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REPORTS OF CASES

DECIDED BETWEEN
DECEMBER 3, 1943 AND JULY 6, 1944

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1943,
AND JANUARY TERM, 1944.

VOLUME CXLIV

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT
For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe and Sarpy.	Wilmer W. Wilson[1] William A. Robertson[2]	Neb. City Plattsmouth
Third	Lancaster.	Jefferson H. Broady John L. Polk Frederick E. Shepherd Ralph P. Wilson	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas and Washington.	Henry J. Beal William A. Day Francis M. Dineen James M. Fitzgerald Charles Leslie Herbert Rhoades John A. Rine Willis G. Sears Arthur C. Thomsen	Omaha Omaha Omaha Omaha Omaha Tekamah Omaha Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings Harry D. Landis	David City Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner Frederick L. Spear	Columbus Fremont
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Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Frank J. Munday Edmund P. Nuss	Red Cloud Hastings
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Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Dayton R. Mounts	Atkinson
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

[1] Died April 7, 1944.
[2] Appointed April 13, 1944, died July 3, 1944.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1943

JOSEPH W. MULLER, APPELLANT, V. FRANK JENSEN, APPELLEE.

12 N. W. 2d 80

FILED DECEMBER 3, 1943. No. 31598.

1. **Appeal and Error.** Where the sustaining of a special demurrer is assigned as error, and the transcript does not contain the pleading against which the demurrer was directed, nor the demurrer, nor the court's ruling thereon, this court cannot determine the error assigned.
2. **Evidence.** Under the circumstances set out in the opinion the trial court did not err, to the prejudice of the plaintiff, in restricting the cross-examination of an expert witness.
3. **Trial.** Error cannot be predicated upon the refusal of an instruction which is not applicable to the evidence.
4. ———. Error alleged in an instruction to the jury must be called to the attention of the trial court, in the motion for a new trial, before it will be considered by this court.

APPEAL from the district court for Platte county: ERNEST G. KROGER, JUDGE. *Affirmed.*

M. S. McDuffee, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Walter, Flory & Schmid and *Edwin Cassem, contra.*

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

SIMMONS, C. J.

This is an action against a physician and surgeon to re-

cover damages for alleged malpractice. The case was tried to a jury and resulted in a verdict for the defendant. Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff's witnesses related the following factual situation: Plaintiff and his son were in an automobile accident on March 20, 1936. The son received an injured finger. The son, accompanied by the father, went to the defendant for treatment of the son's injury on April 1. At that time the defendant volunteered to examine the plaintiff for injuries to his body and found none. Defendant noted an old callous on the inner side of the little finger of the plaintiff's left hand. When the defendant asked about it he was told that it had been there for years and that it hurt sometimes when hard work was done with the hand. Defendant then volunteered to remove it. Defendant, without sterilizing the hand, injected a local anesthetic, took a knife from a table, made diagonal incisions like a star, opened the callous, probed it with an instrument, found nothing in it, dressed it and told the plaintiff it would be all right. Plaintiff went home. The hand pained him during the night and in the early morning he had increasing pain. The doctor was called by telephone the next morning and instructed the plaintiff to soak the hand in hot water. On Saturday, April 4, the plaintiff's hand was inflamed, he was suffering pain and was having chills. He returned to the defendant's office where the old dressing was removed, the wound cleaned and a wet-pack dressing applied. Defendant gave plaintiff a bottle of medicine to apply through the wet pack. Defendant informed the plaintiff that he would not be available on Sunday but to return Monday for treatment. On Sunday the plaintiff was worse and he went to Columbus where he consulted Doctor McGowan. At that time the dressing put on by defendant had not been removed. Doctor McGowan found the hand inflamed and the infection spreading. Plaintiff was hospitalized and treated. A surgeon, Doctor Morrow, was later called. Drains were put in the hand and arm, hemorrhages occurred, a blood transfusion was had, and finally on April 23, in order to save plaintiff's life, the lower left arm was amputated.

It was plaintiff's contention that unsterile instruments were used and the infecting germs negligently placed in the wound when the callous was removed.

Defendant's evidence was, in many particulars, in direct conflict with plaintiff's evidence. It supported this factual situation. Plaintiff and his son came to the defendant's office on March 21. The son's hand was treated. Plaintiff complained of pain in his body. He was examined and no broken bones or other injuries were found. Plaintiff and his son returned on April 1. Defendant treated the son's hand. Plaintiff at that time showed defendant his left hand. There was an infected spot on the left little finger above the callous. A small closed perforation of the skin was evident. Defendant cleansed and sterilized his own hands and the hand of the plaintiff. He then, using a sterile needle, injected a local anesthetic. Then using a knife, that had been sterilized, he opened the wound, found pus, removed a small sliver, showed it to plaintiff, cleansed the wound, placed in it a sterile wick to aid in draining, dressed the wound with sterile gauze and instructed plaintiff to return the next day. Plaintiff did not return. Defendant denied having received the telephone call the next day. On Saturday, April 4, the plaintiff returned. The hand was examined, treated and a wet dressing applied. Defendant instructed the plaintiff to return the following day. Defendant denied that he had told the plaintiff he would not be at home on Sunday and testified that he was at home on that day. Plaintiff did not thereafter consult the defendant and defendant did not thereafter treat him. Defendant's office assistant corroborated him in detail as to the methods used to sterilize the instruments and as to the method and treatment given and the removal of the sliver. Defendant's records corroborated the testimony of the examination, the treatment and the removal of the sliver.

Doctor McGowan was called as a witness by both plaintiff and defendant, and when testifying for the plaintiff on direct examination said that plaintiff had told him when first consulted that he, plaintiff, received an injury on his hand

in the automobile accident; that he did not know whether it was a piece of wire or glass or wood that caused the puncture wound; that he had had more or less pain in the hand from that time on and that the place on his little finger was opened by the home doctor April 1. The record of this history, as given by the plaintiff, was made at the time. Doctor McGowan also testified as to the dressing on the hand on April 5 being different from that shown to have been placed on the hand on April 4 by the defendant. The jury, by their verdict, resolved these conflicts in the evidence against the plaintiff.

We are then to consider whether or not error, prejudicial to the plaintiff and requiring a reversal, occurred at the trial.

Plaintiff's first assignment is that the trial court erred in sustaining "the special demurrer of Frank Jensen wherein the court held that there were several causes of action improperly joined." The transcript shows a petition filed on March 4, 1941, entitled "Joseph W. Muller, Plaintiff, v. Frank Jensen, Defendant." The first paragraph is "That on the 20th day of January, 1941, in the case of Joseph W. Muller, plaintiff, vs. Frank H. Morrow, Patrick H. McGowan and Frank Jensen, defendants, this court held that the original petition filed therein contained misjoinder of the causes of action, which holding was had upon the special demurrer of the defendant, Frank Jensen, and the plaintiff having procured leave to file petitions for each cause of action stated in the original petition, and that they be docketed as separate causes and proceed without further service of summons, alleges:" Subsequently an amended petition was filed containing the above allegation excepting the final word "alleges" and eliminating all reference to Doctors Morrow and McGowan as defendants in other paragraphs of the petition. Both the petition and amended petition concludes with a prayer for "judgment against the defendant."

It seems from this allegation that the plaintiff first brought an action against the three doctors, that a special demurrer was filed to that petition by the defendant Jensen

and that demurrer sustained, and subsequently plaintiff procured leave to file and did file petitions to be "docketed as separate causes." Plaintiff now seeks by this assignment to test the correctness of the trial court's ruling on the special demurrer. The transcript however does not contain the original petition, in which the three doctors were defendants, nor the special demurrer, nor the court's ruling. Under these circumstances we are unable to determine the error assigned. See *Ball v. Nelson,* 45 Neb. 205, 63 N. W. 361.

Plaintiff next argues his assignment that the trial court erred in restricting his cross-examination of an expert witness. This witness was being examined as to the habits, length of life, and the time within which and in what kind of a medium certain germs would become virulent. After some questions the court said "we have had enough about these germs I believe" and stopped the cross-examination as to that subject matter. Plaintiff, by his own expert witnesses, had gone thoroughly into these matters and had done so also by cross-examination of defendant's witness. We see no prejudicial error in the trial court's ruling.

Plaintiff next argues his assignment that the trial court refused to give the following instruction to the jury: "You are instructed that if plaintiff's son Earl called the defendant over the telephone on about March 21, 1936, and the defendant refused to respond to the call or to go to the defendant's (plaintiff's) home as requested by Earl, if he did request it, or that upon the 4th of April, 1936, the defendant after dressing the plaintiff's hand told the plaintiff not to return the next day, then if you find that either or both of these statements are true they or either of them could constitute negligence on the part of the defendant." There was no evidence that plaintiff's son called the defendant over the telephone on or about March 21, 1936. Plaintiff's testimony was that he first went to the doctor's office, so far as this matter is concerned, on April 1, 1936. The evidence of the son was that he called the defendant over the telephone on April 2 and "I told him about it and he said 'What!

That little incision I made yesterday?' and I said 'yes' and he said 'Don't let him get excited about that, have him put it in some hot water, as hot as he can stand it, and it will be over in a day or so.' " He was then asked "And he didn't come?" and answered "No, he never." We do not find testimony of the son that he "requested" the defendant to go to the plaintiff's home. Under these circumstances we see no error in the court's refusal to give the requested instruction. "Error cannot be predicated upon the refusal of an instruction which is not applicable to the evidence." *Chezem v. State*, 56 Neb. 496, 76 N. W. 1056.

The plaintiff next, by separate assignments, complains of the court giving instructions numbered ten and thirteen. An examination of the motion for a new trial, as it appears in the transcript, reveals that the giving of these two instructions was not assigned therein as error. It is the settled rule of this court that error alleged in an instruction to the jury must be called to the attention of the trial court in the motion for a new trial before it will be considered by this court. *Stevenson v. Omaha Transfer Co.*, 87 Neb. 794, 128 N. W. 503; *Fred F. Shields Co. v. Chicago & N. W. Ry. Co.*, 107 Neb. 472, 186 N. W. 332; *Bailey v. Lund*, 134 Neb. 319, 278 N. W. 506.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF THE CITY OF SIDNEY ET AL. CONSUMERS PUBLIC POWER DISTRICT, PETITIONER, V. CITY OF SIDNEY, RESPONDENT.

12 N. W. 2d 104

FILED DECEMBER 3, 1943. No. 31684.

1. Courts. The appointment of the members of a court of condemnation by the supreme court under the provisions of section 19-702, Comp. St. 1929, is a ministerial act and as such it in no way enlarges the jurisdiction of the supreme court.
2. ———. The statutory power of the supreme court to appoint

the members of a court of condemnation does not have the effect of lodging the condemnation proceeding in the supreme court.

3. ———. A proceeding in the supreme court to vacate the appointment of the members of a court of condemnation because of irregularities in the condemnation proceeding is not within the original or appellate jurisdiction of the supreme court, nor is it incidental to any pending judicial proceeding which could have the effect of bringing it within the jurisdiction of the supreme court.

4. ———. When the appointment of a court of condemnation by the supreme court appears to be in accordance with the applicable statute, a petition to vacate the appointment because of irregularities in the condemnation proceeding will not be entertained.

Original proceeding In re Application of City of Sidney *et al.* for the appointment of judges to constitute a court of condemnation against Consumers Public Power District, wherein Consumers Public Power District petitioned for an order vacating the appointment of the court of condemnation previously appointed by the supreme court. *Petition dismissed and injunctive order previously issued dissolved.*

Clarence A. Davis and *William W. Redmond,* for petitioner.

P. J. Heaton and *L. J. TePoel,* for respondent.

Harold C. Linahan, W. W. Wenstrand, G. H. Seig, Edward Sklenicka, Louis T. Carnazzo, H. A. Prince, James C. Kinsler, H. L. Blackledge, Kenneth H. Dryden, Max Kier and *A. A. Whitworth, amici curiæ.*

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

CARTER, J.

The petitioner, Consumers Public Power District, prays for an order vacating the appointment of the court of condemnation appointed by this court to appraise the value of the electric light and power system of the petitioner in and near the city of Sidney, Nebraska, pursuant to the provisions of sections 19-701 to 19-707, Comp. St. 1929.

The record shows that there was filed in this court on March 12, 1942, a certificate as required by section 19-702, Comp. St. 1929, and a request for the appointment of three district judges to constitute a court of condemnation for the ascertainment of the value of the electric light and power system of the petitioner at Sidney. On April 4, 1942, this court entered its order appointing three district judges as a court of condemnation pursuant to the provisions of the aforesaid statute.

Petitioner prays for the vacation of the order of appointment for the following reasons: First, the ordinance of the city and the election held pursuant thereto are void in their entirety in that the proceeding is directed against the property of the Western Public Service Company when the condemnor well knew that said property had been sold and transferred to the Consumers Public Power District prior to the submission of the pertinent question to the electors of the city of Sidney. Second, that the title to said property was in dispute and undeterminable, and the method of taking and the nature of the property permitted to be taken being dependent upon the character of the ownership, a determination of ownership is a condition precedent to a valid condemnation. Third, that the ordinance enacted and the notice of election and ballot by which the proposition was submitted at the election are insufficient in form and substance in that they are ambiguous and uncertain, and wholly fail to show the specific part of petitioner's property sought to be condemned.

