a personal injury by accident arising out of and in the course of her employment which irrecoverably destroys the sight of her right eye, though with extra artificial means she may have fair vision, she is entitled to compensation as for the loss of the eye, under the provisions of" the Minnesota compensation act. And in *Livingston v. St. Paul Hydraulic Hoist Co.,* 279 N. W. 829 (203 Minn. 62), the court said, referring to the act: "For permanent partial disability to an eye, the extent of partial loss of vision as determined by the Snellen formula should be determined without regard to possible correction by use of glasses or corrective lens." While an apparent conflict seems to exist in the Minnesota court's determination of the question, it is quite evident that the circumstances, as disclosed by each case, governed the court's decision.

A case similar to the one at bar is *Juergens Bros. Co. v. Industrial Commission,* 290 Ill. 420, 125 N. E. 337, which we set forth in some detail. In that case the employee was struck in the eye with a small piece of steel while he was engaged in the course of his employment, in setting knives on a beveling machine. The injury caused him but little pain, but several weeks thereafter he noticed the eye was failing, and he secured glasses which gave him some relief. Subsequently, a cataract was removed. The operating surgeon was required to penetrate the cornea and iris and remove the lens of the eye and the piece of steel. The medical testimony showed that it would be impossible to bring the vision of the injured eye to harmonize with the other eye, the vision of which was normal. (This seems to be the weight of the medical testimony in the instant case.) The evidence disclosed that lenses could be secured to enable the employee to see at the fixed focal distance of such lenses. The employee, therefore, had lost the power of accommodation. The estimated loss was three-fourths of a normal eye with such

lenses. The employee since recovery from his temporary disability had been able to and had earned wages equal to his earnings paid prior to the accident. The court held: "Where an employee by an injury to one eye loses all practical use of it except by the use of lenses giving him normal vision at fixed distances, the injury amounts, in effect, to loss of sight of the eye, notwithstanding the possibility that he might to a certain extent recover the sight of that eye if the sight of the other eye should be destroyed."

In the instant case the crystalline lens was removed, and the weight of the testimony of the eye-specialists is that, even with the use of artificial means and scientific processes, the employee would not have normal or proper coordination of his eyes. This we deem necessary to constitute proper restoration or correction where there is a loss of vision.

In an analysis of section 48-121, Comp. St. 1929, we see nothing in the act indicating an intention on the part of the legislature that disability after correction should be the basis for awarding compensation, where there has been an eye injury. If such had been the legislative intent, the act would no doubt have been drafted to so provide. We should not, by construction, put into a law provisions which it does not contain, nor read into it a meaning not intended by the legislature. If the act is faulty, the correction should be made by the legislature and not by the court. We see no more logic in holding that the legislature intended to base disability in an eye case on the condition of the eye after correction than in a leg or arm case where compensation should be awarded on the extent of disability after the attachment of a brace or other appliance. The fact that glasses are required to restore vision is evidence of the permanency of the injury, and whether artificial means may partially or even wholly restore sight, it nevertheless cannot obliterate the effect of the accident causing the injury.

Referring to the statement made in the opinion and the claim of the employer that the employee continued his work from and after the injury at the same wages, this would not bar his right to recovery under the compensation act for the

loss of vision of his right eye. Section 48-121, Comp. St. 1929, definitely fixes compensation for the loss of an eye without exception.

There is no contention made that, in the event the employee is entitled to compensation for the loss of his right eye, the award of $15 a week for 125 weeks would not apply. Other assignments of error are without merit.

For the reasons given in this opinion, we conclude that the award as granted by the district court should be and is hereby

AFFIRMED.

FRANK C. ANDERSEN V. STATE OF NEBRASKA
3 N. W. (2d) 447

FILED APRIL 17, 1942. No. 31207.

1. **Criminal Law.** The *corpus delicti* is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it.
2. ———. *Corpus delicti* may be proved either by direct or circumstantial evidence.
3. ———. Where *corpus delicti* is proved, an unsupported extrajudicial confession may be sufficient to prove the defendant's connection with the criminal act.
4. ———. A person charged with a felony may not be convicted upon his unsupported extrajudicial confession that a crime has been committed, but such confession may be sufficient to prove his connection with the criminal act.

ERROR to the district court for Sarpy county: WILMER W. WILSON, JUDGE. *Affirmed.*

John N. Baldwin, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Herbert T. White, contra.*

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

YEAGER, J.

This is a criminal action wherein in the district court for Sarpy county, Nebraska, Frank C. Andersen, plaintiff in error, was charged in an information with the criminal offense of grand larceny. He was convicted by a jury and was sentenced to serve a term of 2½ years in the state penitentiary. From this conviction and sentence he has brought by petition in error the case to this court for review.

The seven errors assigned may be summarized into four propositions as follows: (1) The verdict is contrary to law, (2) the evidence is insufficient to sustain the verdict returned, (3) there was error in the rejection of evidence, and (4) the sentence is excessive.

The evidence summarized is substantially as follows: William F. Bavinger was the owner of a feed lot in Sarpy county, Nebraska. Soren Christian Jeppesen was the caretaker of the lot and lived in a house situated on the lot. Frank C. Andersen lived some distance northwest of Florence in Douglas county, Nebraska, where he was engaged on a small scale in farming, stock raising and feeding. He, with two sons, was also engaged in the business of trucking and grading.

On the evening of July 26, 1940, plaintiff in error with his wife, his son Clinton Frank Andersen, and two children, drove in one of his trucks to the feed lot of Bavinger, where they remained for perhaps two hours waiting for Jeppesen. Jeppesen failed to appear, so he and his son loaded onto the truck 8 sacks of wool, 5 sacks of oil meal, 2 sacks of molasses and hay, 1 sack of salt, 6 bales of hay, 60 bushels of corn and 2 bags of mineral, all of which was of the value between $60 and $70. Just as they were passing through the Bavinger gate they were apprehended and taken into custody by two private detectives from the Danbaum Detective Agency and the load taken in charge. Plaintiff in error and his son were lodged in jail for the night and the following morning were taken to the Danbaum agency office where each made a statement regarding the taking of the property described. The statements were in the form of questions and answers.

The questions were asked by Robert P. Samardick and the answers given by Frank C. Andersen and Clinton Frank Andersen, respectively. On the trial of the case the statements were admitted in evidence without objection. In his statement Frank C. Andersen admitted the theft of the property described and of a considerable amount of other property over a period of several months. As a witness on his own behalf at the trial, Frank C. Andersen admitted the taking of all of the property described in the statement, but stated that it was without any guilty knowledge on his part. He testified that the property was taken at the direction of Jeppesen and that he understood that it belonged to Jeppesen. He testified that he had an arrangement with Jeppesen whereby he was to feed some stock for Jeppesen who was to furnish the feed, and on sale the increase was to be divided, and that in pursuance of this arrangement he received the property taken from the Bavinger feed lot. He further testified that the arrangement was carried out, the stock fed and sold by him and that the check received on sale was delivered by him to Jeppesen. He offered the check, "exhibit 3," which is not in the bill of exceptions, in evidence. The check was rejected. Also, he testified that the property received after delivery of the check was in lieu of his share of the increase of the stock fed for Jeppesen.

On this basis plaintiff in error urges that the verdict and sentence are contrary to law and are supported by insufficient evidence, the theory apparently being that the *corpus delicti* of the crime was not proved by evidence independent of the statement of the plaintiff in error, and if otherwise, then he had not been proved guilty of grand larceny, but rather that the evidence tended to prove receiving stolen property.

That the *corpus delicti,* or the body or substance of the crime, which in its primary sense is the fact that a crime has actually been committed (23 C. J. S. 181, sec. 916), was proved by sufficient evidence is beyond question. The property in question of William F. Bavinger was taken and removed by trespass, that is, without the knowledge or consent

of Bavinger. This was sufficient as proof of *corpus delicti* without any proof of the identity of the taker. *Corpus delicti* may be proved by circumstantial evidence, but here it was proved by direct evidence, clear and specific. *Sullivan v. State,* 58 Neb. 796, 79 N. W. 721; *Morris v. State,* 109 Neb. 412, 191 N. W. 717.

The *corpus delicti* having been sufficiently proved, the confession alone was sufficient to prove Frank C. Andersen's connection with the criminal act. One may not be convicted of a felony upon his unsupported extrajudicial confession that a crime has been committed, but such confession may be sufficient to prove the defendant's connection with the criminal act. *Sullivan v. State, supra; Egbert v. State,* 113 Neb. 790, 205 N. W. 252. The confession does not stand alone in this case either as to *corpus delicti,* or as to the connection of the plaintiff in error with the crime.

No error was committed in the rejection of "exhibit 3." It has no value as evidence on any issue in this case.

The only other question is that of the severity of the sentence imposed. The record discloses that to the same information on which Frank C. Andersen was tried, Soren Christian Jeppesen pleaded guilty and was sentenced to serve a term of one year in the state penitentiary; also that Clinton Frank Andersen was tried and convicted and that the trial judge placed him on probation. Plaintiff in error claims that his sentence of 2½ years is excessive. It may also be said here that Jeppesen made restitution for all of the property which he had stolen from Bavinger. In the light of these circumstances and of the fact that the trial judge had all of the parties before him and was able to observe their conduct and demeanor, coupled with a probability that the background of the parties was inquired into before sentence, we are unable to say that there was an abuse of discretion in the imposition of a sentence of 2½ years.

Finding no error in the record, the conviction and sentence are

AFFIRMED.

J. B. PANKAU, APPELLANT, V. LAWRENCE BOYER, APPELLEE.
3 N. W. (2d) 634

FILED APRIL 24, 1942. No. 31332.

Reeves v. Nye, 28 Neb. 571, 44 N. W. 736, adhered to.

APPEAL from the district court for Morrill county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

A. J. Kinnersley and *Chauncey E. Barney*, for appellant.

F. E. Williams, contra.

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

EBERLY, J.

This is an action commenced by plaintiff, "J. B. Pankau, M. D.," a regular, duly admitted physician and surgeon of Cheyenne county, Nebraska, on December 18, 1939, in the county court of Morrill county, Nebraska, against the defendant, Lawrence Boyer, for the sum of $173.76. It was for services rendered and medicines furnished by plaintiff for the defendant and his family at their special instance and request between the 10th day of August, 1929, and the 19th day of December, 1935. A true and correct copy of said account showing debits and credits was attached to said petition, marked exhibit A, and made a part thereof, and it was also filed as part of the petition on appeal in the district court. Exhibit A reads as follows:

"Statement

"A. L. Boyer) Dr. J. B. Pankau, M.D. Cr.
Lawrence Boyer)

Date		Paid	Charge
8-11-29	Son		$49.50
2-16-32	Leslie		23.00
2-19-32	Leslie		2.00
2-20-32	Leslie		1.50
2-22-32	Leslie		1.50
2-25-32	Leslie		1.50
2-27-32	Leslie		1.50
2-29-32	Leslie		1.50

3- 2-32	Leslie		1.50
3- 5-32	Leslie		1.50
3- 9-32	Leslie		1.50
3-14-32	Self (Lawrence Boyer)		10.00
3-24-33	Self (Lawrence Boyer)		2.75
5-28-33	Self " "	10.00	
8- 1-33	Leslie		2.75
9-13-33	Leslie		1.75
10-20-33	Self (Lawrence Boyer)	1.50	2.50
10-23-33	Self " "	1.50	1.50
11- 1-33	Leslie		5.75
11- 6-33	Leslie		1.00
12- 6-33	Leslie		1.50
1-19-34	Leslie		.65
1-26-34	Leslie		.65
2- 5-34	Leslie		13.00
2- 6-34	Leslie		1.00
7-29-34	Mrs. Boyer		12.00
8- 3-34	" "		1.50
8- 8-34	" "		2.00
9- 8-34	" "		1.00
9-14-34	" "		1.75
9-22-34	" "		1.50
10- 1-34	" "		1.00
10- 9-34	" "		1.00
10-25-34	" "		1.00
11- 7-34	" "	5.00	1.75
11-26-34	" "		1.50
12- 7-34	" "		10.00
12-10-34	" "		.35
3-15-35		9.50	
12-18-35	" "		1.00
		$27.50	$178.65
12-18-35	Balance Due		$151.15
12-18-39	Interest at 6% on $151.15 from 5-18-36		32.49
	Total		$183.64"

To this petition defendant filed an answer which denied "each and every allegation in said petition set forth not hereinafter expressly admitted." Further, the answer admitted the item of 12-18-35 and offered to pay the same; and pleaded the 4-year statute of limitations (Comp. St. 1929, sec. 20-206) as to all items of charges and credits shown on exhibit A except the single item, the validity of which was admitted. To this answer plaintiff replied by a general denial. The cause was thereafter determined "upon the stipulation of the parties waiving trial to a jury and for trial of the said case to the court on the pleadings." The district court denied a recovery and held the bar of the statute of limitations prevented recovery on all items of plaintiff's claim save and except the last one, for which amount it entered judgment. Plaintiff alone appeals.

As a question determinable by the pleadings alone, it is obvious that the controlling principle is: "An action on an account is barred in four years." *Mizer v. Emigh,* 63 Neb. 245, 88 N. W. 479. And it seems that the performance of services by plaintiff referred to in his itemized account as "12-18-35, Mrs. Boyer, $1.00" was wholly ineffective to extend the period of limitations as to the previous items in such account. As to them the bar of the statute was complete upon the expiration of four years after "3-15-35," the date of the last payment thereon. *Reeves v. Nye,* 28 Neb. 571, 44 N. W. 736; *Mizer v. Emigh, supra.*

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

AFFIRMED.

PERRY CHANA, ADMINISTRATOR, APPELLEE, V. FRANK MANNLEIN, APPELLANT.

3 N. W. (2d) 572

FILED APRIL 24, 1942. No. 31309.

1. **Negligence.** A driver of a truck, who, nearing a narrow one-way bridge in broad daylight, and seeing another truck approaching,

while both vehicles were still several hundred feet from the bridge, and who fails to slacken his speed of 30 to 35 miles an hour, and collides with the other truck just after it has crossed the narrow bridge, is guilty of contributory negligence greater than slight, and is barred from recovering for injuries sustained in collision, even though the driver of other truck was also negligent.

2. ———. "Where the evidence shows beyond reasonable dispute that plaintiff's negligence was more than slight as compared with defendant's negligence, the jury should be instructed to find for the defendant." *Whittaker v. Hanifin*, 138 Neb. 18, 291 N. W. 723.

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

William Keeshan, Walter, Flory & Schmid and *Chambers, Holland & Locke*, for appellant.

D. L. Jouvenat and *William M. Ely, contra.*

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

PAINE, J.

This is an action for damages, brought by the administrator of the estate of Henry J. Chana, against Frank Mannlein for damages resulting from a collision between two trucks. The jury returned a verdict for $5,950, which the trial court reduced to $5,700 by striking out an item of $250 allowed for pain and suffering. Defendant appeals.

Petition was filed in the district court, alleging as a first cause of action that there was a regularly established highway in Boone county extending westward for a distance of several miles from the village of Petersburg, which highway was a graded dirt road, without gravel or other artificial surfacing, and of a width of about 30 feet; that at a point about two miles west of Petersburg there was a wooden bridge on said highway, which bridge was about 16 feet wide and about 16 feet long, and on account of the narrowness of said bridge it was unsafe, if not wholly impossible, for more than one automobile or motor truck to cross said

bridge at the same time; that said bridge was located in a valley at the bottom of two hills on either side thereof.

The petition further alleges that on November 9, 1938, about 10:30 a. m., Henry J. Chana, deceased, was driving his Chevrolet 1½-ton 1935 model motor truck in a westerly direction on said highway above described; that said motor truck was equipped with a grain box, eight feet wide, loaded with 1½ tons of coal which he was taking home; that said truck was also equipped with tire chains on the two rear wheels thereof; that he drove his said motor truck in a careful and cautious manner, at a speed not greater than 35 miles an hour, and on the right side of the center line of said highway until he reached a point about 200 feet east of said bridge, where it became necessary for him to turn said truck to the center of the highway to enable him to cross said bridge; that he then reduced his speed to about 25 miles an hour, and turned his said truck to the center of the highway preparatory to crossing the bridge, when there appeared on the hill immediately to the west of said bridge the motor truck of defendant, traveling east on said highway, and being driven at a high, improper and unreasonable rate of speed of at least 45 miles an hour, and said defendant drove his truck directly into the truck of Henry J. Chana after Chana had reached the bridge and started to drive thereon, with such force and violence that the Chana truck was driven and pushed backward off said bridge; that it was utterly impossible for Henry J. Chana to alter his course or stop his truck before reaching said bridge, and said collision was inevitable so far as it was in the power of Henry J. Chana to prevent it.

It is charged that the defendant, Frank Mannlein, drove his truck at a rate of speed greater than was reasonable and proper, having due regard to the condition of the road,—so fast as to endanger the life and limb of persons traveling on said highway; that he was unable to stop it before it collided with the truck of said Henry J. Chana; that he drove and operated said truck while the road upon which he was driving was wet and slippery, without any chains on

the tires of said truck; that plaintiff was closest to the bridge and had right of way.

It is alleged that the truck of Henry J. Chana was utterly demolished, and said Henry J. Chana suffered great internal and external injuries, from which he died about two hours after the accident; that as the direct and proximate result of the negligent acts of defendant, the said Henry J. Chana was damaged in the total sum of $1,200, as follows: For damage to his truck, $400; for pain and suffering endured by him, $500; for expense incurred for the services of a physician and surgeon, $50; for expense contracted for funeral and burial, $250.

As a second cause of action, the petition describes in detail the injuries to Henry J. Chana which led to his death, and states that he was 55 years of age, and left surviving him his widow and seven children, aged from 9 to 32 years, only two of said children living at home and being dependent on their father for support; that the deceased was a strong and able-bodied man, engaging in the business of farming and operating a motor truck for hire, and was earning from $800 to $1,200 annually.

The plaintiff prays judgment on the first cause of action in the sum of $1,200, and on the second cause of action in the sum of $15,000, with interest and costs of suit.

Answer was filed, admitting the collision, but denying that said collision was caused through any fault, negligence or carelessness of the defendant, but alleging that said collision was caused solely by the negligent, careless, reckless and unlawful operation of his truck by the said Henry J. Chana in the following respects: That said Henry J. Chana approached the bridge at an unlawful and unreasonable rate of speed, in excess of 45 miles an hour, although he could clearly see the truck driven by the defendant, Frank Mannlein, approaching and crossing said bridge before the said Chana reached the bridge; that said Henry J. Chana made no attempt to turn out and slow down, and to avoid the collision with the other truck, but drove his truck into and against the truck driven by defendant as said defend-

ant's truck was leaving the east end of said bridge; that Henry J. Chana did not have his truck under control, and was driving at a rate of speed higher than was reasonable and proper under the conditions of the road and in approaching the bridge across which defendant's truck was driving.

Trial was had to a jury, and on March 12, 1941, a verdict was entered in favor of the plaintiff, and fixing his recovery on his first cause of action in the aggregate amount of $950, and on the second cause of action, for loss of support, at $5,000, or a total of $5,950.

The errors relied upon for reversal by defendant are: (1) There was not sufficient evidence to support the verdict of the jury and the judgment of the court; (2) the verdict and judgment are contrary to the evidence; (3) the court erred in overruling defendant's motion for directed verdict when plaintiff had rested.

It will thus be seen that the defendant relies for reversal upon the fact that the evidence does not support a recovery in the case, and therefore the trial judge should have directed a verdict for the defendant.

The jury went out and visited the scene of the collision, and saw the lay of the ground as the road approached the bridge from either side, and the trial judge went out and visited the place of the accident before passing on the motion for a new trial. However, we believe the facts, most of which are undisputed, give us a very clear picture of the whole situation, and exactly how the unfortunate accident occurred.

The bill of exceptions discloses that these two trucks were approaching each other at about 10:30 a. m., on a perfectly clear day, where one could see for quite a way on each side of this small bridge. It happened on a 24-foot road, which was perfectly familiar to both of these drivers. The deceased knew this bridge, which crossed a ravine, and knew that it was only 16 feet wide, and two ordinary-size trucks could not pass on the bridge. His son James and a neighbor, A. B. Carnahan, were riding with him. The deceased was driving toward the west, with 1½ tons of coal for his load. The de-

fendant was alone, and driving from the west toward the east. There is some little dispute about the condition of the surface of the road. It was a dirt road, no gravel. It was just an ordinary country road. Some days before this there had been a six-inch snow, but the evidence shows that there was a good, dry track in the center of the road. The sheriff and others went out immediately after the accident. This culvert, or bridge, is 16 feet wide and 16 feet long, and in a valley.

Going west from this bridge, the road was level for at least 100 feet, then gradually ascended to the top of a very small hill, which was only 29 feet higher than the floor of the bridge, the top of the hill being 475 feet west of the bridge. Going on west, the surface drops 3½ feet in the next 300 feet, and then drops more sharply for 400 feet, until at the bottom of the decline, 800 feet west, you are 16 feet below the top of the first little hill west of the bridge, and would be out of sight to any one on the bridge, then the road gradually rises to the top of the big hill, which is 2,125 feet west of the bridge.

The deceased, coming from the east, would be driving down a gradual slope of a hill, the top of which was some 1,300 feet east of the bridge. Surveyor Brown testified that a driver approaching the bridge from the east, and 400 feet distant therefrom, could see a truck approaching from the west when it was 900 feet west of the bridge; in other words, the drivers of the two trucks approaching the bridge would be visible to each other when they were 1,300 to 1,400 feet apart.

A. B. Carnahan, who was sitting in the cab with the deceased and his son James, testified that, when they came over the hill east of the bridge, Henry (the deceased) said, "There comes Franz back," and at that time they were traveling 35, or a little better, but slackened some when he approached the bridge. When the defendant's truck got down on the level road west of the bridge, there was a mudhole three or four rods west of the bridge, and he turned out clear to the shoulder to go around this, and then right

back into the road and came right on, and deceased said, "Oh, my God!" and put on his brakes, and defendant's truck crossed the bridge and turned the front end of his truck to the right when the collision occurred.

Both of the trucks stopped instantly at the point of collision, which would indicate that the defendant's truck was not going very fast when they collided. The mark made by the crossed chains was distinct right up to the place of the collision.

Carnahan's evidence on cross-examination as to the moment of the collision is as follows: "Q. 442. And you said that you were expecting that Mr. Chana would slow down all the way as you approached the bridge, didn't you? A. I probably did. Q. 443. You could see the Mannlein truck approaching? A. Yes, sir. Q. 444. And you were expecting Mr. Chana to slow down and pull out? A. Well I supposed one or the other of them would. Q. 445. And neither of them did? A. No, sir."

James Chana, the 18-year-old son of the deceased, who was riding with his father, testified on direct examination as follows: "Q. 539. Did you observe at any time before you reached the bridge at the foot of that hill whether your father slowed the truck down or not? A. I can't say if he did or not." On cross-examination he made these answers: "Q. 613. But as near as you could guess it you were going 30 to 35 miles per hour? A. Yes, sir. Q. 614. And you continued at practically the same speed right down to the bridge? A. Yes, sir. Q. 615. So the brakes were not applied to your truck all the way down the hill, were they? A. No, sir. * * * Q. 618. Were the brakes working all right on that truck? A. Yes, sir. Q. 619. They would stop it quickly? A. Yes, sir. Q. 620. And you had chains on your truck? A. Yes, sir. * * * Q. 626. And then during that quarter of a mile there wasn't any effort made that you saw to slow your truck down? A. No. Q. 627. And yet during all that time you knew this other truck was coming towards you, didn't you? A. Yes, sir."

Delbert Henn testified that he reached the scene of the

accident half an hour after it happened; that the two trucks were both just a few feet east of the bridge, and no part of either was on the bridge; that he traced the marks back of the Chana truck; that you could see the chain marks of the left rear wheel, and there was no indication of sliding of the chain, or skidding,—it was just a plain, rolling chain track, —and that this track came straight down the center of the road, and had not turned; that the front end of the Mannlein truck had been turned to the south or right-hand side, and that the front end, the radiator, was not damaged.

The defendant testified that from a point 875 feet west of the bridge until he crossed the bridge he was traveling at the same rate of speed, about 30 miles an hour; that when he saw Chana was not making any attempt to get out of the track or stop, he crowded his truck over as far as he could to the right, and says the collision took place on the east side of the bridge, just after he had crossed the bridge; that his truck was hit on the left front fender and door. He says positively that the Chana truck did not slow down, or turn out.

At the close of the plaintiff's evidence, the defendant moved the court for a directed verdict "for the defendant for the reason that plaintiff has not proved a cause of action against the defendant, the evidence of the plaintiff conclusively showing that under the most favorable view of said evidence that deceased Henry J. Chana was the driver of the truck in which he was riding, that the said Henry J. Chana—as shown by the evidence—was guilty of contributory negligence greater than slight, and that if the evidence shows any negligence whatever on the part of defendant, defendant's negligence was short of gross negligence under the circumstances and the contributory negligence of the said Henry J. Chana would bar a recovery by plaintiff in this action. Overruled. Exception."

This court has said in the case of *Ritter v. Hering,* 135 Neb. 1, 280 N. W. 231: "Where the evidence establishes that plaintiff was guilty of more than slight negligence, it becomes a question of law for the court and it is the duty of

the court to direct a verdict for the defendant;" and, while the case involved an arterial highway, it none the less states the law, which was given at greater length by Morrissey, C. J., in *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N. W. 158. See, also, *Nelson v. Plautz*, 130 Neb. 641, 265 N. W. 885; *Klement v. Lindell*, 139 Neb. 540, 298 N. W. 137.

A driver of a truck, who, nearing a narrow one-way bridge in broad daylight, and seeing another truck approaching, while both vehicles were still several hundred feet from the bridge, and who fails to slacken his speed of 30 to 35 miles an hour, and collides with the other truck just after it has crossed the narrow bridge, is guilty of contributory negligence greater than slight, and is barred from recovering for injuries sustained in collision, even though the driver of other truck was also negligent. See *Gresham v. Branscome*, 121 Fed. (2d) 440; *Eaton v. Merritt*, 135 Neb. 363, 281 N. W. 620; *McDonald v. Omaha & C. B. Street R. Co.*, 128 Neb. 17, 257 N. W. 489; *Kudrna v. Sarpy County*, 125 Neb. 83, 249 N. W. 87.

"Where two automobiles going in opposite directions approach a bridge on a public highway, it is the duty of each driver to keep on the right of the center, if the bridge is a safe two-way drive; their rights and duties being equal, though one reaches the bridge before the other. In approaching a bridge too narrow to admit of vehicles passing each other, a driver should exercise due care to avoid the contingency of being on the bridge simultaneously with another vehicle, and, if the bridge is narrow, passing motorists should proceed at a reasonable speed, maintaining their automobiles under such control as to enable each to safely keep on his side of the road." 2 Blashfield, Cyclopedia of Automobile Law and Practice, 48, sec. 904.

"Where the evidence shows beyond reasonable dispute that plaintiff's negligence was more than slight as compared with defendant's negligence, the jury should be instructed to find for the defendant." *Whittaker v. Hanifin*, 138 Neb. 18, 291 N. W. 723.

In our opinion, the verdict in the case at bar is contrary to the weight of the evidence, which clearly establishes that the plaintiff's deceased was guilty of negligence more than slight, which barred a recovery. The motion of the defendant for a directed verdict at the close of plaintiff's evidence should have been sustained and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissenting.

My understanding of this case is that it is one of fact for the jury and not one of law for the court. The collision resulting in the death of Henry J. Chana occurred at the end of a 16-foot bridge over a ravine five or six feet deep on an unpaved public highway running east and west. The general slope of the land was toward the ravine and the drivers of the trucks could see the approach of each other for a considerable distance. The Chana truck came toward the bridge from the east and the Mannlein truck from the west. As I view the evidence, it was permissible for the jury to find that when the Chana truck was 216 feet from the bridge, and the Mannlein truck was about 475 feet therefrom, both were traveling at approximately the same rate of speed; but that due to increase of speed by defendant both reached the 16-foot bridge at practically the same time; that before running onto the bridge, the Mannlein truck was turned to the right as if to stop, but instead of doing so ran onto the bridge without slackening speed.

It seems to me that, under the circumstances, the driver of the Chana truck had the right of way and the right to presume defendant would stop before running onto the bridge as he indicated he would; and that the driver of the Chana truck was not negligent as a matter of law. The jury, after viewing the scene of the collision and considering all the evidence and the circumstances, rendered a verdict in favor of plaintiff and I think the judgment thereon should be affirmed.

ALBERT HENGELFELT, APPELLANT, V. FRED EHRMANN, APPELLEE.

3 N. W. (2d) 576

FILED APRIL 24, 1942. No. 31320.

1. **Waters.** A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow.
2. ———. Surface waters may be controlled in their natural flow or course by the owner of the land on which they fall or originate or over which they flow. He may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls or originates or flows on or over adjoining property.
3. ———. "A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor. * * * The quantity of water thus discharged upon the land of an adjoining proprietor may be increased." *Steiner v. Steiner*, 97 Neb. 449, 150 N. W. 205.

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

Jack L. Raymond, for appellant.

Morrow & Miller, contra.

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

PAINE, J.

Plaintiff brought action to recover damages resulting from an unlawful discharge and overflow of rain water and irrigation water upon his land by the defendant. At the close of plaintiff's evidence, the trial court sustained a motion to instruct the jury to return a verdict for the defendant. Plaintiff appeals.

The petition alleged the ownership by plaintiff of the northeast quarter of section 17, township 21 north, range 54 west of the 6th P. M., in Scotts Bluff county, Nebraska; that said tract in its natural state was arid, slightly rolling land, the south portion being higher than the north portion;

that it was all irrigable excepting a small triangular piece in the southwest corner thereof; that said land was planted to corn and other crops.

The petition also alleged that the defendant, Fred Ehrmann, was the owner of the southeast quarter of the same section 17, and that his said land is of the same general character as the land of plaintiff, excepting that the general slope of defendant's land is to the west and north, the lowest point being on the west line thereof, it declining in elevation from south to northwest; that the surface drainage and excess irrigation water from the entire quarter-section drains and has a tendency to escape on the west line thereof.

It was further alleged that both tracts of land were under irrigation, each receiving its water from the Gering Irrigation District canal; that just east of the center of the south line of defendant's land a drainage ditch enters defendant's land, and conducts drainage water from a large area to the south; that after reaching a point approximately 460 feet north of defendant's south line, said drainage waters are diverted by a system of laterals, dikes and irrigation ditches in various directions over defendant's land to irrigate the same; that defendant has constructed a dike 750 feet from the west line of his premises, which runs generally straight north and south from the north line of said premises to within about 1,450 feet of the south line of his premises, which is used to force said surface drainage and irrigation waters to the north line of his said premises; that without said dike and laterals and ditches, such waters would flow in a general northwesterly direction, and would leave defendant's land slightly south of the northwest corner thereof; therefore, the natural course of drainage of defendant's premises is obstructed and altered so that said waters are thrown and discharged in a volume upon the lands of plaintiff, beginning at a point about 950 feet east of the southwest corner of plaintiff's premises and extending to a point 250 feet east thereof.

It is claimed that defendant has thereby wilfully and unlawfully, and over the protest of plaintiff, discharged said

surface drainage and excess irrigation waters in a volume onto the lands of plaintiff, and that by reason thereof said waters did on June 5, 1940, wash and flood plaintiff's land, and deposited débris thereon, totally destroying 35 acres of corn, and rendered ten acres of land unfit for further cultivation, and greatly depreciated the value of all of plaintiff's real estate, so that plaintiff has been damaged as follows: Loss of corn crop, $420; destruction of land and depreciation of and damage to plaintiff's real estate, $3,200. Plaintiff prays judgment in the total sum of $3,620.

In his answer defendant admitted the ownership of the land by plaintiff and defendant respectively, and that same is under irrigation; admitted that on or about June 5, 1940, a large volume of surface water flowed over and across defendant's land upon plaintiff's land, and denied every other allegation contained in the petition.

For further answer defendant alleged that, because of lack of normal precipitation, it is necessary to irrigate the lands of both parties to produce good crops; that to irrigate the land it is necessary to construct lateral ditches thereon, with such dikes as are necessary and proper to conduct water by gravity to the higher portions thereof; that the general slope of defendant's land is from south to north; that many years ago defendant constructed upon his land a system of lateral ditches for the purpose of irrigating the same, and in the construction of said system of lateral ditches it became necessary, in the exercise of good husbandry, to construct the dike referred to in plaintiff's petition, which was no higher than was absolutely necessary to conduct water by gravity to several acres of said land near the northwest corner thereof.