The city of Sidney in its answer contends that the supreme court does not have jurisdiction of the present proceeding in that it is not appellate in character or one of the actions listed in the Constitution as being within the original jurisdiction of that court. It is also contended that the proceeding before us is not incidental to the appointment of the members of the court of condemnation as provided by the applicable statute. The city denies any insufficiency of the city ordinance and ballot submitted to the electors of the city and prays for the dissolution of the injunction

granted. It is upon these issues that the decision must turn.

The record in the proceeding before us shows that an ordinance was passed and an election held upon the question whether the city of Sidney should acquire by eminent domain proceedings the entire electric light, steam and power plants, including both generating and distribution systems of the Western Public Service Company located and operated partly within and partly without the city of Sidney, all of which purports to be specifically described in the ordinance enacted and the ballot used. The record further shows that the electors voted in the affirmative by the required majority to carry the proposition submitted. These facts were communicated to the supreme court in the form of a certificate, regular on its face, together with a request for the appointment of three district judges to constitute a court of condemnation in accordance with section 19-702, Comp. St. 1929. In considering the powers of the supreme court with relation to an application to vacate the order appointing the members of the court of condemnation, the nature of the authority exercised in making the appointment in the first instance becomes of primary importance.

The power of the supreme court to appoint the members of the court of condemnation arises by virtue of section 19-702, Comp. St. 1929, which provides in part as follows: " * * * the city council or officer possessing the power and duty to ascertain and declare the result of such election shall certify such result immediately to the supreme court of the state and the supreme court shall within thirty days after the receipt of such certificate, appoint three district judges from three of the judicial districts of the state, and said three judges shall constitute a court of condemnation for the ascertainment, and finding of the value of any such plant, works, or system * * * ."

It will be noted that the appointment of the members of the court of condemnation is required by the statute upon the filing of a certificate indicating an affirmative vote on the condemnation proposal. It does not arise incidentally to any case pending in the supreme court, either on appeal

or by original action. We have heretofore held that the proceedings of the court of condemnation are judicial in their nature, although it is not a court in the constitutional sense. *Updike v. City of Omaha,* 102 Neb. 782, 169 N. W. 725. In *State v. Neble,* 82 Neb. 267, 117 N. W. 723, we said: " * * * many executive or administrative acts performed by judicial officers, and many judicial acts performed by ministerial officers, are and must be held valid. * * * The appointment of an officer might properly, we think, be classed as the exercise of an executive or administrative function, at least not judicial. Yet courts and judges frequently find it necessary to make such appointments in order that the judicial functions of the courts may be freely exercised. It often happens that courts or judges are clothed with this appointing power where the appointee may not be required to discharge any duty which could be in any way ancillary to the exercise of the judicial functions of the court or judge making the appointment, and yet the validity of the appointment could not be successfully questioned, for the reason that the person appointed would exercise judicial functions in the discharge of the duties imposed under the appointment." And in the *Updike* case the court concluded its discussion of this point in the following language: "We find no difficulty in holding, therefore, that no new court was created by the act in violation of article VI of the Constitution, and that the vesting of the power in this court, or in the chief justice, to appoint the members of the board of appraisers does not violate the constitutional requirements (article II) that the executive, legislative and judicial departments of the government be kept separate, 'and no person or collection of persons being one of those departments, shall exercise any powers properly belonging to either of the others, except as hereafter expressly directed or permitted.'" These holdings were adhered to in *City of Mitchell v. Western Public Service Co.,* 124 Neb. 248, 246 N. W. 484.

We conclude therefore that the supreme court had authority under the quoted provisions of the statute, upon the

filing of the certificate therein required as a condition precedent to such appointment, to appoint the court of condemnation as it did as shown by the record.

The question then posed is whether the supreme court, after making the appointment in accordance with the statute, may vacate its order of appointment because of irregularities in the condemnation procedure, assuming for the purposes of this discussion that irregularities do exist. We do not think that such action has any relation to the appointment of the members of the court of condemnation. We think the situation is similar to that discussed in *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681, 74 N. W. 30, wherein this court in substance said with reference to a proceeding for condemning real estate for a right of way for a railway company: The selection of six freeholders by the county judge as required by the applicable statute did not constitute the proceeding a matter instituted and pending in the county court. The power conferred by the act upon the county judge and the duty required of him by that act are not judicial powers or duties, but purely ministerial acts.

We necessarily conclude that the condemnation proceeding in the case at bar was not instituted in the supreme court and that the proceeding is not now, nor has it been in the past, a pending action in this court.

But it is urged that the right to pass upon the irregularity of the proceeding is incidental to the appointive power. We think this contention is without merit. This same theory was advanced in *Mattheis v. Fremont, E. & M. V. R. Co., supra,* wherein it was said: "A second theory upon which counsel for plaintiff in error seeks to maintain this action is that the county court is invested with equitable jurisdiction, and that this action is brought to that court, invoking its equity powers to set aside the condemnation proceeding because procured by fraud; but this theory, like the other, assumes that the condemnation proceeding occurred in the county court. It may be conceded that the county court, as a court of record, is invested with equitable

powers and jurisdiction in any case before it when by the Constitution or the laws of the state that court is invested with jurisdiction of the subject matter out of which the case or proceeding in hand grows. But neither the Constitution, nor any statute of this state, invests the county courts with general equitable jurisdiction; and if this condemnation proceeding was procured by fraud practiced upon the county judge and the appraisers, the county court is not invested with any equitable jurisdiction to vacate it. If in a suit brought before the county judge sitting as a justice of the peace one party by fraud should obtain a judgment, it certainly would not be contended that the county court was possessed with equitable jurisdiction to set that judgment aside. The county court, then, had no jurisdiction or authority to grant the relief prayed for in this action, viewing it as purely an equitable action invoking the equity powers of the county court."

The logic of the foregoing case is particularly applicable here. The condemnation proceeding was not instituted in or pending in the supreme court. Neither the Constitution, nor any statute of this state, consistent therewith, invests the supreme court with general equitable powers in matters of this kind. The relief prayed for does not bring the action within the original jurisdiction of the supreme court as defined in the Constitution, and it is superfluous to say that it is not within the appellate jurisdiction of the court. The appointment of the members of the court of condemnation being a ministerial act, it cannot have the effect of enlarging the jurisdiction of the court, even though the tendered issues may appear to have some relation thereto.

It is not necessary for us to decide whether the supreme court could pass upon the validity of its appointment of a court of condemnation under an unconstitutional statute. We merely point out that this court did pass upon constitutional questions on applications to vacate similar appointments in the cases of *Updike v. City of Omaha, supra,* and *City of Mitchell v. Western Public Service Co., supra.*

Much of the briefs of the parties, as well as those pre-

pared and filed by *amici curiæ*, are devoted to the contention that sections 19-701 to 19-707, Comp. St. 1929, are unconstitutional in that due process of law is not afforded the owners of the property purported to be condemned under the power of eminent domain. We are unable to pass upon this question for the reason that it is not relied upon in the petition before us. We have many times held that this court will not anticipate a question of constitutional law in advance of the necessity of deciding it and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *First Trust Co. v. Smith*, 134 Neb. 84, 277 N. W. 762; *Howarth v. Becker*, 131 Neb. 233, 267 N. W. 444. The question of constitutionality not being an issue under the pleadings filed, this court may not properly pass upon it.

We conclude, therefore, that the appointment of the members of the court of condemnation in the instant case was in accordance with section 19-702, Comp. St. 1929; that the issue raised by the petition of the Consumers Public Power District is not within the original jurisdiction of this court or of its appellate jurisdiction as they are defined in the Constitution; that the appointment of the members of the court of condemnation by the supreme court as provided by section 19-702, Comp. St. 1929, is a ministerial act only and does not lodge the condemnation proceeding in the supreme court or amount to such an institution of a proceeding as to give this court any jurisdiction to pass upon the question posed by the petition. The petition of the Consumers Public Power District will therefore be dismissed and the injunctive order heretofore issued is hereby dissolved.

DISMISSED.

ALEXANDER A. BAUER, APPELLANT, V. EARL U. WOOD AND ED A. WOOD, ACTING AS COPARTNERS UNDER THE NAME OF EARL WOOD'S DAIRY, APPELLEES.
12 N. W. 2d 118

FILED DECEMBER 3, 1943. No. 31633.

1. **Appeal and Error.** In reviewing a motion for a directed verdict or dismissal, this court will assume the existence of every material fact which competent evidence tends to establish and give the plaintiff the benefit of the logical inferences therefrom.
2. **Fraud.** To maintain an action for damages for false representation, the plaintiff, in substance, must allege and must prove by a preponderance of the evidence the following elements: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied on and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of the damages.
3. ———. 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.
4. **Pleadings.** The rule of law is inflexible that the allegations and the proof, *allegata et probata*, must agree.
5. **Trial.** Where the evidence is insufficient to sustain a verdict for plaintiff, the dismissal of the action is not erroneous.

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

T. R. P. Stocker and *Bruce Fullerton*, for appellant.

Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

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

MESSMORE, J.

Plaintiff seeks to recover compensation for his services in selling dairy products for the defendants. At the close of the plaintiff's evidence, defendants moved for a directed verdict which was sustained. Plaintiff's action was dismissed. From this ruling plaintiff appeals.

Plaintiff's amended petition is of great length. We here set forth the substance of it. In his first cause of action plaintiff alleged the partnership of the defendants and that they were engaged in the business of buying and selling, wholesale and retail, various dairy products and other merchandise, such as candy, cigars and cigarettes, operating various stores of the same nature throughout the city of Lincoln. The defendant with whom the transactions in this case were had was Earl U. Wood, who will be hereinafter referred to as Wood, and who acted for himself and the partnership.

Pursuant to a contract between the plaintiff and defendants, dated May 3, 1935, plaintiff opened a store for business at 931 South Twenty-seventh street in the city of Lincoln June 5, 1935, and entered the employment of defendants as manager, operating the store until March 22, 1941. He alleged that he performed all of the terms and agreements on his part, but that defendants neglected to do the things they agreed to do in such oral and written agreement. Plaintiff then detailed facts to disclose that he had had no previous business experience in the city and placed reliance upon the representations made by defendant Wood, which were inducements for plaintiff to operate the store; that such representations were false and untrue, made for the purpose of defrauding and injuring the plaintiff; that plaintiff, relying upon such representations and believing them to be true, accepted employment, and that defendants so induced the plaintiff, by various acts and artifices, false and fraudulent statements, to enter such employment. It was agreed that upon the sale of milk plaintiff was to receive a commission of one cent a quart. This amount he received until about eight months after the opening of the store when the commission was changed to one-half cent a quart, the defendants representing to plaintiff that they were compelled to pay higher sums for the merchandise, business was falling off, and there was a milk-and-cream war on among various firms in the same locality, making it necessary for them to reduce plaintiff's commission in order

to compete and carry on the business, which was losing money. Wood stated that he had negotiated with other firms in a similar business to meet and stabilize prices and regulate the business competition, to again put the business on a paying basis and reduce the overhead. Plaintiff pleaded that, relying on such fraudulent representations of the defendants, he was injured thereby, and prayed for damages in the sum of $2,000.

The third cause of action incorporated the allegations of the first cause of action with reference to the fraud practiced by the defendants against plaintiff, and was a *quantum meruit* pleading for services, and prayed for $2,000. The second cause of action incorporated all of the elements pleaded in the first cause of action and was for the reasonable value of services in selling merchandise, consisting of candy, cigars, cigarettes and tobacco.

Defendants' answer admitted the nature of the business, the employment of the plaintiff, the contract, and denied the fraud; alleged that there were no oral conditions or stipulations to the agreement; that after it had been entered into the commissions were agreed upon between the parties; that after eight months had elapsed Wood informed the plaintiff that the original commission of one cent a quart on milk would be cut to a half cent, because business was falling off, and defendants were obliged to pay a larger sum for merchandise; further, that plaintiff informed Wood that he was agreeable to the modified commission schedule, and thereafter the sale of products was made by the plaintiff in accordance with the modified schedule of commissions. The answer was substantially the same to the third cause of action, and, with reference to the second cause of action, it admitted that merchandise, such as candy and tobacco, was sold by the plaintiff actually for the purpose of promoting and increasing the sale of milk and other dairy products and promoting business generally. All other averments of the third cause of action were denied.

The contract, attached to the amended petition and made a part thereof, is dated at Lincoln, Nebraska, May 3, 1935.

It designated the parties to the agreement, the place of business, and that plaintiff made a deposit of $200, acknowledged the receipt of this amount; then stated that Earl U. Wood, the managing operator of the defendants, for and in their behalf, was to equip the substation with everything necessary for its complete operation, to pay the light, heat, rent, refrigeration, and to supply the merchandise for sale at the location. Plaintiff was to furnish the help necessary to keep the business open from 7 a. m. to 9 p. m., and longer if business warranted, plaintiff to be the judge. Plaintiff, for his compensation, was to work on a commission basis, the same to be agreed upon from time to time by Wood and plaintiff, and to be taken out on the checking of each day's business, to be done the following morning; the plaintiff to be responsible for the shortage of merchandise except that part which was spoiled or not up to standard; the contract to continue so long as the same was mutually satisfactory to both parties. In case the plaintiff became dissatisfied and desired to terminate the relationship, he could do so immediately, and 90 days thereafter $200 was to be returned to him. A similar provision, so far as the defendants were concerned, was incorporated and, if taken advantage of, would require the return of $200 with 5 per cent interest thereon.

The record discloses that plaintiff was paid commissions in full on the basis of one cent a quart for about the first eight months; that he operated the store, and that from February 1, 1936, to March 1, 1941, 372,405 quarts of milk were sold by the plaintiff upon which a commission of one-half cent a quart was allowed, which the record shows he had received and had taken this amount for a period of nearly six years before terminating the contract. It will be noted that the contract provided that by mutual agreement the commission could be changed. It is quite apparent that, by receiving this amount of money for such period, the plaintiff acquiesced in and agreed to the change. There is evidence that the plaintiff repeatedly requested the defendants to replace the half cent commission for each quart of

milk sold, and plaintiff testified he was led to believe that the reduction in the commission was temporary and it would be replaced. He told defendants' bookkeeper that he wished the defendants would replace the one-half cent commission which had been withheld; he stated that no final settlement was reached and that he had furnished defendants a written statement. He further testified that he and his wife, subsequent to January, 1936, complained to Wood and were told they had nothing to worry about, but that Wood kept putting them off. Wood testified that they were operating the business with little money, but that plaintiff had been paid his commission in full each and every week and that plaintiff had accepted such commission without complaint.

The testimony with reference to the sale of candy and tobacco shows the sales of candy in the amount of $1,569.28; tobacco sales $1,318.31; that defendants' gross profit in candy sales was $207.07, or 15 per cent, and on tobacco $131.50, or 11 per cent; total profit on the two items $339.57; the expense involved in selling the merchandise, including sacks and scales to handle the items and a tobacco license, which was $15 a year; the cost of defendants doing business at the station involved was 18 per cent of the sales in winter months and 10 per cent of the sales during the summer months. There is further testimony that this merchandise was placed in the plaintiff's place of business in order to promote sale of dairy products, and that no agreement of any kind was reached as to plaintiff's receiving any compensation for the sale of this kind of merchandise. The foregoing constitutes the essential elements of plaintiff's evidence.

Plaintiff predicates error on the sustaining of defendants' motion for a directed verdict. In considering the error complained of, the following authority is pertinent:

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said

party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163. See, also, *Zielinski v. Dolan*, 127 Neb. 153, 254 N. W. 695; *In re Estate of Skade*, 135 Neb. 712, 283 N. W. 851; *Bowerman v. Greenberg*, 142 Neb. 721, 7 N. W. 2d 711; *Long v. Railway Mail Assn.*, 143 Neb. 949, 12 N. W. 2d 113. We proceed with the foregoing rule in mind.

Plaintiff contends that in this case there were controverted issues of fact to be submitted to the jury, in that Wood withheld one-half cent commission for each quart of milk sold, which he would eventually raise to the original compensation agreed upon, continually informing the plaintiff that the defendants were "hard up," needed time and would "catch up" on the back payments, leading plaintiff to believe that Wood would abide by his statements in such respect; and, with reference to the sale of candy and tobacco, that Wood had informed plaintiff he would figure out the commission for the reasonable value of the services in selling such merchandise. Plaintiff claims that the profit of defendants on those items was $339.57, and that he is entitled to a commission for the value of the services rendered.

We refer to the contract and that part of it which reads: The plaintiff "for his compensation is to work on a commission basis, the same to be agreed upon from time to time between the said Earl Wood and" the plaintiff. The commission was changed, as heretofore stated, to one-half cent a quart, and this amount plaintiff received in full for a period of nearly six years after the change was made. We conclude that plaintiff is in no position at this time to orally dispute the agreement. It is obvious from a careful reading of plaintiff's amended petition that he based his action upon fraud, rather than upon contract, and pleaded all of the elements of fraud. As held in one of the numerous decisions in this state to the same effect:

"To maintain an action for damages for false representation, the plaintiff, in substance, must allege and must prove

by a preponderance of the evidence the following elements: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied on and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of the damages." *Peterson v. Schaberg*, 116 Neb. 346, 217 N. W. 586.

Having pleaded fraud, the plaintiff was obligated to prove it, as disclosed by numerous decisions of this court, one of which held:

"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." *Ralston Purina Co. v. Cox*, 141 Neb. 432, 3 N. W. 2d 748.

"The rule of law is inflexible that the allegations and the proof, *allegata et probata*, must agree." *Traver v. Shaefle*, 33 Neb. 531, 50 N. W. 683. See, also, *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314; *Imhoff v. House*, 36 Neb. 28, 53 N. W. 1032; *Ayers v. Wolcott*, 66 Neb. 712, 92 N. W. 1036.

The defendants' contention is that the trial court properly directed a verdict against plaintiff, for the reason that this action was brought as one founded on fraud and the plaintiff failed to establish fraud; citing *Reid v. Brechet*, 117 Neb. 411, 220 N. W. 590, wherein this court held:

"In a law action to recover damages growing out of a conspiracy to defraud, and such being the only issue tendered by the pleadings, the evidence of such conspiracy being insufficient to justify the trial court in submitting the case to the jury, it is error to submit the case to the jury on the theory of liability growing out of partnership relation." In determining this question, the court found it necessary to resort to the pleadings to ascertain the nature and theory of the action under which the plaintiff sought recovery and to analyze the pleadings. The function of the pleadings is to state the issues involved and the facts upon which the parties rely for their success in the action. The court in

the cited case went on to say: "Certainly the defendants in this case would have a right to know upon what theory the plaintiff was going to proceed and a right to rely upon plaintiff's statement of the case in order that the defendants might meet the plaintiff's evidence. The evidence must support the allegations in the petition or judgment in plaintiff's favor cannot be sustained." Citing *Traver v. Shaefle, supra; Elliott v. Carter White-Lead Co.*, 53 Neb. 458, 73 N. W. 948.

The plaintiff's criticism that the court in *Reid v. Brechet, supra,* considered the defendants' answer only as a general denial, is not warranted. While the contention was made that the defendants were not misled on the pleadings and that the defendants' pleadings were sufficient to join the issue on contract, and in their answer set forth their contractual defense, it is true that the very nature of the case required an answer to the contract pleaded, to show its relation with reference to the broad charges of fraud by the plaintiff upon which he premised his action. The defendants had a legal right to expect and anticipate that the plaintiff would proceed in accordance with the causes of action as pleaded in his amended petition. The testimony failed to establish any right of recovery in fraud, and the trial court properly directed a verdict for the defendants. The contract was mutual; plaintiff could have terminated it immediately and was not under obligation to accept the reduction made by the defendants for a number of years.

"Where the evidence is insufficient to sustain a verdict for plaintiff, the dismissal of the action is not erroneous." *Beber v. Beebe & Runyan Furniture Co.*, 97 Neb. 446, 150 N. W. 204.

While the plaintiff attempted to lay a foundation for the reasonable value of the services rendered for selling the candy and tobacco, it is apparent that he lacked knowledge of all of the elements necessary to disclose the reasonable value of such services. He did not take into consideration the overhead involved but premised his testimony merely on the cost price of the merchandise and the retail sale price

thereof. A proper objection was made to this testimony which the court sustained. No other testimony to show the reasonable value of such services was offered by plaintiff.

From an analysis of the record, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

GRACE TITE, APPELLEE, V. OMAHA COLISEUM CORPORATION, APPELLANT.

12 N. W. 2d 90

FILED DECEMBER 3, 1943. No. 31595.

1. **Theaters and Shows.** An operator of a place of public amusement is not an insurer of the safety of his patrons, but he owes them that duty which under the particular circumstances is ordinary and reasonable care for their safety.
2. ———. The duty resting on such operator requires him to warn his patrons of any dangers known to him, or which he should know in the exercise of reasonable care, and not known to his patrons, unless such dangers are observable to them in the exercise of reasonable care for their own safety.
3. ———. Evidence that the operator constructed and operated a hockey rink in conformity with the custom and approved methods of prudent operators in the business did not conclusively fix the standard of care of the operator as a matter of law, but is evidence only, which the jury may consider with other evidence, under proper instructions, in determining whether due care was exercised by the operator.
4. ———. A spectator at a hockey game assumes the risk of such dangers as are incident to the playing of the game of which he had knowledge or which should have been obvious and apparent to a reasonable and prudent person under the circumstances.
5. **Negligence.** A spectator at a game of hockey must exercise due care in protecting himself against known dangers or such dangers as should be known and appreciated by a reasonable person in the exercise of due care.
6. **Theaters and Shows.** The manner of the construction of a hockey arena and the dangers incident to the spectators attending a game of hockey are not so general as to be matters of common knowledge.

7. ———. A spectator at a hockey game who voluntarily places himself in a box seat not protected by a screen does not as a matter of law assume the risk of being hit by a flying puck from the playing arena.
8. **Trial.** Instructions examined and *held* that errors relating thereto require the granting of a new trial.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Swarr, May & Royce, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL, and WENKE, JJ., and POLK and NUSS, District Judges.

POLK, District Judge.

This is an action for personal injuries received by plaintiff and appellee while attending a hockey game being conducted by the defendant and appellant in the city of Omaha, Nebraska. On trial the case was submitted to a jury. From a judgment in favor of plaintiff and appellee and an order overruling a motion for a new trial defendant and appellant prosecutes an appeal.

The record shows that appellee, together with her husband and another married couple, attended the hockey game on the evening of January 1, 1941. It was an amateur exhibition with no reserved seats being sold. The appellee's party purchased tickets that entitled them to sit in any unoccupied seats in the coliseum, including the box seats next to the playing arena. They were not ushered to any particular seats and selected seats in one of the boxes. There was a wire screen in front of the seats at the end of the playing arena but none in front of the box and side seats. Around the arena there was erected a board wall about three and one-half feet high. Appellee's party occupied these box seats immediately behind this wall and during the second game a flying puck from the playing arena struck appellee in the face, causing injuries for which she seeks recovery in this action.

In the petition negligence is attributed to the appellant

for its failure to erect a screen in front of the box seats and its failure to give any warning of the danger of pucks leaving the field of play and going into the stands. The appellant answered, alleging freedom from any negligence and contributory negligence on the part of the appellee, and further alleged that the rink with all appurtenances were standard in construction and conformed to those in common and general use in all well managed and prudently operated coliseums in the country; and that appellee's injury was the result of risks and dangers which were incident to the sport and inherent therein, that said risks and dangers were open, apparent and obvious and in the exercise of ordinary care were, or ought to have been, known to and appreciated by her and they were by her voluntarily assumed.

Appellant assigns error of the trial court in its refusal to direct a verdict in its favor after the close of all evidence, and in the giving of certain instructions on its own motion and its refusal to give certain instructions requested by appellant.

We shall first consider the assigned error of the trial court in its failure to direct a verdict for the appellant. It is the contention of the appellant that inasmuch as the undisputed evidence shows that the playing arena with all the equipment, including the arrangement of seats and screens, were in strict conformity with the customs and usages of hockey arenas throughout the country, there was no evidence of negligence and the case was improperly submitted to the jury. Appellee insists that the failure of appellant to erect a screen in front of the box seats or to give any warning of the danger of pucks leaving the field of play and going into the stands was evidence of negligence on the part of the appellant, and therefore the case was properly submitted to the jury, and that the hockey business, itself, cannot determine the standards of due care in the erection and operation of an arena, and that the question as to whether the arena in question was erected and conducted by the appellant free from negligence was a question for the jury under all the facts and circumstances of the case. In addition

appellant insists that under the defenses of contributory negligence and assumption of risk as heretofore set forth the appellee could not recover and that for all of the foregoing reasons the trial court should have directed a verdict for the appellant.

An operator of a place of public amusement is not an insurer of the safety of his patrons, but he owes them the duty which under the particular circumstances is ordinary and reasonable care for their safety. Such duty requires him to provide reasonable protection from and to warn his patrons of any dangers known to him, or which he should know in the exercise of reasonable care, and not known to his patrons, unless such dangers are observable to them in the exercise of reasonable care for their own safety. Shearman and Redfield, Negligence (Rev. ed.) sec. 779; 2 Restatement, Torts, sec. 343; 38 Am. Jur. 754, sec. 96; *Welsh v. Jefferson County Agricultural Society*, 121 Neb. 166, 236 N. W. 331; *Emery v. Midwest Amusement & Realty Co.*, 125 Neb. 54, 248 N. W. 804; *James v. Rhode Island Auditorium, Inc.*, 60 R. I. 405, 199 Atl. 293; *Ivory v. Cincinnati Baseball Club Co.*, 62 Ohio App. 514, 24 N. E. 2d 837; *Danielson v. Reeves*, 211 Minn. 491, 1 N. W. 2d 597; *Hudson v. Kansas City Baseball Club, Inc.*, 349 Mo. 1215, 164 S. W. 2d 318, 142 A. L. R. 858; *Lemoine v. Springfield Hockey Assn., Inc.*, 307 Mass. 102, 29 N. E. 2d 716; *Shanney v. Boston Madison Square Garden Corporation*, 296 Mass. 168, 5 N. E. 2d 1; *Waddel's Admr. v. Brashear*, 257 Ky. 390, 78 S. W. 2d 31, 98 A. L. R. 553.

Is this standard of care as outlined by the foregoing authorities fulfilled as a matter of law by evidence that the hockey rink was constructed and operated in conformity with the custom and methods of prudent operators in the business throughout the country? In other words is this standard of care fixed exclusively by the practices of prudent operators, or are these practices evidence to be used by the jury together with other evidence in determining the question of due care? Appellant cites a number of Nebraska cases which, it insists, show that this state has adopted

the position that the standard of care is fixed by the custom and usages of the business, and that a jury is not free to fix a standard different than that established generally by prudent operators in the particular business. These cases are: *Missouri P. Ry. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 N. W. 821; *O'Neill v. Chicago, R. I. & P. Ry. Co.*, 66 Neb. 638, 92 N. W. 731; *Weed v. Chicago, St. P., M. & O. Ry. Co.*, 5 Neb. (Unof.) 623, 99 N. W. 827.