Defendant alleges that there is a territory south and east of his land, comprising several square miles, which drains through a natural draw which enters the south side of his land slightly to the east of the center thereof, but at a point about 300 or 400 feet from the south line said draw disappears, and the land becomes flat and level, except that it slopes gently to the north; that on June 5, 1940, a cloudburst occurred in said territory south and east of plaintiff's land,

and this large volume of water flowed down through said draw, and spread out over a large area of defendant's land, and then flowed in the natural course of drainage across plaintiff's land; that defendant was in no way responsible for said flood, or the damage, if any, resulting therefrom to plaintiff's land or crops.

In his reply plaintiff admitted that the normal precipitation from year to year upon and in the vicinity of plaintiff's and defendant's lands is insufficient to produce good crops, and that it is necessary to irrigate said real estate in order to produce profitable crops thereon, and admits that the territory south and east of defendant's land drains through a ditch or draw, which disappears at a point south of defendant's land, and plaintiff denies each and every other allegation contained in the answer. At the close of plaintiff's evidence, the trial court sustained defendant's motion for an instructed verdict in his favor.

The first witness was H. E. Gentry, county surveyor of Scotts Bluff county, who had done engineering work for 24 years, and is a licensed engineer, and had prepared two very excellent maps of the two farms and the land to the south of defendant's quarter.

It shows the drain ditch coming into the defendant's land under the flume of the Gering Irrigation District main canal, then the drain ditch connects with several small laterals running north a little past the center of defendant's quarter, and shows the larger lateral A to the west of the seven smaller laterals.

The testimony indicates that this lateral A has been built up higher at the north end over a period of years until the bottom of the lateral is higher than the surrounding ground. This particular lateral A is from eight inches up to two feet higher than the surrounding ground. Throughout the years defendant Ehrmann has gone in and ditched this lateral with a ditcher, and has done some fresno work, and the result is that this lateral A has increased gradually in height, as the defendant has a little land in his northwest corner that is higher, and so the lateral must be raised to irrigate it.

This lateral A only carries water now to the defendant's land, but it used to carry it to the plaintiff's land too. The plaintiff got his land about 15 years ago, and got water through this lateral, but finally the Gering Irrigation District required the plaintiff to get his water from the east side of his land on his own lateral, and he stopped using this lateral A across the defendant's land.

There appears to be a sharp difference in the evidence as to whether excess water flows off to the north over plaintiff's land, or to the northwest and misses the plaintiff's land.

The evidence shows that on June 5, 1940, a storm came up, and plaintiff says that at that time Ehrmann was drawing water from the irrigation district and irrigating his land; that one Pippet, Ehrmann's hired man, was doing the irrigating, and about 3 o'clock in the afternoon a shower came up, and lasted from half to three-quarters of an hour. The rain on June 5 was described by the witnesses: Delmar Hengelfelt, "a nice ordinary rain;" Kaufman, "just a good rain;" Ralph Campbell, who lives one mile north and half a mile east of Hengelfelt, "just a good heavy rain;" Alex Campbell, who lives 1¼ miles north, "it was just a good rain." But as a result of the rain a combination of the irrigation and rain waters from the Ehrmann farm washed across onto plaintiff Hengelfelt's farm, and plaintiff claims that it caused a large amount of damage on his farm.

The counsel for defendant calls it a rain of cloudburst proportions away off to the south of defendant's land, and that it came down through the draw onto Ehrmann's land, and finally got onto the plaintiff's land. Defendant claims that this flood water went north onto plaintiff's land, but the flow of water was quite a little to the east of lateral A where it crossed onto plaintiff's land. It was a great, wide piece of surface water, covering at least a space of about 500 feet in width, so it could not have been gathered together by any lateral or ditch. The plaintiff himself testifies that the water was going down in great volume, and covered all of the laterals on defendant's land.

The evidence shows clearly that the Gering Irrigation

District canal filled up from this storm, and where it ran on this flume across the old draw, water slopped over from the flume and overflowed into the draw, which was about 15 feet under it, thus adding escaped irrigation water to the surface water and the water flowing in the draw from the south.

There is dispute whether there is any evidence that the rain of June 5 was of cloudburst proportions, but when we realize that, as a result of such rain, the water ran in a sheet 500 feet wide from one farm to the other, such volume could not be produced by "a nice ordinary rain," or it would have happened in the same way with every ordinary rain.

"Overflow water that escapes from the banks of a running stream, and that does not return to its banks, nor find its way to another stream or watercourse, is surface water." *Anderson v. Chicago, B. & Q. R. Co.*, 102 Neb. 497, 167 N. W. 559.

The contention of the defendant is that surface water is a common enemy that every proprietor may fight as he deems best, regardless of its effect on other proprietors adjoining. This was the common-law rule. 67 C. J. 866. This rule is in force in Nebraska, with this modification,—that in fighting surface water the upper proprietor may not accumulate surface waters into a ditch, or drain, and thereby increase the flow, and discharge them in volume on the servient estate, and cannot divert them so they go in a different direction. See *Todd v. York County*, 72 Neb. 207, 100 N. W. 299; *Lincoln Street R. Co. v. Adams*, 41 Neb. 737, 60 N. W. 83; *Jacobson v. Van Boening*, 48 Neb. 80, 66 N. W. 993.

Surface waters may be controlled by the owner of the land on which they fall or originate or over which they flow. He may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls or originates or flows on or over adjoining property. See *Town v. Missouri P. R. Co.*, 50 Neb. 768, 70 N. W. 402; *Norris v. Union P. R. Co.*, 111 Neb. 540, 196 N. W. 924; *Andrews v. Village of Steele City*, 2 Neb. (Unof.) 676, 89 N. W. 739; *Todd v. York County*, 72 Neb. 207, 100 N. W. 299.

"A landowner who is not guilty of negligence may, in the

interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor. *Todd v. York County*, 72 Neb. 207; *Perry v. Clark*, 89 Neb. 812; *Arthur v. Glover*, 82 Neb. 528; *Aldritt v. Fleischauer*, 74 Neb. 66. The quantity of water thus discharged upon the land of an adjoining proprietor may be increased." *Steiner v. Steiner*, 97 Neb. 449, 150 N. W. 205.

"Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage." *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897, 60 N. W. 373. See, also, *City of Beatrice v. Leary*, 45 Neb. 149, 63 N. W. 370.

Now, after discussing surface water, we will consider a watercourse, which is defined by section 31-302, Comp. St. 1929, as follows: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." Whether or not water is passing in a natural drain is a question to be determined from the facts of the case. See *Muhleisen v. Krueger*, 120 Neb. 380, 232 N. W. 735.

But, in the case at bar, while a draw more than two feet deep brought in water at the southeast corner of defendant's land, it did not continue across his land as a watercourse, but toward the center it just flattened out, and the water ran wherever gravity naturally took it.

We do not find that this draw became a natural watercourse that ran off from defendant's land to the west, and which would, if lateral A had not been built, have carried this flood water from this storm off the west side of defendant's land and saved it from running north onto plaintiff's land and damaging his crop.

The evidence and maps support the conclusion that this flood water ran directly over and across the small laterals of the defendant, and overran the northern part of defendant's

land, and as surface water flowed from defendant's land onto the plaintiff's land in a stream at least 500 feet wide; that this water rushed onto the plaintiff's land because it was a natural flow of gravity, and not because it was retarded or directed by lateral A, or other laterals, and that, while the defendant admits the damages caused to the plaintiff's land by this great volume of surface water, in which escaping water from the irrigation canal was mingled, yet defendant insists that this damage was caused to the plaintiff without any negligence on the part of defendant.

The trial judge listened to the testimony of all these witnesses, and listened to similar arguments which were made to this court by counsel. The propositions of law involved in this litigation are all well established.

In conclusion, we find that the trial judge, considering the evidence and the law, reached the conclusion that, whatever damage may have been caused by these flood waters, it was not through the negligence of the defendant, and therefore at the close of the plaintiff's evidence sustained a motion instructing the jury to return a verdict for the defendant.

From a careful examination of the pleadings, the bill of exceptions, and the law set out in the briefs, we have reached the same conclusion that was reached by the trial judge, and his disposition of this matter is hereby

AFFIRMED.

JAMES P. HOCTOR V. STATE OF NEBRASKA.
3 N. W. (2d) 558

FILED APRIL 24, 1942. No. 31189.

1. **Criminal Law.** Where an information is filed, charging the offense of embezzlement, and a copy thereof is served personally on the defendant, and he has more than the 24-hour period to prepare to meet such charge, enters his plea of not guilty, and subsequently the county attorney obtains the right to amend such information by changing the dates of the alleged embezzlement, this without the knowledge of the defendant, and no copy

of the amended information is served upon him, and where the case, at a later date, proceeds to trial, the county attorney in his opening statement predicating the case on the amended information, to which the defendant objects, and thereafter the amended information is amended to conform to the original information, and the case proceeds to trial on the original information, *held* not to constitute prejudicial error.

2. **Counties.** Section 60-1014, Comp. St. Supp. 1939, does not contemplate that fees, designated therein to be retained by the county clerk for the purpose of administration of the act, shall constitute additional compensation to such clerk.
3. **Embezzlement.** The fees as contemplated by section 60-1014, Comp. St. Supp. 1939, are public moneys, and the portion thereof to be retained by the county clerk is used for public purposes. Where the statute provides for the collection of fees by a public official for the purposes as designated therein, and a certain portion of such fees are to be retained by the officer for the purpose of administering the act, and the evidence discloses that, instead of using such portion of fees for the purposes designated in the act, the officer converts the fees to his own use, he may be charged with the offense of embezzlement, under the provisions of section 28-550, Comp. St. 1929.
4. ———. Section 28-550, Comp. St. 1929, charges the county clerk, in his official capacity as an officer, with the collection, receipt, safe-keeping, transfer or disbursement of public moneys belonging to the county, and provides that if such money is converted to his own use his act constitutes an embezzlement and a high crime for which he may be punished.
5. **Counties.** A county officer is required to perform the duties of his office for the compensation allowed him by statute, and if the legislature imposes upon him additional duties, and provides no additional compensation therefor, he, in his official capacity, is obligated to perform such services without additional compensation.
6. ———. Section 26-124, Comp. St. 1929, contemplates that a county clerk, chargeable with money belonging to the county by collection of fees, as authorized by law, shall render accounts and settle with the county board, as required in said section.
7. **Criminal Law.** The instructions of the court, construed and read together, and taken as a whole, properly state the issues involved and are not prejudicially erroneous.
8. ———. Section 28-550, Comp. St. 1929, when originally adopted as section 124 of the Criminal Code, in 1873, contained the word "if" before the word "any," and, upon a revision of the statutes and codification thereof in 1913, the word "if" no longer ap-

peared in said section and was deleted either by omission or mistake, and upon an analysis of said section as now existent, it states the offense of embezzlement, and, in the absence of such word, the statute is not invalid by reason of the omission of the word "if."

9. ———. Section 28-550, Comp. St. 1929, *held* sufficient, as now existent, to define the offense of embezzlement as set forth therein.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Eugene D. O'Sullivan, Arthur J. Whalen and *Ernest S. Priesman,* for plaintiff in error.

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

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

MESSMORE, J.

Plaintiff in error, defendant below, was charged in an information, filed August 31, 1940, with the crime of embezzlement of $9,110.10, belonging to Douglas county, Nebraska. At the time, he was the duly elected, qualified and acting county clerk of said county.

The charge is, in substance, as follows: That on or about the 29th day of August, 1940, the defendant, "as such officer being charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money belonging to the county of Douglas, state of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use and embezzle of said public money" $9,110.10, "which said money had then and there come into the custody and possession of the said James P. Hoctor, by virtue of his said office * * * a portion of the public money received, controlled, and held by him for safe-keeping, transfer, and disbursement as such county clerk. * * * "

A copy of the information was served personally on the defendant as provided by law. He was arraigned September

12, 1940, and entered his plea of not guilty. November 19, 1940, the county attorney procured leave to amend the information by alleging that the embezzlement occurred between January 1, 1940, and July 26, 1940. Defendant had no knowledge of the amendment. January 6, 1941, the court granted the defendant the right to withdraw his plea of not guilty and file a motion to quash the original information. This motion was overruled. Subsequently, a demurrer to such information was overruled.

The record is in dispute as to whether or not the defendant was arraigned on the amended information; he was not served with a copy thereof, and he complains that he did not have the 24-hour period in which to prepare his defense. The jury was impaneled January 6, 1941; the case proceeded to trial January 7, 1941. The county attorney, in his opening statement, predicated the case on the amended information, as amended; defendant's counsel checked statements made with the first information filed and served on defendant, being the only information of which defendant and his counsel were aware. Objection to the procedure was made, and at the conclusion of argument thereon the court directed that the case proceed on the original information, permitting amendment to the amended information to conform to the original. Request was made to reassert the motion to quash and the demurrer to the information, as finally amended. The request was denied, and the demurrer to the opening statement of the state was overruled. The opening statement was then made by the county attorney on the original information, and the cause proceeded to trial. Objection was made thereto and to the taking of testimony after the first witness was sworn, and a motion of dismissal was made and overruled. The jury returned a verdict convicting the defendant of embezzlement of $8,617.72 from Douglas county, Nebraska. At the conclusion of the testimony, defendant moved for a directed verdict, which was overruled. Motion for a new trial was overruled. The defendant was sentenced to two years in the penitentiary and to pay a fine of $17,235.44. He brings the record of his conviction to this court for review.

Defendant contends that the foregoing rulings of the court constituted prejudicial error, in that the same are violative of section 3, art. I of the Constitution of Nebraska, reading in part: "No person shall be deprived of * * * liberty * * * without due process of law;" violative of section 11, art. I of the Constitution, reading in part: "In all criminal prosecutions the accused shall have the right to * * * demand the nature and cause of accusation, and to have a copy thereof;" and violative of the Fourteenth Amendment to the Constitution of the United States, reading in part: "No State shall * * * deprive any person * * * of liberty * * * without due process of law."

The contention is based on section 29-1802, Comp. St. 1929, which refers to indictments, and provides that the defendant shall be served with a copy thereof and shall not be, "without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." In this state, in the absence of an indictment by a grand jury, the county attorney may inform against the defendant, and the same rule applies as stated in the foregoing statute.

The law is settled in this state that the defendant's right to have a copy of the information and one day thereafter to prepare for trial is a substantial right, and a denial thereof is error, if the right has not been waived. *Barker v. State,* 54 Neb. 53, 74 N. W. 427; *Wozniak v. State,* 103 Neb. 749, 174 N. W. 298. It will be noted that the first amendment to the information constituted a change in the dates only and did not change the offense as charged in any of its details. Upon an analysis of the authorities, we conclude the following are applicable to the situation presented by the procedure above set out:

The rule as stated in 23 C. J. S. 245, sec. 942, follows: "If an indictment is amended by the insertion of matter which substantially changes the crime charged, or which includes another person in the charge, accused must be served with a copy of the amended indictment. (In the instant case, the

offense charged was not changed.) However, it has been held that the failure to give accused a copy of the amended indictment was not error where no prejudice was shown. Where the amendment consists of a matter of form only, without effecting any material change, or where matter is stricken out diminishing the aggravating circumstances, a copy of the amended indictment need not be served." While the foregoing rule relates to indictments, it is applicable in this state, where the county attorney, by virtue of law, is an informant, without the assistance of a grand jury except when called. This is reflected by the decisions cited by the state.

In the case of *Razee v. State,* 73 Neb. 732, 103 N. W. 438, the county attorney was permitted to amend the information. The court said: "There can be no substantial objection urged to an amended information which charges the same offense on which the accused has had his preliminary examination." The amendment involved matters of clerical errors and punctuation.

In the case of *Eigbrett v. State,* 111 Neb. 388, 196 N. W. 700, it was claimed that the defendant was deprived of the statutory right to be served with a copy of the information on which he was tried. A copy of the information as originally drawn was served on the defendant, as required by law. The change made by the amendment consisted of indorsing thereon the names of three additional witnesses and in inserting in the county attorney's recital of the date on which he filed the information the year 1923. There was no change in the accusation or in the date of the offense charged, and the original information was in no wise amended to his injury. The court held:

"Accused in a criminal prosecution is entitled to a copy of the information within 24 hours after it is filed in the district court, but he is not, as a matter of right, entitled to an additional copy merely because, with his knowledge, additional names of witnesses are properly indorsed on the information, nor because the information is amended in an immaterial respect in no wise changing the accusation."

In the instant case, the information as finally amended did not change the date of the offense as originally charged. The defendant was served, as provided by law, with a copy of the original information, and, as finally amended, there was no change in the date of the alleged embezzlement. Therefore, he was tried on the offense as stated in the original information.

The offense involved section 60-1014, Comp. St. Supp. 1939, and was charged under section 28-550, Comp. St. 1929. Section 60-1014, *supra*, provides:

"The clerks of the various counties shall charge a fee of twenty cents for each memorandum certificate and thirty cents for each certified copy of a certificate of title. Such fees shall be retained by the said clerks. In addition to the foregoing fees, the clerks of the various counties shall charge a fee of fifty cents for each certificate of title, a fee of twenty-five cents for each notation of any lien on a certificate of title and twenty-five cents for each cancelation of notation of any lien on a certificate of title. The clerks of the various counties shall retain twenty cents of the fifty cents charged for each certificate of title; ten cents for each notation of lien; and ten cents for each cancelation of notation of lien. The remaining thirty cents charged for the certificate of title, the remaining fifteen cents charged for notation of any lien on a certificate of title and the remaining fifteen cents charged for any cancelation of notation of lien shall be paid to the state treasurer to be credited to the state general fund, and, if and when specifically appropriated by the Legislature for that purpose, shall be used during any biennium solely by the Department of Roads and Irrigation to pay the cost of administering this Act. The clerks of the various counties shall remit all funds due the state treasurer under this Act monthly and not later than the fifth day of the month following the collection thereof. The clerks of the various counties shall use all funds derived from fees specified herein for the administration of this Act in their respective counties."

Section 28-550, Comp. St. 1929, provides in part: "Any

officer * * * charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money or any part thereof, belonging to the state or to any county * * * shall convert to his own use * * * any portion of the public money or any other funds, * * * every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys * * * as shall be thus converted, * * * which is hereby declared to be a high crime, and such officer * * * shall be imprisoned * * *" as provided for in said section.

The defendant contends that the fees collected by him and, as shown by the provisions of the statute, to be retained by him for the administration of the act would not constitute an embezzlement as contemplated by section 28-550, Comp. St. 1929. This contention is based on the proposition that no requirements exist in section 60-1014, Comp. St. Supp. 1939, that he pay any amount of fees, so collected and to be retained by him, into the general fund of the county, and, further, that there is no statutory requirement as to the disposition of such fees except as specifically stated therein; that is, for administrative purposes. This being true, none of such fees constitutes public moneys. The county commissioners, by resolution adopted, paid the salaries of the additional assistants required for administration of the act and furnished the supplies therefor. For some period of time defendant turned over such fees to the county treasurer and subsequently failed to do so.

The charge of embezzlement turns on the construction which this court gives to section 60-1014, Comp. St. Supp. 1939. The provisions of the statute are clear in the following respects: Certain fees are to be paid to the county clerk, for the purposes as designated in the act, by the public, who are required to comply with the provisions thereof. While it is true that the act does not state the manner in which the county clerk shall expend the proportionate amount of fees to be retained by him for the administration thereof, it is clear that the act does not provide that such fees constitute additional compensation to be paid to the

clerk. The strictest construction placed on the statute does not warrant such analysis. The fees are paid by the public; the money is used for a public purpose; the county clerk is not privileged to retain the fees as compensation for additional services rendered. Without detailing the law in this respect, we refer to the case of *Mehrens v. Bauman,* 120 Neb. 110, 231 N. W. 701, involving a statute which provided for a fee to be received by the county treasurer as additional compensation for issuing drivers' licenses, and specifically designated that the fee was additional compensation. The same is not true in the instant case for the reasons above set out. The county clerk collected the fees in his official capacity.

The further contention is made by defendant that the county commissioners were merely volunteers and had no statutory authorization to receive any of the fees as shown in section 60-1014, Comp. St. Supp. 1939, for administration purposes, or that any such amounts were required to be paid to the county treasurer; that section 60-1014, *supra,* is a separate and independent act from any other acts involving moneys to be paid by the county clerk to the county treasurer for county government purposes and supersedes such acts. With this contention we cannot agree. The following sections of the statute are still applicable to the defendant as county clerk of Douglas county:

Section 33-135, Comp. St. 1929, contains the following provision: "All county officers * * * whose offices are salaried offices and who are to be paid out of the county general fund shall pay over the funds received from fees to the county treasurer on the first Tuesday in January, April, July and October of each year, and shall take the receipt of the county treasurer therefor."

Section 26-124, Comp. St. 1929, provides: "All persons chargeable with money belonging to any county shall render their accounts to and settle with the county board at the time required by law, and pay into the county treasury any balance which may be due the county, take duplicate receipts therefor, and deposit one of the same with the clerk of the county within five days thereafter."

Section 26-1002, Comp. St. 1929, provides: "It shall be the general duty of the county clerk: First. To record in a book provided for that purpose all proceedings of the board; Second. To make regular entries of their resolutions and decisions in all questions concerning the raising of money; Third. To countersign all warrants issued by the board and signed by its chairman; Fourth. To preserve and file all accounts acted upon by the board, with their action thereon; and he shall perform such special duties as are required of him by law. * * * "

It will be noted that section 33-135, *supra,* uses the language "shall pay over the funds received from fees to the county treasurer." Section 60-1014, Comp. St. Supp. 1939, designates that the moneys paid by the public for the purpose contained in the act are fees.

Defendant cites and quotes at length from the case of *Moore v. State,* 53 Neb. 831, 74 N. W. 319, as being conclusive of his right to retain the fees as evidenced by section 60-1014, *supra,* for administering the act. A careful reading of the foregoing case discloses an entirely different situation from that in the case at bar. As disclosed in *Moore v. State, supra,* a statute was passed in 1873, relating to insurance companies, wherein each of said companies or associations, etc., was required to pay fees for filing and examination of the first application of any company and the issuing of the certificate of license thereon ($50), which should go to the auditor. Other fees were mentioned. It was under this section that the moneys alleged to have been embezzled were paid to Moore as state auditor of public accounts. In 1875 the Constitution went into effect, and section 24, art. V thereof, after fixing the salaries of the executive officers, provided that "They shall not receive to their own use any fees, costs, interest upon public moneys in their hands, or under their control, perquisites of office or other compensation, and all fees that may hereafter be payable by law for services performed by an officer, provided for in this article of the Constitution, shall be paid in advance into the state treasury." Moore was prosecuted under section 124 of the

Criminal Code, which is now section 28-550, Comp. St. 1929. It will be noted that the statute involved, under which Moore received the fees, specifically states that such fees are to go to the auditor. The constitutional provision changed or modified the statute to such extent that the fees were to be paid in advance into the state treasury. It was held that under the circumstances said section 124 (now section 28-550) did not apply to Moore. The court said (p. 848): "To hold that the auditor is a person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, when the law expressly forbids him to receive it or handle it, would certainly go beyond the plain import of the words of the statute, and create a crime by construction in the plainest violation of the law." Section 124 of the Criminal Code (now section 28-550, *supra*), the court held, applied only to officers or persons charged by law with the collection, receipt, safe-keeping, transfer or disbursement of public moneys, and that the auditor of public accounts was not, as such officer, charged with the collection, receipt, etc., of public moneys.

In the instant case, section 60-1014, Comp. St. Supp. 1939, specifically required the defendant to receive the fees, as designated therein, in his official capacity. The law made it his duty to do so. There was no such language that the fees should go to him, and no subsequent constitutional provision modifying section 60-1014, *supra*. We believe it is unnecessary to point out further distinction between the two cases. The inapplicability of the *Moore* case to the instant case is apparent.

When the defendant became county clerk he was required to look to the statute for his compensation for the services to be performed by him in his official capacity, and if the legislature imposes by statute additional duties upon him and provides no additional compensation therefor, he, in his official capacity, is obligated to perform such services without additional compensation. *Nuckolls County v. Peebler*, 65 Neb. 356, 91 N. W. 289.

We conclude that the defendant, as county clerk, was

authorized to collect the fees, as provided in section 60-1014, Comp. St. Supp. 1939, and that such fees are public moneys; nor is any portion thereof, to be retained by him for administration of the act, additional compensation, but they are to be used for a public purpose. In his official capacity he is required to account for public funds and to pay such funds to the county treasurer, as provided by law. This would be true in the event the resolution of the county commissioners, referred to herein, was invalid. Therefore, the fact that defendant converted such fees to his own use without paying for any part of the administration of the act, knowing that the county commissioners were paying for such administration, and abiding by their resolution and paying fees into the public treasury for any period of time, would indicate clearly that section 28-550, Comp. St. 1929, is the applicable section under which to charge embezzlement under the circumstances as here existing.

We deem it unnecessary to set out any statement of the evidence, in view of our holding, and the claim of defendant that he paid into the county treasury fees in excess of the amount he is alleged to have embezzled, and has a credit with the county, is immaterial. The evidence with reference to the bank accounts is also immaterial.

Defendant contends that the court, in failing to give certain requested instructions, committed error. The instructions requested were upon the defendant's theory of the case, that he had a right to retain the fees for administrative purposes and that there can be no embezzlement. We have read with care the requested instructions and conclude that there was no error in their rejection.

The defendant further contends that the court erred in giving certain instructions, stating that defendant consistently used funds belonging to the state of Nebraska, when, in fact, it had been admitted that all funds due the state had been paid to the state. While the court might have eliminated this language and confined the instruction to funds due the county, we conclude, after reading all of the instructions and construing them together and as a whole, that they

properly state the issues involved and do not constitute prejudicial error.

The defendant attacks section 28-550, Comp. St. 1929, contending that said section is meaningless and a nonentity and does not define any felony known as embezzling public moneys, or any other offense. This matter was never presented to the trial court for its determination. However, inasmuch as it involves a statute which affects the liberties of individuals, we will determine this assignment of error.

The defendant calls our attention to a number of cases in this state announcing the law with reference to criminal statutes, as follows: In this state all public offenses are statutory; no act is criminal unless the legislature has, in express terms, declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law. It is elementary that penal statutes are inelastic and must be strictly construed. *Macomber v. State,* 137 Neb. 882, 291 N. W. 674, and cases cited therein.

Applying the above rule and in furtherance of the contention, the defendant states that all statutes of this state, in force and effect prior to the adoption of the Code revision of 1913, were supplanted and repealed and ceased to have any force and effect without the readoption of the revision of 1913, known as Revised Statutes of Nebraska for 1913. In 1911 the legislature provided for a commission for revision and recompilation of the laws of Nebraska. Laws 1911, ch. 166. This commission was to revise, consolidate and compile the general laws, the Code of Civil Procedure and the Code of Criminal Procedure of the state of Nebraska, and among its duties the commission was required to "bring together all statutes and parts of statutes relating to the same subject-matter * * * supply apparent omissions, reconcile contradictions and note imperfections in general; but such commissioners shall have no authority to make any change in any act or part of any act. * * * " Laws 1911, ch. 166, sec. 2. Therefore, the Revised Statutes of 1913 being a statutory or a true revision, it supplants and takes the place

of the laws that existed in Nebraska prior to the adoption of the revision, and repeals all laws in conflict therewith.

In support of the above contention, the cases of *In re Estate of Berg*, 139 Neb. 99, 296 N. W. 460, and *Pinn v. State*, 107 Neb. 417, 186 N. W. 544, are cited, the contention being that in the *Berg* case it was held the revision of 1913 was a true revision and supplanted and repealed all laws and existing laws that existed theretofore, and reinstated all laws that had been repealed which were included in the commissioners' report to the legislature. The *Berg* case involved section 584 of the Civil Code, which had been repealed, probably inadvertently, in 1905. Laws 1905, ch. 174. The revising commission included the repealed section in its report. The court held that by adopting the report of the commission, directing the compilation of the Revised Statutes of 1913, containing the repealed section, such section was made the law.

The controversy in the instant case arises over the elimination, in the Revised Statutes of 1913, of the word "if" before the word "any" in section 28-550, Comp. St. 1929. The word "if" before the word "any" appeared in the original act adopted in 1873 as section 124, and without the word "if" the provision of the statute would indicate that no offense was charged for embezzlement of public moneys, but rather that a public officer would be permitted to embezzle funds.

Without detailing the history of the statute in question, it must be conceded that at the time of the prosecution of the defendant the word "if" before the word "any" was absent therefrom, and this was also true when the statutes were revised in 1913, as claimed by the defendant. It is not denied that the court has the power to look at former statutes in an attempt to clarify the meaning of the words contained therein, and it is further admitted that the court is not permitted to add the word "if" in the statutes involved in order to make it state an offense. However, a reading of the statute without the word "if" shows that it does state the offense of embezzlement of public moneys.

Section 28-550, Comp. St. 1929, provides, in part: "Any

officer * * * charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money * * * shall convert to his own use, or to the use of any other person * * * any portion of the public money * * * or if any person shall advise, aid or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement (embezzlement is a criminal offense; the statute discloses who shall be held to have embezzled), * * * which is hereby declared to be a high crime," and such officer shall be punished according to law.

The following rule is of assistance: "A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. * * * No presumption arises from changes of this character that the revisers or the legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears." 59 C. J. 894.

Obviously, there was no intent on the part of the commissioners, appointed by the state to perfect the revision and codification of 1913, to authorize embezzlement by public officers, and the rule applies that there was no intention to change the law. However, as we have pointed out, even in the absence of the word "if," the statute involved states an offense which is sufficient to determine this assignment of error, and we hold that defendant's contention that section 28-550, Comp. St. 1929, is meaningless and a nonentity in failing to state the offense of embezzlement is without merit.

For the reasons given in this opinion, the verdict of the jury and the judgment of the court thereon are

AFFIRMED.

GERING IRRIGATION DISTRICT, APPELLANT, V. MITCHELL IRRIGATION DISTRICT ET AL., APPELLEES.

3 N. W. (2d) 566

FILED APRIL 24, 1942. No. 31314.

1. **Waters.** Where two irrigation districts receive water diverted under separate appropriations through a joint canal, injunction will lie to prevent a practice by one the effect of which is to prevent the other from receiving all the water to which it is entitled under its appropriation, which comes through its inlet, less transportation loss.
2. ———. *Held,* that maintenance of checks in the canal, when plaintiff is drawing water from the Pathfinder reservoir, in such manner and at heights that would have the effect of reducing velocity of flow of water below two and one-half feet a second is unwarranted and should be enjoined.
3. **Injunction.** Evidence of plaintiff brings it within the rule that a party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief, and injunction will not lie unless the right is clear, the damage is irreparable and the remedy at law is inadequate to prevent a failure of justice.
4. **Waters.** A continuous wrongful diversion of irrigation water will be restrained in equity at the instance of one who is deprived of the rightful use of the water so diverted, although no actual damage is alleged or proved.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Reversed, with directions.*

Neighbors & Danielson, for appellant.

James A. Greenwood and *Floyd E. Wright, contra.*

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

YEAGER, J.

This is an action for an injunction by the Gering Irrigation District, a corporation, plaintiff and appellant, against the Mitchell Irrigation District, a corporation, Guy Spurrier, Ralph Morrison and James Nickol, the board of directors of Mitchell Irrigation District, and Cy Godby, the superintendent of the district, defendants and appellees.

On the issues presented by the pleadings a trial was had to the court which resulted in a dismissal of plaintiff's petition. A motion for new trial was duly filed which was overruled. From this judgment the plaintiff has appealed. The case comes here for review *de novo*.

For assignments of error the plaintiff sets forth substantially that the findings and decree are contrary to and not supported by the evidence and that they are contrary to law.

In the petition by way of summary it is set forth that the plaintiff is an irrigation district comprising about 14,000 acres of land in the vicinity of Gering, Scotts Bluff county, Nebraska, and that the defendant district is also an irrigation district, comprising about 13,500 acres of land, also in the vicinity of Gering. The plaintiff has an appropriation of water for irrigation under the laws of Nebraska in the amount of 208.62 cubic feet of water a second, with a priority date of March 15, 1897. The defendant district has an appropriation under the laws of Nebraska and Wyoming of 194.6 cubic feet of water a second with a priority date of June 20, 1890. The head-gate and diversion works of plaintiff are on the North Platte river east of the Nebraska-Wyoming line, and the head-gate and diversion works of the defendant district are on the North Platte river west of the Nebraska-Wyoming line. The appropriation of the defendant district was obtained from the Mitchell Canal & Irrigating Company by assignment.