In the case of *Missouri P. Ry. Co. v. Lewis, supra,* a recovery was denied an injured employee for the reason that no evidence was introduced to show that blocking switches was such a safeguard as was generally recognized by those engaged in operating railroads. It was held in the case of *Omaha Bottling Co. v. Theiler, supra,* that where it was shown that the injury to an employee was due to excessive pressure in a bottle, rather than providing a screen for protection, that the duty an employer owed his employee was that "care required by the usual and ordinary usage of the business." In the case of *O'Neill v. Chicago, R. I. & P. Ry. Co., supra,* it was held that the company was not liable to one of its employees for an injury received from an unblocked guard rail for mere error of judgment in furnishing structures and appliances for the use of its servants in the prosecution of its business. The court said: "The servant assumes the risks incident to the nature of his employment. Among these is the danger of error of judgment by his employer in the choice of tools and mechanisms with which his tasks are to be performed, * * * ." In *Weed v. Chicago, St. P., M. & O. Ry. Co., supra,* the court said an allegation of negligence against the company could not be maintained by an injured employee for the reason that the car on which he was injured "was constructed, equipped, and had all the appliances that cars of its class have on all railroads."

In Volume 68, American Law Reports, page 1400, there appears an exhaustive note under the title "Custom as a Standard of Care." In this note cases involving master

and servant and other negligence cases are examined and discussed. As a preliminary statement the author says on page 1401: "Where the question does not arise between master and servant, the usual holding is that conformity to custom is not, in itself, the exercise of due care." And again on page 1416 he says: "While the authorities make little attempt expressly to distinguish cases arising between employer and employee from other negligence cases, the cumulative effect of the decisions, as a whole, is to emphasize general practices as being of more importance in determining the liability of the master to his servant, than in determining the liability of other persons, for alleged negligence. The proposition that the master is not liable if he furnishes appliances of a sort in general use, and conducts his business in a manner conforming to the usage of others engaged in the same business under similar circumstances, is clearly traceable in many of the cases to the basic rule that the servant assumed the ordinary risks of his work, such ordinary risks evidently being deemed by many courts to be those usual to the employment."

This recognition of the basis of the rule in master and servant cases will be found in the quoted language from *O'Neill v. Chicago, R. I. & P. Ry. Co., supra.* There is sound reason for this recognition. A duty to a servant, familiar with the construction and operation of appliances used in his work, is obviously different from that duty owed to the public generally.

While the rule that custom and usages of business establish a standard of care has been recognized in other states outside the field of master and servant cases, it has not, to our knowledge, been recognized in this state. As a matter of fact this court in the case of *Albrecht v. Morris*, 91 Neb. 442, 136 N. W. 48, refused to hold that the establishing of a custom of leaving trenches for water pipes open under certain conditions would constitute a complete defense to an allegation of negligence. The position taken by the courts in both master and servant and negligence cases is found in 38 American Jurisprudence, 680, sec. 34, where it is said:

"Although there is considerable uncertainty in some of the decisions as well as some authority directly in conflict, the rule which has been supported generally by most of the authorities and which appears to be sound is that conformity to custom is not in itself the exercise of due care. The weight of authority supports the view that since negligence is the failure to do that which an ordinarily prudent man would do, or the doing of that which an ordinarily prudent man would not do, under the same circumstances, an ordinary custom, while relevant and admissible in evidence on the issue of negligence, is not conclusive, especially where the custom is clearly a careless or dangerous one."

The majority view is succinctly stated in the well known case of *Texas & P. Ry. Co. v. Behymer,* 189 U. S. 468, 23 S. Ct. 622, where it is said: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

In the case of *Thurman v. Ice Palace,* 36 Cal. App. 2d 364, 97 Pac. 2d 999, it was held that even though the evidence showed that the Ice Palace had constructed and equipped a skating rink in conformity to the general custom and usage prevailing throughout the United States and Canada, the question of whether the company was negligent in not providing either notices warning patrons of danger from flying pucks or screens to protect the spectators in case a puck should be driven above the railing surrounding the rink is one of fact for the jury. The same position is taken by the court in the case of *James v. Rhode Island Auditorium, Inc., supra,* where the defendant argued that it had discharged its full duty when it constructed its hockey rink like other hockey rinks in various cities. The court said: "We do not agree with this contention. The practice in other places and the opinion of the expert in this case are circumstances entitled to proper consideration as evidence, but they are not conclusive."

In view of the holdings in the California and Rhode Island cases and of the courts generally in all classes of cases and

the apparent reason given for the holding in the Nebraska case of *O'Neill v. Chicago, R. I. & P. Ry. Co., supra,* to wit, that the servant assumes the risks incident to the nature of his employment, we are constrained to hold that the rule should not be extended to this case.

We conclude that evidence that an operator constructed and operated a hockey rink in conformity with the custom and approved methods of prudent operators in the business did not conclusively fix the standard of care of the operator as a matter of law, but is evidence only which the jury may consider with other evidence, under proper instructions, in determining whether due care was exercised by the operator, and that the issue of whether or not the appellant was negligent was properly submitted to the jury.

In its answer the appellant has pleaded the defenses of contributory negligence and assumption of risk. The appellee has joined issue with the answer and the case was tried and submitted to the jury on all defenses without objection. In treating the defenses of contributory negligence and assumed risk in relation to the motion to direct a verdict it can be said that these defenses in this case overlap and any conclusion reached herein pertaining to the conduct of the appellee applies with equal force to each defense. We have recently held in the case of *Landrum v. Roddy,* 143 Neb. 934, 12 N. W. 2d 82, that the defense of assumption of risk is not inconsistent with the defense of contributory negligence and that the two defenses may arise under the same state of facts. The position of the appellant is that under either or both defenses appellee's conduct was such that a verdict should have been directed against her. Under both defenses appellant insists that appellee placed herself and remained in a position of danger after she knew, or in the exercise of ordinary care should have known, that she was in a dangerous situation which required some affirmative act on her part for her safety.

A spectator at a hockey game assumes the risk of such dangers as are incident to the playing of the game of which he had knowledge or which should have been obvious and

apparent to a reasonable and prudent person under the circumstances. An operator owes the spectator reasonable care for his safety but as a concomitant to this duty the spectator owes the duty to protect himself against known dangers or such dangers incident to the game as would be apparent to a reasonable person in the exercise of due care. 38 Am. Jur. 845-848, secs. 171-173; 2 Restatement, Torts, sec. 466; Shearman and Redfield, Negligence (Rev. ed.) sec. 135; *Edwards v. Kirk*, 227 Ia. 684, 288 N. W. 875; *Lemoine v. Springfield Hockey Assn., Inc., supra; James v. Rhode Island Auditorium, Inc., supra.*

Appellant refers to a number of cases in which spectators at baseball games were denied recovery, and, by analogy after reviewing the manner in which the playing arena of both games are constructed, the way the games are played, and the dangers incident thereto, contends that spectators at hockey games should be treated in law as occupying similar positions to spectators at baseball games. In other words, that the games of baseball and hockey and their incidental dangers to spectators are equally familiar to the attending public and that the mutual duties of operator and patron are in legal contemplation the same in both games. Inferentially the position is taken that the law obtaining in baseball cases is unique for this particular game, and should likewise be applied to the game of hockey. A few of the leading baseball cases, including those cited by the appellant are: *Keys v. Alamo Baseball Co.*, 150 S. W. 2d (Tex. Civ. App.) 368; *Williams v. Houston Baseball Assn.*, 154 S. W. 2d (Tex. Civ. App.) 874; *Hudson v. Kansas City Baseball Club, Inc., supra; Brisson v. Minneapolis Baseball & Athletic Assn.*, 185 Minn. 507, 240 N. W. 903; *Wells v. Minneapolis Baseball & Athletic Assn.*, 122 Minn. 327, 142 N. W. 706; *Ivory v. Cincinnati Baseball Club Co., supra*; *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S. W. 1076.

What is this distinguishing feature which in appellant's opinion exists in baseball cases? An analysis of these cases reveals a definite trend of the courts to deny recovery for

injuries received by spectators from balls going into unscreened stands from the playing field. The basis of the denial seems to be placed on the conduct of the spectator and culpability on his part. It seems to be predicated on the principle that a spectator with knowledge of the dangers incident to the playing of the game assumes the risk of being injured thereby, and this without regard to any negligence on the part of the operator. In those cases, however, in which the spectator denied actual knowledge of the dangers a recovery was not permitted because it was held that the circumstances surrounding his attendance were such and the game of baseball was so commonly known that knowledge was imputed to him and he was held to have assumed the hazards of the game. Seemingly the tendency of the courts is to hold that in all baseball cases involving injuries to spectators from balls going into the unscreened stands from the playing field the question of knowledge, either actual or constructive, is one of law for the courts. While in some cases there was evidence that would show knowledge, the courts in deciding that the spectator had knowledge as a matter of law emphasized the fact that there is a common knowledge of baseball and its incidental dangers. This common knowledge seems to have been the deciding factor in causing the courts to view the question as one of law for the court rather than one of fact for the jury. The distinction which appellant perceives in baseball cases does not show a different rule of substantive law as respects the duties of the operator or spectator. It merely shows establishment of knowledge of danger which precludes recovery is arrived at in a different manner.

Should this doctrine of common knowledge of baseball and the dangers incident to the playing of the game be extended to hockey cases? This question has been considered and answered in very few cases. They are cited in the briefs and are as follows: *Hammel v. Madison Square Garden Corporation*, 156 Misc. 311, 279 N. Y. Supp. 815; *Ingersoll v. Onondaga Hockey Club, Inc.*, 245 App. Div. 137, 281 N. Y. Supp. 505; *Elliott and Elliott v. Amphitheatre Ltd.*,

(Man.) (1934) 3 W. W. R. 225; *Shanney v. Boston Madison Square Garden Corporation, supra; James v. Rhode Island Auditorium, Inc., supra; Lemoine v. Springfield Hockey Assn., Inc., supra*; *Thurman v. Ice Palace, supra*; *Thurman v. Clune*, 51 Cal. App. 2d 505, 125 Pac. 2d 59.

The New York court has announced in two cases that it fails to find any distinction, in so far as the mutual duties of operators and spectators are concerned, between the games of baseball and hockey, and has followed the rule found in baseball cases heretofore discussed.

In the case of *Ingersoll v. Onondago Hockey Club, Inc., supra*, in an opinion by a divided court, we find the following language: "It seems to me that appellant in attending a hockey game occupied precisely the same status as a spectator at a baseball game and that the same rules should be applied in each instance. There was no obligation on the part of respondents to protect appellant against a danger incident to the entertainment which any reasonable spectator could foresee and of which she took the risk. The risk of being hit by a baseball or by a puck at a hockey game is a risk incidental to the entertainment and is assumed by the spectators."

In the Canadian case of *Elliott and Elliott v. Amphitheatre Ltd., supra*, recovery was denied the plaintiff because it was shown that he had played hockey for a number of years and must be held to have a thorough knowledge of the risks assumed by the public. Actual knowledge having been found to exist, this case is of little value in the instant case where the question of knowledge is a controverted issue.

The states of Massachusetts, Rhode Island and California have denied the applicability in hockey cases of the rule followed in baseball cases. In the case of *Shanney v. Boston Madison Square Garden Corporation, supra*, the court in referring to the New York hockey cases said: "We are not inclined to agree with the two decisions last mentioned. Cases as they arise must be decided by the application of general principles to the particular facts shown and not by arbi-

trary classification according to the names of various games."

In the case of *James v. Rhode Island Auditorium, Inc., supra,* the court said: "We find considerable difficulty in reaching the conclusion that the average person has a similar knowledge of the risks incident to hockey and to baseball. The games are fundamentally different. In hockey the puck is supposed to be driven *along* the ice towards the goal at each end of the playing surface while in baseball the ball is pitched through the air to be batted out toward the playing field, far or near, on the ground or in the air, according to the skill of the batter or to chance. The average person of ordinary intelligence in this country is so familiar with the game of baseball that it is reasonable to presume that he appreciates the risk of being hit by a pitched or batted ball without being specially warned of such danger. Therefore, a spectator at this nationally known game may ordinarily be held to have assumed such a risk. It is going quite far to assume, however, that the average person has the same knowledge respecting the risk of being hit by a flying puck in a hockey game played in a specially constructed rink, which, according to the testimony of the defendant's expert, is not yet fully standardized in all details. Furthermore, the game of ice hockey in rinks is of rather recent origin in this country. The dangers incident to the game may be or become known to those who attend such performances, but we have great difficulty in believing that those dangers are a matter of common knowledge in the community."

And again in the case of *Thurman v. Ice Palace, supra,* we find the following language: "The rule which has apparently uniformly been applied to baseball cases is, we believe, inapplicable to ice hockey games, for the reason that the average person of ordinary intelligence in this country is familiar with the game of baseball and it is reasonable to presume that such person appreciates the risk of being hit by a pitched or batted ball without being specifically warned of such danger. Hence a spectator at this nationally known

game may ordinarily be held to assume such risk. However, the average person does not have the same knowledge respecting ice hockey or the risk of being hit by a flying puck while observing such a game."

Appellant attempts to distinguish the instant case, where it appears that appellee had attended a hockey game at a previous season, and one game and a part of another on the evening she was injured, from the cases in Massachusetts, Rhode Island and California, by pointing out that in these cases, the persons injured were attending games for the first time. We do not think this position is well taken. It will be noted that in the New York case of *Ingersoll v. Onondaga Hockey Club, Inc., supra,* cited by appellant, a recovery was denied even though the plaintiff there was attending her first hockey game, the court saying that this did "not change the rule of liability so far as respondents are concerned."