The petition further sets forth that on September 24, 1897, the Mitchell Canal & Irrigating Company contracted by an instrument which contained no power of revocation, —in terms a deed,—for a valuable consideration, to extend to the plaintiff the use of its canal for the purpose of transportation of its appropriated water to the head-gate of its irrigation district. The parties to this action make no contention that they are not bound by the instrument.

In the petition it is alleged that the defendant district has violated its contract for delivery or transportation of water, and has and is engaging in practices which interfere with and prevent proper and complete transportation of water to

which plaintiff is entitled, and which effect an appropriation or diversion of water belonging to plaintiff by the defendant district. It is to enjoin these alleged acts and practices that the plaintiff has instituted this action.

The defendants by answer deny that they have failed to perform the obligations of the contract, and further deny that they have in any wise interfered with or prevented the complete transportation of water to which plaintiff is or has been entitled or that they have appropriated or diverted any of its water.

In point of fact at the time of the execution of the instrument referred to, which will be hereinafter called the contract, the defendant district, or rather its predecessor, had a diversion inlet or head-gate from the North Platte river, a short distance west of the Nebraska-Wyoming line. It had a canal extending eastward from the head-gate, of the length of approximately 27 miles, through its irrigation district. The purpose of the canal was to transport the appropriated water to lateral turnouts where it was to be taken out in order that it might be used for irrigation purposes. Along the canal and in the district are about 112 turnouts. After the contract was entered into, the plaintiff constructed a diversion inlet or head-gate at a point about three-quarters of a mile to the east of the inlet of the defendant district, which was on the Nebraska side of the line. It constructed a canal which connected with that of the defendant district at a point approximately two miles from plaintiff's inlet. The appropriated water of each district is measured in at its head-gate and when both are drawing water at the same time the water joins at the junction of the two canals. From this point the water of the defendant district is carried down the canal and distributed there-along proportionately to its irrigators through the 112 turnouts. The water of the plaintiff must be transported along the entire length of the canal and at the east end it is run over a flume and measured to the plaintiff.

In the canal are 13 checks spread over the entire length of the canal. The exact distances between these checks are

not disclosed, but we may assume that the intervals between are somewhere near equal. The checks are of concrete and were constructed in the base of the canal and at the time of original construction their top surfaces were probably above the bottom line of the canal. The checks were so built that removable boards might be placed on top of the checks in order that their heights might be elevated. Among the purposes of the checks were to control the velocity of the water and to control its elevation to the end that water might be efficiently and equally distributed.

The canal passes through various kinds and qualities of soil throughout its length. Three types are named. These three are sand loam, loam sand and Brule clay. Some general information is given as to their relative porosity, quantity and location, but no attempt at reasonable accuracy is given. It appears that the more sandy portion is to the west end, and that east of this and over most of the distance the canal runs through Brule clay.

In addition to its appropriation of water from the river the plaintiff in 1913 by contract obtained the right to a supplemental supply of water. The government of the United States, pursuant to act of congress, completed a reservoir known as the Pathfinder reservoir to the westward in Wyoming, for purposes among which was the storage of water to be used for irrigation in supplement of appropriations from the natural flow of the North Platte river. By contract the plaintiff purchased the right within given limits and restrictions to the use of water from this reservoir when it was not obtaining water from the river under its 1897 appropriation.

The amount of water received and to be received by plaintiff and the defendant corporation under their respective appropriations was determined and determinable by measurement at their head-gates or inlets from the North Platte river. Likewise the amount of water received and to be received by plaintiff from the Pathfinder reservoir was determined and determinable by measurement at its head-gate or inlet on the river. It may well be stated here that at no time

has the plaintiff received in the aggregate an amount of water from its appropriation and its purchase in excess of the maximum amount allowable under its appropriation.

Under the contract between plaintiff and defendant district it was contemplated that there would be transportation losses in the conveyance of plaintiff's water from its appropriation inlet to the head-gate of its district. These losses were to be borne by the plaintiff. No formula was prescribed for the determination of such losses.

Several elements contribute to these losses. The most important perhaps are seepage or leakage and evaporation.

The first phase of the action of the plaintiff resolves itself into the proposition that for a long period of time the defendant district under the guise of deduction of transportation losses has been appropriating water belonging to the plaintiff to the use of the irrigators in its district. It is this that plaintiff seeks to enjoin. It also seeks to have the court fix a formula whereby the amount of water to be received during the irrigating period of the year, and each month thereof, may be determined. The second phase is a charge that by reason of the manner in which the defendant district operates its canal and controls the water therein, when both parties are at the same time receiving water under their respective appropriations, the water coming to plaintiff is allowed to fluctuate so that plaintiff is not permitted to obtain the full beneficial use of the water received. This practice plaintiff seeks to enjoin. The third phase is the charge that when the defendant district is receiving no water under its appropriation, and when the plaintiff is receiving water under its purchase agreement from the Pathfinder reservoir, the defendant district maintains the checks in the canal in such manner that the flow of water is unduly retarded, thus causing excessive transportation losses and preventing receipt by the plaintiff of all water to which it is entitled.

Taking the phases in their order, no dispute exists as to the accuracy of measurements of water as it comes in through the inlets from the river and the evidence does not

direct our attention to any above the junction of the two canals, nor is there any dispute about the claim that plaintiff is entitled to all of the water drawn under its appropriation and purchase agreement except the portion which is lost in transportation. The dispute depends upon transportation losses from the junction of the two canals to the head-gate of the plaintiff, which is to the east of the area served by the defendant district, and the methods used by the defendant district in computing, measuring and allocating the losses. It will be noted here that transportation, control of transportation and delivery of water to plaintiff's head-gate are entirely and exclusively in the hands of the defendant district.

We arrive at the conclusion from all of the evidence that transportation losses are variable from month to month and day to day, and even on occasion from hour to hour. The variations are dependent upon many things, some of the most important of which are (1) volume of water, (2) velocity of flow, (3) distance, and (4) porosity of soil over or through which the water is transported.

In arriving at a conclusion here, on the record, we are dependent largely upon results of and deductions from experience rather than upon measurements of losses attending the various specific agencies producing loss. In so far as volume is concerned the measurements of the volume of intake of the plaintiff at its diversion inlet and at its head-gate are certain as by computation is the loss to it en route. No reliable information is given as to the velocity of the water at any given time, or over any period or periods, further than general statements as to the length of time it would take water to travel the length of the canal under hypothetical conditions. Distance is discussed for the most part in its relation to the factor of evaporation which in its turn is dependent upon temperature and other atmospheric conditions, but it is without preciseness. Likewise no effort has been made in the record to give information as to the relative porosity of the soil of all or of any part of the canal.

The plaintiff produced expert witnesses, irrigation engi-

neers, who took into consideration the known measurements at inlet and district head-gate, the results of some knowledge gained from observation of the physical structures and physical conditions in the canal, evaporation data from stations close at hand where evaporation was measured, and the other variable factors involved in water transportation loss, and gave it as their conclusion and opinion that for the period covered by the action here the defendant district had deducted from the water received by plaintiff at its inlet larger quantities than could be accounted for by transportation loss. The details and computations of these losses are too lengthy to be set forth here.

Against these standards and computations, which plaintiff calls, at least in part, theoretical, the defendant district has set up by evidence no counter standards and computations. It discloses only a practice in the distribution of water. The practice is, with knowledge of its own intake of water and sometimes, perhaps most of the time, with knowledge of plaintiff's intake, to estimate the necessary adjustment of the outlets to its irrigators, which outlets have no measuring devices, with the purpose of giving these irrigators 80 per cent. of its inflow, and of giving to plaintiff the balance of the water in the canal, and then making adjustments to meet these estimates. This practice makes allowance for a 20 per cent. transportation loss. These estimates are made by the man or men in charge of the operation of the canal.

The only element of accuracy or approaching accuracy in the entire operation is with regard to the amount of water taken in at the inlet from the river. There is no measuring device in the canal or at any irrigator outlet below the inlet at the river. No defense witness was able to say as a fact, or to give an opinion based on reasonable foundation, that the use of water responded specifically or generally to the estimates made by the operators of the canal. An examination of the record of the measured intake of plaintiff at its river intake and its measured receipt of water at its district head-gate, and of the measured intake of the defendant dis-

trict, discloses that there was a wide variation from the result contemplated by the described practice of the defendant district for division of water in a manner more often than not to the disadvantage of the plaintiff.

We are brought to the conclusion on this, the first phase of this action, that on the questions involved such evidence as plaintiff has adduced must be accepted. Is it then sufficient in and of itself to warrant granting the relief prayed, or some of it?

We think it is sufficient to justify a finding that in the past the defendant district has used water for its purposes which properly should have been delivered to the plaintiff and that a similar result will follow a continuance of the practices now being followed by the defendant district. It follows that injunction will lie to prevent any practice which will prevent the plaintiff from receiving all of the water to which it is entitled under its appropriation which comes through its river inlet, less transportation loss.

In the light of the evidence which discloses almost an entire lack of measuring devices or means whereby any reasonably accurate division of water can be accomplished, it is not so clear that a workable formula can be worked out and prescribed for future division of water when both districts are drawing water under their respective appropriations. It is clear that the plaintiff has a right which requires protection in the light of past trespasses thereon. The plaintiff has supplied a formula based in part on fact, and in part on opinion drawn from facts some of which are far from certain. The defendants have brought forth no formula. The most that can be said is that they have sought to cast doubt upon, and add to the uncertainty of, the facts out of which have come the opinions on which plaintiff's formula is based.

In this light we are inclined to the view that the formula supplied by plaintiff should be applied to the division of water until such time as by proper and sufficient evidence the defendant district in a proper action shows that the formula is faulty and should be revised.

The formula is as follows: The total loss of water in

transportation of the water drawn by months from April to October shall be: April, 26 second feet; May, 28 second feet; June, 30 second feet; July, 33 second feet; August, 32 second feet; September, 28 second feet; October, 23 second feet.

In case the two are drawing an equal amount of water, 60 per cent. of the transportation loss shall be attributed and charged to plaintiff and 40 per cent. to the defendant district. If they are drawing in unequal amounts the same proportionate basis shall be applied in the determination of the respective transportation losses. This formula provides the maximum transportation loss which may be attributed and charged to the plaintiff.

Coming now to the second phase, the evidence clearly shows that throughout the irrigation seasons there have been many quite marked fluctuations in the flow of water as it has come to the head-gate of plaintiff's district. Various reasons for fluctuation have been assigned, some of which were at least to a degree under control of the defendant district and some of which were not. No single incident has been pointed out when the defendant district failed reasonably to take the necessary steps to correct the situation responsible for the fluctuation. There has been no constancy of flow in the canal, and it is not difficult to understand that there are difficulties in providing against even marked fluctuations when it is remembered that the canal is not only an artery for the transportation of water, but is also a feeder for more than a hundred irrigation outlets along its distance, which must be separately adjusted to meet the changing conditions. Other causes of fluctuation are rainfall and seepage or flow into the canal from an adjacent irrigation district. Furthermore, if the fluctuation is upward to the extent that a portion of it becomes waste water, it is the duty of the plaintiff under the contract to provide a wasteway to carry this water away.

There is insufficient evidence to justify a finding that the defendant district has failed to exercise the control of the canal necessary to prevent excessive fluctuations in the flow of water therein.

Now as to the third phase of the action the record discloses that there are periods when neither the plaintiff nor defendant district is obtaining water under appropriation. During a portion of such periods the plaintiff draws water from the Pathfinder reservoir by reason of its purchase agreement. This water enters through the river appropriation inlet and travels the length of the canal to plaintiff's head-gate. This water, of course, belongs to the plaintiff in its entirety. It claims, however, that the defendant district by reason of the height at which it keeps the checks in the canal retards the flow of this water, which causes losses by evaporation and seepage which would not occur if the checks were lowered sufficiently to permit a free flow to its head-gate. This the defendant district denies.

Arguendo, the defendant district says that the plaintiff has no right to have this water transported in the canal since it is outside the contract of the parties; that the parties had in contemplation only such water as plaintiff should receive under its appropriation from the North Platte river. This matter requires no consideration in the case at bar. The defendants have tendered no such issue here. This practice has gone on continuously since 1913 and we are not called upon to determine whether it has been done of right or by permission. Whether of right or by permission, no rule is cited which would allow impounding or confiscation of such water by the defendant district.

Admittedly during the periods when the plaintiff is receiving water from the Pathfinder reservoir, the checks are maintained at a height considerably above the concrete bases of the checks. This controls the velocity of the water and its elevation back of the checks. The longer it takes for the water to flow down the more evaporation, and the higher the water is held the more seepage there would be through the perimeter and into the soil surrounding the canal. This represents a loss to the plaintiff. The defendant district contends that it maintains checks during these periods only to a height necessary to hold the waterflow at a velocity which will not scour and damage the canal.

The record discloses that at least at one time during these operations the velocity was reduced to slightly more than one and one-half feet a second. The record further discloses that during the time when the defendant district is drawing water a velocity of two and one-half feet a second is not unusual or dangerous to the canal. No reason is given which would justify a lower velocity when plaintiff alone is using the canal than when the defendant district alone or plaintiff and defendant together are using it. It is suggested that the maintenance of the higher level has the effect of keeping the canal primed, which would have the effect of reducing transportation losses when the defendant district resumes drawing water under its appropriation. This is undoubtedly true, but nothing appears in the record or the briefs which would justify a finding that a part of plaintiff's water may be used for this purpose.

The record justifies a finding and a holding that the maintenance of checks in such manner and at heights that would have the effect of reducing the velocity of the flow of water below two and one-half feet a second when the plaintiff is receiving water from the Pathfinder reservoir is unwarranted and should be enjoined.

The defendant district cites the rule that one who seeks an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and that injunction will not lie unless the right is clear, the damage irreparable and the remedy at law is inadequate to prevent failure of justice. *Buettgenbach v. Gerbig*, 2 Neb. (Unof.) 889, 90 N. W. 654; *Radford v. Wood*, 83 Neb. 773, 120 N. W. 458; *Boschulte v. Elkhorn River Drainage District*, 102 Neb. 451, 167 N. W. 730; *World Realty Co. v. City of Omaha*, 113 Neb. 396, 203 N. W. 574; *Chizek v. City of Omaha*, 126 Neb. 333, 253 N. W. 441. We conclude that plaintiff's evidence meets the requirements of this rule. It is true that the evidence to sustain plaintiff's position is not as complete and satisfactory as might be desired, but there is competent evidence supporting the controverted facts. The right is clear and it requires no stretch of the imagination to arrive at the

conclusion that this kind of damage is irreparable and a remedy at law is inadequate.

The exigencies of this situation require that we hold that a continuous wrongful use or diversion of irrigation water will be restrained in equity at the instance of one who is deprived of the rightful use of the water so used or diverted, although no actual damage is averred or proved. See *Moore v. Clear Lake Water Works*, 68 Cal. 146, 8 Pac. 816; *State v. Cochran*, 138 Neb. 163, 292 N. W. 239; 67 C. J. 1386.

It is therefore the opinion of this court that the decree of the district court be and the same is reversed, and the cause remanded, with directions to enter a decree in accordance with the findings herein as follows:

The defendant district shall be enjoined from engaging in any practice the effect of which would be to prevent plaintiff from receiving all of the water coming to it under its 1897 appropriation, except that portion lost in transportation from its inlet at the North Platte river to the head-gate of its district, taking into consideration all factors necessary to be considered in the computation of transportation losses.

For the purposes of computation of transportation losses until such time as by proper and sufficient evidence the defendant district in a proper action shows competently that the formula is faulty and should be revised, the following formula shall be adhered to in computing and determining the minimum amount of water that plaintiff shall receive, or the maximum amount of transportation loss to be charged to it at times when both parties are drawing water under their appropriations: April, 26 second feet; May, 28 second feet; June, 30 second feet; July, 33 second feet; August, 32 second feet; September, 28 second feet; October, 23 second feet. In case the two are drawing an equal amount of water, 60 per cent. of the transportation loss shall be attributed and charged to plaintiff and 40 per cent. to the defendant district. If they are drawing in unequal amounts the same proportionate basis shall be applied in the determination of the respective transportation losses.

The defendant district shall be enjoined from, by the use

of checks or otherwise, reducing or retarding the velocity of flow of water which the plaintiff shall be receiving through the canal from the Pathfinder reservoir below the rate or speed of two and one-half feet a second, and from appropriating any portions of such water to its own use or for any of its purposes.

REVERSED.

HERMAN E. FAIRCHILD, APPELLANT, V. FAIRCHILD CLAY PRODUCTS COMPANY, APPELLEE.

3 N. W. (2d) 581

FILED APRIL 24, 1942. No. 31316.

1. **Evidence.** When a party pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact.
2. **Master and Servant.** As a general rule, when parties have contracted for performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract it will be presumed that the employment continued under the same contract and upon the terms originally fixed.
3. **Contracts.** Two parties are necessary to the making of an agreement, and a mere intention on the part of one to accept a less sum than agreed upon, or even an express statement by him that he would accept a less sum, would not of itself bind him to do so.
4. **Payment.** Where there is a continuing contract of employment with no time fixed for termination and no time fixed for payment, and there is no substantial lapse in continuity of employment, any payment of salary, in the absence of a contrary intent, will be presumed to be payment upon the delinquent and unpaid salary.

APPEAL from the district court for Jefferson county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

Perry, Van Pelt & Marti, Arthur E. Perry and *Ralph R. Perry,* for appellant.

Denney & Denney, contra.

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

YEAGER, J.

This is an action by Herman E. Fairchild, plaintiff and appellant, against the Fairchild Clay Products Company, a corporation, defendant and appellee. The action is on a contract of employment appearing in the minutes of the defendant company, and is for services as president of the company for the period beginning March 19, 1932, and ending January 31, 1936. The case was tried to a jury and verdict was returned in favor of the defendant. Judgment was entered on the verdict. Motion for new trial was made which was overruled. From this judgment the plaintiff has appealed.

The plaintiff set forth in his petition, as amended, that at a meeting of the board of directors held on or about March 15, 1929, plaintiff was awarded by resolution a salary of $125 a month as president of the defendant company and that he served as president, and at the salary of $125 a month from March 15, 1929, to and including January 31, 1936. He further says that he received his full salary to and including March 18, 1932, but that from March 18, 1932, to and including January 31, 1936, he only received the sum of $1,795.39, leaving due and owing the sum of $4,004.61. For this last amount plaintiff prayed judgment.

The defendant filed a general denial and further answering denied that plaintiff was duly and legally elected president and allowed a salary as set forth in the petition. It pleaded further that the salary claimed was barred by the statute of limitations; that plaintiff voluntarily reduced his salary to the amounts received by him, and that he accepted the sum he received as full payment for his services; that plaintiff made no claim for salary until there was a change of stockholders and until after there was a new management, and that thereby plaintiff is estopped to claim a greater amount of salary than that which he received.

For reply the plaintiff generally denied the allegations contained in the answer, and further alleged that on account

of the depression he allowed his salary to accumulate, that the parties considered his salary as an account current and that the defendant is estopped to plead the statute of limitations.

On the issues thus tendered the case was tried with the results indicated.

As grounds for reversal the plaintiff has assigned many errors, but after an examination of the entire record we find it unnecessary to discuss all of them.

Plaintiff first complains of instruction No. 2 given by the court on its own motion. The instruction is as follows:

"You are instructed that the evidence in this case shows that during the period in issue in this action, the plaintiff was the president of the defendant corporation, that he performed the duties of that office, and that the payment of a salary of $125 per month was authorized.

"You are further instructed that in order to establish his right to recover in this action, the burden is on the plaintiff to prove, by a preponderance of the evidence, the following:

"1. That he has not been paid in full for that service.

"2. The amount due him.

"If you find that the plaintiff has sustained the burden of proof as above set forth, then your verdict will be in favor of the plaintiff for the amount which you find is due to him, together with interest thereon at the rate of six per cent. per annum from the 1st day of November, 1938."

Plaintiff insists that this instruction improperly imposes the burden of showing nonpayment on the plaintiff, his theory being that the defendant has pleaded payment and therefore the burden was on the defendant to sustain that burden. This contention cannot be upheld, since examination discloses that payment was not pleaded by the defendant. The defendant pleaded only a substituted arrangement or contract, the statute of limitations, and a voluntary reduction of salary by plaintiff under circumstances which estopped him to assert a claim for an unpaid portion thereof against the defendant company. Under the issues plaintiff was required in the first instance to prove his contract and failure

of performance by the defendant. The failure of performance alleged was failure to pay in accordance with the terms of the contract. If the giving of the instruction had been error, as claimed, it would have been without prejudice, since the subject of this burden was stipulated anyway. The instruction embodied a correct application of the rule with regard to the burden of proof. The correct rule is that, when a party affirmatively pleads a fact which is material to the issue, he thereby assumes the burden of proving the existence of such fact. *Pierce v. Miller,* 107 Neb. 851, 187 N. W. 105; *Fenske v. Strait,* 121 Neb. 177, 236 N. W. 441; *Gutzmer v. Nelsen,* 121 Neb. 214, 236 N. W. 614; *Cohen v. Swanson Petroleum Co.,* 133 Neb. 581, 276 N. W. 190.

Attention is now directed to instruction No. 4 which is as follows:

"You are instructed that if you find from a preponderance of the evidence that notwithstanding the employment of the plaintiff and the fixing of his salary at $125 per month, the plaintiff, in consideration of business conditions, the financial condition of the defendant, or for the purpose of contributing to the continuance of his own employment by the defendant or for any other purpose beneficial to himself, did, of his own accord, reduce the amount of his salary and did accept the sums actually paid to him from month to month in full satisfaction of any claim for services, and that from all the facts and circumstances as shown by the evidence, the defendant was justified in believing that the plaintiff was so accepting the sums he actually received, then the plaintiff cannot recover in this action.

"On the other hand, if you find that the plaintiff merely refrained from taking his full salary from month to month without any intention on his part to waive the balance and without any basis or justification in the facts and circumstances to justify the defendant in believing that the plaintiff was accepting the sum actually received in full satisfaction of his salary then the plaintiff is not barred from recovering herein as otherwise stated in these instructions."

This instruction embodies the affirmative defense that

there was a voluntary reduction of salary and an estoppel to assert a claim for unpaid balance and, of course, assumes the existence in the record of evidence supporting this defense. A careful examination of the bill of exceptions discloses no such evidence either direct or circumstantial. The only evidence on the subject is that offered by the plaintiff, which is to the effect that he merely refrained from taking his full salary from month to month without any intention on his part to waive the balance, and without any basis or justification in the facts and circumstances to justify the defendant in believing that the plaintiff was accepting the sum in satisfaction of his salary.

Under the evidence, or rather lack of evidence, plaintiff insists that it was error to submit this defense to the jury. On the other hand, the defendant urges that the evidence was sufficient for submission. Both parties cite in support of their respective contentions the case of *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024. As pointed out in that case, the salary of Barber was fixed for a period of years, and after the expiration of the fixed period he reduced his own salary under the following circumstances as set out in the opinion (p. 677): "Here, while there was no action by the corporation expressly, the court has found that from the time Barber as general manager reduced his own salary, along with the salaries of other employees, to the time he ceased to be an officer of the company, he drew his salary from time to time substantially on the basis of the reduction; and the evidence is clear and convincing that he took the money withdrawn in full satisfaction of his claim for salary, and had no thought of claiming more until his right to withdraw the $2,200 was challenged after the new management took charge." No such evidence appears here. Again in the same opinion the following appears (p. 676): "Undoubtedly, as a general rule, when parties have contracted for performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract, it will be presumed that the employment continued

under the same contract and upon the terms originally fixed. * * * But this presumption must yield to evidence showing a change of terms. * * * It may be conceded that it would take two to make the new agreement, and that a mere intention on the part of Barber to accept a less sum, or even an express statement by him that he would accept the less sum, would not of itself bind him so to do." In the case here there was no change of terms to which the presumption of continued employment upon the terms originally fixed was required to yield, and there was no evidence of intention or expressed statement that plaintiff would accept less than $125 a month for his service. There is nothing in this which would operate to estop or prevent plaintiff from making demand and maintaining action at law to recover the balance of unpaid salary.

It therefore follows that, there having been no evidence adduced to support the allegation that the plaintiff had voluntarily reduced his salary, this defense was erroneously submitted to the jury.

The next complaint is as to instruction No. 5 given by the court on its own motion, and the refusal of instruction No. 1 requested by the plaintiff. These instructions relate to the defense of the statute of limitations.

For an understanding of the question presented, a review of certain facts is necessary. From a date prior to March 15, 1929, to and including January 31, 1936, the plaintiff was president and manager of the defendant company, and as such gave all of his time to the company's business. On March 15, 1929, by resolution of the board of directors, plaintiff's salary was increased from *$100 to $125 a month.* No further action was taken by the board of directors until after January 31, 1936. Until March 18, 1932, plaintiff drew his salary of $125 a month. Thereafter and up to January 31, 1936, plaintiff drew a total of $1,795.39. The amounts were irregular and the withdrawals were also irregular over the entire period. The matter was never discussed by plaintiff and any one connected with the company. There is no evidence of any agreement in relation thereto.

The checks for salary withdrawals were ordered and signed by plaintiff as president of the company. No record was kept of salary paid or payable to plaintiff except of the salary withdrawals actually made. The plaintiff did not remain in charge of the company after January 31, 1936. He did not make claim for unpaid salary until about February 15, 1938. The petition for recovery of unpaid salary was filed on November 1, 1938, and on the same day service of process was had on the defendant company.

On these facts plaintiff contends that it was error for the court to give instruction No. 5, and that it was also error to refuse to give instruction No. 1 requested by the plaintiff.

The contention with reference to instruction No. 5 is clearly correct. The contention with reference to instruction No. 1 requested by plaintiff is incorrect. There was no evidence which justified in any wise the submission of the defense of the statute of limitations to the jury.

The rule applicable here is this, that where there is a continuing contract of employment with no time fixed for termination and no time fixed for payment, and there is no substantial lapse in continuity of employment, any payment of salary, in the absence of a contrary intent, will be presumed to be payment upon the accumulated delinquent and unpaid salary. *Blair v. Estate of Willman*, 105 Neb. 735, 181 N. W. 615; *Phifer v. Estate of Phifer*, 112 Neb. 327, 199 N. W. 511. See, also, *Ebersole v. Omaha Nat. Bank*, 71 Neb. 778, 99 N. W. 664; *Bosler v. McShane*, 78 Neb. 86, 110 N. W. 726; *In re Estate of Holloway*, 89 Neb. 403, 131 N. W. 606; *In re Estate of Skade*, 135 Neb. 712, 283 N. W. 851. There is no competent evidence of a contrary intent in the bill of exceptions.

In support of its position, the defendant cites, among others, the case of *Reeves v. Nye*, 28 Neb. 571, 44 N. W. 736. The action there was for threshing in three separate years. The first year was separated by two years from the second. It was held that the claim for the first year was barred by the statute of limitations. There was clearly no continuity of employment. The other cases cited do not come into conflict with the holding in the case at bar.

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

REVERSED.

JACK WEBBER ET AL., APPELLEES, V. CITY OF SCOTTSBLUFF ET AL., APPELLANTS.

3 N. W. (2d) 635

FILED APRIL 24, 1942. No. 31338.

1. **Municipal Corporations.** Municipal corporations are *prima facie* the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence.
2. ———. Municipal corporations are granted by statute the right to enact ordinances regulating auction sales within their corporate limits. Comp. St. 1929, sec. 16-238.
3. ———. To meet constitutional requirements, a city ordinance must respond to the same tests as would be required of statutory enactments.
4. ———. *Held,* that the action was properly brought under section 20-21,141, Comp. St. 1929.
5. ———. The right to regulate auction sales is found in the police power, and the regulatory provisions of an ordinance under the police power must have some relation to the public health, safety or welfare.
6. ———. If ordinances under the police power do not bear some relation to the public health, safety or welfare, they are void as an invasion of the property rights of persons affected by their enforcement.
7. **Auctions.** The business of an auctioneer and of selling merchandise at auction is useful and lawful in the commerce of the state.
8. **Constitutional Law.** A regulatory provision of an ordinance having some relation to public health, safety or welfare, but which arbitrarily and unreasonably interferes with private business and imposes unreasonable and unnecessary restrictions, may not be upheld.
9. ———. It is competent for the city by ordinance to classify, but the classification to be valid must rest on some reason of

public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified.

10. ———. "Under the Constitution, persons in the same class, or who should be considered as included within the relations and circumstances provided for, must be governed by the same rules; otherwise the legislation is unconstitutional." *Ernesti v. City of Grand Island*, 125 Neb. 688, 251 N. W. 899.

11. ———. *Held*, that the ordinance is in part unconstitutional and void for the reason that it is unreasonable and arbitrary, and restrictive rather than regulatory, and is unconstitutional and void in its entirety for the reason that it creates an arbitrary, illegal and unreasonable classification.

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

Lewis F. Shull, Chauncey C. Sheldon and *Jack L. Raymond*, for appellants.

Morrow & Miller, contra.

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

YEAGER, J.

This is an action for permanent injunction and for a declaratory judgment by Jack Webber and Mayme Webber, plaintiffs and appellees, against the city of Scottsbluff, Albert T. Howard, James Hedge, C. I. Nycum, Straight Townsend and James H. Anderson, respectively mayor, chief of police, police magistrate, city attorney and assistant city attorney of the city of Scottsbluff, defendants and appellants. The action is to enjoin the enforcement of ordinance No. 497 of said city, and by judgment to declare the ordinance void and unenforceable. The injunction was issued by the district court for Scotts Bluff county in conformity with the prayer of the petition and the defendants have appealed.

The first section of the ordinance prohibits auction sales on the streets, alleys, highways and public grounds of the city of Scottsbluff. The second section prohibits auction sales within the city without first filing with the city clerk an inventory, obtaining a license and paying a license fee.

The third section provides that the inventory, sworn to, shall be filed with the city clerk not less than 15 days before commencing sale, and shall contain the name of the merchant, the place of sale, the name and address of the auctioneer, and show in detail the quality, quantity, kind and grade of the goods, wares, domestic animals and merchandise to be sold. The fourth section provides that it shall be unlawful to sell, offer, or expose for sale at any auction sale, or to list on the inventory, any goods, wares or merchandise which are not the regular stock of the store or place of business which is being closed out, or to make any replenishment or addition thereto for the purpose of such sale or during the time of sale, or to fail, neglect or refuse to keep accurate records from which the city clerk may ascertain the kind, quantity or number of goods sold. The fifth section provides that no goods shall be sold which are not included in the inventory, and that no goods shall be included in the inventory which are not owned by the licensee, also that the sale shall be held on successive days, Sundays and holidays excluded, and between 9 o'clock a. m. and 6 o'clock p. m., and at such sale there shall not be used by-bidders, commonly called "cappers," nor shall any person be permitted to make false or pretended bids, nor shall premiums, prizes or gifts of merchandise be offered as incentives to bidders, and that there shall be no additions to offered articles or groups of articles. The sixth section exacts a license fee of $5 a day payable in cash in advance to the city clerk for the entire period during which the auction is held. The seventh section exempts completely from the terms of the ordinance auction companies doing business within the city of Scottsbluff who sell at auction goods, wares, domestic animals and merchandise for the general public on commission. Section eight is the penalty provision and it provides for prosecution of violations as misdemeanors with minimum penalty of $5 and maximum of $100, and for revocation of license. The two remaining sections are of no importance here.

Coming now to the substance of the petition, the plaintiffs alleged that they were copartners engaged in the re-

tail furniture business in the city of Scottsbluff, and that on February 2, 1941, they advertised an auction sale which was to begin on February 3, 1941, at their place of business, which sale would continue from day to day, except on Saturdays and Sundays, until their merchandise had been sold. The hour for commencement of daily auctions was 7:30 p. m. This was without obtaining a license and without compliance with the other terms of the city ordinance referred to. Auction sales were held on February 3 and 4.

On February 5, 1941, a complaint was filed charging the plaintiff Jack Webber with a violation of the ordinance. A warrant was issued and he was arrested and brought before the police magistrate, and date for hearing was set for February 7, 1941. At or about the time of the arrest, Jack Webber was advised by the assistant city attorney that complaints would be filed for daily successive violations of the ordinance.

Plaintiffs alleged that the purpose of the city ordinance was to exact from them an illegal tax or fee for the privilege of selling merchandise, and that the ordinance is discriminatory and void and without authority of law, and in violation of the Fourteenth Amendment to the Federal Constitution and the rights guaranteed by the Constitution of the state of Nebraska.

The plaintiffs prayed for the issuance of an injunction and for a declaratory judgment decreeing that the ordinance is void and unconstitutional and for other equitable relief.

To the petition the defendants filed a general demurrer which was overruled. They then answered. In the answer the general demurrer was renewed. The answer denies the invalidity of the ordinance and the conclusions of the plaintiffs, but substantially admits the pertinent facts with reference to the contents of the ordinance, its enactment, the violation thereof by plaintiffs and the arrest of Jack Webber. The central facts which present the issue which must be determined in this case are admitted in the answer.

The plaintiffs demurred generally to the answer. This

demurrer was sustained and decree was entered in conformity with the prayer of the petition.

The issue here is the question of whether or not the ordinance, or some part of it, is void for unreasonableness apparent on its face, or on account of unreasonableness having been established by proper evidence which is clear and unequivocal, it being the rule that municipal corporations are *prima facie* the judges of the necessity and reasonableness of ordinances, and that a legal presumption exists in their favor unless the contrary appears on their face or unless unreasonableness is established by clear and unequivocal evidence. *Peterson v. State,* 79 Neb. 132, 112 N. W. 306; *State v. Withnell,* 91 Neb. 101, 135 N. W. 376; *Hawkins v. City of Red Cloud,* 123 Neb. 487, 243 N. W. 431; 2 McQuillin, Municipal Corporations (2d ed.) Revised, 887, sec. 768.

That the city of Scottsbluff had the power to enact an ordinance regulating auction sales is not questioned. This power is statutory. Comp. St. 1929, sec. 16-238. The question is not the lack of power to enact, but whether or not the enactment places arbitrary and unreasonable restrictions on the conduct of lawful business, whether or not it is class legislation, whether or not it is a prohibition instead of a regulation, whether or not it is in violation of the guaranties of the Constitution of Nebraska, and whether or not it is violative of the Fourteenth Amendment to the Federal Constitution which is in part as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. art. XIV, sec. 1.

To meet constitutional requirements, the ordinance must respond to the same tests as would be required of a statutory enactment. *Ernesti v. City of Grand Island,* 125 Neb. 688, 251 N. W. 899.

Preliminary to a discussion of these questions, we think that the action of plaintiff was properly brought. The stat-

utes make provision for such actions. Section 20-21,141, Comp. St. 1929, is as follows: "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." See *Dailey Estate v. City of Lincoln,* 107 Neb. 151, 185 N. W. 332; *Hoyt Bros. v. City of Lincoln,* 130 Neb. 79, 263 N. W. 898.

The right to regulate auction sales is found in the police power, and the regulatory provisions of an ordinance under the police power must have some relation to the public health, safety or welfare. *Smiley v. MacDonald,* 42 Neb. 5, 60 N. W. 355; *In re Anderson,* 69 Neb. 686, 96 N. W. 149; *Union P. R. Co. v. State,* 88 Neb. 247, 129 N. W. 290; *State v. Withnell, supra; Hoyt Bros. v. City of Lincoln, supra; Carolene Products Co. v. Banning,* 131 Neb. 429, 268 N. W. 313; *Golden v. Bartholomew,* 140 Neb. 65, 299 N. W. 356; *Jay Burns Baking Co. v. Bryan,* 264 U. S. 504, 44 S. Ct. 412. If they do not bear such relation they are void as an invasion of the property rights of persons affected by their enforcement. *Hoyt Bros. v. City of Lincoln, supra; Carolene Products Co. v. Banning, supra; Jewel Tea Co. v. City of Geneva,* 137 Neb. 768, 291 N. W. 664; *Jay Burns Baking Co. v. Bryan, supra.*

The business of an auctioneer and of selling merchandise at auction is a lawful and useful business as has been declared by this court. *Caldwell v. City of Lincoln,* 19 Neb. 569, 27 N. W. 647. It is difficult, if not impossible, to find a basis for a conclusion that a 15-day notice to a city clerk before an auction sale, an inventory to the city clerk of all goods to be sold, containing the quality, quantity, kind and grade of the merchandise intended to be sold, a prohibition against addition to a regular stock of merchandise, a requirement by ordinance that accurate records shall be kept,

that sale shall be had on successive days, that there shall be no addition to articles offered for sale, or that sales shall not be conducted after 6 o'clock p. m., and not before 9 o'clock a. m., or any of these restrictions, have any relation to public health, safety or welfare. This difficulty is not lessened when we observe that *auction companies* doing business in Scottsbluff, Nebraska, who sell for the general public on commission are specifically exempted from each and all of the provisions of the ordinance, and upon them there are no restrictions or regulations whatever.

Assuming that these regulatory provisions do have some relation to public health, safety or welfare, it seems clear that they arbitrarily and unreasonably interfere with private business and impose unreasonable and unnecessary restrictions on auction sales and for that reason may not be upheld. *Caldwell v. City of Lincoln, supra; Ernesti v. City of Grand Island, supra; Jewel Tea Co. v. City of Geneva, supra; Jay Burns Baking Co. v. Bryan, supra.* In the sense of the approach by the city of Scottsbluff to auction sales, the ordinance here is in its essence in terms restrictive rather than regulatory. In this connection we are not unmindful of the rule already stated that municipal corporations are *prima facie* the judges respecting the necessity and reasonableness of their regulatory ordinances, but this rule cannot be carried to the extreme of requiring us to hold on the face of the ordinance that restrictions upon a lawful business having no inherent, generally recognized, or legislatively declared vices are regulations proper under the police power.

The ordinance applies, as has been pointed out, to all persons desiring to conduct auction sales, except *auction companies* selling for the general public on commission. It is contended by plaintiff that this is an arbitrary and unconstitutional discrimination and classification under the rule of law that, while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or

expediency of diverse legislation with respect to the objects classified. *Ernesti v. City of Grand Island, supra;* Cooley, Constitutional Limitations (5th ed.) 481. See, also, *State v. Graham,* 16 Neb. 74, 19 N. W. 470; *State v. Berka,* 20 Neb. 375, 30 N. W. 267; *County of Lancaster v. Trimble,* 33 Neb. 121, 49 N. W. 938; *State v. Robinson,* 35 Neb. 401, 53 N. W. 213; *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365; *Livingston Loan & Bldg. Ass'n v. Drummond,* 49 Neb. 200, 68 N. W. 375.

In the opinion in the case of *Ernesti v. City of Grand Island, supra,* it is stated: "Under the Constitution, persons in the same class, or who should be considered as included within the relations and circumstances provided for, must be governed by the same rules; otherwise the legislation is unconstitutional." Within the meaning of these rules, we are unable to find a reason why the restrictions of this ordinance should apply to persons situated as were the plaintiffs, and not be made applicable to an auction company which obviously could have come into the place of business of the plaintiffs and done exactly the same things that plaintiffs did without any restriction whatever.

We conclude, therefore, that the provisions of the ordinance in question to which attention has been directed are unreasonable and arbitrary, that they are, as applied to the business of selling at auction, restrictive rather than regulatory, and that the entire ordinance creates an arbitrary, illegal and unreasonable classification. The ordinance is, therefore, in its entirety unconstitutional and void.

The decree of the district court is

AFFIRMED.

ANNA M. MORRELL ET AL., APPELLEES, V. JOHN W. TOWLE, APPELLANT.

3 N. W. (2d) 655

FILED MAY 1, 1942. No. 31306.

1. **Judgment.** "Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of

an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 743.

2. ———. Where a judgment is indisputable and drawn only from certain premises, the premises and the judgment are equally indisputable in a subsequent action between the same parties.

3. ———. "Where the judgment determines the title or right under which the party claims, it is decisive as to any other property or right claimed under the same title." 34 C. J. 906.

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

Clarence T. Spier, for appellant.

Baird & Baird and *R. B. Hasselquist, contra.*

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

SIMMONS, C. J.

This is an action brought on March 24, 1933, to recover the amount alleged to be due for rent accrued under a 99-year lease on certain property in the city of Omaha. Thereafter in April, 1933, the defendant Towle brought an action as plaintiff under the declaratory judgment act against the lessor, Morrell, resulting in the judgment of this court on July 9, 1935, holding that an assignment of a part of the leasehold was valid and that Towle was not liable for rents accruing on such part of the leasehold estate for the unexpired term of the lease. See *Towle v. Morrell,* 129 Neb. 398, 261 N. W. 827, which should be read at this point by any one studying this decision. Thereafter this action progressed as recited later herein. The action was tried as an equity action in 1937. A decision was delayed until 1941 when judgment was rendered for the plaintiffs and against the defendant and the intervener. Morrell, who was the original plaintiff, died December 31, 1937, and this action was revived in the names of the executrix and executor of his estate. From that judgment the defendant Towle appeals.

There is no question presented as to the amount of the

judgment. The sole question presented is whether or not Towle is liable for rent in any amount.

The factual situation presented by this litigation cannot be briefly stated. It requires an extended review of the evidence in this case as well as the record in two other cases involving this same subject-matter.

Morrell was the owner of the property here involved, which had a frontage of 80 feet on Twenty-fourth street in Omaha, together with what appears to be a claim to a 13-foot alley. On March 31, 1919, he entered into a 99-year lease of the property with Rose C. Gentleman. The conditions of that lease, important here, are set out in *Towle v. Morrell, supra.* On the following day Rose C. Gentleman assigned this lease to Ernest Sweet. The validity and effect of this assignment do not appear to be questioned.

Sweet entered into possession of the premises and constructed four one-story business buildings on the premises, each with a front of 20 feet. He apparently became short of funds and borrowed $6,000 from Edwin S. Towle, father of defendant John W. Towle, and secured the loan by a mortgage on his leasehold interest. The defendant seems to have negotiated the making of that loan.

October 13, 1925, Morrell notified both Sweet and Towle that because of a default in the payment of rent and taxes as provided by the lease "in case said defaults or either of them shall continue ninety (90) days * * * said lease and all of your rights including rights of possession of said property shall at once cease and terminate."

Thereafter negotiations between Sweet and defendant Towle were had resulting in a written agreement dated January 12, 1926, whereby Towle agreed to pay ground rents, taxes and special assessments in the sum of $6,700 due on the premises and Sweet agreed to convey to Towle *with covenants of general warranty* all of his right, title and interest in and to the 99-year lease "and the leasehold interest therein created," subject to the taxes, special assessments and ground rents above referred to and the Edwin S. Towle mortgage. Towle agreed to pay the then due ground rent,

taxes and special assessments and "keep an accurate account thereof." Towle was given the right to place the property in the hands of an agent for rental, or sale provided a purchaser could be found at a price not less than the total amount of encumbrances then against the property plus any sums paid by Towle, with interest, plus agent's commissions. It was further provided that out of rent moneys collected the rental agent should first deduct his commission, then the ground rents should be paid, then taxes and special assessments, then interest on the Edwin S. Towle mortgage, then Towle was to be paid 7 per cent. interest on the money he had advanced. Any sums left in the hands of the rental agent after paying the above items and necessary repairs were to be equally divided between Sweet and Towle. It was further provided that if the rents received were insufficient to pay the above items (excluding payments of interest to Edwin S. Towle and defendant) then defendant' Towle agreed to advance such sums as were necessary to "be added * * * to his *investment* in said property and said lease and leasehold" together with 7 per cent. interest. In case of sale it was provided that the proceeds should be distributed as follows (after paying agent's commissions): First, the payment of the Edwin S. Towle mortgage and interest unless assumed by the purchaser; second, all other liens, unless assumed by the purchaser; third, all sums paid and advanced by Towle, and the residue to be divided between Sweet and Towle on a sliding scale basis. Towle's share was to increase from 12½ per cent. if sold within three months to 50 per cent. if not sold until more than a year from the date of the contract. It was further provided that no sale of the "lease or leasehold" could be made prior to five years from the date of the contract for a sum less than the total of all liens and interest existing against the property plus the total amount of Towle's "investment" therein remaining unpaid, unless agreed upon by Sweet and Towle. After five years Towle had the right to "convey said lease and leasehold" on such terms as he determined upon. The contract was executed, witnessed and acknowledged by the parties on

January 13, 1926. It does not appear to have been placed of record, nor is there any evidence, except the following, that its provisions were made known to Morrell. Towle testified that Morrell and his daughter came to his office, at Towle's request, and Towle explained to them that he "was going to take over, as trustee, the management of this property." This appears to have been before the agreement between Sweet and Towle. Later, on direct examination, he testified that he told them of his interest in the property on account of his father's mortgage, that he would put up the $6,700 and "that I was going to handle the matter from there on." Still later, on direct examination, he said that he told them that he "had made this deal" with Sweet, was to take over the management of the property, "would collect the rents and so far as the money was available would remit to them for their leasehold rentals and take care of the taxes." This testimony evidently all relates to the same conversation had on January 13, 1926, as the date is finally fixed. Morrell gave a receipt dated January 13, 1926, for $2,075, the ground rent due as of July 1, 1925, with interest. On cross-examination Towle was asked, "You testified to this conversation you had January 13, 1926; did you tell Mr. Morrell for whom you were trustee? A. Well, I don't recall the conversation took any such trend as that. I simply told him I had made arrangements with Mr. Sweet to take over the management of that property, and I would collect the rents, pay the taxes, and so far as funds were available would pay them their leasehold," and Morrell "didn't object." Morrell testified that he could remember no such occurrence, and the daughters denied positively that they were ever in Towle's office, although the giving of the receipt is not questioned.

Also on January 13, 1926, Sweet and wife, by instrument entitled "Assignment of Lease," conveyed with covenants of title and warranty their interest in the lease and leasehold to Towle. This instrument provided that Towle "hereby accepts the said transfer and assignment, and accepts and assumes all the terms and covenants in the said lease contained to be kept and performed by the lessee, and agrees

to comply with, be bound by, and perform each and every of the said agreements by the said lessee to be performed." The Sweets and Towle signed this instrument. The Sweets acknowledged it; Towle, on the advice of his then attorney, did not. Towle testified that he did not record the instrument; however, it was filed for record on January 13, 1926. In this connection it is noted that the plaintiff in *Frankfurt v. Neon Radiant Sign Co.*, 129 Neb. 405, 261 N. W. 830, to which reference will be made later herein, alleged in his petition that Towle caused this agreement "to be recorded," and that Towle in his answer in that action admitted that allegation (among others) to be true.

Thereafter Towle entered into possession of the premises and rented and otherwise dealt with them.

Something over a year after these events occurred, Towle was instrumental in organizing a corporation known as Dutch Cleaners. On May 21, 1927, for the recited consideration of $8,541.79 (which actually was $8,000 in the common stock of the Dutch Cleaners), Towle and wife assigned their interest in this lease as to the north 40 feet of the property to the Dutch Cleaners, Inc. By that instrument Towle and wife covenanted that they were lawfully seised of the leasehold, that it was free of encumbrances, except taxes and special assessments which the corporation assumed, and except the Edwin S. Towle mortgage, one-half of which the corporation assumed and agreed to pay. The instrument contained a warranty of title. The corporation agreed to pay one-half of the ground rent. The taxes were thereafter divided on the records so that those assessed against the north half were carried in the name of the Dutch Cleaners and those on the south half assessed either against the property as owned by Sweet or Towle. (Towle did not know which.) The Dutch Cleaners then further improved the property, and it appears, with some delays, paid the ground rents to Morrell direct until 1932 when they became seriously delinquent. Towle offered to pay the delinquent rents on the south half of the property. Morrell insisted that payments be credited as against all the delinquencies,

and the question arose as to whether Towle was liable for the rent on that part of the premises assigned to Dutch Cleaners. That controversy resulted in the beginning of the present action by Morrell, the bringing by Towle of the action *Towle v. Morrell, supra,* and Towle's claiming for the first time in writing that he was a trustee and not an owner, by assignment, of the leasehold.

Additional evidence bearing on the question of Towle's contention that he was a trustee of the property for Sweet should be recited. June 17, 1926, Sweet wrote Towle asking if he would be willing to pay certain "old bills" against the property (not included in the agreement of January 13, 1926) provided Sweet surrendered all claims to the property; Sweet recited that he did not think he should pay them "if you get the property." June 22, 1926, Towle replied that taxes and ground rent would be due the next week totaling $3,691.61, that those payments would "run the property beyond its actual value," and "I am not going to take more of a loss on this than is necessary." August 2, 1926, Sweet replied, referring to Towle "as owner of the property," suggested certain improvements, and that "some fine morning * * * you will wake up to the realization that you have acquired a real piece of property," and offering to surrender "my contract as sales agent and all rights" for $5,000. Sweet asked for the amount Towle and his father had invested in the property. Sweet again referred to the old bills, asked Towle to pay them, and that it be adjudicated "when the property is sold or traded." August 6, 1926, Towle replied, refused to put up any more money, as "it looks like a loss for me;" that he had had to put up money to protect his father's loan; that he believed Sweet should "take back this property;" that neither one of them had a "nickel's worth of equity" in the property. Beginning on August 5, 1926, Towle also wrote a number of letters to Morrell, transmitting rents due or delinquent and explaining delays. September 10 he said: "You must surely understand that there is practically no income on this property at this time and that what I pay you has to come from some-

where else." A similar statement is found in a letter of January 6, 1927, including, "In taking this property over *from* Mr. Sweet * * * I did not realize the real situation." December 31, 1927, and July 16, 1928, and January 1, 1931, and January 2, 1932, he recited that Dutch Cleaners would make or had made remittances. In a letter to Mr. Morrell's attorney dated January 5, 1928, Towle said, "My position is that I am merely a *temporary owner* of the title to that leasehold" and "I should think that you would appreciate the fact that *I agreed to underwrite this rent* of Adam Morrell at a time when the property was not paying one-fourth of the income he received from me." (Emphasis supplied.) On January 7, 1933, Towle wrote Morrell that he was "pressed for funds" and asked if he could remit $500 quarterly. He asked Morrell to consent to a revaluation and stated that "changed conditions since this lease was drawn have made this a very unreasonable and unfair document. I came into this proposition more in the capacity of a trustee in order to protect a mortgage Mr. Sweet had given against this leasehold." January 20, 1933, Towle wrote Morrell disclaiming responsibility for the Dutch Cleaners payments and stating: "By advancing private funds I have been keeping up the taxes and rental on that portion which I took over as trustee for certain interests." He again recited that the property did not justify one-fourth the amount of the lease, that the lease should be rewritten and an adjustment made "not only with me but with the Dutch Cleaners." February 14, 1933, Towle wrote Morrell: "I will continue paying you on that part of the lease that I still have, which was taken over by me as trustee until further notice." He again charged that the lease was not "a fair document," that there should be a revaluation and that that would "solve the difficulty." On December 30, 1933, the date of the decree in the district court in *Frankfurt v. Neon Radiant Sign Co, supra* (referred to later herein), Towle abandoned the property, did not advise Morrell of that fact, and did not assign his interest to any one.

Before stating the issues in the instant case, it seems ad-

visable to examine into and determine the issues presented and decided in *Towle v. Morrell, supra,* from the pleadings and decree offered in evidence in this case; and in *Frankfurt v. Neon Radiant Sign Co., supra.*

In *Towle v. Morrell, supra,* Towle pleaded that Morrell was the owner in fee of the premises; that he entered into a 99-year lease with Rose C. Gentleman on March 31, 1919, for a stipulated annual rental; that thereafter on April 1, 1919, Gentleman assigned her interest in the leasehold to one Sweet; that thereafter on January 13, 1926, Sweet executed a purported assignment to Towle as assignee; that said assignment was incomplete, not in accordance with the requirements of the lease, and invalid; that it was not intended by Towle or Sweet as a "definite transfer," but that Towle held Sweet's interest "as trustee, as additional and collateral security for a mortgage indebtedness" due and owing by Sweet to Towle's father; that the Morrells were not parties to said transaction nor was it made for their benefit; that on May 21, 1927, Towle assigned his interest in the north half of the premises to Dutch Cleaners, Inc.; that by paragraph 7 of the lease between Gentleman and Morrell, Gentleman or her assigns had power to assign to a responsible party, providing there was no delinquency and that such assignment "shall be evidenced in writing, duly executed and acknowledged by the assignor and assignee" (paragraph 7 is set out in opinion in *Towle v. Morrell, supra*); that subsequent to the assignment the property had been improved to the extent of $50,000; that part of the improvements were there before the "purported assignment" to Towle by Sweet; that controversy had arisen regarding the liability of the plaintiff, the plaintiff contending that the transfer from Sweet to him never was intended to be an assignment of the leasehold and did not operate as such; that the improvements placed on the premises extinguished the liability of those "lessees or assignees or persons in possession" when their possession "terminated or was transferred;" that the plaintiff desired to have the question of "construction and liability determined." The 99-year lease,

the assignment from Gentleman to Sweet, and the "Assignment of Lease" from Sweet and wife to Towle (acknowledged before a notary by the Sweets but not by Towle) were attached as exhibits. The contract between Sweet and Towle was not attached or pleaded.

The prayer of Towle's petition was for the court to construe and interpret the terms of the lease with respect to the facts, and that the "purported assignment" of Sweet to plaintiff be held ineffective and void to transfer the interest of Sweet to plaintiff "so far as the defendants and the premises are concerned," and that it was intended as security "in the hands of plaintiff as trustee," and "that this plaintiff be absolved from any and all liability whatever with respect to said lease by reason of said purported assignment, *or, in the alternative,* to determine that, if this plaintiff is liable in any degree," it "extends to and is limited specifically" to that portion of the premises which plaintiff had not conveyed to Dutch Cleaners.

Morrell's answer set up the amount of rent due on the lease and the pendency of the action, *Morrell v. Towle* (the instant suit); admitted the execution and assignment of the lease by Sweet to Towle, that Towle entered into the possession and control of the premises and has had the use and benefits therefrom; and pleaded estoppel. Morrell prayed that the assignment by Sweet to Towle be held to be in full force and effect, that Towle was liable thereon for the full performance of all the terms of the lease.

The trial court limited its findings to a construction and interpretation of paragraph 7 of the 99-year lease and held that it meant a "total and not a partial" assignment; that the erection of improvements upon the leasehold "to the value of, or in excess of, $25,000 extinguishes the liability of the lessee or assignees of the lessee or persons in possession of said premises, when and as of the time their actual possession of said premises terminates or is transferred and the lease is assigned in accordance with paragraph 7 of said lease," and that "the plaintiff is and has been, since January 13, 1926, in possession of the premises described in the lease

* * * *as assignee thereof, which assignment is valid and effective.*" (Emphasis supplied.)

The trial court decreed that "An assignment of said lease as a whole but not in part" was permitted, and "that when improvements had been erected upon the leasehold property to the value of $25,000 such improvements constituted security for the lease and extinguished the liability of the lessee * * * when and as of the time their actual possession of said premises terminates or is transferred and the lease is assigned in accordance with the conditions in paragraph 7 of said lease." It is noted that the decree does not include in the adjudication the finding that Towle had been in possession of the premises "as assignee thereof, which assignment is valid and effective." However, the declaratory judgment act under which Towle proceeded provides: "The supreme court and courts of general chancery and common-law jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and *such declarations shall have the force and effect of a final judgment or decree.*" (Emphasis supplied.) Comp. St. 1929, sec. 20-21,140.

It is further noted that the trial court did not grant the prayer of Towle's petition that he "be absolved from any and all liability whatever with respect to said lease by reason of said purported assignment."

Towle appealed to this court from this decree and stated in the opening paragraph of his brief, "The various other points involved *having been satisfactorily settled by the trial court,* the only question presented on appeal for the determination of this court is whether or not the terms of the lease permit an assignment of a part of the *lessee's interest* therein." (Emphasis supplied.)

This court on appeal by Towle ordered the decree of the district court modified "by adjudging the assignment of Towle valid with the effect of *releasing him from liability*

for subsequently accruing rents for the north 40 feet of the leasehold estate for the unexpired term of the lease." *Towle v. Morrell, supra.*

It will be noted further from the opinion that this court considered Towle as assignee of the lease from Sweet and as assignor to the Dutch Cleaners, and the Dutch Cleaners as Towle's assignee, and considered Towle to be "the owner of the entire lease" prior to the assignment to Dutch Cleaners. Upon the receipt of the mandate, the district court amended its decree and findings and construed the seventh paragraph of the lease "to permit and validate the assignment" by Towle to Dutch Cleaners; that said "assignment was valid," and "released said Towle from any and all liability under said lease for subsequently accruing rents * * * under the terms of said lease *for that portion of the leasehold premises* conveyed to Dutch Cleaners," and repeated the finding with reference to the placing of improvements on the property and release from liability when the "lease is assigned in accordance with paragraph 7 of said lease" above quoted. The finding that Towle was "assignee" and that the "assignment is valid and effective" which was contained in the first decree was omitted from the later decree, an action which patently was not in accord with the decree of this court.

Some time during this period there was also organized the Neon Radiant Sign Company, in which it appears that Towle took part and had an interest. It became one of the tenants in the south half of the property. Sweet died in California and his administrator on September 16, 1933, brought an action in the district court for Douglas county against the Neon company, the Dutch Cleaners, Towle and Mrs. Sweet, which eventually reached this court and was decided July 9, 1935. Morrell was not made a party to it. Neither was he or his attorney advised nor did they know of its pendency. Towle offered in evidence the decree in the district court and the decree on the mandate of this court to show his position with reference to this property and not as binding on Morrell. The pleadings were not offered. We have the right and the duty to examine into that proceeding to determine

what issues were presented and what determined. See *Witzenburg v. State*, 140 Neb. 171, 299 N. W. 533. An analysis of the pleadings reveals that the plaintiff in that action, as administrator, alleged the lease of Morrell to Gentleman (and attached a copy in full); alleged its assignment to Sweet (but did not set out the assignment); alleged the indebtedness of Sweet to Edwin S. Towle and John W. Towle, the contract between Sweet and Towle of January 13, 1926, which he alleges was an agreement to assign "in trust" (and attached a copy in full); alleged the assignment of Sweet to Towle of January 13, 1926 (but did not set out the assignment); alleged Towle's possession and management of the property. All of these allegations Towle admitted in his answer. Plaintiff further alleged reliance on Towle, a failure to account for the income, the transfer to Dutch Cleaners, a breach of the trust, that its continuance was no longer necessary, and prayed that the assignment be held to be one in trust, that Towle be required to account and that the Sweet estate and heirs be restored to ownership. To these latter allegations Towle alleged prudent and proper management, that the assignment to Dutch Cleaners was for the benefit of the leasehold, that any defaults were occasioned by a failure of the property to produce income, that he had performed his agreements and had advanced his own funds for the benefit of the trust.

Towle prayed for an accounting of the amounts due him from the trust estate and that he be reimbursed therefor.

The Dutch Cleaners answered that it had no knowledge of most of the facts alleged in the petition except the assignment to it; set out that it had paid consideration therefor, improved the property and was the absolute owner thereof, and that it had complied with the terms of the lease; and prayed that its rights be protected.

The Neon company answered that it had no knowledge of the facts set out in the petition except that it was a tenant month to month and prayed that its rights be safeguarded. Mrs. Sweet does not appear to have answered, and it is not shown that service was had upon her. It will thus be seen

that there was no issue presented to the district court by the pleadings on the question as to whether or not there was a trust agreement or whether or not Towle was a trustee. Those were matters admitted by the pleadings. Trial was had. Towle's brief filed in this court recites that he testified that "he had never claimed any other interest in the property than that of trustee." The district court entered a lengthy decree, holding that Towle held the property in trust, that he had defaulted by allowing the ground rents to become delinquent, that the object of the trust had failed, and that the necessity for the trust had ceased on December 31, 1932, and terminated the trust as of that date; held that Towle was not indebted to the trust estate and that the Sweets should be reinvested with full title to the property with rights superior to the Dutch Cleaners.

Towle and the Dutch Cleaners, however, appealed from that decree to this court. An appearance was made for the plaintiff (Frankfurt) but later that appearance was withdrawn. The two appellants in a joint brief assigned two errors. Towle contended that he was entitled to be reimbursed for advances made to protect the trust. Dutch Cleaners asked that its rights be protected. No other briefs were filed or appearance made. This court held that Towle should be given credit and protected for what he had contributed to the leasehold estate. This court did not determine the question as to the amount for which Towle was to have credit, but the judgment was "reversed and the cause remanded for further proceedings." In the case of *Towle v. Morrell, supra* (released the same day), this court held that the Dutch Cleaners' assignment was valid. It will be seen that each appellant prevailed on the point presented.

This lengthy review of the evidence and of the pleadings and decisions in the two cases discussed has appeared necessary in order that an understandable statement can be made of the history and issues in the instant case. The original petition was filed March 24, 1933, as a law action to recover *rents*. Action was delayed pending the determination of *Towle v. Morrell, supra*. An amended petition was filed Oc-

tober 3, 1935, alleging the Morrell to Gentleman lease; the assignments to Sweet, and to Towle; that Towle was liable; and setting out the amounts claimed for the entire leasehold. (By amendment at the time of the trial these allegations were extended for amounts due to January 1, 1937.) Towle on February 5, 1936, moved that Frankfurt be made a party defendant. This motion was overruled. Towle answered; admitted the Morrell-Gentleman lease, the assignment to Sweet, the improvements made by Sweet, the Sweet debt to Edwin S. Towle, and the debt to himself, the agreement between himself and Sweet, the assignment unacknowledged by him; and alleged that it was not a "definite transfer" of the interests of Sweet, that it was made for the benefit of the two parties and not Morrell; that Towle carried out the agreement; that Morrell knew his (Towle's) capacity with reference to the property, that Sweet died and that Frankfurt was his administrator. Towle then alleged the *Frankfurt v. Neon Radiant Sign* action; the decree; the appeal; that while modified with respect to certain matters, this court "generally affirmed the decree with respect to other matters." Towle then alleged the assignment to Dutch Cleaners and the history of that litigation. He then alleged that by reason of these things he had been absolved from liability for rents on the north 40 feet of the premises from May 21, 1927, and that that was *res judicata*. Towle further answered that he was trustee for Sweet and that this court had affirmed that relationship and terminated it; that all rents on either half had been paid up to the dates alleged and he was not liable. Plaintiff then moved to strike all that portion of the answer pertaining to the suit of *Frankfurt v. Neon Radiant Sign Co.* This motion was sustained by the trial court, and that action is not assigned as error on this appeal.

Plaintiff by reply admitted the Morrell-Gentleman lease, the assignment to Sweet, the assignment to Towle and the *Towle v. Morrell* action and decrees. He further alleged that by reason of *Towle v. Morrell, supra,* the liability of Towle for the rent under the lease and the assignment was

"admitted, established and adjudicated," and that defendant is estopped to deny liability. Plaintiff further alleged that Towle had assumed those obligations in the assignment and had held himself out as assignee owner; that plaintiff had accepted him as such; and that Towle was estopped to claim otherwise.

Towle then moved that the action be transferred to an equity court for a determination of the equitable principles involved and a pronouncement of the equitable remedies indicated. Frankfurt next filed a petition in intervention reciting this story including the decision in the district court and this court in his action, and praying for a determination of his rights to the leasehold. This petition was stricken from the files on motion of the plaintiff and no appeal taken therefrom.

Martha Sweet, as the widow and sole heir of Ernest Sweet, then filed a petition in intervention, alleging substantially all of these matters, as heretofore set out by Towle, and by Frankfurt in the action brought by him; alleged that Towle was a trustee; alleged the proceedings in *Frankfurt v. Neon Radiant Sign Co.*, that if plaintiff were successful Towle could look to her for reimbursement, that plaintiff seeks to deny her rights, that she has been in possession of the south half of the property; and prayed for a determination of the rights of the parties and that the leasehold as to the south half be quieted in her.

Plaintiff moved to strike this petition in intervention and his prayer was denied. Plaintiff then answered the petition in intervention and prayed for its dismissal and for equitable relief. Towle does not appear to have answered the petition in intervention.

Thereafter the cause was transferred to the equity docket upon defendant's motion made earlier in the case.

The case was tried in June, 1937, and the court on April 21, 1941, found that by reason of the proceedings in *Towle v. Morrell, supra,* Towle was released from liability for the rent on the north 40 feet of the leasehold. As to the remainder of the leasehold the court found in favor of the

plaintiff and against the defendant and the intervener on issues joined; found that there was due the plaintiffs from Towle for rent up to and including January 1, 1937, the sum of $11,834.53, for which he entered judgment for the plaintiffs against the defendant. Motion for a new trial was filed and overruled. Towle appeals.