It would seem that the courts of Massachusetts, Rhode Island and California have refused to follow, in hockey cases, the "common knowledge" rule found in baseball cases because of the apparent difference in the knowledge of the games and the dangers incident thereto.

In view of the novelty of the game of hockey in this state, and the acquaintanceship and experience of appellee with the game and its incidental dangers, as shown by the record, we feel that the question of her knowledge of the game and its dangers, and her entire conduct as it related to the issue of dereliction of duty on her part was a matter for the consideration of the jury.

We hold that the trial court did not commit error in overruling appellant's motion to direct a verdict in its favor.

The remaining assignments of error relate to the giving of certain instructions by the trial court and its refusal to give certain requested instructions of the appellant. Assignments II, III and IV complain of the failure of the court to properly instruct the jury on the duties of the appellee under the defenses of contributory negligence and assumption of risk. The court told the jury in instruction No. VI

that the appellee "did not assume the risk of being struck by a flying puck, unless you find from the evidence that plaintiff knew and appreciated the danger of being struck by such puck." This is not a complete statement of her legal duties. The jury should have been informed in substance that a spectator assumes the risk of dangers incident to the playing of the game which she knew or which a reasonably prudent person under the circumstances should have known or foreseen. The duties of the appellee, under the defense of contributory negligence, likewise should have been defined. In this connection the jury should have been told, in substance, that her duties required her to exercise reasonable care in protecting herself against known dangers, if any there were, and such dangers incident to the playing of the game that should have been known and appreciated by a reasonable person in the exercise of due care. This court has recently held in the case of *Grantham v. Watson Bros. Transportation Co.*, 142 Neb. 367, 9 N. W. 2d 157, that "Want of ordinary care, and not knowledge of danger, is the test of contributory negligence." We hold that the failure to properly instruct the jury on the duties of appellee as outlined was prejudicial error.

In instruction No. XI the court instructed the jury on the law under the comparative negligence statute. The jury were told in this instruction and a supplemental instruction that if the plaintiff's negligence was slight in comparison with the negligence of the defendant the plaintiff could recover. In instruction No. XI, however, in addition to the foregoing, the jury were told that the plaintiff could recover if her negligence was slight and the defendant's negligence was gross in comparison. As to the correctness of instruction No. XI and the supplemental instruction we have serious doubt. However, in view of the fact that a retrial must be had for errors above set forth, we do not feel required to pass on this matter.

The court did not err in refusing to give appellant's requested instruction No. V. We think instruction No. VII given by the court correctly submitted to the jury the law

relating to evidence of custom and usages of the business.

For the errors of the trial court in giving instruction No. VI and its failure to correctly instruct on the duties of the appellee to which the appellant was entitled under its defenses, the judgment of the trial court is reversed and the cause remanded for a new trial in harmony with the views herein expressed.

REVERSED.

IN RE WILL OF JOHN T. SULLIVAN. MARGARET SULLIVAN, APPELLEE, V. F. EUGENE SULLIVAN ET AL., TRUSTEES, APPELLANTS.

12 N. W. 2d 148

FILED DECEMBER 10, 1943. No. 31605.

1. Trusts. Ordinarily, a trust for the support and maintenance of a named beneficiary can be reached to satisfy the claim of a wife or minor child for support against such beneficiary.
2. ———. The fact that the provisions of a testamentary trust provide that the trustee is under a duty to support the named beneficiary, and the extent of the exercise of such duty is left to the discretion of the trustee, does not defeat the claim of a wife or minor child for support.
3. ———. The extent of the discretion conferred upon a trustee is measured by the settlor's manifestation of intention.
4. ———. Where the settlor provides that the trustee shall have uncontrolled discretion in carrying out the purpose of the trust, the words "uncontrolled discretion" are ordinarily construed as merely dispensing with the standard of reasonableness.
5. ———. Where the exercise of a power by a trustee is required by the terms of the trust or by the principles of law applicable to the duties of trustees, and the trustee fails to act at all, his failure constitutes arbitrary action which the courts will correct in a proper action.
6. ———. Where the court may properly control the exercise of a power by a trustee, but not the discretion to be employed by such trustee, it may do so by directing him to act or refrain from acting, by setting aside the transaction when he has already acted, by holding him liable for the results of his action or nonaction, or, if it be necessary, remove him as such trustee.

7. ———. A court may not, however, substitute its discretion for that reposed in the trustee under the provisions of a testamentary trust.

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

Ellick, Fitzgerald & Smith, for appellants.

Wear, Boland & Nye, contra.

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

CARTER, J.

This is an action to compel the trustees of a testamentary trust to pay to the wife and minor child of the named beneficiary sufficient sums for their support and maintenance. The district court found for the plaintiff and ordered the defendant trustees to pay her the sum of $50 a month from and after December 4, 1941. The defendants appeal.

The record shows that the will of John T. Sullivan was admitted to probate on March 23, 1940, and contained the following provisions pertinent to the present controversy: "to my executors hereinafter named, or their successors, or such executor hereof as may be named by the proper court, I give, devise and bequeath the remaining undivided one-fifth thereof, in trust, however, for the use and benefit of my son, Lawrence P. Sullivan, of Omaha, Nebraska, who is an invalid. My said executor or executors shall securely and properly invest and re-invest said trust estate, or any part thereof available for such purpose, in good and valid investments under orders from the county court in which this instrument is admitted to probate, and they shall apply the proceeds or income therefrom for the proper use, support and maintenance of said son, Lawrence P. Sullivan, as the same is received by them or as his needs may require or necessitate, and for that purpose may use and apply any part or portion of the principal of said trust estate from time to time as in their judgment may be required or necessary therefor, they being the sole judges of such necessity

without applying to the courts for authority so to do, and I declare that said executors shall have full and uncontrolled discretion as to the application of said income and trust estate for the uses aforesaid.

"Upon the death of said son, Lawrence P. Sullivan, I devise and bequeath whatever part of said trust estate remains at his death to the heirs at law of my said son as their absolute property."

The record further shows that Lawrence P. Sullivan, the named beneficiary of the trust, is wholly incapacitated and that there is no possibility of his condition improving. At the time of trial he was being cared for in a hospital, the cost of which, together with that of doctors, nurses and supplies, was approximately $300 a month. There is evidence that the life expectancy of the named beneficiary is about ten years. It is not disputed that the value of the trust estate on September 30, 1942, was $14,825.80.

The plaintiff is the wife of Lawrence P. Sullivan. The record shows that her health is such that she is unable to support herself. Plaintiff has two children residing with her, one of which, a daughter, has reached her majority, and the other, a son, was 18 years of age when the case was commenced. At the time of trial the son was earning approximately $100 a month. The evidence is, however, that the son has a physical deformity which requires constant medical care and attention and which limits his earning capacity. Without going into detail, it was upon this state of facts that the defendant trustees failed to provide support and maintenance from the trust fund for the wife and minor son of the named beneficiary of the trust.

The question appears to be one of first impression in this state, and while the courts of other states have passed upon similar cases, their holdings have not been uniform. We think the general rule is that a trust for the support and maintenance of a named beneficiary can be reached to satisfy the claim of a wife or minor child for support against such beneficiary. Restatement, Trusts, sec. 157. This is so, even if the testamentary provision provides that the

trustee is under a duty to support the named beneficiary and the extent of its exercise is left to the judgment of the trustee. Under such a trust arrangement the trustee may be required by the courts to apply at least the minimum amount, which could reasonably be considered necessary for the support of the beneficiary, to the accomplishment of the settlor's expressed purpose. Similarly, if the trustee undertook to apply more than the maximum amount which could reasonably be considered necessary for the beneficiary's support, the proper court will exercise its processes to restrain such an application of the trust funds by the trustee. But within these limits the power of decision rests with the trustee and the court may not properly substitute its judgment for that of the trustee. *In re Moorehead's Estate,* 289 Pa. St. 542, 137 Atl. 802, and cases therein cited. See, also, *Eaton v. Eaton,* 81 N. H. 275, 125 Atl. 433; *Eaton v. Eaton,* 82 N. H. 216, 132 Atl. 10; *Bucknam v. Bucknam,* 294 Mass. 214, 200 N. E. 918.

Defendants call our attention to the following statement in the testator's will with reference to the powers of the trustees: "and I declare that said executors shall have full and uncontrolled discretion as to the application of said income and trust estate for the uses aforesaid." The extent of the discretion conferred upon the trustees is, of course, measured by the settlor's manifestation of intention. We think a correct statement of the law appears in Restatement, Trusts, sec. 187 (j), wherein it is said: "The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee

acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment." And in Restatement, Trusts, sec. 187 (e) it was further said: "If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee."

Our conclusion in this respect is that the trustees are obliged to carry out the purposes of the trust, but that they are not bound by the usual standard of reasonableness. Their failure to act at all, however, is no less an arbitrary action on their part. *Roats v. Roats,* 128 Neb. 194, 258 N. W. 264; *In re Estate of Vohland,* 135 Neb. 77, 280 N. W. 241. We are of the opinion, therefore, that the trustees are required to act in respect to providing maintenance and support for plaintiff and her minor son in accordance with the provisions of the testamentary trust as construed herein. They cannot ignore testator's desire that "they shall apply the proceeds or income therefrom for the proper use, support and maintenance of said son, Lawrence P. Sullivan," by refusing his needy wife and son support from the trust fund created for his support. While it may be true that the judgment of the trustees, when exercised, is final and not subject to review by the courts under the wording of this particular trust arrangement, they are nevertheless required to act in respect to providing support for a wife and minor son shown to be in need thereof.

This holding makes it necessary for us to consider the

form of the decree or judgment which can properly be entered in a case of this kind. It appears clear at the outset that the court was without authority to determine the amount of support to which plaintiff was entitled from the trust fund. The settlor of the trust prescribed that this was to be a duty of the trustees and clearly the court has no authority to substitute its judgment for that of the trustees. The court can, in a proper case and by proper proceedings, compel the trustees to carry out the terms of the trust in the manner that the settlor contemplated that they would act. But the court cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act and compel such action within such limits.

In *Eaton v. Eaton,* 82 N. H. 216, 132 Atl. 10, the court, in dealing with a similar subject, said:

"The trustee having made no payments for the child's support, the court determined what amount was proper therefor, apparently from the time of the divorce, and ordered the trustee to pay it from the fund. In making this order the court erred. The question was whether the trustee had acted reasonably. If it was found he had not, the appropriate order was to require him to do so. His failure to administer the fund properly did not entitle the court to act as a substitute trustee. It was to the reasonable exercise of the trustee's judgment that the determination of the need of support from the fund was committed. The question is one of fact, which the will provides the trustee should decide, and his decision stands if it is a reasonable one. His failure to act for inadequate reason is unreasonable, and, if persisted in, would be ground for his removal by the court appointing him, but not for any court to act in his place.

"The court, in passing on the reasonableness of the trustee's action by way of revision, may find the least amount that a reasonable judgment would allow, and order payment accordingly. The court may also find the most that would be thus allowed, and enjoin payment in excess thereof. But within the limits of reasonableness the trustee alone

may exercise discretion, since that is what the will requires."

While it is true in the *Eaton* case that the trustee was limited in acting by the rule as to reasonableness and that the trustees in the present case were not limited by such a rule, nevertheless, the power of the court, or want thereof, to substitute its judgment for that of the trustees was no different.

"When the court controls the exercise of a power by the trustee, it may do so by directing him to act or refrain from acting; by setting aside the transaction where he has already acted; or by holding him liable for the results of his action or non-action. The court will sometimes remove a trustee or deny or diminish his compensation where he has abused discretion conferred upon him." Restatement, Trusts, sec. 187 (b).

In our opinion the district court erred in entering a judgment for support money in the amount of $50 a month to be paid from the trust fund. If the wife and minor son were in need of support as the court found, the district court should have entered a decree pointing out the duties of the trustees under the will and directing that they proceed to act in accordance therewith. If and when the trustees proceed to act as required by the trust provisions in the will and as directed by the court, whether their action meets the requirements of the will raises a question which is not now before the court. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in accordance with this opinion.

REVERSED.

ERLE O. ROBBINS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
12 N. W. 2d 152

FILED DECEMBER 10, 1943. No. 31622.

1. Licenses. Where a defendant was prosecuted for unlawfully and feloniously negotiating for sale, assignment, transfer and exchange, certain securities to a person not a dealer in such securities, and which securities were not specifically exempt from the provisions of sections 81-5436 to 81-5475, inclusive, Comp. St. Supp. 1939, without authority from the department of banking of the state of Nebraska, as provided for by law; and where such defendant, relies for his defense on section 81-5440, Comp. St. Supp. 1941, that such securities are exempt for the reason that they have been outstanding and in the hands of the public for a period of not less than five years, and assumes the burden of proof to establish such exemption, produces the evidence to show the exemption, which is not contradicted, the burden of proof has been met by the defendant, as provided in said section, and no crime has been committed by him as charged in the information.
2. ———. Where a defendant is charged with the sale, exchange and offering for sale and exchange, certain securities (named), and engaged in the business of selling, exchanging and offering to sell and exchange securities, without having secured from the department of banking of the state of Nebraska a permit to do business as a broker, as required by law, and the evidence shows beyond a reasonable doubt that such person did not secure from the proper authorities a permit to do business as a broker, a jury's verdict of conviction will not be set aside.