No appearance has been made in this court by Martha Sweet and accordingly she, while designated an appellee, is making no objection to the decree.

The *Frankfurt* decision is not of a controlling consideration for four reasons: First, Morrell was not a party to that action. Second, it is quite obvious that the nature of the title held by Towle was never an issue either by pleadings or controverted fact before the district court. Third, this court was not presented with that question, did not determine it, and did not affirm the decree of the district court in that regard. On the contrary, that judgment was "reversed and the cause remanded for further proceedings." This was a general remand. *Bliss v. Live Stock Nat. Bank,* 124 Neb. 880, 248 N. W. 645. It should be noted here that *Towle v. Morrell, supra,* was "Remanded for modification of decree" in accord "with directions" contained in the last paragraph, whereas there were no such directions or limitations placed upon the reversal in the *Frankfurt* case. Fourth, there was no issue between the plaintiff and defendant on the question of the effect of the *Frankfurt* case. There was an issue on that question between the plaintiff and the intervener. That issue the trial court resolved in favor of the plaintiff and against the intervener, and from that determination the intervener has not appealed nor cross-appealed.

We now come to what we consider to be the basic question involved. May Towle under the facts here disclosed successfully contend in an equity court that he has no liability to Morrell for the performance of the terms of this lease as to that part of the premises not assigned to Dutch Cleaners? We think that he cannot.

We have set out the evidence in considerable detail in or-

der that it may be fully analyzed. We arrive at an independent conclusion in accord with that which has twice been reached by the district court for Douglas county, to wit, that Towle is an owner of this leasehold by assignment and liable according to the covenant contained in the Sweet to Towle assignment for the full performance of its terms as to that part of the leasehold not covered by the decision in *Towle v. Morrell, supra.*

The instruments of record are instruments of absolute assignment. The letters between Towle and Sweet indicate an assignment with title passing, but with Sweet having some possible interest therein, which by the contract appears to be largely the right to participate, in a diminishing degree, in any profits realized by Towle in the event of a sale. Towle dealt with and conveyed the leasehold to Dutch Cleaners as an owner and so recited in the instrument of conveyance. Not only that, but he took a consideration for that conveyance which an owner would have the right to take, but which under the terms of the agreement, were he a trustee, he would not have a right to take. The written record made by letters to Morrell through the years reveals the claim of ownership which in one instance it recited. It was not until the stringent economic conditions of 1933 arose that Towle sought to avoid his liability, first, by seeking a revision of the lease, and then by the claim that he was a trustee, but that came long after his status as owner with its rights and liabilities had been established in fact. We are not unmindful of his testimony in 1937 that he told Morrell in January, 1926, that he was taking this property as trustee, which testimony Morrell denied. However, Towle recited the substance of that conversation on four occasions, the second and third time on direct examination, in which he did not mention a trusteeship, and on cross-examination he disclaimed that the conversation took that "trend." This testimony given by Towle in 1937 is discredited by Towle's own acts prior thereto. He says that he told Morrell in 1926 that he (Towle) would pay Morrell only those rents received after deducting therefrom the taxes; in short, that he was

to give Morrell only the nets of the rent, and yet for seven years he paid Morrell the ground rents stipulated in the lease (excepting those paid by Dutch Cleaners), apparently at all times in part out of his own funds and without protest that he was not obligated to make those payments. Towle's testimony as to this conversation is further discredited by the fact that the contract between Sweet and Towle provided that Towle should advance whatever sums were necessary to pay the ground rentals (and other items) if the gross rents were not sufficient.

To this evidence must be added the fact that he asked the district court in *Towle v. Morrell, supra,* to release him from all liability, that that court refused to do so, and that this court granted him a release from the one-half of the rent in the Dutch Cleaners' assignment by decision based on the proposition that Towle was the owner of the leasehold and had the right to assign it "*pro tanto.*" Towle in this action claims the protection and the benefit of that judgment. He cannot now be heard to deny the conclusions of fact upon which that judgment rests.

"Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 743, cited with approval in *Wheeler v. Brady,* 126 Neb. 297, 253 N. W. 338; *State v. Newman Grove State Bank,* 128 Neb. 422, 259 N. W. 170; *Blochowitz v. Blochowitz,* 130 Neb. 789, 266 N. W. 644.

"If a judgment necessarily presupposes certain premises, they are as conclusive as the judgment itself. Reasons for the rule are that a judgment is an adjudication on all the matters which are essential to support it, and that every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based is as effectually passed upon as the ultimate question which is finally solved." 30 Am. Jur. 928, sec. 183.

This court in *Hanson v. Hanson,* 64 Neb. 506, 90 N. W. 208, said: "It is allowable to reason back from a judgment to the basis upon which it stands, on the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." This court has also held: "Where a judgment is necessarily based on certain premises, such premises are equally conclusive, in a subsequent action between the same parties, as the judgment itself." *Shelby v. Creighton,* 65 Neb. 485, 91 N. W. 369. "A judgment is an estoppel upon a party not only in so far as it decides a question adversely to his claim or contention * * * but where it recognizes or sustains his theory or claim it estops him from afterward taking a different position in litigation with the same opponent." 34 C. J. 907. "Where the judgment determines the title or right under which the party claims, it is decisive as to any other property or right claimed under the same title." 34 C. J. 906. See *Hanson v. Hanson, supra.*

Only one judgment is permissible in this case, and that is that Towle is an owner of the leasehold under an assignment which is valid and effective and that he holds the assignment of the leasehold (save and except that covered by the judgment in *Towle v. Morrell, supra*) subject to the obligation to perform its terms and conditions. The manner in which he may be excused from that liability was determined in *Towle v. Morrell, supra,* to wit, by assignment "in accordance with the conditions in paragraph 7 of said lease." That assignment Towle, obviously, has not made.

The judgment of the district court is

AFFIRMED.

YEAGER, J., did not participate in this decision.

METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE, V. ABRAHAM L. CULL ET AL., APPELLEES: DOROTHY V. PORTER ROTHROCK ET AL., APPELLANTS.

3 N. W. (2d) 645

FILED MAY 1, 1942. No. 31273.

1. **Guardian and Ward.** A guardian is not required to apply to the probate court for direction in handling every detail of his management of the affairs of his ward.
2. ———. If wards, after becoming of age and employing an attorney, have received and retained the benefit of transactions made by their guardian, with full knowledge of any irregularity therein and their rights in the premises, they will be presumed in law to have ratified such acts of their guardian.

APPEAL from the district court for Burt county: JOHN L. POLK, JUDGE. *Affirmed.*

George Evens, Howard Saxton and *Robert Saxton,* for appellants.

Cranny & Moore, W. M. Hopewell, C. O. Stauffer and *F. A. Wright, contra.*

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

PAINE, J.

Plaintiff as assignee brought action to foreclose its first mortgage of $37,000, and the petition recites that certain wards, now of age, are defendants, and have an interest, junior and inferior, because of a second mortgage on said premises, and an accounting is asked. The former wards filed cross-petition, in which they allege that plaintiff's mortgage is inferior to their interests in said property. Many other defendants answered, and Herbert Rhoades, the guardian of said wards, filed a special appearance, objecting to the jurisdiction of the district court over him, on the ground that the claims of the cross-petitioners against the guardian are pending in the probate court of Burt county, which has original jurisdiction thereof, upon which ground the special appearance was sustained by the district court,

from which order the cross-petitioners appeal. On the same date, December 19, 1938, an additional decree was entered, finding amount due plaintiff on its mortgage was $49,564.60, and declaring it to be a first lien. The cross-petition of the former wards was dismissed, from which decree appeal was also taken.

It is most difficult to set out even the substance of the pleadings, which occupy over 100 pages in the transcript, but the petition recites that on July 8, 1927, defendants Abraham L. Cull and Christine L. Cull executed and delivered to E. H. Lougee, Inc., their promissory note in the sum of $37,000, bearing interest at 5 per cent. per annum, with ten interest coupons. Coupons numbered 1 to 6 inclusive were fully paid and satisfied, but interest coupons due August 1, 1936, and August 1, 1937, each in the amount of $1,850, are past due and wholly unpaid.

The defendants executed and delivered to E. H. Lougee, Inc., a mortgage deed as security therefor upon certain tracts of real estate in Burt county, Nebraska, containing in all 402 acres. Said E. H. Lougee, Inc., sold and assigned said mortgage to the plaintiff, Metropolitan Life Insurance Company, and plaintiff is entitled to a foreclosure of its said mortgage for the satisfaction thereof.

The petition also alleges that Herbert Rhoades was the duly appointed guardian for Dorothy V. Porter Rothrock and Eloise E. Porter Shoup, and that they have now reached their majority and, together with Herbert Rhoades as guardian, have some interest in said mortgaged premises by virtue of the mortgage recorded February 27, 1936, securing $9,800, but that whatever interest they have, if any, is subject, junior and inferior to the lien of plaintiff's mortgage.

On March 11, 1938, Herbert Rhoades, guardian, filed a separate answer, admitting the corporate capacity of plaintiff and the execution of the note and mortgage, and denying every other allegation contained in the petition, and he further alleges that for years he was guardian of the defendants Dorothy V. Porter Rothrock and Eloise E. Porter Shoup, but that several years ago the said defendants be-

came of full legal age, and since have been acting for themselves, under the advice of their counsel, in the management of their properties. Said answering defendant alleges that he has filed a full and complete report of his stewardship as such guardian in the county court for Burt county, and has heretofore asked for his discharge as such guardian. He prays that said action be dismissed as to him at plaintiff's costs.

The answer of Dorothy V. Porter Rothrock and Eloise E. Porter Shoup, filed March 12, 1938, alleges that said defendants have an interest in said mortgaged premises, which is superior and prior to the interest of any and all other parties to the suit.

For cross-petition they allege that on July 13, 1923, letters of guardianship on the estates of Frank L. Porter, Dale W. Porter, Fern F. Porter, Dorothy V. Porter and Eloise E. Porter, minors, were issued by the county court for Burt county to Herbert Rhoades; that on September 28, 1923, the said guardian received from the clerk of the district court the sum of $23,467.22 as trust funds for his said wards; that during and prior to the year 1927 said Herbert Rhoades was discharged as guardian of Frank L. Porter and Dale W. Porter, but continued to act as such guardian of the three remaining minors. On September 17, 1923, said guardian made application to the county court for authority to lend not to exceed $15,000 from the property of the minors Fern F. Porter, Dorothy V. Porter and Eloise E. Porter for a period of five years, at the rate of 6 per cent. interest, to Abraham L. Cull, of Oakland, Nebraska, W. S. Newmyer, of Lyons, Nebraska, A. C. Holmquist, of Oakland, and W. H. Harding, of Oakland. To secure the payment of said proposed loan, the said parties agreed to give a mortgage, subject to a prior mortgage of $35,000, on the land in Burt county involved in this suit. Hearing on the application of the guardian to make loan was held on September 24, 1923, and on said date the county court entered an order approving the application, and directing the guardian to make said loan of $14,700 on the land, subject to a prior mortgage of $35,000

thereon, which mortgage had been assigned to the New York Life Insurance Company.

On March 2, 1927, Fern F. Porter became 21 years of age, and demanded her estate of the guardian, and in order to obtain money with which to pay Fern F. Porter the amount owing to her, the guardian, without any right or authority so to do, professed to enter into a new contract with the mortgagors, whereby the said Abraham L. Cull would advance sufficient cash to enable the guardian to pay to his said ward, Fern F. Porter, the $4,900 due her.

It is alleged that, pursuant to the wrongful agreement, said Herbert Rhoades, guardian, wrongfully canceled and released in writing the $14,700 mortgage, and the said Abraham L. Cull professed to give to the said E. H. Lougee, Inc., a new mortgage against said land for the sum of $37,000, to mature August 1, 1937, and to draw interest at the rate of 5 per cent. per annum, and said mortgage was filed on July 23, 1927. Thereafter Herbert Rhoades, guardian, paid to his ward, Fern F. Porter, such sums as were due her, and was discharged as her guardian.

Thereafter, it is alleged, the said Herbert Rhoades wrongfully and negligently accepted a second mortgage, pretended to secure the payment of $9,800, being the total sum due Mrs. Rothrock and Mrs. Shoup from their said guardian, said second mortgage being against the land involved herein, and being expressly subject to the prior mortgage thereon in the sum of $37,000 in favor of E. H. Lougee, Inc.

The cross-petition alleges that, in connection with the pretended investment of said wards' funds in the second mortgage of $9,800, the guardian made no application to the county court for and received no authority from said county court to cancel or release the note of $14,700, or the mortgage securing same, and said defendants and cross-petitioners now have a first lien on the premises for the payment of the balance of the principal sum of $9,800 with accrued interest.

It is alleged that no part of said $9,800, with interest thereon, except interest to August 1, 1935, has been paid to

the cross-petitioners, and that the guardian has not made his final settlement with them, and is still owing such amount to them, and has not been discharged as their guardian; that the mortgage of $14,700, given by Abraham L. Cull and wife to Herbert Rhoades, guardian, should be foreclosed and the interest of the plaintiff in said land and the proceeds thereof be declared junior and inferior to the rights of said cross-petitioners to the same; that an accounting be had of the amount due the said cross-petitioners as *cestui que trustents* from Herbert Rhoades, guardian, and the defendants, Abraham L. Cull and Christine L. Cull, Herbert Rhoades, guardian, E. H. Lougee, Inc., W. S. Newmyer, A. C. Holmquist and W. H. Harding, be adjudged to pay any deficiency which may remain after applying the proceeds of said sale to the payment of the amount due the cross-petitioners.

The plaintiff, for reply to the answer and cross-petition, denies that the mortgage held by Herbert Rhoades as guardian for Dorothy V. Porter Rothrock and Eloise E. Porter Shoup is a first mortgage lien, and alleges that said mortgage is subject, junior and inferior to the lien of the mortgage set out in plaintiff's amended and substituted petition.

Herbert Rhoades, guardian, filed special appearance, objecting to the jurisdiction of the court against him as guardian for the following reasons: (1) That the matters and claims set forth are brought as an original action, and not on appeal from the probate court for Burt county; (2) the matters and claims of said cross-petitioners are wholly matters, facts and claims over which the probate court has original jurisdiction, and over which the district court has appellate jurisdiction only; (3) all the matters, facts and claims set out in the cross-petition are now pending in the probate court on the final report and application of guardian for discharge and the objections thereto filed by said cross-petitioners, and in which proceedings the probate court has not yet entered any judgment or final order; (4) the district court is without jurisdiction to hear and determine the matters, facts and claims against the guardian as set out in said cross-petition.

The district court on December 19, 1938, sustained the special appearance, which was treated as a special demurrer, for the reason that said matters, facts and claims as set out in the cross-petition are within the exclusive original jurisdiction of the county court for Burt county, the same not being in the district court upon appeal.

The cross-petitioners present a number of errors relied upon for reversal. They insist that the court erred in not directing the foreclosure of the unpaid mortgage of $14,700, or the other mortgage in the sum of $9,800; that the court erred in granting the plaintiff a first lien against the real estate on the ground that the same was not supported by sufficient evidence; that the court erred in finding that Herbert Rhoades, guardian, had legally and validly released the $14,700 mortgage of his wards, and it is argued that the guardian had no legal right or authority to release the mortgage of $14,700 on July 21, 1927, by a marginal release, without first having applied formally to the county court for authority to make said release, and without the county court granting any authority therefor, and that such marginal release is null and void, and the mortgage of $14,700 remains in full force and effect.

In regard to the release of a mortgage by a guardian, Chancellor Kent, in deciding the case of *Field v. Schieffelin,* 7 Johns. Ch. *150, 11 Am. Dec. 441, in New York in April, 1823, said: "Though it be not in the ordinary course of the guardian's administration to sell the personal property of his ward, yet he has the legal right to do it, for it is entirely under his control and management, and he is not obliged to apply to this court for direction in every particular case. It was said by Lord Hardwicke, in *Inwood v. Twyne,* Amb. 419, that he might change the nature of the infant's estate, under particular circumstances, and the court would support him in the act, if the court would have directed the change under the same circumstances."

The cross-appellants rely upon the case of *Federal Land Bank v. Tuma,* 116 Neb. 99, 216 N. W. 186, 56 A. L. R. 186, in which case Agnes Tuma was appointed guardian for her

minor children, and sought to secure a loan from the Federal Land Bank upon the homestead which had belonged to her husband in his lifetime. The loan was refused unless she acquired the entire fee in the land; thereupon she brought an action for partition and purchased the land from the referee for $30,000, and receipted for her one-third interest in the land, and also acknowledged receipt in favor of the retiring guardian of her children for $15,999.30. It was contended that the referee's deed to Mrs. Tuma was void because of the failure of the referee to collect the purchase price from the sale of the land, as Mrs. Tuma had paid nothing. This court said that the receipts did not represent money, but were a part of a scheme to change the record title of the interest of the heirs into a paper title in their mother, and that it was not a proper investment of the funds of the ward, nor was it authorized by the court. The court held that it should be voided for the best interests of the children, save as the rights of innocent purchasers are involved, and it held that, while preserving the rights of innocent purchasers, the court will "restore the wards as nearly as possible to the position they would have occupied had their guardians done their duty in preserving their interests."

We see nothing in this *Tuma* case which invalidates the release entered by the guardian in the case at bar. The abstract showed a release of the mortgage by a duly appointed and acting guardian, the named mortgagee. We see nothing in such a record to require the attorney examining such title to inquire into the state of the guardianship funds, and he has a right to assume that the guardian was acting in the interest of his wards. See *Federal Land Bank v. Worley*, 135 Neb. 493, 282 N. W. 476.

A purchaser who deals fairly with a guardian has a right to presume that the guardian acts for the benefit of his ward, and such purchaser is neither bound to inquire into the state of the trust, nor to be responsible for the guardian's faithful application of the trust money, unless the purchaser knew, or had sufficient information to put him on inquiry, that the guardian was practicing or contemplated a breach of his trust.

We have not been cited to any law in Nebraska which requires an order of court before a guardian can release a mortgage. The guardian's right to the custody and management of the ward's property implies the power to collect and receive moneys due the ward, and hence to receipt for the same, and, if secured by a mortgage, to discharge the mortgage, whether the money has become due or not. See *Mason v. Ackley,* 52 Okla. 157, 152 Pac. 846; Woerner, American Law of Guardianship, sec. 62.

The evidence shows that in 1923 Cull owned some 400 acres of land in Burt county, and made a mortgage of $35,000, which was given eventually to the New York Life Insurance Company, and a second mortgage of $14,700, with individual signers on the note, was given to Herbert Rhoades as guardian for three minors. Rhoades had been duly authorized to make such an investment of his wards' funds. Some four years later Cull, in securing a new and larger mortgage through the Metropolitan Life Insurance Company, secured a release by Rhoades as guardian on the margin of the record of the second mortgage of $14,700, so that the new mortgage to the Metropolitan Life Insurance Company might become a first mortgage, and when the new loan was closed Rhoades as guardian took a second mortgage for $9,800 for two of his wards, as the third one had become of age and was paid off in full.

After the two wards became of age they employed their own attorney, George Evens, to collect the defaulted interest on their mortgage, and $1,014 interest was collected and turned over by Herbert Rhoades, guardian, to attorney Evens. On February 26, 1936, Herbert Rhoades filed his petition in the county court for Burt county, setting out that the two wards had become of age, and he had been unable to collect more than the $1,014 of principal and interest, and prayed the court for an order directing him to surrender and release the original note and mortgage and accept a new note and mortgage from Abraham L. Cull for the balance due, the same to be subject to the first mortgage of $37,000, and there is attached thereto the waiver and consent of Mrs.

Rothrock, signed before a notary public in Umatilla county, Oregon, on February 21, 1936, and the waiver and consent of Mrs. Shoup, signed before a notary public in Hutchinson county, Texas, on February 22, 1936, in each of which they joined in the prayer of their said guardian asking that said order be entered, and these two women were on said date last given of full age, were both married, and had employed their own attorney.

We have carefully examined the original brief and the reply brief of the cross-petitioners, which briefs in their more than 200 pages present an exhaustive discussion of the law of the case, proceeding upon the assumption that the guardian has deliberately mishandled the affairs of his wards. It is claimed that the guardian has waived, abandoned and released without consideration the rights of the wards in their original second mortgage of $14,700, without authority of the county court, and that the district court should restore to the wards all of the rights they would have if the $14,700 mortgage had not been so released by the guardian conspiring and cooperating together with others to destroy the value of the same, and thereby defraud the minors. It is insisted that the $14,700 second mortgage investment was *in custodia legis* as trust fund, and is only subject to the orders of the county court until duly disposed of by the county court; that, as no sufficient consideration was received by the guardian, such release of said second mortgage was void.

Now, this court does not share a belief that the evidence supports such allegations and charges. From an examination of the evidence, one may as easily reach the conclusion that the guardian was duly authorized to invest the funds of his wards in the second mortgage, with additional signers, for $14,700, subject to a $35,000 first mortgage to the New York Life Insurance Company; that due to natural conditions of adversity, when interest became in default, and one of the wards had reached the time when a settlement must be made, the mortgagor found an opportunity to secure a slightly larger first mortgage of some $37,000 through the

Metropolitan Life Insurance Company, which could only be done by the release of the second mortgage of $14,700 by the guardian and his taking of a new second mortgage for a lesser amount, subject to the new first mortgage of the Metropolitan Life Insurance Company. This transaction was perfectly open and legitimate, and the customary method of handling such proceedings in such times. At the conclusion of the entire transaction, one of the wards had been paid off, and the position of the remaining wards was not materially altered, as they still had a second mortgage on all of the same real estate, and the mere fact that their investment in the second mortgage was subject to a first mortgage in a slightly larger amount does not give ground for charging that the transaction was an attempt to deceive and defraud the wards, or dissipate their property. Perhaps some better way of handling this situation might have been devised, yet considering all of the evidence we cannot see that the guardian can be charged with being derelict in his duty.

If the release by the guardian was unauthorized by the court, yet we cannot overlook the fact that each of the two wards, after becoming of age and employing an attorney, has received and retained the benefit of such transaction, with full knowledge of any irregularity therein and her rights in the premises. They will be presumed in law to have ratified the acts of their guardian. *Borcher v. McGuire*, 85 Neb. 646, 124 N. W. 111; Dame, Guardianship (3d ed.) 767, sec. 751.

In this opinion we have heretofore set out at length the rulings of the district court, and without repeating them at length we have reached the conclusion that the same were correct, and they are hereby affirmed.

AFFIRMED.

MATT W. HOMAN, APPELLEE, V. BOARD OF EQUALIZATION, BOONE COUNTY, APPELLANT.

3 N. W. (2d) 650

FILED MAY 1, 1942. No. 31299.

1. **Taxation.** The fixing of valuations of property for taxation purposes is prescribed by the Constitution and legislative enactments supplementary thereto.
2. ———. Taxes must be levied by valuation uniformly and proportionately upon all tangible property. Const. art. VIII, sec. 1.
3. ———. The provisions of chapter 102, Laws 1939, provide a method for fixing the valuation of real property different from that prescribed for other tangible property, contrary to the uniformity provision of section 1, art. VIII of the Constitution, and it is consequently void.
4. ———. Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization. The duties of the state board of equalization are unrelated thereto and have no direct relationship to the duties of a county board of equalization.
5. ———. One aggrieved by the action of a county board of equalization can appeal to the district court. Comp. St. 1929, sec. 77-1705. One aggrieved by the action of the state board of equalization may prosecute a writ of error to the supreme court. Comp. St. 1929, sec. 77-1004. The final orders of each must be given effect.

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

Walter R. Johnson, Attorney General, Edwin Vail, William Keeshan and *Raymond P. Medlin,* for appellant.

Earl Hasselbalch, contra.

Perry, Van Pelt & Marti, amici curiæ.

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

CARTER, J.

This is an appeal by the board of equalization for Boone county from a decree entered by the district court for Boone

county, fixing the valuation of plaintiff's property for taxation purposes.

The record shows that Homan was the owner of 80 acres of land in Boone county. The property was assessed for taxation purposes in the amount of $6,580 in 1940. Homan complained that this valuation was too high, and on June 13, 1940, the county board of equalization reduced the valuation to $3,290. On July 19, 1940, Homan appealed to the district court for Boone county, and on December 9, 1940, the district court entered its decree, finding the actual value of the property for taxation purposes to be $1,875. On July 8, 1940, a hearing was had by the state board of equalization and on July 26, 1940, it entered an order raising the assessed valuation of all property in Boone county to the amount of the original valuation by the board of equalization, less 21 per cent.

The county board of equalization appeals from the decree of the district court fixing the valuation at $1,875. The court in its decree also found that the fact that the above described real estate is in the village school district of Cedar Rapids depreciates its value. Complaint is also made of the rulings of the trial court in admitting evidence that the Homan land was in the Cedar Rapids school district and that the taxes in the district were so high as to seriously impair the value of plaintiff's land.

The fixing of valuations of property for taxation purposes is prescribed by the Constitution and legislative enactments supplementary thereto.

The applicable constitutional provision provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes other than property taxes may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature." Const. art. VIII, sec. 1.

The statute applicable to such cases as the one at bar, prior to 1939, was section 77-201, Comp. St. 1929, which was as follows: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."

In 1939 the legislature amended this section by adding the following language: "And in arriving at the 'actual value' of real property there shall also be taken into consideration the proximity of such property to markets, the school facilities and other advantages and other facilities afforded by the governmental subdivision or subdivisions in which the real property is situated, the tax burden upon the real property, and every other element or factor affecting the actual value of said real property." Comp. St. Supp. 1939, sec. 77-201.

A reading of section 77-201, Comp. St. Supp. 1939, reveals that the amendment of 1939 has provided one of two things; first, a different method for fixing the actual value of real property than that prescribed for other property, or, second, the legislative amendment of 1939 was merely declaratory of the elements considered in arriving at actual value in any event. We are inclined to the view that the inclusion of the additional elements to be considered in fixing actual value of real property creates two different methods of appraising property in the same class. A consideration of the new elements prescribed in the 1939 amendment would result in a different valuation than if the amendment had not been made. In *Schulz v. Dixon County*, 134 Neb. 549, 279 N. W. 179, this court, in discussing the same subject, said: "The payment of general taxes for school purposes may not operate, directly or indirectly, to secure immunity from the payment of state or county taxes, in whole or in part. To do so would be to violate the constitutional provision requiring state and county taxes to be equal and uniform throughout the state and throughout the county. Such is the inescapable effect of the decision before us." The reasoning contained

in the foregoing case is unanswerable and, in the interest of brevity, it will not be quoted here. We conclude therefore that the establishment of the two methods of valuation of property in the same class for taxation purposes results in a want of uniformity prohibited by section 1, art. VIII of the Constitution. The record shows a finding by the trial court that the fact that the land is in the city school district depreciates its value. It is also shown that the tax burden upon the property was taken into consideration in arriving at the actual value of the land. Consequently, elements were considered in fixing the valuation of this real property for tax purposes which could not be properly considered. It is pointed out that the decision in the *Schulz* case was subsequently abrogated by the 1939 amendment of section 77-201, Comp. St. 1929. We agree with the general proposition that the legislature has the power to change the substantive law as announced by this court by the passage of a statute so providing, but it does not have the power to pass a statute in violation of the provisions of the Constitution in so doing. By the injection of provisions which create a want of uniformity in determining the actual value of property in the same class for taxation purposes, the legislative amendment (Laws 1939, ch. 102) is in direct conflict with section 1, art. VIII of the Constitution, and is consequently void.

It is argued that the constitutionality of chapter 102, Laws 1939, was not properly raised by the pleadings. We think that the pleading in the answer of the constitutional provision, coupled with the other allegations contained therein, is sufficient to raise this issue. The question was clearly raised by the motion for a new trial, and we conclude that the issue is properly before this court.

It is urged that the action of the state board of equalization fixes the valuations of the property involved for tax purposes and that a failure to appeal from such order makes the actual value fixed by the state board of equalization final for all purposes. With this we cannot agree. In *Hacker v. Howe*, 72 Neb. 385, 101 N. W. 255, this court said: "The state board does not deal with individual assessments but

with the property of a county as a whole, and if it appears to them to be assessed at a valuation relatively lower or higher than the property in all other counties, the whole is affected by the order of equalization, and not the different items or classes. Individual discrepancies and inequalities the law contemplates shall be corrected and equalized by the county authorities, and a taxpayer failing to avail himself of the opportunity thus presented has no legal ground of complaint because of the action of the state board of equalization in lowering or raising the valuation of all the property in the county so as to conform with all other property throughout the state. The county board is especially empowered to hear complaints and grievances as between individual taxpayers, and to adjust and remedy the same as may seem just and equitable. The state board possesses no such power." See, also, sections 77-1702, 77-1705, Comp. St. 1929.

When a taxpayer claims that real estate is assessed too high, he should first apply for relief to the county board of equalization and, if denied, should appeal to the courts. *Power v. Jones,* 126 Neb. 529, 253 N. W. 867. Clearly, the plaintiff pursued the proper course to secure a reduction of his individual assessment.

This conclusion requires that the judgment of the district court be reversed and the cause remanded, with directions to the trial court to determine the actual value of plaintiff's property for taxation purposes without regard to chapter 102, Laws 1939. The valuation so determined will supersede that fixed by the county board of equalization.

The record shows that the state board of equalization ordered an increase in valuation over the valuation fixed by the county board of equalization. This order was not appealed from and became final. Consequently, after the district court has found the actual value of plaintiff's property for purposes of taxation, the county board of equalization is required to give effect to the final order of the state board of equalization. Plaintiff, not having appealed from the order of the state board of equalization, is in no position to complain of the increase ordered by that body over and above

the amount of the actual valuation finally determined under the provisions of sections 77-1702, 77-1705, Comp. St. 1929.

For the reasons stated, the judgment is reversed and the cause is remanded for further proceedings in accordance with the opinion.

REVERSED.

EDWARD A. HESS, APPELLEE, V. BOARD OF EQUALIZATION, BOONE COUNTY, APPELLANT.

3 N. W. (2d) 653

FILED MAY 1, 1942. No. 31300.

Taxation. Evidence examined and *held* sufficient to sustain the judgment of the district court fixing the value of plaintiff's real estate for taxation purposes.

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

Walter R. Johnson, Attorney General, Edwin Vail, William Keeshan and *Raymond P. Medlin,* for appellant.

Earl Hasselbalch, contra.

Perry, Van Pelt & Marti, amici curiæ.

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

CARTER, J.

This is an appeal by the board of equalization for Boone county from a decree entered by the district court for Boone county, fixing the valuation of plaintiff's property for taxation purposes.

The record shows that Hess was the owner of 240 acres of land in Boone county. In 1939 the assessed valuation of this land with the improvements was $8,680. In 1940 the value of the improvements was increased from $460 to $1,700, thereby raising the assessed valuation of the property to $9,920. Hess complained that this valuation was too

high, and on June 13, 1940, the board of equalization, without taking evidence, made a blanket cut of 50 per cent. in all real estate valuations subject to the action of the state board of equalization. On July 19, 1940, Hess appealed to the district court for Boone county, claiming that the valuation of his property was still too high. On July 8, 1940, a hearing was had by the state board of equalization, and on July 26, 1940, it entered an order raising the assessed valuations of all property in Boone county to the amount of the original valuation by the board of equalization, less 21 per cent. This fixed the valuation of the Hess land and improvements at $7,835. The appeal from the order entered by the county board of equalization was tried in the district court, where a judgment was entered fixing the actual value of the property at the time of the hearing before the county board of equalization at $2,400. The board of equalization of Boone county appeals from this judgment.

The procedure followed in this case is similar to that pursued in *Homan v. Board of Equalization, ante,* p. 400, 3 N. W. (2d) 650. As determined in that case, it is the proper method to obtain a reduction of an individual assessment.

The only question in this case is the sufficiency of the evidence to sustain the judgment. The evidence of plaintiff was to the effect that the land was worth $10 an acre. The witness George W. Williams, a licensed real estate agent residing in Albion, testifies that the land is worth from $10 to $12.50 an acre. The witness J. H. Pieper testifies that the land was worth $10 an acre. The defendant's evidence consisted of a showing of the assessed valuation of similar lands. The trial court, in addition to hearing the evidence, made a personal inspection of the land itself. The statute, section 77-201, Comp. St. 1929, requires that all property subject to taxation shall be valued and assessed at its actual value and that in arriving at such value there shall be taken into consideration its value in the market in the ordinary course of trade. The language of the statute is plain and any attempt to add to the definition therein contained could serve no useful purpose.

We think the evidence is adequate to sustain the value placed upon this land for taxation purposes in accordance with section 77-201, Comp. St. 1929. This is particularly true in view of the trial court's action in making a personal examination of the lands involved.

The judgment of the district court is therefore affirmed and the valuation found by the district court shall, after the order of the state board of equalization is given effect, constitute the valuation of plaintiff's lands for taxation purposes for the years 1940 and 1941. See *Homan v. Board of Equalization, supra.*

AFFIRMED.

GUSTAVIA LENNOX, APPELLANT, V. JENNIE ANDERSON ET AL., APPELLEES.

3 N. W. (2d) 645

FILED MAY 1, 1942. No. 31221.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. Opinion on motion for rehearing of case reported in 140 Neb. 748. *Former judgment vacated.*

Charles E. Foster and *Harry C. DeLamatre,* for appellant.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

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

MESSMORE, J.

This case appears in 140 Neb. 748, 1 N. W. (2d) 912. That part of the opinion of this court remanding the cause, with instructions to enter judgment for the plaintiff, giving her a fee simple title to the real estate in question and the personal property of which Charles J. Sanders died seised, after deducting all expense incurred in the probate proceedings

and debts allowed against his estate, is hereby set aside, and the cause is remanded for a new trial in keeping with the decision of this court in *Lucas v. Lucas*, 138 Neb. 252, 292 N. W. 729.

FELIX BRONNENKANT, APPELLANT, V. LOUIS B. KUCERA ET AL., APPELLEES.

3 N. W. (2d) 913

FILED MAY 8, 1942. No. 31246.

1. **Appeal.** Parties will be restricted in this court to the same theory upon which the case was prosecuted or defended in the trial court.
2. **Malicious Prosecution.** In an action for malicious prosecution, one of the indispensable elements for the plaintiff to establish is the absence of probable cause for such proceeding.
3. ———. Where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed by evidence on behalf of the plaintiff.
4. ———. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts.

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

Herbert W. Baird, J. A. Hayward and *Homer Kyle*, for appellant.

Rinaker, Delehant & Hevelone and *Hall, Cline & Williams*, *contra.*

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

SIMMONS, C. J.

In this action plaintiff seeks to recover damages for malicious prosecution as a result of his having been committed

to the state hospital as insane. At the conclusion of plaintiff's case in chief, the defendants each moved for a directed verdict. The trial court sustained the motions. Plaintiff filed a motion for a new trial which was overruled. He appeals to this court assigning as error the directing of the verdict and the overruling of the motion for a new trial.

During the consideration of the motions for a directed verdict, the trial court stated that, from the opening statements and the reading of the petition, he had proceeded on the theory that the action was one for false imprisonment. He then stated that the plaintiff's attorney "now informs the court that this is not an action for false imprisonment but wholly for malicious prosecution," and that the question to be determined was whether or not evidence had been introduced sufficient to take the case to the jury on the question of want of probable cause. In his motion for a new trial plaintiff said: "The court erred in trying said cause on the theory that plaintiff's cause of action was an action for false imprisonment whereas it was * * * an action based on malicious prosecution."

Plaintiff now seeks to have this court consider the cause as one for false imprisonment and thereby to present the question of the legality of the proceedings by which plaintiff was committed. Plaintiff, and not the trial court, elected to construe his pleadings and his cause as one for malicious prosecution. He cannot now be heard to state that it is an action for false imprisonment nor have it so considered. "It has long been the established rule of this court that the parties will be restricted to the same theory upon which the case was prosecuted or defended in the trial court." *Kimball v. Lincoln Theatre Corporation,* 129 Neb. 446, 261 N. W. 842. This court has said: "In a malicious prosecution case, the necessary elements for the plaintiff to establish are: * * * (4) the absence of probable cause for such proceeding. * * * If any one of these elements is lacking, the result is fatal to the action." *Kersenbrock v. Security State Bank,* 120 Neb. 561, 234 N. W. 419. "Want of probable cause is an indispensable element of an action for malicious prose-

cution." *Clausen v. Omaha Loan & Bldg. Ass'n,* 131 Neb. 666, 269 N. W. 517.

This court has held: "While some of the facts supporting probable cause were disputed by evidence on behalf of plaintiff, yet there were others undisputed upon which the defense of probable cause might be predicated. In such circumstances we have held that the question of probable cause is one of law for the court. 'In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant.' *Bechel v. Pacific Express Co.,* 65 Neb. 826, 91 N. W. 853, by Pound, C.; *McHugh v. Ridgell,* 105 Neb. 212, 180 N. W. 75; *Kersenbrock v. Security State Bank,* 120 Neb. 561, 234 N. W. 419." *Clausen v. Omaha Loan & Bldg. Ass'n, supra.* "It cannot matter that some or many of the facts bearing on the issue as to probable cause are in dispute, if there are still enough established and undisputed to determine the question in point of law." *Bechel v. Pacific Express Co.,* 65 Neb. 826, 91 N. W. 853. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts. 34 Am. Jur. 731, sec. 47, 784, sec. 140, 790, sec. 153; 38 C. J. 405. Paraphrasing the language of Commissioner Pound in *Bechel v. Pacific Express Co., supra,* the question now is not whether plaintiff was insane, but whether those who charged him with being insane *at the time* and under the circumstances did not have probable cause to believe him insane.

Did the plaintiff submit evidence sufficient to take the case to the jury on that issue, or was the question one of law to be determined by the court?

This litigation arose as a result of plaintiff having been found to be insane by the Board of Commissioners of Insanity (hereinafter called the Board) and committed to the State Hospital for the Insane. It appears that on or about August 23, 1935, a lawyer called the clerk of the district court, ex-officio a member of the Board, and asked if he

would arrange a meeting of the Board the following day to consider a charge against the plaintiff for dipsomania. He asked that it be conducted at the place of residence of the plaintiff. The meeting was arranged and the following day the three members of the Board appeared at the home to conduct the hearing. The evidence indicates that the defendants were all present. The plaintiff was called before the Board and questioned and excused.

The medical member of the Board, during the hearing, formed the opinion that the plaintiff was insane and advised that an affidavit of insanity be filed and hearing had. The clerk prepared the affidavit and the defendant Engel executed it and the hearing proceeded thereon. Plaintiff was recalled and questioned. The defendants Engel, Coleman, Barnes, and Hayes testified, as well as two other witnesses, during some part of this proceeding. The physician's return showed that the plaintiff was in poor health physically; that he had the delusion that he was being persecuted; that this delusion was "increasing;" that he had threatened to injure himself; and that from information obtained from witnesses and plaintiff and from her observation of plaintiff she found him to be insane. Plaintiff was thereafter committed to the state hospital and held and treated until released by habeas corpus proceedings on November 10, 1938. Defendant Griffith was superintendent of the hospital.

The evidence furnished by the plaintiff in this action does not disclose what evidence was offered to the Board at the time of the commitment. It discloses only a summary of what the physician reported as the result of her examination upon which, in part, she based her finding that the plaintiff was insane. The record further discloses that it was known to at least a part of the defendants at the time of and prior to the hearing that the plaintiff was ill physically and mentally; that he had at times, over a period of years, used intoxicants to the extent that he had caused scandal to his church and had been disciplined by his superiors; that he had been removed from and denied pastorates because of his conduct and condition; and that as a result thereof had the

fixed delusion, described as a paranoia, that his superiors were persecuting him and denying him advancement and service in his church. It further appears from plaintiff's own testimony in this action that he went through those two appearances before the Board without any rational comprehension of what was taking place or of the nature of the hearing or the matters investigated and without making inquiry as to the purpose of the investigation. His actions and demeanor and mental condition were observable by the Board.

It further appears from the evidence given at the trial in May, 1940, that the plaintiff at that time (1940) disputed some of the facts appearing on the physician's return. There is no evidence that those facts were questioned at the hearing before the Board in August, 1935, nor that they weighed, in a controlling way, in the determination made by the Board. Plaintiff also produced an expert witness who examined the plaintiff in 1938, studied his history and gave it as his opinion that the plaintiff was sane in 1935. However, this is an opinion formed following an examination made three years after the commitment and obviously not formed or known in August, 1935. Further, this witness stated that others, knowing the same facts, might rationally and reasonably reach the conclusion that plaintiff was insane in 1935.

As we read this record, the trial court reached the only conclusion the evidence sustains, i. e., the plaintiff not only failed to show absence of probable cause, but proved that probable cause existed.

The judgment of the trial court is

AFFIRMED.

IN RE ESTATE OF V. L. DIMMITT.
CLARK B. EVANS, APPELLEE, V. LURA BONEY ET AL., APPELLANTS.

3 N. W. (2d) 752

FILED MAY 8, 1942. No. 31261.

1. Wills. The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in his will, and to give it effect, unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.
2. ———. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made.
3. ———. The intention of the testator must be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, nor conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property.
4. ———. "The testator is a despot, within limits, over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances." 12 Harvard Law Review, 417.
5. ———. It is a general rule that parol evidence of the testator's declarations is not admissible, yet the better view limits this rule to cases in which there is no possible ambiguity. Therefore, while parol evidence is not admissible to show what a testator intended to write, it may be admitted where its effect is merely to explain or to make certain what he has written. In ascertaining the testator's intention, the words of the will are to be read in the light of the circumstances under which the will was made, and to that end the court may put itself in the place of the testator for the purpose of determining the objects of the testator's bounty or the property which is the subject of disposition.
6. ———. An undelivered deed may be incorporated in a will by reference, if the terms of the will, assisted, if necessary, by the surrounding circumstances, are sufficient to identify the deed and to show the intention of giving effect to it.

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

J. D. Cronin and *Moodie & Burke*, for appellants.

Zacek & Nicholson, contra.

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

PAINE, J.

This is an appeal by contestants from an order of the district court admitting to probate, as the will of the decedent, two written instruments, one a will and the other a warranty deed which the court found was incorporated into and made a part of the will by reference.

Petition was filed in the district court for Cuming county on June 8, 1939, alleging that V. L. Dimmitt, resident for many years of Cuming county, died March 4, 1939, leaving a last will and testament; that by the sixth paragraph of said will he made a part thereof a certain deed, made by testator and wife to Alta J. Pullman, conveying to her a quarter-section of land in Cuming county; that said deed was made by testator long prior to the execution of his will; that said instruments are on file in the county court for Cuming county, and have been admitted to probate therein, and the same are offered for probate in the district court.

On May 6, 1940, an amended answer was filed by the contestant, to wit, Lura Boney, a sister of deceased, and Beulah M. Priest, Lillian L. McKeone and LeRoy Dimmitt, children of a deceased brother of deceased, and Pearl Cary, who is a son of Mary R. Cary, who was a sister of testator and who died subsequent to his death, and subsequent to the docketing in court of the appeal, and as such heirs at law all contestants are interested in the estate of V. L. Dimmitt, deceased. In the fifth paragraph they object to the probate of the purported deed described in the petition, alleging that it was not executed and delivered as required by law, and that the same is invalid and ineffectual to pass title to the property therein described. It is alleged in paragraphs 6 and 7 that the purported deed of conveyance offered for probate was not executed and witnessed in the manner provided by law for the execution of wills, and does not constitute a

testamentary disposition of the real estate therein described, and that paragraph 6 of said will does not evidence any intention of testator to incorporate said deed, or any other document, into or as a part of said will.

Contestants pray that the purported deed offered for probate as a part of the last will and testament of V. L. Dimmitt, deceased, may be disallowed and denied probate, and that it be decreed not to be incorporated into or made a part of the last will and testament of said deceased.

Proponent filed reply on said May 6, 1940, denying each and all of the allegations contained in the fifth and sixth paragraphs of the amended answer.

On May 7, 1940, a jury was waived, and the cause was tried to the court and was taken under advisement. Thereafter, on July 11, 1940, judgment was entered by the court, finding that said deed was duly executed by the testator, that it was not executed with the formalities required of testamentary instruments, that at the time of its execution it was not intended to be such an instrument, and standing by itself it cannot be given effect as an instrument of that nature; that at the time of the execution of the last will and testament the testator intended to, and did by reference, incorporate into and make said deed a part of said instrument, and said instruments together constitute the last will and testament of the deceased, and should be admitted to probate as such; wherefore, it is considered, ordered and adjudged that both of the instruments, being the same instruments admitted to probate by the county court for Cuming county, be admitted to probate in the district court as together constituting the last will and testament of the deceased.

Objection is made to each and all of the findings of the court, and each is alleged to be an error sufficient for reversal.

There is practically no dispute about the following facts as shown by the evidence. V. L. Dimmitt, the testator, died March 4, 1939, at the age of 78 years, having resided about 50 years on his 320-acre farm northwest of Wisner in Cum-

ing county. His wife predeceased him about two years. Their only child died in infancy, and testator left no issue. His heirs at law were two sisters, Lura Boney and Mary R. Cary, of Red Oak, Iowa; two nephews, Aldos D. Brouhard and Avan L. Brouhard, of Ames, Iowa, who were sons of Jennie Brouhard, a deceased sister; and two nieces and a nephew, Beulah M. Priest and Lillian L. McKeone, of Omaha, Nebraska, and LeRoy Dimmitt, of Papillion, Nebraska, daughters and son of Elmer Dimmitt, a deceased brother.

Alta J. Pullman was a niece of the testator's wife, and was born in Mills county, Iowa, and lived with her parents until she was three years old. The testator and his wife had only one child, a daughter who died in infancy, and so they urged the parents of Alta J. Pullman to let her live with them, which they did, and at three years of age she was taken into their home in Iowa. When she was five years of age they removed to Nebraska, and as soon as they were settled they took her to their new home, and she lived with them continuously until she was married in 1907, at the age of 27 years. After her marriage she visited them in Nebraska two or three times a year, and they repeatedly visited her in her Iowa home. On November 30, 1936, before his wife's death, which occurred in 1937, testator and his wife executed a deed to the home quarter to Alta J. Pullman. This deed was sealed in an envelope and placed by testator in his safety deposit box in the First National Bank at Wisner, where it remained until his death. It is undisputed that the deed was never delivered, and never left testator's possession and control in his lifetime. Four or five months prior to the testator's death, Mrs. Pullman was notified that he was ill, and she went out to his home. She, together with Mr. and Mrs. Tucker, took him to a hospital at Wayne. As they commenced their journey, the testator said to her: "I am pretty sick and you know that. I may not come back and if I don't come back here is the key and you can have this place. Your aunt and I have always said that; and it is in the will."

Mrs. Pullman testified: "I have the key in my possession in my pocketbook. Q. He handed you the key at that time?

A. Yes, sir. Q. That was the key to the dwelling-house occupied by him located on the southeast quarter of section 8-24-4 in Cuming county? A. That is right. Q. Then what did you do; drive out on the road? A. Yes; we started to Wayne. Q. Did something else happen on the road? A. We started to go and he said to Mr. Tucker—'Drive a little slow.' And when we got to what he said was the division of the farms— Q. Just tell what you mean, where was this place you stopped? A. Where the tenant lives. Q. That is between the quarters Mr. Dimmitt owned? A. Yes, sir. Q. All right, go on." Objection overruled. "A. He says to me 'This is the section line between the places'—the line where the two quarters join in other words. 'You see Mr. Dinklage's fence here'— Q. That was across the road? A. That was across the road. I said 'Yes,' and he said 'Here is your line. Follow that. You may have to put in your half of the fence and that will be eighty rods possibly. I don't think you will have any trouble with them.' He told me that was the lawful thing, and how many feet the posts were apart. He said 'You don't need but two wires to make a lawful fence here.' That is what he told me. I didn't know and I don't know today."

Lon Tucker, who is a farmer living northwest of Wisner, was a friend of the testator for more than 40 years. They had visited each other's homes hundreds of times, and he said that he had taken the deceased on a great many trips; in fact, for the last 15 or 20 years he took the deceased on practically every trip that he made. He said he had hauled him thousands of miles, and the two families were very close friends. He saw Mrs. Pullman around the place from the time she was a girl until she got married and moved to Iowa. After that he had taken Mr. and Mrs. Dimmitt to visit her in Iowa many times, some years three or four times during the year, and Mrs. Pullman came to visit the Dimmitts, and continued to come to visit Mr. Dimmitt after Mrs. Dimmitt died, just the same as she had before. He said that when they were sick he would go up and take care of the Dimmitts.

Mr. Tucker testified that Mr. Dimmitt always thought

well of Mrs. Pullman "and I could not see any other way;" that the deceased told him many times of his intentions toward her, and Mr. Dimmitt told him that his feelings were just the same as any man's feelings would be toward his own child; that conversations in regard to these matters were over a period of 20 years; that some time prior to his death he took Mr. Dimmitt to the hospital at Wayne; that he had been quite sick and that none of his relatives were there except Mrs. Pullman and her daughter, and that he had quite a good deal of difficulty in persuading Mr. Dimmitt to go to the hospital at Wayne, some 14 miles away; that he was not addicted to taking advice, and was a rather stubborn sort of person; that he and his wife and Mrs. Pullman went to the hospital with him. "We got him ready and got out on the porch and he locked the door and he handed the key to Mrs. Pullman. 'Now,' he said, 'you know that this old home is yours. If anything happens to me and I don't get back here' he says, 'This old home is yours.' He says, 'Now, you know where the line of this place is, know all about it here.' And then we started and we got down to where the line was there— Q. Did he give her anything? A. He gave her the key. Q. At that time? A. Yes. He handed her the key. Q. This key to the house in which he lived, was it? A. Yes, sir. And when we got to the north line of the quarter he stopped on the road and showed her as near as he could where the line was, and he says, 'Now, there will probably have to be a fence through there between you and the boys' quarter.' "

The will, exhibit A, was dated December 31, 1937, and was properly executed. The first paragraph related to debts and funeral expenses. In the second paragraph, the northeast quarter of section 8-24-4 in Cuming county was given to the two nephews, Aldos D. Brouhard and Avan L. Brouhard. The third paragraph gave $200 to the East Liberty Cemetery Association in Mills county, Iowa. The fourth paragraph gave all of testator's telephone stock to Lucille Genevieve Schultz. The fifth and sixth paragraphs read as follows:

"Fifth: All the rest and residue of my personal property

I order and direct that my executor hereinafter named divide the same according to private instructions I have given him.

"Sixth: I have already deeded to my niece, Alta J. Pullman, the southeast quarter (SE¼) of section eight (8), township twenty-four (24), north, range four (4), east of the 6th P. M. in Cuming county, Nebraska, and for that reason I do not devise any real estate to her in this Will."

The seventh paragraph appointed Clark B. Evans executor, and he is the appellee and proponent of the will.

The proponent contends that by the sixth paragraph the deed was incorporated into and made a part of the will. The contestants deny that the deed was ever delivered.

The deed, exhibit C, is a warranty deed, on a regular printed blank, filled in on a typewriter, and dated and acknowledged November 30, 1936, before Clark B. Evans, notary public, and is signed by the testator and his wife, and conveys the southeast quarter of section 8-24-4, Cuming county, to Alta J. Pullman, "for and in consideration of the sum of One Dollar ($1.00), Services performed over a period of years, and Love and Affection."

The deed was never recorded, but bears on the back, among other indorsements, these words: "Admitted to Probate and filed for record April 19-1939 as a part of the Last Will and Testament of V. L. Dimmitt. Homer A. McDonald Co. Judge."

Clark B. Evans testified that he lived in Wisner, Nebraska, and had been acquainted with the testator for about 50 years; that he drove out to see Mr. Dimmitt when called, and when he received the necessary instructions he drove back to town and prepared the warranty deed, and took it back to their farm, about seven or eight miles out, and they signed and executed the deed. Mr. Evans testified that he took the deed back to town, placed it in an envelope, and gave it to Mr. Dimmitt the next time he came to town, and he never saw it again until the will was read.

Neil D. Saville, cashier of the First National Bank of Wisner for 13 years, was well acquainted with the testator, who

was a customer of the bank. He testified that Mr. Dimmitt did not have a safety deposit box, but had a box of his own, in which he kept his papers, and that he left his box in the bank simply for safe-keeping. He said the box was not locked, and on the order of the county judge he opened the box and forwarded the sealed envelope containing the deed to the county judge.

The contestants present, as the sole question, whether the deed was incorporated into and made a part of the will by the language of paragraph 6 thereof. It is insisted that the language contained no disposable words; it is not a devise, and the intent statute of Nebraska (Comp. St. 1929, sec. 76-109) is powerless to change that statement; that a mere recital in a will that testator has previously deeded realty, which recital proves to be erroneous because of the nondelivery of the deed in the testator's lifetime, does not disclose an intention to incorporate such undelivered deed, and does not operate as a devise of the realty.

In support of this proposition, they cite *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. n. s. 645, *Allenbach v. Ridenour*, 51 Nev. 437, 279 Pac. 32, and *Witham v. Witham*, 156 Or. 59, 66 Pac. (2d) 281, 110 A. L. R. 253, but in each of these cases there appear to be circumstances which are not found in the case at bar.

The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in his will, and to give it effect, unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. See *Dahmer v. Wensler*, 350 Ill. 23, 182 N. E. 799, 94 A. L. R. 1.

"The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, and considering the circumstances under which it was made." *Luenenborg v. Luenenborg*, 128 Neb. 624, 259 N. W. 649.

"If possible without violating well-settled rules of law, effect must be given to every word in a will." *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299.

The statement of Judge Sullivan in *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075, has often been quoted by this court, and is as follows: "No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it."

In an article published in 1899 in 12 Harvard Law Review, 417, Justice Holmes discussed the interpretation of wills, and said: "It is true the testator is a despot, within limits, over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances."

In this case we are faced with the question: Under what conditions may an extrinsic document be incorporated into the will, and admitted to probate with the will?

The first essential requisite in such cases is that the instrument must be in existence, which is admitted in this case. The next requisite is that it must be referred to in the will in a manner which will clearly identify the instrument. There can be no question in the case at bar as to the deed being the one referred to in the will.

The argument, therefore, seems to rest on the point: Can the words of the will be construed to be, or to imply, an intention on the part of the testator to incorporate this particular deed into and make it a part of his will? See 68 C. J. 640; *Bottrell v. Spengler*, 343 Ill. 476, 175 N. E. 781.

It is the general rule that parol evidence of the testator's declarations is not admissible, yet the better view limits this rule to cases in which there is no possible ambiguity. But declarations of the testator may be admissible, not to show

direct expressions of his intention, but to show the facts and circumstances surrounding the situation under which he executed the will.

Reference is made in several text-books and in many opinions to the early English case of *Allen v. Maddock,* 11 Moore's P. C. Cases, 427, 25 Eng. Ruling Cases, 439. In this case the testatrix on December 1, 1851, drew up in her own handwriting a paper described as the "last will and testament of me, Anne Foote, of Bath, which I make and publish for all my worldly substance." In this she gave several legacies and appointed executors, but this instrument was attested by only one witness, and was therefore invalid. On September 13, 1856, the day before her death, she executed a "codicil to my last will and testament," which was on a separate sheet of paper, and properly executed as a will. The codicil was apparently executed to give her faithful servant, Eliza Baker, the sum of 100 pounds and certain furniture, but appointed no executor, and made no other reference to the will. Under these circumstances the two papers were admitted to probate, and an appeal was taken.

In the opinion itself it refers to Wigram's "Extrinsic Evidence in Aid of the Interpretation of Wills," and approves the summing up by the author in the following words: "Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare. It follows that—with the light which that situation alone affords—the testator's meaning can be determined by a Court; the Court which so determines does, in effect, declare that the testator has expressed his intention with certainty, or, in other words, that his will is free from ambiguity."

It is said in the opinion that the question was one of fact which obviously must be explained, and can only be explained by parol evidence; that there is no ambiguity whatever in the expression by which the reference is made, but parol evidence must necessarily be received to prove whether

there is or is not in existence at the testator's death any such instrument as is referred to by the codicil. The holding of the court follows: "An unattested, or imperfectly attested paper may be incorporated in a will by reference, if the terms of the will, assisted (if necessary) by the surrounding circumstances, are sufficient to identify the paper, and to show the intention of giving effect to it."

In *Loring v. Sumner*, 23 Pick. (Mass.) 98, a case was decided at the October term, 1839, in which the testator said in his will: "I have given to my son $1,000 by note, for his full part of my estate." This note was invalid as having no consideration, but it was held that on the whole the testator by his will had manifested an intention or determination that such amount should be paid out of his estate to his son, and therefore the court could see no good reason why the determination manifested in the will should not be carried into execution.

In *Newton v. Seaman's Friend Society*, 130 Mass. 91, 39 Am. Rep. 433, the testator directed that legacies should be paid according to the directions which had been written in a book by another and signed by him, and the book was finally admitted to probate, and the legacies were paid in accordance therewith, and it was held that a paper referred to in a will and containing directions for the disposition of the estate, but not executed nor witnessed as a will, *should be admitted to probate as a part of the will*, if it was in existence at the date of the will, and is clearly identified.

Of the many Nebraska cases on wills, we believe that one of them throws light on the question before us. It is *In re Estate of Hopper*, 90 Neb. 622, 134 N. W. 237, which came up from Douglas county. William Hopper, a widower, had nine children. He had his will prepared, and at the same time seven warranty deeds. In his will he made a specific bequest to a daughter and to one of his sons. The will recited that he had executed conveyances by warranty deed to seven of his children of land of approximately equal value, and directed that upon his death the executors should deliver the deeds to the seven grantees, and that the land so deeded to them should be held by them in fee simple thereafter.

Judge Sedgwick, in writing the opinion, held that oral evidence was admissible to prove the circumstances surrounding the execution of the instrument. It was further held that a writing in existence at the time of executing a will, and made at the same time and as a part of the same transaction, may by reference be made a part of the will. It was argued that the deeds were not made in compliance with the statute in relation to the execution of wills, and, never having been delivered to the grantees in the lifetime of the grantor, were ineffectual to pass title. But it was held that the deeds and the will taken together were intended and executed by the deceased as his will. It was held:

"A writing in existence at the time of executing a will, or made at the same time and as part of the same transaction, may, by reference, be made a part of the will, if it is described and fully identified by the terms of the will itself.

"Oral evidence is competent to prove the signatures of witnesses who signed such writing referred to in the will and made a part thereof, and to prove that the writing offered is the same instrument so identified by the signatures of such witnesses."

In this *Hopper* case, deeds were given effect, because by placing them away with the will the testator by this act, and by his reference in the will, intended to incorporate them into his will, and the deeds thereby had a testamentary effect. In the *Hopper* case the testator said: "I have made and executed conveyances by warranty deed." In the case at bar the testator said, "I have already deeded to my niece, Alta J. Pullman," and by the sixth paragraph of the will in the case at bar he gives her the last piece of his land, and in the seventh and last paragraph he appoints the executor. Aside from all extrinsic evidence, the language of that will discloses an intention on his part that Mrs. Pullman is to receive the home quarter-section as a part of his testamentary scheme.

One must give the language used in a will the significance intended by the testator. The will is not his autobiography; it states facts very briefly. When a man makes his will he is

testamentarily inclined, and what he has in mind is to be proved so that his scheme for the distribution of all his property works out. Certainly the testator in that sixth paragraph had in mind that he was disposing of the last piece of his property, for when a man makes a will there is a presumption that he does not intend to leave his property intestate. The primary purpose is to give intention to all that the testator said, and when that is done, and we get at his intention, then the courts are to carry that out.

Merritt Schultz was a witness for the contestants. He said his father and Mrs. Dimmitt were cousins. He visited the testator in the hospital at Wayne, and testator told him he had *willed* the southeast quarter to Alta J. Pullman.

It is clear in this case that the testator and his wife had several years before decided to give to Alta J. Pullman the old home place, where she had been raised to womanhood, and in carrying that out a warranty deed was drawn up and executed by the grantors, but, not knowing how long either of them might live, no delivery was made of the deed. Very shortly after the death of the wife the husband made this will, in which he states clearly that they have already deeded to the niece this property, and having deeded it to her he does not devise her additional property in his will. Is this court justified in saying that the deed and will together do not show the intention of the testator, and that, because the will says he does not devise her any real estate in the will itself, therefore the little girl whom they took into their home, because she was about the age of their deceased daughter, and raised to womanhood, shall be entirely disinherited by the will and the deed, and this fine property shall go to relatives, with some of whom the testator had very little to do, and one of whom, Lon Tucker, who witnessed the will, said he had never heard mentioned by the testator in their many years of close acquaintance? Such a disposition of this home place would be a tragedy, and would defeat the very purpose of the deceased husband and wife in their desire to leave their best piece of property to the one who had loved them and whom they had loved.

By this disposition no conjecture is resorted to, no speculation is indulged in, but the sacred right of a testator to give his property to the only one he intended to have it is carried out by this court.

In conclusion, it appears to the court that the testator intended to dispose of all of his property by his will. Is it natural to suppose he would leave out the most valuable tract of land? This deed to his niece, Alta J. Pullman, was never delivered, but was kept off the record by the testator, for he intended to hold the title to that home place until he died. If he had intended that deed to be effective at the time he put it in his safety deposit box, he need not have mentioned it in his will at all. Therefore, at the time of its execution it was not intended to convey title, and standing by itself it cannot be given effect as a deed; however, at the time of the execution of the will the testator intended that the two instruments should be admitted to probate and convey title to his most valuable piece of property to the one to whom he had handed the key to the house when he locked the door when he left for the hospital, and said, in brief, I am pretty sick, I may not come back; if I don't, here is the key, and you can have this place; your aunt and I have always said that, and it is in the will.

Therefore, at his death his will conveyed a good title to his niece of the property described in the deed. It is an accepted rule that the will always speaks from the date of testator's death, and speaks conclusively as of that particular date.

Because of the reasons set forth in this discussion of the facts and the law, the decision of the district court is hereby

AFFIRMED.

YEAGER, J., dissenting.

I respectfully dissent from the majority opinion in this case. It appears to me that the adoption of this opinion has the effect of destroying existing and fundamentally sound rules for interpretation and enforcement of testamentary dispositions of estates.

The testator, V. L. Dimmitt, died March 4, 1939. On No-

vember 30, 1936, he executed a deed to Alta J. Pullman to the southeast quarter (SE¼) of section eight (8), township twenty-four (24) north, range four (4) east of the 6th P. M. in Cuming county, Nebraska. His wife joined in the deed. The deed was placed in a box in the First National Bank of Wisner, Nebraska, where it remained until after the death of Dimmitt. Mrs. Dimmitt died in 1937, and thereafter on December 31, 1937, Dimmitt made a will, the sixth paragraph of which is as follows:

"Sixth: I have already deeded to my niece, Alta J. Pullman, the southeast quarter (SE¼) of section eight (8), township twenty-four (24), north, range four (4), east of the 6th P. M. in Cuming county, Nebraska, and for that reason I do not devise any real estate to her in this will."

The deed was admitted to probate in the county court as a part of the testamentary disposition of the estate of V. L. Dimmitt. Appeal was taken to the district court where the action of the county court was sustained. The majority opinion affirms the decision of the district court.

The majority opinion holds that this paragraph of the will was sufficient as a devise of the real estate described to Alta J. Pullman.

In our consideration of this matter we must not lose sight of the fact that the question of whether or not this was sufficient as a devise is the sole and only question for determination in this case. We must not become confused by the discussion regarding delivery of the deed to the real estate, and the key to the house. The point of such discussion bears only on the question of whether or not there was passage of title under the deed, which is not an issue triable in this case.

Coming back then to the real issue presented, on the clear and specific language employed by the testator, can it be said that he intended a devise of the real estate to Alta J. Pullman? The will itself supplies the unequivocal answer. The testator said in language so plain and simple that it is not subject to construction, but only to acceptance, that he did not so intend. He said: "I do not devise any real estate to her in this will." The fact that he intended to convey to her

real estate by deed, and that what he did in that connection was sufficient or insufficient to effect a conveyance, is beside the point and of no consequence here. Words could not have been selected to express the testamentary intention more clearly than those used. There was no ambiguity, latent or patent.

This court has said: "In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law." *Martens v. Sachs*, 138 Neb. 678, 294 N. W. 426; *In re Estate of Pfost*, 139 Neb. 784, 298 N. W. 739.