ERROR to the district court for Otoe county: WILMER W. WILSON, JUDGE. *Reversed and dismissed as to counts one and two; affirmed as to count three.*

Thomas E. Dunbar, for plaintiff in error.

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

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

MESSMORE, J.

The plaintiff in error was prosecuted under an informa-

tion containing three counts. Three separate forms of verdict were submitted to the jury, the jury returning a verdict of guilty on each of the three counts. Plaintiff in error was sentenced to three to five years' imprisonment on each count, the sentence to run concurrently. From judgment on the verdict and overruling of the motion for a new trial, the plaintiff in error (hereinafter referred to as defendant) brings the case to this court for review.

The information, in substance, is as follows: On or about May 5, 1941, the defendant unlawfully and feloniously did negotiate for sale, assignment, transfer and exchange of certain securities to one Essie V. McDowell, a person residing in the state of Nebraska, and not a dealer in such securities, being known as "Mid-Continent Cary Trust Units," which securities were and are not specifically exempt from the provisions of sections 81-5436 to 81-5475, Comp. St. Supp. 1939, without authority from the department of banking of the state of Nebraska, as provided by law, contrary to the form of the statutes. The second count is the same as the first, but covers the transfer of certain securities to one Fern Perkins. The third count is that the defendant then and there did sell, exchange, offer for sale and exchange certain securities known as the "Mid-Continent Cary Trust Units" and engaged in the business of selling, exchanging and offering for sale and exchange securities without having secured from the department of banking of the state of Nebraska permits to do business as a broker, as required by article 54, ch. 81, Comp. St. Supp. 1939, contrary to the form of the statutes. The defendant contends that the verdict is not sustained by sufficient evidence as to counts one and two.

Section 81-5440, Comp. St. Supp. 1941, in so far as the first two counts need be considered, exempts securities outstanding and in the hands of the public for a period of not less than five years.

Section 81-5441, Comp. St. Supp. 1941, provides, in substance, that in a criminal case, where any person relies for his defense upon any of the exemptions provided, the bur-

den of proof to establish such exemption is on such person.

In this connection, the defendant offered the evidence, by deposition duly and properly taken, of one V. H. Van Horn, assistant secretary and treasurer of Mid-Continent Cary Trust, Tulsa, Oklahoma. This testimony discloses that the company had outstanding and in the hands of the public since August 1, 1935, 3,860 units, having a stated public sales price of $100 each, and that the complete issue was outstanding and in the hands of the public for a period of over five years; that the first unit was sold August 1, 1935, and the last unit November 21, 1935, and the sale of the last unit completed the sale of all the units in the trust. The witness stated: "Mid-Continent Cary Trust units have never been listed on any registered stock exchange. The original issue was sold by registered over-the-counter dealers and all subsequent dealings between members of the public have been through over-the-counter dealers." There was no evidence *contra* to this offered by the state. The defendant established that the securities described in the information were exempt from the operation of the security law. The convictions on counts one and two are set aside.

Count three was properly proved by the state, and a review of the evidence fully discloses the defendant's failure to comply with the provisions of article 54, ch. 81, Comp. St. Supp. 1941. The conviction on count three is affirmed.

We have searched the record in vain to discover any misconduct on the part of the state's attorney or the trial judge which in any way constitutes prejudicial error.

Objection is made that the trial court marked "Given" on certain instructions which were, in fact, not given. The instructions were peremptory instructions to find the defendant not guilty on all three counts and were offered by defendant's counsel. At most it was a slip of the pen, and the trial judge no doubt intended to write "Refused." The failure of the trial judge to write the word "Refused" on the margin of an instruction requested by defendant is not ground for reversal, where such failure is not prejudicial. See *City of Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62;

Jolly v. State, 43 Neb. 857, 62 N. W. 300; *Home Fire Ins. Co. v. Decker*, 55 Neb. 346, 75 N. W. 841; *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120; *Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640.

We conclude that the first two counts of the information should be dismissed; that the conviction should stand on the third count of the information, and that the sentence of three to five years should be sustained.

JUDGMENT ACCORDINGLY.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. LAURA L. PALMER, ADMINISTRATRIX, ET AL., APPELLANTS: HARVEY T. BRADDOCK, APPELLEE.
12 N. W. 2d 125

FILED DECEMBER 10, 1943. No. 31713.

1. Mortgages. A foreclosure sale will not be set aside on account of inadequacy of price unless it appears that the inadequacy of price is so great as to shock the conscience or justify a finding of fraud, surprise or mistake.
2. ———. On objection to confirmation of foreclosure sale an element to be considered is the question of whether or not a higher bid may be obtained in event of resale.
3. ———. A notice of sale under foreclosure decree is not rendered invalid by including therein more property than was authorized by the decree, in the absence of anything to indicate that any one was prejudiced or misled thereby.
4. Trial. An objection to taxation of costs in the district court must be addressed to that court on motion to retax costs to make it available for review by the supreme court.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed with leave to redeem within 30 days from issuance of mandate.*

Charles A. Fisher, for appellants.

Greydon L. Nichols, William W. Graham, Philip M. Wellman and *Franklin L. Pierce, contra.*

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

YEAGER, J.

This matter comes to this court on objections to confirmation of sale of real estate under decree foreclosing mortgage against certain lands in Dawes county, Nebraska.

The plaintiff in the foreclosure action was the Federal Land Bank of Omaha, a corporation. The defendants were Laura L. Palmer, as administratrix of the estate and as widow of Samuel Palmer, deceased, Arthur H. Palmer and Thomas J. Palmer. The mortgage had been executed by Samuel Palmer in his lifetime and on his death Laura L. Palmer, widow, became administratrix of the estate. Arthur H. and Thomas J. Palmer were heirs of Samuel Palmer. Harvey T. Braddock was the purchaser at the foreclosure sale. The defendants are appellants here and plaintiff and the purchaser at the foreclosure sale are appellees.

The mortgage was against 3595.89 acres of land. Foreclosure decree was entered February 27, 1936, fixing the amount of the lien at $10,379.08 with interest at 8 per cent per annum. On October 1, 1938, the administratrix was adjudged a bankrupt under subsection s, sec. 75 of the National Bankruptcy Act. From this date until December 15, 1942, the lands remained under control of the bankruptcy court. On the latter date by order of the United States district court these mortgaged lands were abandoned to the secured creditors. For the purposes of the bankruptcy proceeding plaintiff's claim as a secured creditor was allowed in the sum of $11,000. On December 8, 1941, out of the bankruptcy proceeding plaintiff was paid the sum of $1,156.03, and on November 10, 1942, it was paid $700.

In 1937 a sale of the land under the foreclosure decree was made but it was never confirmed. The sale was set aside on objection to confirmation by appellants in January, 1943.

On March 26, 1943, plaintiff obtained an order of sale in the amount of the lien with 8 per cent interest per annum

and for costs in the amount of $100.11. Notice of sale under this order was duly published and on May 5, 1943, the sheriff sold the lands to the appellee, Braddock, for $13,100.

On May 8, 1943, appellees served notice on the attorneys for appellants that they would seek confirmation of the sale before the district judge at chambers in Alliance, Box Butte county, Nebraska, at two o'clock p. m., May 20, 1943. On May 19, 1943, appellants filed objections to confirmation.

Hearing was started on the application for confirmation and objections thereto on May 20, 1943, and continued for further hearing on June 1, 1943. Final order was rendered confirming the sale on this latter date, which order was filed June 25, 1943.

Appellants urge that the court erred in confirming the sale. The claimed grounds of error are numerous and will be discussed in the order assigned.

The first assignment is that the court erred in holding that the property sold at its fair value and that at another sale it would not bring a greater amount. This contention is not sustained by the record. Appellants adduced evidence by affidavits that the value of the land was greatly in excess of the bid which was the basis of the sale. Appellees produced witnesses who testified to the contrary. Here was a determinable question of fact. From the record we cannot say that the price was inadequate. Certainly we cannot, on the evidence, say that the price was so inadequate as to shock the conscience or justify a finding of fraud, surprise or mistake. *Metropolitan Life Ins. Co. v. Heany*, 122 Neb. 747, 241 N. W. 525; *E. H. Lougee, Inc., v. Matters*, 124 Neb. 223, 246 N. W. 242; *Hill v. Campbell*, 125 Neb. 585, 251 N. W. 106; *Lorenzen v. Stobbe*, 134 Neb. 796, 279 N. W. 774.

There is another supporting reason why, on the record, this objection of appellants is untenable. There is nothing to indicate that at another sale a greater price would be obtained. The express purpose of the continuance of the hearing on confirmation was to obtain information that a higher bid could be obtained. No information upon which reliance

could be placed was forthcoming. In *Equitable Trust Co. v. Groves,* 133 Neb. 177, 274 N. W. 457, this court considered insufficiency of evidence to prove the prospect of a higher bid in the event of resale as an element in overruling objections to confirmation of sale.

The second assignment is that in the published notice of sale lands other than those described in the decree were included and that thereby an improper sale was had. It is true that other lands, lands belonging to a third person, were erroneously included in the notice, but at the sale and to all bidders the deputy sheriff explained the error and stated that such lands were not being sold. There was no showing and no effort made to show that this in any wise affected the bids or the price paid for the lands properly included in the notice and we find nothing to indicate that the sale was adversely affected by this inclusion. We are of the opinion that this situation is controlled by the principle announced in the third syllabus point in *Northwestern Mutual Life Ins. Co. v. Marshall,* 1 Neb. (Unof.) 36, 95 N. W. 357, as follows: "A notice of sheriff's sale is not rendered invalid by including therein more than the sheriff was authorized to or did in fact sell." The only factual distinction between that case and the one here is that there the order of sale was for lands while the notice included the right to future rents, issues and profits, whereas here the order embraced certain lands and the notice included other lands. The authorities cited by appellants do not contemplate a situation such as the one presented here.

The third assignment is that in the amount for which confirmation was had was included $14.85 for revenue stamps to be placed by the sheriff on the deed to the purchaser. On this point suffice it to say that this was included as an item of costs. This is a matter to be addressed to the district court on motion to retax costs and is not available as an objection to confirmation of sale. *Burton v. State,* 34 Neb. 125, 51 N. W. 601; *Hartford Fire Ins. Co. v. Corey,* 53 Neb. 209, 73 N. W. 674; *Lamaster v. Elliott,* 53 Neb. 424, 73 N. W. 925.

The fourth assignment is that the court erred in holding that the return to the order of sale showed the correct amount due plaintiff. This may be answered by stating that the order of confirmation is silent on this subject.

The fifth assignment is that the court erred in holding that plaintiff was entitled to interest during the time this land was held in the bankruptcy action. Plaintiff was a secured creditor and appellees cite no authority to the effect that interest does not continue to accrue upon the debt of a secured creditor after adjudication in bankruptcy. In *Wilson v. Dewey*, 133 Fed. 2d 962, it is stated: "The rule that no interest accrues on the debts or claims of unsecured creditors after the date of bankruptcy where the bankruptcy estate is insolvent does not apply to the debts or claims of secured creditors." The contention of appellants in this respect is without merit.

There is no merit in the sixth and seventh assignments. These two assignments pertain to the computation of the balance due on the mortgage with interest and costs. We find no error in the computation as presented to the court at confirmation. Credit was duly given for the amounts paid through the bankruptcy court. Also the plaintiff voluntarily reduced the rate of interest of 8 per cent per annum on the decree to 6 per cent and confirmation was made in conformity therewith. In addition to this, deficiency was waived. Thus it will be seen that appellants were not prejudiced but profited by this waiver of interest and of deficiency.

The eighth and last assignment is that the issuance of an order for writ of assistance in the decree of confirmation outside Dawes county was error. This may be answered by the statement that the issuance of the order complained of was of no consequence in any event and was mere surplusage and unnecessary. The decree in foreclosure entered in February, 1936, contained a good and sufficient order for writ of assistance which was in full force and effect at the time of confirmation of sale.

Finding no error in the proceedings the decree of the dis-

trict court is affirmed. Appellants however are allowed 30 days from the issuance of mandate to redeem. On failure to redeem within the time specified deed shall issue.

AFFIRMED.

LESLIE CAROL BARTHOLOMEW, APPELLANT, V. SKELLY OIL COMPANY, APPELLEE.
12 N. W. 2d 122

FILED DECEMBER 10, 1943. No. 31676.

1. **Landlord and Tenant.** In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property.
2. **Principal and Agent.** A person relying upon the act of an agent has the burden of proving such agent's authority.

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

E. F. Armstrong, Lowell E. Hahn and *Edgar Ferneau,* for appellant.

Beghtol, Foe & Rankin and *Lee Kelligar, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL, and WENKE, JJ., and POLK and NUSS, District Judges.

NUSS, District Judge.

Action by Leslie Carol Bartholomew against the Skelly Oil Company to recover damages for personal injuries suffered by the plaintiff as a result of an explosion of gasoline at a filling station where the plaintiff was working. At the conclusion of the evidence the trial court directed a verdict for the defendant and the plaintiff appeals.

It is undisputed in the evidence that the defendant, Skelly Oil Company, owned the filling station in question; that on the 19th day of August, 1940, it leased the same in writing to Dean Turnbull who operated the same. The lease provided in substance that the lessee should do nothing to

injure or damage the property; that on the termination of the lease to return the same to lessor in as good condition as when received, reasonable wear and tear excepted, and to pay for any part which might be destroyed or damaged; to save the lessor harmless against all claims and demands for any loss, damage or injury to person or property caused by the lessee's operation of the station; and that none of the provisions of the lease should be construed as reserving to lessor any right to exercise any control over the business or operations of the lessee or to direct in any manner how such business should be conducted; that the lessor should have no control or direction over the employment or conduct of employees of lessee and that in no event should any person or persons employed by lessee be considered an employee of lessor.