Again it is stated: "Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain." *Lincoln Nat. Bank & Trust Co. v. Grainger*, 129 Neb. 451, 262 N. W. 11; *Martens v. Sachs, supra; In re Estate of Pfost, supra.*

The case of *In re Estate of Hopper*, 90 Neb. 622, 134 N. W. 237, cited and commented upon in the majority opinion, is clearly not in point in the present situation. There, simultaneously with the making of the will, the testator executed seven warranty deeds. The deeds were admitted to probate. There by specific declaration in the will the testator made the deeds a part of the testamentary disposition. In the case at bar, by equally specific declaration, the testator removed the deed from his testamentary disposition.

The case of *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, closely parallels this one. A father deeded his home farm to his son Thomas, and ten months later made a will in which he disposed of all his property by will except the home farm. In the will he said that he had deeded the farm to his son, Thomas Noble. He delivered the deed to the cashier of a bank where it was held subject to the order of the grantor. The court held that the deed operated neither as a conveyance nor a devise. Of like effect is *Allenbach v. Ridenour*, 51 Nev. 437, 279 Pac. 32.

The testator clearly had no intention of giving Alta J.

Pullman anything by will and, in my opinion, this court has established a dangerous precedent in declaring the existence of a testamentary intent which is specifically negatived by the language of the will which is clear and plain.

SIMMONS, C. J., and CARTER, J. concur in the dissent.

SAMUEL CAMPAGNA, APPELLEE, V. HOME OWNERS LOAN CORPORATION, APPELLANT.

3 N. W. (2d) 750

FILED MAY 8, 1942. No. 31206.

1. **Vendor and Purchaser.** A merchantable title need not be free from every technical defect, the test being whether a man of reasonable prudence, familiar with the facts and the questions of law involved, would, in the ordinary course of business, accept such a title as one which could be sold to a reasonable purchaser.
2. ———. Ordinarily, a purchaser of real estate can make no valid objection to a judgment which is not enforceable against the land purchased.
3. ———. A judgment, patently unenforceable, is not a lien or encumbrance within the meaning of a contract provision obligating one "to convey property free and clear of all liens and encumbrances whatsoever."

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. Opinion on motion for rehearing of case reported in 140 Neb. 572. *Former judgment of affirmance vacated and judgment of district court reversed and case dismissed.*

Ray E. Doughtery, Louis W. Heyde and *Mose Silverman,* for appellant.

Paul J. Garrotto, contra.

Richard O. Williams, Arthur C. Sidner, Franklin L. Pierce, Claude S. Wilson, Alexander McKie, Maurice S. Hevelone and *Lewis R. Ricketts, amici curiæ.*

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

CARTER, J.

This action was commenced by plaintiff to recover back $100 paid by him to the defendant as earnest money on an unperformed real estate contract. Plaintiff obtained judgment and defendant appealed to this court. In a former opinion found in 140 Neb. 572, 300 N. W. 894, this court affirmed the judgment. The matter is now before us on motion for a rehearing.

The record shows that on January 14, 1939, defendant agreed in writing to sell the real estate in question to the plaintiff for $7,200. The contract obligated defendant "to convey said property to plaintiff free and clear of all liens and encumbrances whatsoever." Plaintiff claims that defendant failed to perform its contract because of a certain judgment of record which defendant failed to have removed as a cloud upon the title. The determining question is whether the judgment was a lien or encumbrance within the meaning of the contractual provision heretofore recited.

It appears that on November 26, 1930, a former owner of the property was prosecuted in federal court for a criminal offense and fined $500 and costs. No execution was ever issued upon this judgment. The former owner who had been subjected to the fine died on November 12, 1931. We think this amounted to an abatement of the judgment. In *United States v. Mitchell,* 163 Fed. 1014, the court said: "The purpose of a fine imposed in a criminal case is the punishment of the defendant personally for the offense of which he has been convicted, and, while the federal statutes provide for the collection of a fine by execution as in case of civil judgments, there is no provision making it a debt, and, where a defendant upon whom a fine has been imposed by a federal court dies before the fine has been paid or collected, the cause abates, and the fine cannot be collected from his estate." See, also, *United States v. Dunne,* 173 Fed. 254; Patton, Titles, secs. 356, 358.

But whether or not the judgment was abated, it certainly had become dormant. We have held on numerous occasions that a dormant judgment is not a lien on real estate. It is

true that upon revivor of the judgment the lien thereof again attaches although its priority is lost. But if the real estate is transferred while the judgment is dormant, the lien of the judgment cannot be asserted against such real estate. *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109; *Horbach v. Smiley*, 54 Neb. 217, 74 N. W. 623; *Halmes v. Dovey*, 64 Neb. 122, 89 N. W. 631; *Glissmann v. Happy Hollow Club*, 132 Neb. 223, 271 N. W. 431.

It is urged the use of the words "free and clear of all liens and encumbrances whatsoever" removes the case from the operation of the general rule. The contract requires that the property be free of "all" liens and encumbrances. We fail to see how the addition of the word "whatsoever" could add anything to the plain words of the agreement. The term encumbrance is usually defined as any right or interest in land, held by one other than the owner, which diminishes the value of his title, but which is not of such an extent as to be inconsistent with his ability to convey a fee. In Patton, Titles, sec. 315, it is said: "However, a purchaser can make no valid objection to a judgment which is not enforceable against the land involved."

In *Solt v. Anderson*, 62 Neb. 153, 86 N. W. 1076, this court came to the same conclusion. We said: "By the answer the defendant interposed as a defense the plea that there were certain apparent liens on the land which prevented the conveyance of a good title, and that the administratrix had abandoned the contract and committed waste on the real estate materially diminishing its value. On these issues, under the evidence, the court found against the defendant, and its findings are, we think, supported by the evidence. While there may have been apparent liens, the evidence failed to show any actual present lien for any sum or sums whatever. They were either dormant or for other reasons were shown to be of no validity as against the property described in the contract."

A merchantable title need not be free from every technical defect, but the test is whether a man of reasonable prudence, familiar with the facts and the questions of law involved,

would, in the ordinary course of business, accept such a title as one which could be sold to a reasonable purchaser. *Bliss v. Schlund,* 123 Neb. 253, 242 N. W. 436. In the instant case the law clearly demonstrates that the judgment is unenforceable. We think the judgment was abated by the death of the judgment debtor, but, assuming that it was not, the land was free from the lien thereof by virtue of its transfer during the dormancy of the judgment. Applying the rule announced in the *Schlund* case, we fail to see how a man of reasonable prudence, familiar with the facts and the questions of law involved in the situation before us, could seriously urge that the patently unenforceable federal judgment could impede the transfer of title. We now think that we came to an incorrect conclusion on this point in our former opinion and we hereby vacate our former opinion to the extent that it conflicts herewith.

The judgment of the district court is reversed and the action dismissed for the reasons herein stated.

REVERSED AND DISMISSED.

RALSTON PURINA COMPANY, APPELLANT, V. W. W. COX, APPELLEE.

3 N. W. (2d) 748

FILED MAY 8, 1942. No. 31230.

Fraud. Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it, and upon failure to so prove, the party alleging fraud fails.

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

Earl Hasselbalch and *Cottrell Fox,* for appellant.

Raymond P. Medlin and *William Keeshan, contra.*

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

MESSMORE, J.

This is an action on a contract, originally brought in the justice of the peace court, and from a dismissal of the plaintiff's case was appealed to the district court. The contract sued on was in the sum of $345.80, entered into July 29, 1936, and was for the sale of six and one-half tons of "Hog Fatena Meal," a product manufactured by the plaintiff as a tested, scientific hog feed. The contract contained a promissory note, to be paid on or before February 1, 1937, and provided that the meal was to be fed to 22 hogs, owned by the defendant, clear and free of all liens, and to be marketed through a commission company on or about February 1, 1937. There was an assignment for the amount of the purchase price in the contract to be deducted from the defendant's share upon the sale of the hogs as provided therein.

The amended petition in the district court, after setting forth the factual situation with reference to the contract, prayed for judgment in the sum of $72.16. Defendant's cross-petition was premised on fraud, in that the agents of the plaintiff represented to defendant that the hog food was tested scientifically, guaranteed and warranted by the plaintiff, on the basis that 300 pounds of feed would add 100 pounds of pork and no other feed would be required; that the plaintiff's agent demonstrated, through advertising and radio announcements repeating the warranty; that the defendant relied on the representation, believed it to be true, and was thereby induced to execute and deliver the contract; that the plaintiff knew the representation to be false and made the same with reckless disregard of the truth thereof, with the intent that defendant would rely and act upon it. Defendant further alleged that he had 21 head of hogs, weighing 80 pounds apiece; that the meal was intended to put 200 pounds on each hog; that it was consumed by November 15, 1936; that he demanded more of such feed but was unable to obtain it; thus he was compelled to feed 100 bushels of barley of the value of $55. After making certain deductions for the barley fed, defendant counterclaimed in the amount of $58.84 and interest. Jury was waived;

trial had to the court; plaintiff's petition was dismissed, and defendant's counterclaim denied. Motion for a new trial was overruled, and the cause was appealed to this court.

The first assignment of error is the insufficiency of the evidence to prove defendant's counterclaim. The defendant testified that he had heard of the plaintiff's product by radio advertising, wherein it was held out as a cheap, scientific food, capable of producing 100 pounds of pork to 300 pounds of feed. Pursuant to this advertising, he called on a merchant who operated a feed store at Albion, Nebraska, and who handled the plaintiff's product. The merchant represented to him that for his 21 hogs, each weighing 50 pounds, it would require six and one-half tons of the feed to put on 250 pounds of fat, and that this amount of Fatena meal would last until February 1, 1937. All dealings with the defendant were had through this merchant on or about July 29, 1936. Thirty days after signing the contract, he obtained the meal; it lasted until December 26, 1936, and he was unable to feed his hogs any longer. Two had died, and the remainder were shipped to the commission company, as provided in the contract, the result being that the sale of the hogs lacked $72.16 of paying the amount stated in the contract. During the period of waiting for the meal, he had fed a quantity of barley to his stock. The feed merchant testified that he told the defendant the food would produce poundage on the hogs in the amount fed, as testified to by the defendant; that he had literature authorizing him to so represent the Fatena meal; that he had heard the radio program which made the claim as testified to by the defendant.

The defendant's counterclaim is based on fraud. Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it. *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Giles & Son v. Horner*, 97 Neb. 162, 149 N. W. 333; *Fritsche v. Turner*, 133 Neb. 633, 276 N. W. 403; *Saffer v. Saffer*, 133 Neb. 528, 274 N. W. 479.

This brings us to an examination of the evidence, to determine whether or not the defendant has proved his counterclaim by a preponderance thereof. Defendant testified

that he was an experienced hog feeder; he fed the plaintiff's product from August to December 26, 1939; from his experience it is reasonable to believe that he would know the value of such product. He further testified: "Q. And these hogs did fine on this feed? A. They did as long as it lasted. Q. And you believe for mature hogs it would have done what they claimed? A. I believe so. Q. It was pretty good feed? A. Yes, as far as it went, the only thing I am kicking on they got all the security and I figure they have enough." Defendant further stated that he would pay the obligation.

Appearing in the record is exhibit 2, which is a response to a request for payment of the balance made on June 29, and which contains the following written statement of the defendant: "Well I received your letter as you can see and as to giving you more security nothing doing. I told Martin (a representative of the plaintiff) that if you fellows let me alone till I got the money I would pay." The rest of the statement is with reference to being sued and states that they could sue if they desired, but not to write him any more letters.

The foregoing evidence does not show, by a preponderance thereof, that the defendant relied upon any representation made by the plaintiff; nor was he induced by such representation to execute and deliver the contract. The evidence does not show that the representation was false or made with the intent, on the part of the plaintiff, to defraud the defendant and induce him to act thereon to his damage. Defendant has failed to prove his counterclaim by a preponderance of the evidence, the burden to so prove being on him.

The allegations of warranty appearing in the defendant's answer and cross-petition are wholly without merit. The general rule, as stated in 55 C. J. 688, is applicable: "In order for an express warranty to exist, there must be something positive and unequivocal concerning the thing sold, which the vendee relies upon, and which is understood by the parties, as an absolute assertion concerning the thing sold, and not the mere expression of an opinion; representa-

tions which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty. Dealer's talk is permissible; and puffing, or praise of the goods by the seller, is no warranty, such representations falling within the maxim *simplex commendatio non obligat.*"

We deem further discussion of assignments of error unnecessary.

For the reasons given in this opinion, the judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of the plaintiff in the sum of $72.16 and interest.

REVERSED.

ROSE, J., dissenting.

In my view of the evidence and the law applicable to the facts, the judgment of the district court should be affirmed.

STATE, EX REL. JOHN B. QUINN, APPELLEE, V. FRANK MARSH, SECRETARY OF STATE, APPELLANT.
3 N. W. (2d) 892

FILED MAY 8, 1942. No. 31419.

1. **Constitutional Law.** Where the Constitution creates an office and enumerates the qualifications for eligibility to the office, the legislature is without power to impose other conditions of eligibility.
2. ———. "The Constitution of this state confers plenary legislative power upon the general assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some express restriction or limitation can be found in the Constitution itself." *Hallenbeck v. Hahn*, 2 Neb. 377.
3. ———. In the determination of the legislative prerogative and power when weighed against claimed constitutional limitation and inhibition, it is the declared general policy and doctrine of this state that the Constitution confers plenary legislative power upon the legislature; and, if an act is within the legitimate exercise of that power, it is valid, unless some express restriction or limitation can be found in the Constitution itself.
4. ———. "This doctrine is elementary, is cardinal, and arises out of the very nature of our form of government. With us,

sovereignty resides with the people." *Hallenbeck v. Hahn*, 2 Neb. 377, 397.

5. ———. The reasonableness of a legislative restriction upon eligibility to hold a constitutionally created office is a proper subject of judicial review.
6. **Public Service Commissions.** *Held*, that section 75-101, Comp. St. 1929, as it relates to age restriction, is not violative of the true express or implied intent and purpose of the Constitution.
7. **Elections.** *Held*, that the section does not establish exclusions from constitutional office, nor annex qualifications expressly or impliedly prohibited by the Constitution.
8. ———. *Held*, that the section does not have the effect of granting to one class of voters powers in governmental affairs in excess of those granted to others.
9. **Public Service Commissions.** *Held*, that no presumption arises from section 2, art. IV, and section 7, art. V, of the Constitution, of an intent that the legislature should be without power to require that railway commissioners should possess reasonable qualifications as a condition of eligibility to hold office.
10. ———. *Held*, that in the light of the importance of the functions of the office as disclosed by the Constitution and the statutes, the restriction of section 75-101, Comp. St. 1929, as to minimum age of railway commissioners is not unreasonable.

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

Walter R. Johnson, Attorney General, and *Robert A. Nelson*, for appellant.

Loren H. Laughlin, contra.

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

YEAGER, J.

This is a special action authorized by the provisions of section 32-1129, Comp. St. 1929, providing for judicial review of the action of the secretary of state in passing upon certificates of nomination or nomination statements of candidates for public office. The action as originally instituted in the district court was by the state of Nebraska on relation of John B. Quinn, who will be hereinafter referred to as relator, against Frank Marsh, secretary of state, who will be referred to as respondent.

The substantial facts are the following: John B. Quinn, a duly qualified voter affiliated with the Republican party, on the 6th day of November, 1941, filed in the office of the secretary of state an application or nomination statement to have his name printed and carried on the official primary ballots for the primary election to be held throughout the state of Nebraska on August 11, 1942, for the office of state railway commissioner for the regular term commencing in January, 1943, which application was duly accepted by the secretary of state. On November 14, 1941, an objection and protest to the application was duly and regularly filed on the ground that by reason of his age relator was ineligible to become a railway commissioner in the light of the statute (Comp. St. 1929, sec. 75-101, as amended by the laws of 1933 and 1941), which provides that no person is eligible for membership of the railway commission who is less than 30 years of age, whereas relator would not become 30 years of age until July 26, 1943. The substantial facts contained in the objection having been admitted to be true, the secretary of state rejected the application.

From the ruling of the secretary of state the relator filed his action for review in the district court. On review the district court held that section 75-101, Comp. St. 1929, in so far as it provides that state railway commissioners shall be not less than 30 years of age is unconstitutional, null and void, and that such requirement as to age is arbitrary, unreasonable and capricious, and thereby contravenes and conflicts with section 18, art. III, section 1, art II, and section 22, art. I, of the Constitution of Nebraska, 1875, and in consequence ordered forthwith the reinstatement of the application.

From this action of the district court the secretary of state has appealed and as ground for reversal, among others not necessary to be discussed, urges that the decision is contrary to law.

The facts not being in dispute, the only question for determination is the constitutionality of a part of section 75-101, Comp. St. 1929, which part is as follows: "The members of

the state railway commission shall be resident citizens of this state, and qualified voters under the Constitution and laws thereof, and not less than thirty years of age."

The part of section 18, art. III of the Constitution, brought into question here is the following: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * The opening and conducting of any election, or designating the place of voting."

Section 22, art. I of the Constitution, is as follows: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

We are, therefore, called upon here to determine the question of whether or not the provision of section 75-101, Comp. St. 1929, which prohibits persons under the age of 30 years from holding the office of railway commissioner is legislation which contravenes one or both of the quoted constitutional provisions.

To begin with it appears to be conceded, and it cannot be denied, that where the Constitution creates an office and enumerates the qualifications for eligibility to the office the legislature is without power to impose other conditions of eligibility. *Jansky v. Baldwin,* 120 Kan. 332, 243 Pac. 302; *Humphreys v. Walls,* 169 Md. 292, 181 Atl. 735; Mechem, Public Officers, p. 27 *et seq.*

It appears appropriate then to inquire into the question of whether or not section 20, art. IV of the Constitution, which is the provision creating the offices of state railway commissioner, and which became a part of the Constitution by amendment in 1906, enumerates any qualifications for eligibility. The section is as follows: "There shall be a state railway commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and

the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

It will be observed that there are no provisions pertaining to eligibility. However, it is the contention of the relator that, the Constitution having imposed no conditions of eligibility, no power existed in the legislature to impose any such conditions, and, even assuming the power to impose conditions, that those imposed are arbitrary, unreasonable and capricious.

The relator urges the following: (1) That the statute is violative of the true intent of the Constitution and that it exceeds the general express and implied constitutional purpose; (2) that where the departments of government are definitely separated as are those of Nebraska, the legislature may not establish arbitrary exclusions from office nor annex qualifications to constitutional offices of the executive department where the Constitution has not established exclusions or annexed qualifications; (3) that the courts will not permit one class of voters to be given more power in governmental affairs than another class; (4) that in view of the fact that since section 2, art. IV, and section 7, art. V, of the Constitution contain specific prohibitions on the question of age of certain constitutional officers, this must be conclusively presumed to be a bar to legislative declaration of conditions of eligibility based upon any age other than that of an elector; (5) that the legislative limitation in question is a legislative encroachment upon the executive department of government.

No case like or of a similar character to this one has ever been before this court, and but few have been before any of the courts. One approaching it as closely as any to facts from another jurisdiction is the case of *Attorney General v. O'Neill*, 280 Mich. 649, 274 N. W. 445. In that case the right of O'Neill to hold the office of circuit judge was

brought into question. The Constitution of Michigan contained no exclusionary provisions against the holding of judicial office. The statutes, however, did contain certain exclusionary provisions. They provided that no person should be eligible for election or appointment to the office of circuit judge unless he had been duly admitted and licensed as an attorney and counselor in all of the courts of the state for a period of at least eight years. O'Neill was admitted to the bar on motion in the circuit court for the county of Saginaw, but did not file with the clerk of the supreme court the necessary affidavit to entitle him to practice in all of the other courts of the state.

In that case three opinions were written, all arriving at the ultimate conclusion that O'Neill was entitled to hold the office of circuit judge, but each arrived at its conclusion on an entirely different basis. The three opinions are mentioned for the reason that in them are collected references to most, if not all, of the reported cases having a direct bearing on the question presented here.

In the majority opinion numerous cases were reviewed which resulted in the following pronouncement: "The conclusion is inevitable that under the division of powers in the Michigan Constitution the judiciary is an independent department of the State government and the legislature has no power to annex qualifications for circuit judges not found in the Constitution." It will be noted that the majority opinion turned on a question of division of powers of government.

In the second opinion, after review and quotation from numerous decisions, the conclusion was arrived at that where the Constitution imposed no restriction as to eligibility of circuit judges the legislature was without power to do so.

In the third it was concluded that O'Neill was qualified to hold the office of circuit judge since he had actually been admitted to practice law in the state for more than eight years, and that the requirement that he file affidavit with the clerk of the supreme court should be held to be merely directory.

In this opinion it was concluded that, where the Constitution fails to prescribe qualifications for public office, the legislature had the right to prescribe the conditions upon which the right should be conferred. The following from Mechem, Public Officers, p. 22, sec. 66, was quoted with approval: "Where, however, the Constitution does not prescribe the qualifications (for public office), it is the province and the right of the legislature to declare upon what terms and subject to what conditions the right shall be conferred."

In the opinion in the case of *Humphreys v. Walls, supra,* cited by relator, the following is found: "It is a general rule that, where the Constitution states the essential qualifications of an official, elective or appointive, created by it, they cannot be varied by the legislature unless authorized by the instrument itself;" also the following: "But where, as in this state, the Constitution has declared so unequivocally the conditions essential to the eligibility to some offices, and has stated with equal precision other conditions which will render a person ineligible for any office created by it, it may be assumed that, when it failed to prescribe any special qualifications as essential to eligibility to constitutional offices, it did not intend any." With reference to the asserted assumption that a constitutional failure to prescribe special qualifications indicates an intention that there should be none, a reading of the opinion discloses that this is *dicta,* since the court was dealing with a situation where a constitutional restriction had been imposed to which the legislature sought to add other restrictions. The constitutional restriction was senatorial scrutiny and approval.

From the decisions of this court relator cites *State v. Bartley,* 41 Neb. 277, 59 N. W. 907, and *State v. Moorhead,* 99 Neb. 527, 156 N. W. 1067. In the opinions in these cases the following is found: "An act which violates the true meaning and intent of the Constitution and is an evasion of its general express or plainly implied purpose is as clearly void as if in express terms prohibited."

From this and the other cases cited it is argued that, from the fact that the Constitution contains no provision for

eligibility of railway commissioners to hold office, it was the implied purpose that there should be none imposed by the legislature.

On the other hand, it is the contention of the respondent that in the absence of restriction, and in the light of the silence of the Constitution in this regard, the legislature has (1) the power to impose conditions of eligibility upon railway commissioners to hold office which are not unreasonable, and (2) that the fixing of a minimum age limit of 30 years is not unreasonable.

In support of respondent's contention with regard to legislative power, our attention is directed to a number of decisions.

In the opinion in *Jansky v. Baldwin, supra,* the following statements are found:

"This section of the Constitution is silent as to requirements of eligibility. It is the rule that when the Constitution of a state creates an office, and names the requirements of eligibility therefor, the legislature has no authority to make additional requirements, nor to provide that one may hold the office who does not have the constitutional requirements. * * *

"Our Constitution (art. 5, secs. 2, 5 and 6) has placed certain restrictions upon the right of suffrage and the right to hold office. So long as a legislative act does not infringe upon those restrictions, it cannot be said to be unconstitutional. * * * Suitable educational qualifications and previous experience of such officers as county superintendent of public instruction change with changed conditions of the people. The Constitution, although it provided such office, did not deal with the subject of the specific fitness of the person who should be elected to such office, leaving that to the legislature to be fixed and modified as educational needs might require."

In *Darrow v. The People,* 8 Colo. 417, 8 Pac. 661, the Colorado court stated the following, which is in part a quotation from *Ohio v. Covington,* 29 Ohio St. 102: "We do not believe that the framers of the Constitution, by this provision, intended to say that the right to vote should be the sole and

exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other disqualifications should be imposed. If, as has been well said, they 'had intended to take away from the legislature the power to name disqualifications for office, other than the one named in the Constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration.' "

In *Ohio v. Covington, supra,* it is stated: "Indeed, the true rule for ascertaining the powers of the legislature is to assume its power under the general grant ample for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition."

In *State v. McAllister,* 38 W. Va. 485, 18 S. E. 770, it is stated: "Defendants in error agree that because this section forbids any persons except qualified electors to hold office, by just implication, the converse of the proposition is also included in the meaning of the section; that is to say, that all electors are duly qualified to hold office. Such reasoning is very fallacious. This provision was simply intended to limit the number from whom the various officers of this state might be chosen to those having a voice in the selection of such officers, and not in any sense intended to determine the qualifications necessary to properly discharge the duties of any office."

As has already been pointed out, no similar case has been previously before this court, but very early in the history of the state the court announced a policy and certain principles to be applied in the determination of the legislative prerogative and power when weighed against claimed constitutional limitation and inhibition which policy and principles have been steadfastly adhered to.

In *Hallenbeck v. Hahn,* 2 Neb. 377, it was stated:

"The Constitution of this state confers plenary legislative power upon the general assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some

express restriction or limitation can be found in the Constitution itself."

(Page 397): "This doctrine is elementary, is cardinal, and arises out of the very nature of our form of government. With us, sovereignty resides with the people. Were they acting as a whole for themselves, there can be no doubt but this, or any other law that should receive a majority sanction, would be conclusive. But, parcelling out the exercise of their sovereign power to the three departments of government,—the legislative, the executive, and the judicial, —to the first has been committed, except what has been abandoned to the congress of the United States, the exercise of the whole sovereign law-making power as completely and absolutely as possessed by the people, subject only to such limitations as the people may have chosen to impose. These limitations are set out in the state Constitution."

In the recent case of *Swanson v. State,* 132 Neb. 82, 271 N. W. 264, it is stated: "The principles above enunciated have long been approved in this jurisdiction, and we are fully committed to the doctrine that the Constitution of this state is not a grant but a restriction on legislative power, and that the legislature may legislate upon any subject not inhibited by the Constitution." Other cases supporting this doctrine are *State v. Lancaster County,* 4 Neb. 537; *State v. Dodge County,* 8 Neb. 124; *Shaw v. State,* 17 Neb. 334, 22 N. W. 772; *Magneau v. Fremont,* 30 Neb. 843, 47 N. W. 280.

After examination and analysis of the pertinent constitutional provisions and the decisions and authorities, and in the light of the established doctrine of this state pertaining to the power of the legislature to enact laws, we hold:

That section 75-101, Comp. St. 1929, is not violative of the true express or implied intent and purpose of the Constitution.

That the section does not establish exclusions from constitutional office, nor annex qualifications expressly or impliedly prohibited by the Constitution.

That the section does not have the effect of granting to

one class of voters powers in governmental affairs in excess of those granted to others.

That no presumption arises from section 2, art. IV, and section 7, art. V, of the Constitution, of an intent that the legislature should be without power to require that railway commissioners should possess reasonable qualifications as a condition of eligibility to hold office.

That the limitation of section 75-101 is not an encroachment by the legislative upon the executive department of government.

We are now confronted with a determination of the question of whether or not the legislative restriction contained in section 75-101, Comp. St. 1929, is unreasonable. This court is not committed to any doctrine on the question of whether reasonableness should be a test of legislative restriction on the right to hold constitutional public office, nor to a method or procedure for the determination of the question of reasonableness if it shall become an issuable matter.

The courts of Wisconsin have determined that the question of reasonableness is a proper subject of inquiry and judicial review on the theory that legislative restrictions on the right to hold constitutional office are matters coming within the police power. In the case of *State v. Phelps*, 144 Wis. 1, 128 N. W. 1041, it was held: "It is further elementary that, the extent to which the legislature may go in the field of police power, is primarily a matter for its judgment. As to the case in hand, the same as others, it could not properly go beyond reasonable regulation. However, what is and what is not reasonable, is primarily for legislative judgment, subject to judicial review. Such review does not have to do with expediency. It only deals with whether the interference, from the standpoint of a legitimate purpose, can stand the test of reasonableness, all fair doubts being resolved in favor of the proper exercise of lawmaking power."

Whether it be, as in Wisconsin, under the police power, or under the general power of the court, to review the acts of the legislature in a proper action instituted for that purpose in pursuance of the division of the sovereign powers of

the state government, it appears clear that the reasonableness of a legislative restriction upon eligibility to hold a constitutionally created office is a proper subject of judicial review, and accordingly that becomes the considered determination of this court.

As an aid in determining the reasonableness of the restriction in question, few, if any, extraneous facts are presented. In truth, none could have been presented. We must resort, therefore, to an examination of the constitutional provision creating the railway commission and prescribing its duties and functions (art. IV, sec. 20), and the statutes adopted in pursuance thereof (Comp. St. 1929, ch. 75, with amendments thereto).

In pursuance of and within the power conferred by this provision the legislature, in a full chapter (chapter 75, *supra*), occupying 20 pages of the statutes not including its amendments, has defined the many duties of the railway commission. Among the many important duties this commission is called upon to perform are the following: To regulate rates and services of all common carriers, to investigate violations of law by common carriers, to conduct hearings, to enter orders, to enforce provisions relating to sale of liquid fuel tractor engines in the state, to regulate rates and service and to have general control over pipe lines for oil and gas, to regulate the issuance of stocks and bonds of common carriers, to find the valuation of public service corporations in the state. From an examination of this constitutional and these statutory provisions, it is safe to say that no other agency of the state subordinate to the sovereign government itself has more broad, far-reaching and important powers and functions than does the state railway commission.

In the light of the common knowledge that the proper understanding, determination, administration, execution and control of big problems and multifarious activities require knowledge and experience, and that while age is not the sole factor in the acquisition of knowledge and experience it is an important one, can this court say that the requirement

that an elector shall have attained the age of 30 years before he shall be eligible to hold the office of state railway commissioner is unreasonable? We conclude that the question requires a negative answer.

From this record we do not know anything about the qualities or individual qualifications of the relator to perform the duties of a railway commissioner. It may be that his personal qualifications are such as would permit him to perform the duties of the office with credit and dispatch, but that is not a matter for proper inquiry here. The only question here is the reasonableness of the restriction in section 75-101, Comp. St. 1929, and it is held that in the light of the importance of the functions of the office as disclosed by the Constitution and the statutes the restriction is not unreasonable.

It is, therefore, the opinion of this court that the decision and judgment of the district court should be and are reversed, and the petition of relator is dismissed.

REVERSED AND DISMISSED.

JAMES TOTH V. STATE OF NEBRASKA.

3 N. W. (2d) 899

FILED MAY 15, 1942. No. 31197.

1. **Incest.** In a prosecution for incest, the evidence of the prosecutrix need not necessarily be corroborated by an eyewitness to the particular act, but it is necessary that she be corroborated as to the material facts and circumstances which tend to support her testimony and to establish or corroborate the truth thereof.
2. ———. Such corroboration may be either by direct testimony or by circumstantial evidence.
3. **Witnesses.** Incest is not a crime against the wife within the meaning of section 20-1203, Comp. St. 1929.
4. **Criminal Law.** The wife of the defendant cannot be a witness against the husband in such an action.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Theodore L. Richling, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Herbert T. White, contra.*

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

SIMMONS, C. J.

The defendant in this action was charged with, and tried for, the crime of incest. He was found guilty, the jury recommending leniency. Motion for a new trial was made and overruled. Defendant appeals.

He presents first the sufficiency of the evidence to sustain the conviction. The daughter testified to the act and prior occurrences. Supporting her testimony was that of her mother, wife of the defendant, and of members of the family, who testified to circumstances, acts, conduct, admissions, and statements of the defendant. His evidence, by several witnesses, consisted of a denial of the testimony of the state's witnesses, an alibi as to the time of the particular act relied upon by the state, and explanations of parts of the state's evidence and admissions made by the daughter.

The rule is that, in a prosecution for incest, the evidence of the prosecutrix need not necessarily be corroborated by an eyewitness to the particular act, but it is necessary that she should be corroborated as to the material facts and circumstances which tend to support her testimony and to establish or corroborate the truth thereof. Such corroboration may be either by direct testimony or by circumstantial evidence. *Bridges v. State*, 80 Neb. 91, 113 N. W. 1048. The evidence received by the court for the consideration of the jury has been reviewed. It is in conflict on material points. Assuming that prejudicial error did not occur in its admission, the evidence is sufficient to sustain the conviction.

Over proper objection, the wife of the defendant was permitted to testify at length regarding acts, declarations, and admissions of the defendant, and his conduct toward their daughter, covering a period of years down to and including

a conversation had with the defendant while he was in jail awaiting trial. She was further allowed to testify regarding conversations had with the daughter and members of the family with relation to the conduct of the defendant and the alleged offense. The mother and wife was the principal corroborative witness.