About two months before January 31, 1941, the lessee, Turnbull and his employees noticed excessive gasoline fumes around the station and particularly from the pits where the storage tanks were located. Turnbull testifies that he notified the company thereof; that he "had mentioned the fact to the district manager; I had notified the district representative, his name was T. E. Badger." Being asked by plaintiff's attorney who Mr. Badger was he replied, "He was the district representative for Skelly Oil Company." That he knew him well; that he came to the filling station at fairly regular times, once or twice a week or some times once every two or three weeks. That he mentioned the fumes to Badger at the station and Badger, "suggested I get a plumber." That he, Turnbull, contacted one Steve Combs, a plumber, who made an investigation and informed Turnbull it would cost $5 or $6 to make the repairs. "I told the district representative and he told me to go ahead and hire Mr. Combs." "Q. He instructed you to go ahead and have him make the repair, did he? A. That's right." That Mr. Combs came to the station on the 31st day of January, 1941. That in order to drive the fumes from the pit he obtained an electric fan, took it to the mouth of the pit of the manhole and started the fan going when a spark from the

fan ignited the gas and caused a terrific explosion which killed Combs and injured the plaintiff who was standing about five or six feet away. The plaintiff at that time and for some time prior thereto had been an employee of Turnbull.

The foregoing is all the evidence upon which the plaintiff seeks to hold the defendant company liable.

The accident and plaintiff's injuries in this case were caused by the obvious negligence of the plumber, Combs. The question, therefore, is whether the defendant is responsible for the negligence of Combs. Admittedly if Combs were an employee of the defendant the defendant would be liable for his negligence. It is not claimed that the defendant would be liable otherwise.

Under the lease it was the duty, not of the defendant company, but of Turnbull to make any and all repairs upon or in connection with the premises. In the absence of an express covenant or stipulation in the lease, a lessor is not bound to make ordinary repairs to leased property. *Turner v. Townsend*, 42 Neb. 376, 60 N. W. 587; *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519, 77 N. W. 1102; *Young v. Rohrbough*, 88 Neb. 101, 129 N. W. 167; *Daggett v. Panebianco*, 106 Neb. 572, 184 N. W. 117; *Roberts v. Rogers*, 129 Neb. 298, 302, 261 N. W. 354; 36 C. J. 125; 32 Am. Jur. 522, sec. 657. There is nothing whatever in the lease in this case either directly or indirectly imposing upon the company the duty to make any repairs.

On the contrary, the provision of the lease requiring the tenant to yield the premises at the termination thereof in substantially the same condition as when the tenant took over, completely negatives any duty of the landlord to repair or to pay for repairs. *Turner v. Townsend, supra.* Since the lease imposes upon the tenant, Turnbull, and not upon the company, the duty of making repairs, any claim that the company assumed or undertook to make the repairs in question, must, under the above authorities, be substantiated by a preponderance of evidence to that effect.

Has the plaintiff sustained this burden? We think not.

Mr. Badger could have "suggested I get a plumber," and could have "told me to go ahead and hire Mr. Combs," and could have, indeed, instructed Turnbull to go ahead and have Combs make the repair, as was suggested in the question of counsel, and still not have undertaken to waive the company's rights under the lease or to undertake for the defendant the hiring and paying of Combs. Those statements are entirely consistent with a mutual recognition of the tenant's duty of making the repairs. We believe that a verdict based, as it would have to be, upon that evidence alone could not be sustained.

Assuming, however, that Badger did direct Turnbull to hire Combs for the company and that the company would pay him therefor, there is, nevertheless, an insuperable obstacle. There is a total failure of any evidence to show that Badger had any authority to waive the company's rights under the law and the lease and to undertake or assume for the company a duty which was stipulated against in the lease. Both Turnbull and the plaintiff testify that Badger was "district representative" for the defendant company, but beyond that there is nothing whatever to show his status, duties or authority. It would require sheer assumption to find that Badger had authority to waive the provisions of the lease and to make repairs in the filling station. A person relying upon the act of an agent has the burden of proving such agent's authority. *C. F. Blanke Tea & Coffee Co. v. Eager*, 75 Neb. 562, 106 N. W. 603; *Trephagen v. City of South Omaha*, 69 Neb. 577, 96 N. W. 248, 111 Am. St. Rep. 570; *Ketelman v. Chicago Brush Co.*, 65 Neb. 429, 91 N. W. 282; 14a C. J. 399; 13 Am. Jur. 905, sec. 944.

The evidence fails completely to show that Badger had any authority, actual or ostensible, to bind the company in the making of the repairs. Surely the term "district representative" is too vague to permit an assumption by the court or a jury of the requisite authority.

Since this disposes of the case it is not necessary to consider whether the plaintiff was guilty of contributory neg-

ligence in knowingly remaining within the area of danger just prior to the explosion.

The judgment of the district court is affirmed.

AFFIRMED.

ELIZABETH H. WOLFE, APPELLANT, V. WARREN B. WOLFE, APPELLEE.

12 N. W. 2d 368

FILED DECEMBER 21, 1943. No. 31596.

1. **Trial.** The ordinary meaning of the term "hearing in equity" is the trial of the case, including the introduction of evidence, the argument of counsel, and the decree of the court.
2. ———. Where the word "hearing" is qualified by the word "final," it clearly refers to the proceeding by which the case was absolutely determined and necessarily includes the rendition of the final order or decree.
3. **Divorce.** The entry of a final order or decree is a necessary attribute to a final hearing as used in an order awarding temporary alimony in monthly payments pending the final hearing of said cause.

APPEAL from the district court for Madison county: LYLE E. JACKSON, JUDGE. *Reversed and dismissed.*

Bernard Ptak and *Forrest Lear*, for appellant.

H. G. Greenamyre, contra.

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

CARTER, J.

This is a suit to obtain an injunction against the plaintiff, enjoining the collection of certain temporary alimony payments awarded the plaintiff in a divorce action. The trial court found for the defendant and enjoined the collection of the questioned payments. Plaintiff appeals.

The record shows that Elizabeth H. Wolfe commenced a suit for a divorce against her husband, Warren B. Wolfe, on

November 23, 1938. On December 3, 1938, the district court entered an order requiring the defendant to pay the plaintiff "the sum of $50 per month temporary alimony pending the final hearing of said cause." The cause came on for trial on May 2, 1939, at which time evidence was taken and the rests of the parties noted. The cause was thereupon taken under advisement until July 31, 1939, at which time a final decree of divorce was entered, providing for the payment of alimony and support money in the amount of $1,000, no mention being made of the order for temporary alimony. It is the contention of the defendant that a "final hearing" was had on May 2, 1939, and that under the language of the order, fixing the temporary alimony, no further payments became due after that date. The plaintiff contends that the "final hearing" mentioned in the order fixing temporary alimony was had on July 31, 1939, and that the payments due on the first days of May, June and July, 1939, remain due and unpaid. The sole question is whether the plaintiff wife is entitled to $50 a month on the three payment dates accruing between the formal trial and the date the decree was entered.

The statute providing for temporary alimony states in part: "In every suit brought, either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; * * *." Comp. St. 1929, sec. 42-308. It is evident therefore that the district court in its discretion could have ordered the payment of temporary alimony up to the date the final order was entered and that the meaning of the words "pending the final hearing," as used in the trial judge's order, are in no way limited by the statute providing for the allowance of temporary alimony.

The term "final hearing" seems to have been given several meanings dependent upon the nature of the situation existing when the term was defined. It has been said that the hearing in equity is equivalent to the trial of an action at law. In other words, the term "hearing" applies to suits

in chancery and the term "trial" applies to actions at law. 30 C. J. S. 876, sec. 480. "The ordinary meaning of the term 'hearing in equity' is the trial of the case, including the introduction of the evidence, the argument of counsel, and the decree of the court." *American Grain Separator Co. v. Twin City Separator Co.*, 202 Fed. 202; *State v. Seehorn*, 283 Mo. 508, 223 S. W. 664. See, also, 10 Ency. Pleading & Practice, 8.

In *Babcock v. Wolf*, 70 Ia. 676, 28 N. W. 490, the court said: "The trial of a chancery suit is called a hearing, and, technically considered, this includes not only the introduction of evidence and the arguments of the solicitors, but the pronouncing of the decree by the chancellor; * * * ."

But when the word "hearing" is qualified by the word "final," it clearly denotes the proceeding by which the case was absolutely determined and necessarily includes the final order or decree. A hearing that does not result in a final order is not a final hearing. The one is therefore a necessary attribute of the other. See *Miller v. Tobin*, 18 Fed. 609; *McArthur Bros. Co. v. Commonwealth*, 197 Mass. 137, 83 N. E. 334.

Can it be said that the hearing held on May 2, 1939, was a final hearing in the absence of a final order or decree disposing of the issues of fact and law raised at such hearing? If the decree had been appealed or a new trial required for any reason, could it reasonably be said that the hearing of May 2, 1939, was a final hearing? We think not. The use of the words "final hearing" in the order fixing temporary alimony contemplated the proceeding by which the issues were finally disposed of on their merits. The rendition and entry of the final decree on July 31, 1939, was an integral part of the final hearing and it cannot be successfully contended that the final hearing was completed prior to that date.

In this connection it must be noted that the district court is authorized by section 42-308, Comp. St. 1929, to require the husband to pay temporary alimony during the pendency of the action. While it is within the discretion of the trial

court as to the amount of temporary alimony, if any, which is to be paid by the husband, the presumption is that regularly prescribed payments are to continue during the pendency of the litigation, and it is only when a contrary intent is clearly manifested by the court's order that it will be interpreted in a restricted sense. The statute contemplates that a husband will be required to make it possible for the wife to carry on the suit during the pendency of the litigation, and in the absence of an order clearly restricting monthly payments to a shorter period, it must be presumed that the trial court intended them to run during the pendency of the suit.

We think the trial court erred in failing to dismiss the defendant's petition for an injunction. The permanent injunction granted by the trial court is therefore vacated and the cause of action dismissed. An attorney's fee of $100 is allowed plaintiff's attorneys for services rendered in this court.

REVERSED AND DISMISSED.

MART FENDER, APPELLANT, V. C. F. MCCAIN, APPELLEE.
12 N. W. 2d 541

FILED DECEMBER 21, 1943. No. 31583.

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.
2. **Contracts.** Where a debt has been satisfied and extinguished by the voluntary act of the creditors, making settlement in full, a promise to pay accrued interest on the original indebtedness is not supported by a sufficient consideration, or a moral consideration.
3. **Case Overruled.** The case of *Krause v. Swanson*, 141 Neb. 256, 3 N. W. 2d 407, is hereby overruled in so far as it conflicts with the rules of law announced in the instant case.

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

C. J. Campbell and *J. Jay Marx,* for appellant.

Mockett & Finkelstein, contra.

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

MESSMORE, J.

The plaintiff brought this action to recover on a promissory note, executed April 27, 1937, in the amount of $86, due one year after date, with interest. The history of this note, briefly summarized, is as follows:

Sarah M. McCain and her husband, C. F. McCain, defendant, were indebted to the First Trust Company of Lincoln, as successor-trustee for certain bondholders, including the plaintiff who was interested to the extent of $1,000. The total amount of indebtedness of the McCains was in the sum of $13,415.01, secured by a mortgage on real estate belonging to Sarah M. McCain, wife of the defendant. On or about the 27th day of January, 1934, this mortgage indebtedness was refunded by a new loan, made by the Home Owners Loan Corporation in the sum of $13,515. There remained the sum of $952.08, which constituted accrued and unpaid interest on the indebtedness, and on January 27, 1934, the defendant executed a note in the amount of $952.08, due and payable in two years. Subsequently, in lieu of the previous note and after it became due in 1936, the defendant executed and delivered to each bondholder, as a renewal, his note for his or her proportionate share of the larger amount, with accrued interest, and the note for $952.08 was canceled. The renewal note to the plaintiff, the bondholder in this action, was due in April. The defendant was unable to pay it; thereafter, on the date noted, the present renewal note was executed.

The defendant's answer denied liability on the note sued on, for the reason that the original note and mortgage of the McCains went out of existence at the time of the final settlement entered into on January 27, 1934; alleged that the bondholders agreed to take the H. O. L. C. bonds in full settlement of the original note and mortgage, so that when

the settlement was made and the bondholders took the $952.08 note from this defendant, which was unsecured, for accrued interest, there was no consideration; that the H. O. L. C. required an agreement from the bondholders before the note was taken that they would accept the bonds in full settlement, and after the transaction was closed the H. O. L. C. required a further receipt from the bondholders that they had taken the bonds in full settlement; that the taking of the original $952.08 note was a fraud on the H. O. L. C. and that such corporation was not apprised of the matter; that the rule of the H. O. L. C. in all refunding matters is that the application for a loan and all supporting documents be sent to Washington, D. C., together with a copy of the contract and proposed contract, approved by the H. O. L. C. board of directors, which was not done. The settlement sheet disclosed that the property was appraised for $17,092. The H. O. L. C. would accept no agreement with the debtors, concluding an agreement with the successor-trustee for the balance between the $83 and par value of the bonds. The bonds subsequently paid out in full at the par value of $100 each.