It is not our right or duty to pass upon the guilt or innocence of the defendant. Neither may we weigh the moral gravity of the charge made against the defendant. In this case, as in all other criminal proceedings, the state must establish its case by compliance with the rules of criminal evidence and procedure. In this case, as in all others, the defendant's rights must be safeguarded.

We are presented with the legal question as to whether or not the admission of the testimony of the wife was prejudicial error requiring a reversal of the judgment and the granting of a new trial.

Section 20-1201, Comp. St. Supp. 1941, provides that, " * * * in all cases, civil and criminal * * * The following persons shall be incompetent to testify * * * Second. Husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward, except as may be otherwise provided by law. * * * " Section 20-1204, Comp. St. 1929, provides: "Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal, in testimony any such communication made while the marriage subsisted except as is now or may be hereafter otherwise provided by law." Section 20-1203, Comp. St. 1929, applicable here, provides: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other * * * ." These sections clearly set up a legislative prohibition closing the lips of the spouse "except in a criminal proceeding for a crime committed by the one against the other." The statute is clear. It means what it says.

Two questions are to be determined affirmatively before the one spouse may be a competent witness against the other. Is it a criminal proceeding? Is it for a crime committed by the one against the other? It should be remembered that in this state "No act is criminal unless the legislature has in express terms declared it to be so." *Lane v. State,* 120 Neb. 302, 232 N. W. 96. See *Behrens v. State,* 140 Neb. 671, 1 N. W. (2d) 289. Defendant was tried for a violation of section 28-906, Comp. St. 1929, which provides: "If a father shall licentiously cohabit with his own daughter, the father shall, on conviction be punished by confinement in the penitentiary for a term not less than twenty years."

That this is a criminal proceeding is clear. Is it one for a crime committed by the husband against the wife? The statute makes the offense consist of the act by the father with his daughter. From an analysis of the statute, it does not appear that the legislature declared the crime to be one against the wife.

The state, however, cites three decisions of this court which it claims authorizes the testimony of the wife against the husband in an incest case. In *Lord v. State,* 17 Neb. 526, 23 N. W. 507, an attempt was made to charge the defendant with deserting his wife and living and cohabiting with another woman in a state of adultery. The wife was permitted, over objection, to testify as to the marriage and the desertion and to identify the other woman. This court held that it was not error. It may here be noted that by amendment in 1905, Laws 1905, ch. 172 (twenty years after the decision in the *Lord* case), the legislature provided that the wife is a competent witness against the husband in desertion cases. See Comp. St. 1929, secs. 20-1203, 28-458. The case of *Lord v. State, supra,* was one that had in it the two elements, *desertion* and adultery. In reaching its conclusion, it should be noted that this court relied upon certain decisions from Iowa and Texas to which reference will later be made.

Owens v. State, 32 Neb. 167, 49 N. W. 226, was an incest

case. In that case *the wife did not testify.* The bill of exceptions shows that the county attorney argued to the jury that the wife was not called to testify and commented on the defendant's failure to present his wife as a witness. An examination of the briefs reveals that the defendant took the position in this court that it was the duty of the prosecutor to have called the wife as a witness. The attorney general in his brief made no mention of the matter. Under these circumstances this court held that it was the "prosecutor's privilege to have called" her; that it was gross error to permit the argument to go to the jury that the defendant should have called her; and without any discussion of authority, this court said: "In *Lord v. State,* 17 Neb. 526, it was held, and consistently maintained, by reason and precedent, that a wife may be called by the state to testify against her husband on an indictment for adultery. This rule remains; and if for adultery, the more swiftly might she be called on an indictment for incest."

Hills v. State, 61 Neb. 589, 85 N. W. 836, was a prosecution for bigamy. In that case the first wife signed the complaint before the examining magistrate, and later, over objection, testified as a witness for the state. This court, citing *Lord v. State, supra,* and *Owens v. State, supra,* and the Iowa cases that were cited in *Lord v. State, supra,* held: "The wife is a competent witness against the husband in a criminal prosecution for bigamy or adultery, inasmuch as these are crimes specially against her and not merely against the relation." Not called to our attention by the state is *Harris v. State,* 80 Neb. 195, 114 N. W. 168. That case was a prosecution for statutory rape upon a stepdaughter. The wife signed the complaint before the magistrate but does not appear to have testified. There this court, citing *Lord v. State, supra,* and *Owens v. State, supra,* held that the wife may sign the complaint against the husband in such a case.

The state further relies upon *State v. Chambers,* 87 Ia. 1, 53 N. W. 1090, and *State v. Shultz,* 177 Ia. 321, 158 N. W. 539, 4 A. L. R. 1071.

In *State v. Shultz, supra,* it was held that the prohibition

against the wife's testifying against the husband does not apply when the charge is incest, citing *State v. Chambers, supra,* and *Compton v. State,* 13 Tex. App. 271, 44 Am. Rep. 703. The statute set out in *State v. Chambers, supra,* is similar to our own. There the Iowa court, citing its own decisions relied upon by this court in the early opinion and following them, held that a prosecution for incest was a crime against the wife and that she was a competent witness. It is interesting here to note that the Iowa court in *State v. Shultz, supra,* cited *Compton v. State, supra,* as sustaining its position, and in *State v. Chambers, supra,* cited the same Texas case as holding the wife "was not a competent witness against her husband." The Texas cases will be discussed later.

State v. Chambers, supra, cited and relied upon the following cases. *State v. Hughes,* 58 Ia. 165, 11 N. W. 706, was a bigamy case. There the lawful wife, over the objection of the defendant, testified "to prove the marriage between her and the defendant." This was held not to be error, citing *State v. Sloan,* 55 Ia. 217, 7 N. W. 516, and *State v. Bennett,* 31 Ia. 24. *State v. Sloan, supra,* was a bigamy case. The first wife testified over objection. The court without citation of authority held that, "if the defendant is guilty of bigamy, he committed a crime against his wife," and that she was a competent witness. *State v. Hazen,* 39 Ia. 648, was an adultery case, where the wife's testimony was admitted, and *State v. Bennett, supra,* was followed. *State v. Bennett, supra,* was an adultery case. There the question presented was whether or not the husband was a competent witness against the wife. The court considered it as one of "first impression." The court there pointed out that the Iowa statute provided that "no prosecution for adultery can be commenced but on complaint of the husband or wife," and that that led "to the inference that the offense is rather a crime against the partner to the marital relation than against society in general," and that "the only mode of commencing the prosecution is by becoming a prosecuting witness before the grand jury, or by filing an information be-

fore a committing magistrate," and that the magistrate must examine the informant, that "the informant assumes the attitude of a witness," and that to "deny the right of the husband to testify * * * would also deny his right to commence the prosecution," and that that "would prove too much." It therefore appears that the Iowa decisions, upon which the decisions of this court rest, stem back to a decision of that court in an adultery case based upon a particular statute which the court held made the spouse a competent witness.

The Texas cases cited by this court in *Lord v. State, supra,* are *Morrill v. State,* 5 Tex. App. 447, and *Roland v. State,* 9 Tex. App. 277. In the *Morrill* case the court said, "decisions may be found which hold that adultery of the wife * * * is a crime * * * against the husband," citing only *State v. Bennett, supra. Roland v. State, supra,* relied entirely upon the *Morrill* case. However, *Compton v. State, supra,* was a charge for incest with a stepdaughter. In that case the Texas court specifically overruled the *Morrill* and *Roland* cases. It appears that Texas has repeatedly affirmed the decision in *Compton v. State.* See *Calloway v. State,* 92 Tex. Cr. 506, 244 S. W. 549. Our investigation indicates that it has been followed by other courts.

It follows that the decisions of this court upon which the state relies, rest upon adjudications from the Texas courts, which that court has overruled, and upon a decision from Iowa based upon a particular statute not similar to the one involved here. We need not now determine whether or not our cases should be modified. It is clear that they should not be construed to extend, and that they do not justify an extension of, the rule as urged by the state. This court has said: "A judge, in writing an opinion, must be permitted a certain latitude in stating his reasons for the conclusions that are reached. It quite often happens that statements are made and conclusions announced in the body of an opinion that are not necessary for a decision of the questions presented and are not directly applicable thereto. These statements are also sometimes carried in the syllabus of the case,

which is prepared by the writer of the opinion. Writers of opinions endeavor to prevent those occurrences. When they do occur, they are not considered to be controlling, although they are often helpful and likewise are often later adopted by the court by subsequent reference thereto. Because of these situations, there have evolved the rules now followed by this court, to wit: As precedents, the controlling features of an opinion are the rules of law necessarily reached and stated in determining the issues presented based upon the facts found in the record. The opinion controls the syllabus, the latter being merely explanatory of the former and having no more force and effect than statements made in the opinion upon which they are based." *Maxwell v. Hamel,* 138 Neb. 49, 292 N. W. 38.

Cases on this subject-matter are collected in 4 A. L. R. 1071, and 35 A. L. R. 138.

Our attention has been called to statements in 8 Wigmore, Evidence (3d ed.) sec. 2239. This is an authority that courts and lawyers respect. It is noted that Professor Wigmore refers to what "*ought to be* plain in law." See page 258. This text was directly considered by the supreme court of Oklahoma in *Cargill v. State,* 25 Okla. Cr. 314, 220 Pac. 64, 35 A. L. R. 133, wherein that court said: "The inadequacy of the reasons for the rule and its exceptions, as stated by Wigmore, may be sound, but we are called to look beyond these reasons. We are here called upon, not to determine the wisdom of the law, but to determine what the law is. If the law is unwise, the legislature can easily modify it. So far as possible, we are bound to follow the law as declared by the highest courts of the land, rather than that of text-writers, however eminent."

It is also noted that Professor Wigmore in his footnotes, page 259, so far as his text relates to incest, cites the Iowa and Nebraska cases analyzed herein, including *Harris v. State, supra,* with this statement, "rape under age, on the defendant's stepdaughter; *the wife admitted.*" He also recognizes the overruling of the previous Texas cases by *Compton v. State, supra.*

The supreme court of Washington has held that a wife is not a competent witness against the husband in a prosecution for incest. *State v. Beltner,* 60 Wash. 397, 111 Pac. 344. Also Oklahoma in *Lacey v. State,* 27 Okla. Cr. 42, 224 Pac. 994.

The supreme court of New Jersey in *State v. Masnik,* 123 N. J. Law, 335, 8 Atl. (2d) 701, an incest case, held: "A wife or husband is precluded from testifying against each other in a criminal action except to prove the fact of marriage." Their statute is different than the ones we have been considering. It specifically provides that the husband or wife is competent, in a criminal action, to testify against the other spouse to prove the fact of marriage; that a married woman may testify against her husband when she is the complainant against him, and that unless otherwise provided one spouse is not competent to give evidence against the other in any criminal proceeding.

The supreme court of South Dakota in *State v. Burt,* 17 S. Dak. 7, 94 N. W. 409, had this same question before it in an incest case, where the wife was permitted, over objection, to testify for the state. The court there considered our decisions in *Lord v. State, supra,* and *Owens v. State, supra,* and the Iowa decisions, and came to the conclusion that this court had held that the wife was a competent witness in incest cases. The statutes are similar. The state here argues that, adultery being a crime against the wife, even more so is incest. It has likewise been suggested that by analogy, adultery and bigamy being held by some courts to be crimes against the wife, so is incest. The fallacy of this reasoning lies in the assumption that adultery is an essential element of incest. These contentions are all answered by the South Dakota court in the following language: "We cannot avoid the conclusion that the legislature intended to exclude the wife's testimony in this class of cases when its introduction is not consented to by her husband. As heretofore suggested, the general rule relating to the examination of married persons excludes the testimony of each without the consent of the other. The competency of either in the absence of

consent is the exception. * * * With reference to this statute the husband's crimes might be classified thus: (1) Those which are against persons other than his wife; (2) those which are against no particular person; and (3) those which are against his wife. It is only in actions for crimes belonging to the last-mentioned class that the wife can testify for or against her husband without his consent. *Had the defendant, in the case at bar, been a widower when the acts were done for which he is being punished, his crime would have been the same. The existence of the marital relation between the witness and the defendant did not, in any legal sense, affect or constitute any element of the crime for which he was convicted.* Should we hold that the crime charged in this action was one against the wife, it would logically follow that the rape or murder of defendant's daughter would have been a crime against her within the meaning of the statute. To hold that a wife may testify for or against her husband, without his consent, in cases of incest, would be, in effect, to establish the rule that either husband or wife may testify for or against the other, without consent, in all actions wherein either is defendant; and such was manifestly not the legislative intent. With the policy of this statutory rule the courts are not concerned. If the law should be changed, the duty of changing it devolves upon the legislature, not upon this court." (Italics supplied.) *State v. Burt, supra.* See, also, *Bassett v. United States,* 137 U. S. 496, 11 S. Ct. 165.

We follow the reasoning of the South Dakota court and other courts cited, and hold that incest is not a crime against the wife within the meaning of the statute, and that she cannot be a witness against the husband. It follows that the admission of the wife's testimony was prejudicial error requiring a reversal of the case.

The defendant submits that the state's evidence "tended to show that the alleged act * * * was done forcibly and against the will" of the daughter and that it was evident that the defendant might have been guilty of a violation of section 28-407, Comp. St. 1929, providing that carnal knowl-

edge of a daughter forcibly and against her will constituted rape, and that the jury should have been instructed that, if they believed that the act was done forcibly and against the daughter's will, they should acquit the defendant of incest. We see no merit in this contention. The state's burden was to prove the crime charged. The fact that evidence, if believed, might warrant conviction for a different offense does not alter the situation. See *Welch v. State*, 58 Ga. App. 447, 198 S. E. 810.

The defendant further complains about the admission of the evidence of several witnesses on different matters. In the main this evidence was admitted without objection and accordingly error cannot be predicated upon it.

For the error in admission of the testimony of the wife, the judgment of the district court is reversed, the verdict set aside and the cause remanded for further proceedings.

REVERSED.

ROSE, J., dissenting.

I do not concur in the opinion that testimony of a ravished daughter, a competent witness in a prosecution for incest, that her father committed that felony is insufficient to support a conviction unless corroborated by other evidence. I do not find in the Constitution or in the statutes or in the common law adopted by the legislature any law requiring such corroboration. I think that is a judicial requirement which originated in mistake or error without any foundation in law and that it has not been made law by judicial adherence to it. A statute declares:

"Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared." Comp. St. 1929, sec. 20-1201.

I have not found therein, nor elsewhere in the law, any law that says testimony of a female child that she was ravished by her father shall not be believed by the jury or held insufficient to sustain a conviction unless corroborated by other evidence.

PAINE, J., dissenting.

The Nebraska statute, section 20-1203, Comp. St. 1929, providing that "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by one against the other," was intended by the lawmakers, in my opinion, to protect the hallowed institution of marriage.

When the husband destroys the marital relation, and by sexual depravity defiles his own daughter, the reason for preventing husband and wife from testifying against each other disappears.

When a good mother discovers the commission of such a felony, her anguish may be more appalling and lasting than by a violent assault if made upon her by her wicked husband. While the injury inflicted upon the wife by the husband's incestual attacks upon their daughter is not specifically defined by statute as a crime against the wife, it is clearly so understood in a popular sense, and is so defined by Webster, as follows: "A crime is a violation of a public right and may also involve a violation of the rights of an individual."

The main opinion in this case fails to set out the facts, and a brief statement of the evidence will be helpful to a complete understanding of the law involved.

Defendant was charged with incest, and pleaded not guilty, but at the trial was found guilty by the jury. A motion for new trial was overruled, and the defendant was sentenced to the penitentiary for a period of 20 years, and brings his conviction to this court by petition in error.

This family resided 3½ miles northeast of Benson, in a one-room house. Mary, the prosecutrix, lived with her father and mother and three brothers and one sister. Her father and mother slept in one bed, and she and her sister slept in another bed, and the brothers slept on a davenport that opened into a bed, and they had thus lived there for 16 years. In November of 1930, while her mother was in the hospital, her father for the first time attempted to have relations with the daughter, who was then about seven or eight years old.

The mother testified to seeing the father following this

daughter into an outside toilet, and surprised her husband when he was taking indecent liberties with the daughter, then about 11 years old, and thereafter did all in her power to keep the daughter in the company of the other children at all times.

As to the particular act charged in the amended information, as occurring September 8, 1939, the daughter testified that she had been working at Abe Somberg's, 5414 Nicholas street, Omaha, and on this particular Thursday afternoon, which was her afternoon off, her father told her he would come to Somberg's the next night, which was Friday, at 7:30 p. m., and get her. "Q. What did you say to that? A. I told him I did not want him to come, and he said he was coming anyhow. Q. Did you tell him anything about coming out? A. No; he said if you don't come out, I will come in after you. Q. Why did you object during this last year? A. I just told him I did not want him to ruin my life. Q. What did you mean by that? A. By having a child or something. Q. What did he say about that? A. He said that he would take care of it, and see that I did not have one. Q. Now, on September 8, 1939, which is the night after your night off? A. Yes. Q. About what time did your father come after you? A. He came about 7:30. Q. And how do you place the time? A. I had just finished the evening dishes, and was upstairs in my room, when I saw him drive up. * * * Q. What did you do? A. I knew if I did not go out to the car he would come in after me. Q. Anyhow so you went out to the car? A. Yes; anyhow I went out to the car. * * * Q. Was it dark as yet? A. Well, it was just getting dark. Q. Where did you go? A. We went out to some side road at Seventy-second and Redmond. (Near the Danish cemetery in Douglas county.) * * * Q. What did you do after he stopped the car? A. Well, he told me to get in the back, and he got in the back too. Q. After you got in the back what did he do, and what did you do? A. Well, after I got in the back seat, he took my bloomers off, and went through with the act."

Rose Toth, the wife, over objections, gave in addition a large amount of testimony describing in the greatest detail

the complaints the daughter made to her of her father's conduct with her, and of other circumstances and facts which support this conduct. In fact, the testimony of the wife takes up 38 pages of the total bill of exceptions of 210 pages, and furnishes facts and circumstances which were amply sufficient in the minds of the jurors to lead them to return their verdict of guilty.

The father took the witness-stand, and his testimony covers some 40 pages of the bill of exceptions. He glibly denies ever having had sexual relations with his daughter at any time.

The wife, Rose Toth, being called on rebuttal, testified as follows, without any objection being made. She went to see him at the jail. "Q. Did you have any conversation with him? A. Yes, I did. Q. When was that? A. On Friday before the preliminary hearing I went up to see him. * * * Q. Was anybody with you when you went up there? A. I was alone. Q. Where was he? A. He was inside of the wires and I was on the outside in the hall and talking to him through the wires. Q. Just tell the gentlemen of the jury what he said to you and what you said to him with respect to this particular case, and his pleading guilty and about the testimony in this case. A. Well, he first asked me, 'What are you going to do with this,' and he said, 'If I get sent away are you going to keep the place and stay and wait for me?' and I said, 'What else could I do,' and he said, 'You could make it easy for me and get me less time if you do as I say,' and then he told me that I should have the girl tell that he only attempted it, he said he would be willing to plead guilty, * * * and he said it would look much better for her and it would be easier on him."

The information charged the defendant with having committed the crime of incest under section 28-906, Comp. St. 1929, reading: "If a father shall licentiously cohabit with his own daughter, the father shall, on conviction be punished by confinement in the penitentiary for a term not less than twenty years." The defendant was found guilty under this section and given the minimum sentence of 20 years.

Objection was made to the introduction of other acts in addition to the one charged, but this court has held that this evidence about his attempts to commit this crime when she was eight years old, and again when she was 11 years old, is proper, for these significant acts of undue familiarity with the daughter would lead a reasonable man to a belief in the existence of an incestuous disposition on the part of the father. See *Smothers v. State,* 81 Neb. 426, 116 N. W. 452.

Again, this court has said: "In a prosecution for rape upon a female child not previously unchaste, proof of facts and circumstances justifying a finding, independently of her own testimony, that accused had the opportunity and the inclination to ravish her may be sufficient corroboration of direct and positive evidence by her that he did so." *Whetstone v. State,* 99 Neb. 469, 156 N. W. 1049. See the incest cases of *Bridges v. State,* 80 Neb. 91, 113 N. W. 1048; *Schwartz v. State,* 65 Neb. 196, 91 N. W. 190.

The main opinion holds that, because of our statute, section 20-1203, Comp. St. 1929, set out in the first paragraph of this dissent, the wife of the defendant cannot be a witness against the husband in a charge of incest against the husband.

It is said in 70 C. J. 118: "Broadly, at common law, and under some statutes, husband and wife are incompetent as witnesses for or against each other in either civil or criminal proceedings, the rule of exclusion ordinarily applying irrespective of the kind of testimony offered, or the character of proceeding involved. But the rule of exclusion was subject to certain exceptions or modifications even at common law."

"Note, it hath been resolved by the justices, that a wife cannot be produced either against or for her husband, *qua sunt duæ animæ in carne una.*" 1 Coke's Littleton, 6 b. See 1 Blackstone Comm. 443.

Mr. Justice Sutherland, in *Funk v. United States,* 290 U. S. 371, 54 S. Ct. 212, 93 A. L. R. 1136, stated, in referring to this old rule, that the common law is not in a stage of arrested development, but is a body of law in a state of growth and change, continually developing and adapting itself to

new conditions which confront its application. Prior decisions are cited in support of the view that a court, in the face of greatly changed conditions, is not chained to ancient formulæ, and as rejecting the view that courts are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of changed conditions. Paragraph 1 of the syllabus held that the wife of one on trial in a federal court for a criminal offense is not incompetent as a witness in his behalf. Judge Sutherland then cited the language used in *Rosen v. United States*, 245 U. S. 467, 38 S. Ct. 148: "We conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

In a case in Colorado, the wife was convicted of killing her stepdaughter, Leona, aged 10, by striking her on the head with an auto tire iron and throwing her body in a lake. "Murder by wife of husband's child *held* 'crime committed by one against the other' within statute, so that husband could testify against wife." *O'Loughlin v. People* (1932) 10 Pac. (2d) 543 (90 Colo. 368).

In the case of *Wilkinson v. People*, 86 Colo. 406, 282 Pac. 257, Ernest Wilkinson was convicted and sentenced for the crime of rape by force. Defendant was the stepfather of the victim, and his wife was the mother of the victim, who was a little dwarf, 24 years of age, only four feet in height, weighed only 60 pounds, and had the mentality of a ten-year-old child. The stepfather had had sexual intercourse with her over a considerable period of time, until she informed her mother, who immediately caused his arrest. All crimes are against the public, but some crimes are particularly against individuals. A murderer commits a crime against the person whose life he destroys. The thief commits a crime against the person whose property he steals. In a review of the decisions, it appears there is conflict in respect to the question as to when a husband or wife may testify against the other under statutes similar to the Colorado statute. In Texas a late decision seems to limit a wife's right to

testify against her husband to cases of violence against her person, as in the common law. Other decisions from the Iowa and Nebraska courts extend the right to testify against her husband in any criminal action or proceeding for crimes committed against her, as bigamy and adultery. Since some private wrong or injury is included in every crime, it is evident that the word "crime," in that clause of the statute which permits the husband or wife to testify against the other in a criminal action for a crime committed against the other, means the private wrong or injury included in such public crime. The word must have such meaning or the statute is meaningless. It follows that a wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted.

In this *Wilkinson* case, I think this paragraph is especially in point: "If bigamy, and, under certain circumstances, perjury, are such crimes committed by one spouse against the other, as to render the husband or wife competent to testify against the offending party, it follows logically and inevitably that rape is also such a crime. The innocent spouse is not precluded by the statute from testifying against the accused spouse, who stands charged with this offense. The innocent spouse is a competent witness, with or without the consent of the accused spouse, and such evidence is not within the prohibition of the statute. This is particularly true in this case, where the crime was committed against the natural daughter of the wife, and therefore an outrage upon nature in its dearest and tenderest relations as well as a crime against humanity itself."

Many of the courts, in discussing this question, group the crimes of rape, adultery, bigamy and incest together, and hold that incest is governed by the same reasoning which permits a wife to testify in the other crimes, as all of them are crimes against the wife.

"It is the fact of the marital relation that makes the acts here charged constitute the aggravated crime of incest. Were it not for this relation, these acts would constitute a

much less grave offense. The crime charged is surely as much, if not more, a crime against the wife of the accused than would be the crime of adultery or bigamy. Following former decisions of this court, we hold that this is a prosecution for a crime committed by the defendant against his wife, within the meaning of section 3641, and that Mrs. Chambers was a competent witness for the state." *State v. Chambers*, 87 Ia. 1, 53 N. W. 1090, 43 Am. St. Rep. 349. See, also, annotation, 4 A. L. R. 1071.

In *State v. Shultz*, 177 Ia. 321, 158 N. W. 539 (1916), the defendant claimed that the statute had been violated in permitting the wife to testify against the husband, to support the charge that he was guilty of incest. It was held (158 N. W. 539): "In a prosecution for incest, defendant's wife was properly allowed to give evidence tending to support the charge, despite Code, sec. 4606, and Code Supp. 1913, sec. 4607, prohibiting husband or wife from being witnesses against each other, except as the statute expressly permits."

"The common law did not fail to recognize that the rule of privilege was subject to some sort of exception. That exception was commonly placed on the ground of *Necessity*,—that is, a necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule." 8 Wigmore, Evidence (3d ed.) sec. 2239.

"That adultery by one spouse is an offense against the other is conceded in morals, and ought to be plain in law. The argument may be made, to be sure, that adultery by the husband * * * was not a crime at common law, and ought not to be a crime; but that is a mere evasion; whenever it is made a criminal offense, then if any crime at all can be a crime, not only against the state, but also a 'crime against the other,' adultery is certainly one of those crimes. So, too, is incest or rape. So, equally, is bigamy. Nevertheless, judges have been found who dispute this; it has been argued, in skilful word-fencing, that a bigamous marriage is a crime 'against the marital relation,' but not 'against the wife.'" 8 Wigmore, Evidence (3d ed.) sec. 2239.

"The rule that husband and wife are incompetent as wit-

nesses for or against each other has been substantially whittled down by judicial interpretation and by statute providing that a husband and wife shall not be witnesses against each other without the other's consent, except in suits for divorce and in cases of prosecution for bigamy and where the cause of action grows out of a personal injury or wrong done by one to the other. Comp. Laws 1929, sec. 14221." *People v. Zabijak,* 280 N. W. 149 (285 Mich. 164).

Again, in a Colorado case it is said: "Our statute does not limit the right of the husband or wife to testify to criminal prosecutions for crimes involving personal violence, either actual or constructive; the language is unqualified that the husband or wife may testify against the other 'in a criminal action or proceeding for a crime committed by one against the other.' This language is broad enough to include any crime, whether of violence to the person, or other crime committed by the husband or wife directly affecting the other." *Dill v. People,* 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254. See, also, *Schell v. People,* 65 Colo. 116, 173 Pac. 1141. See very full and able discussion of the entire question in the dissenting opinion of Judge Poffenbarger in *State v. Woodrow,* 58 W. Va. 527, 52 S. E. 545, 2 L. R. A. n. s. 862, in which a father was convicted of shooting his baby, Ruth, 14 months of age, while held in her mother's arms, and the conviction was reversed because the mother was allowed to testify against her husband. See, also, annotation following *State v. Boyd,* 2 Hill (S. Car.) 288, 27 Am. Dec. 376.

While newspapers upon moral grounds usually omit accounts of this revolting crime of incest, yet it is fairly common in our state. In preparing the facts for this dissenting opinion, I received from Neil Olson, the warden of the Nebraska penitentiary, a detailed history of every man sentenced for the crime of incest, as shown by the records. On May 16, 1887, a Hamilton county farmer, 35 years of age, appears to be the first, and the last in the list is a laborer from Polk county, 50 years of age, sentenced November 17, 1941, and altogether 68 men have been sentenced for this crime. The record shows that all but six were American

citizens, only one was a Negro, and one an Indian.

Would the law enforcement officers have been able to bring about the conviction of the men guilty of this crime if the wives had not been permitted to testify?

For many years this question has been considered settled in Nebraska. The writer of this dissent was district judge for 14 years, and held court in 30 different counties in Nebraska, and, in his opinion, few of the convictions by the jury, or pleas of guilty secured, in incest cases would have been brought about except for the testimony of the mothers in each of the cases of which he has had knowledge.

Why has it been considered settled that a mother could testify against the father who had ravished their daughter?

Because this matter has been before the Nebraska court several times. In the case of *Lord v. State,* 17 Neb. 526, 23 N. W. 507, it was held: "Under a statute permitting a husband or wife to testify in a criminal proceeding for a crime committed by one against another, *Held,* That on the trial of a husband on an indictment for adultery, the wife was a competent witness against him." Judge Maxwell said: "And in our view, it was intended by the legislature to include the offense here charged; and the ends of justice will be best subserved by permitting the wife to testify."

In the case of *Owens v. State,* 32 Neb. 167, 49 N. W. 226, a conviction was reversed by the supreme court on the ground that the evidence was insufficient as the daughter in that case denied that she had had intercourse with the father, and the only testimony offered was that of neighbors; but although it may be argued that it is dictum, Cobb, C. J., uses the following pertinent language: "In *Lord v. State,* 17 Neb. 526, it was held, and consistently maintained, by reason and precedent, that a wife may be called by the state to testify against her husband on an indictment for adultery. This rule remains; and if for adultery, *the more swiftly might she be called on an indictment for incest.*" (Italics mine.)

In *Hills v. State,* 61 Neb. 589, 85 N. W. 836, which was a prosecution for bigamy, a complaint was signed by the wife

of the defendant, and she testified over objection, and Norval, C. J., says: "The wife is a competent witness against the husband in a criminal prosecution for bigamy or adultery, inasmuch as these are crimes specially against her and not merely against the relation."

In adultery a husband has intercourse, usually with a mature woman, not his wife, and if many courts have held it was proper for his wife to testify against him in such a case, because it was a crime committed against her, much greater is the reason, supported by morality and law, for allowing her to testify when her own husband has ravished their own daughter.

An opinion has recently been released in this court entitled *Murphy v. Travelers Ins. Co., ante,* p. 41, 2 N. W. (2d) 576, involving X-ray burns upon the hand of a dentist. This case was given exhaustive study for months after it was argued on April 7, 1941, and the decision rendered is supported only by a minority of the courts, but it was concluded that these decisions presented better reasoning, and the decision of this court did not follow the opinion of a majority of the states which reached a contrary conclusion.

It is my opinion that, in the case at bar, the crime of incest, committed by a husband upon his own daughter, is clearly a crime committed against the mother of that daughter, his own wife, and that it comes within the exception provided in section 20-1203, Comp. St. 1929, even though the majority of courts may hold to the contrary.

By the main opinion, this case is reversed because the mother was allowed to testify against the father, although section 29-2308, Comp. St. 1929, states clearly that no judgment shall be set aside for the improper admission of evidence if this court shall consider that no substantial miscarriage of justice has occurred. The history of this law was set out at length in my dissent in *Vinciquerra v. State,* 127 Neb. 541, 256 N. W. 78, in which the defendant was convicted of murder, and sentenced to 15 years, and such conviction was reversed by this court because the court, among other things, failed to give a proper instruction to the jury

on the sufficiency of circumstantial evidence. The case was retried in Douglas county, but, as often happens in second trials, the same evidence could not then be procured because of the lapse of time, and at the second trial the jury on October 25, 1934, returned a verdict of not guilty, and the defendant was released and discharged.

It is my opinion that the defendant in the case at bar had a fair trial, that it was proper under our statute for the wife and mother to testify to the facts of the crime he committed, and that this court should have announced the law to be as follows:

(1) Section 20-1203, Comp. St. 1929, provides in part: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by one against the other." Under this section, the wife of the accused has been allowed to testify against her husband in prosecutions of cases of rape, adultery, bigamy and incest, on the ground that each of these crimes was a crime against the wife.

(2) Our Nebraska statute (Comp. St. 1929, sec. 20-1203) does not limit the right of the husband or wife to testify to criminal prosecutions for crimes involving personal violence, either actual or constructive; the language is unqualified that the husband or wife may testify against the other "in a criminal proceeding for a crime committed by one against the other." This language is broad enough to include any crime, whether of violence to the person, or other crime committed by the husband or wife directly affecting the other.

(3) Incest committed by a father, ravishing his own daughter, is a crime against his wife, the mother of said daughter, and the wife is a competent witness against him, under our Nebraska law.

ROSE, J. I agree with Judge Paine that the wife was a competent witness in this case and I think the conviction should be affirmed.