The trial court found for the defendants. We are not concerned with the finding with reference to public policy and need not determine the validity of such finding in the present opinion. We are concerned with the finding that defendant C. F. McCain gave the note and for the purpose as heretofore set out, and that the note in question was a secret transaction with the bondholders, unauthorized and illegal and not collectible. We therefore determine the question on the basis of the applicability of contract law, in accordance with *Murphy v. Omaha Loan & Bldg. Assn.*, 141 Neb. 230, 3 N. W. 2d 403, and other cases cited in the opinion. The plaintiff appeals, assigning as error that the judgment is contrary to the evidence and the law. The H. O. L. C. will hereinafter be referred to as the corporation and the First Trust Company of Lincoln as the successor-trustee.

The record contains exhibits setting forth the transaction

which will be briefly set out chronologically, in accordance with their importance and as we deem necessary.

On August 22, 1933, the assistant trust officer, by letter to the defendant, informed him that the bondholders refused to accept the corporation's bonds; called his attention to certain taxes and dates due, and the waiving of certain interest.

On November 7, 1933, at a meeting of the bondholders, it was stated that the loan had been approved for $12,072, and that the defendant had agreed to make up the difference of principal and past-due interest and interest to accrue to date of delivery of the bonds, to save the bondholders harmless for two years from date of delivery as against the market value and par value, should the bonds not pay 100 cents on the dollar. It was understood that the second mortgage, to cover interest and the difference in principal and possible loss on the sale of bonds, could not be considered of any value at the time, but the bondholders thought that a second mortgage, secured by the property, subject to a lien of $12,000 to the corporation, might have some advantages.

Exhibit 12 is a letter, dated November 14, 1933, from the branch manager to the defendant, with reference to an application for a loan of $12,073, stating that, after rechecking and personal investigation, a loan for $13,000 would be recommended, and calling attention to a bulletin received from the department at Washington, to the effect that an agreement by the defendant with the mortgagee to make up any loss that might be incurred through a sale of the bonds, owing to the selling price being less than par, would be ineligible; that "The Corporation requires, if it refunds, that the mortgagee accept the bonds outright at face value plus accumulated interest and absolutely release the mortgagor to that extent," and, if the loan could be refinanced on the basis of $13,000, without such an agreement to discount the bonds, then the loan would be recommended for headquarter's approval.

On November 16, 1933, the defendant wrote one Ihringer, a bondholder, calling attention to a conference held with the

branch manager of the corporation at the time defendant was requesting revaluation of the property; that he, defendant, was asked outright if any agreement had been requested of him to make up the difference between the market value and the par value of the bonds, and the defendant stated he "could only answer him truthfully. It was then that he agreed to raise the valuation to an extent where the full amount of the loan could be refunded by the issue of the Loan bonds. The balance of the proposed loan would have to be used for payment of taxes." In this letter the defendant said: "I regret exceedingly that this ruling of the Home Owners' Loan Corporation necessitates a reconsideration of the matter, but you will recognize that their ruling must be observed. It is permitted that I make arrangements with your Trustee for the payment of the past due interest and this I stand ready to do."

Exhibit 10 is a notation of the meeting of the bondholders, dated November 22, 1933, wherein a motion was made that the First Trust Company act as trustee, "under a note which Mr. McCain agrees to give to cover all interest due the bondholders to date, we to make collection for a period of two years and pay same to the bondholders."

The "Mortgagee's Consent to Take Bonds," dated December 4, 1933, reads in part: "the undersigned (successor-trustee) has considered the method of refunding mortgages provided in Home Owners' Loan Act of 1933, as passed by Congress and approved by the President, and the undersigned hereby consents, if said refunding can be consummated, to accept in full settlement of the claim of the undersigned the sum of $12,500—12/20-33;" signed by the assistant trust officer.

Exhibit 8 is a receipt, dated February 9, 1934, acknowledging receipt of $12,560.96 in bonds, and $1.54 in cash, in full payment of the amount due the successor-trustee as lienholder in the loan of Sarah M. McCain and the defendant, refunded by the corporation.

On April 18, 1936, the assistant trust officer of the successor-trustee wrote to Mr. Ihringer, enclosing the original

note of January 27, 1934, for $952.08, signed by the defendant, which became due January 27, 1936, stating that the note had been canceled for the reason that individual notes, representing the *pro rata* share of such note, had been signed by the defendant and delivered to the individuals, original bondholders.

On April 11, 1936, the bondholders released the successor-trustee from any further responsibility for the collection of the original note.

It was stipulated that the original note was given for accrued interest on the original mortgage transaction. Throughout the record there appears nothing, other than the statement of the defendant, contained in his letter of November 16, 1933, to Ihringer, who was charged with the collection of the individual notes, to show that the corporation had knowledge of any kind with reference to the original note as being part of the transaction involving the refunding, which was accepted by the successor-trustee for the benefit of the bondholders.

The plaintiff's contention is that the defendant represented to him and the other bondholders and the trustee that the giving of his note for the accrued interest was approved by the corporation and that the corporation had permitted it; directing our attention to the case of *Murphy v. Omaha Loan & Bldg. Assn., supra,* and its similarity to the instant case. In the *Murphy* case a second mortgage was involved, and there had been a full disclosure made to the H. O. L. C. of the taking of the evidence of debt and the second mortgages to secure the debt, and the H. O. L. C., with full knowledge of the fact, consummated its new loan. The new evidence of debt and the original mortgage were held valid and enforceable. Likewise our attention is directed to *Krause v. Swanson,* 141 Neb. 256, 3 N. W. 2d 407, as being similar, in that the note sued on in the *Krause* case was executed after the refunding transaction. The plaintiff, Donald Krause, urged defendant Lenore B. Swanson to execute the consent to take the H. O. L. C. bonds. Defendants testified, in substance, that the plaintiffs at that time were

to pay the difference between the value of the bonds and the balance due on the land contract in cash, and no second mortgage was contemplated. Donald Krause testified that he was to pay in cash, if he could, and, if he could not, then pay a portion in cash and give a second mortgage for the balance. This court held:

" '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." The court said that, under the evidence, the debt was legally extinguished. The case turned on the principle, as the court held:

"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." That is, a moral obligation was existent, and, therefore, the foregoing rule was applied.

Krause v. Swanson, supra, cited as authority *Fourth Nat. Bank of Cadiz v. Craig,* 1 Neb. (Unof.) 849, 96 N. W. 185, wherein it was said: "The principle is well settled that a moral obligation to pay a pre-existing legal debt is a good consideration for the execution of a note and mortgage in its payment." The rule was applied by upholding the note by a promise to repay the surety the amount he had paid on the principal obligation, even on the assumption that the surety might, for some ulterior reason, have lost his right of action.

In the *Craig* case, John Craig on August 7, 1893, executed to the First National Bank of Cadiz, Ohio, a note for $3,744, and to secure the same he and his wife executed a mortgage on certain lands in this state. John Craig sent the note to his father, Walter Craig, who resided in Cadiz, the father endorsed his name on the back of the note and delivered it to the bank, and appellant John Craig received the money. After maturity, the appellants failed to pay the note. Suit was brought against the father, as surety, in Ohio, resulting in a judgment against him for the amount due on the note.

The father made payments on the judgment from time to time. Finally, an execution was issued on the judgment, and on September 3, 1895, the sum remaining due was paid from the proceeds of the sale of the father's property. On June 3, 1895, the father was indebted to the bank on the obligation in the amount of several thousand dollars, and he executed an assignment of his claim against the son, John Craig, arising by reason of the repayment of the note described, and authorized the bank to proceed to collect the amount due from John and the other appellants. The bank presented the claim, demanded that John and the other appellants satisfy it, and John Craig executed the note and mortgage in suit. The answer alleged fraud. A decree was entered, foreclosing the mortgage. There was no evidence of fraud in the record. Judgment was taken against Walter Craig on the note nearly a year before the assignment. He had made payments on it. The transfer was completed by an actual transfer of the note 30 days before the execution of the mortgage in suit. The proceedings operated to transfer to the bank the right which the father undoubtedly had to collect the amount he had paid from his son John. This was a sufficient legal consideration for the note and mortgage in suit. Back of this is the fact that the father's surety had paid the debt of the son John and was entitled to repayment of the amount. Therefore, there was a moral obligation to pay a preexisting and legal obligation which constituted sufficient consideration for a note given in its payment. There is a difference between an existing legal obligation and no obligation at all.

We have detailed the facts in *Fourth Nat. Bank of Cadiz v. Craig, supra,* to disclose its inapplicability to the situation as presented in *Krause v. Swanson, supra.* We deem it inadvisable to distinguish the Wisconsin cases, cited in the *Krause* case, as the factual situation is not analogous to either the instant case or *Krause v. Swanson.*

We take cognizance of the case of *McMillan v. Palmer,* 198 Ark. 805, 131 S. W. 2d 943, wherein the court sustained the proposition of a moral consideration, tantamount in

character to that which was pronounced in *Krause v. Swanson, supra.* The *McMillan* case is the minority view, and we conclude its reasoning is contrary to the best accepted reasoning by a majority of the courts on the subject, and consequently do not follow the *McMillan* case. The majority rule is reflected by the following statement in the Annotation, 17 A. L. R. 1335:

"While, as has been seen, the cases are nearly unanimous in upholding the validity of a new promise without a new consideration, after a discharge by operation of law in bankruptcy or insolvency proceedings, they, with a few exceptions (which will be subsequently noted), unite in holding that a new promise, after a voluntary discharge by act of the parties, is invalid without a new consideration, even when the debt, or a portion of it, is unpaid."

The following cases pronounce in principle the proper rule: A debt is voluntarily discharged by a composition among creditors, and it is wholly gone and leaves no obligation to pay, either legal or moral, which will support a new promise. *Martin Lewis & Co. v. Simons,* 1 Handy (Ohio) 83. A new promise, after a voluntary release by the act of the parties, is not founded on a sufficient consideration. *T. P. Shepard & Co. v. Rhodes,* 7 R. I. 470, 84 Am. Dec. 573. A debt released upon an accord and satisfaction by a composition assented to by all the creditors is extinguished, and cannot form the consideration of a new promise. *Evans, Fite, Porter & Co. v. Bell,* 15 Lea (Tenn.) 569. Where a debtor has entered into a deed of composition with his creditors by which they release him from his debts, a promissory note subsequently given to a creditor for the remainder of the debt is a *nudum pactum. Ex parte Hall,* 1 Deacon, Bankr. (Eng.) 171.

The foregoing cases held in principle: It is well settled that a mere moral obligation does not constitute a valid consideration for a promise, and the cases which seem to be exceptions to this rule are cases in which the provisions of some positive law had interposed to prevent the enforcement of a just and legal claim.

In the instant case, when the McCains were in default of their mortgage, the bondholders had a remedy to which they could resort. They chose to have the successor-trustee settle the debt in its entirety. This was done. Under the circumstances, there was nothing left upon which to base a moral consideration. The interest on the indebtedness went out when the refinancing was completed on account of the settlement.

A moral obligation, as heretofore shown by the Annotation, *supra*, cannot have consideration founded on that which is not in existence. We refer to the rule in *Tarascio v. Mancuso*, 141 Neb. 225, 3 N. W. 2d 400, which has heretofore been stated in *Krause v. Swanson, supra*, which is applicable to the facts in the instant case, and which has been adhered to in *Murphy v. Omaha Loan & Bldg. Assn., supra*.

The case of *Krause v. Swanson*, 141 Neb. 256, 3 N. W. 2d 407, in so far as it conflicts with the instant case as to the applicability of a moral consideration being present in a state of facts as here existing, is overruled and vacated.

AFFIRMED.

YEAGER, J., dissents.

IN RE CONDEMNATION OF REAL ESTATE IN BLOCKS 13, 14 AND 15, KOEHLER'S SUBDIVISION, CITY OF GRAND ISLAND. SALLIE NAGLE, APPELLEE, V. CITY OF GRAND ISLAND, APPELLANT.

12 N. W. 2d 540

FILED DECEMBER 21, 1943. No. 31652.

1. **Municipal Corporations.** When the legislature has enacted a law affecting municipal affairs, which are also of state-wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield.
2. **Held**, procedure in condemnation is a matter of state-wide concern.

APPEAL from the district court for Hall county: WILLIAM F. SPIKES, JUDGE. *Reversed.*

C. E. Cronin, for appellant.

A. J. Luebs, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL, and WENKE, JJ., and POLK and NUSS, District Judges.

WENKE, J.

This is a condemnation proceeding by the city of Grand Island under the provisions of section 16-602, Comp. St. 1929, to acquire certain property within the city of Grand Island for park purposes. From an award of the appraisers, Sallie Nagle, owner of a part of the property, appealed to the district court for Hall county. From an order of the district court dismissing the action, the city has appealed.

That the establishment of the park within the corporate limits of the city was strictly of local concern and that the city of Grand Island has the right to take the property for park purposes under the power of eminent domain is without question.

The question presented here is whether or not the procedure for condemning this property under the power of eminent domain is a matter of state-wide concern so that when the legislature provided a procedure therefor, as it did in section 16-602, Comp. St. 1929, for cities of a certain class, which class includes Grand Island, such statutory enactment is controlling and the charter provisions of the city, which provide for condemnation as by railroad companies, being chapter 74, art. 3, Comp. St. 1929, must yield thereto.

Grand Island adopted a home rule charter in 1928 and under the provisions of section 2, art. XI of the Constitution, its charter must be consistent with and subject to the Constitution and laws of this state. Such cities may provide for the exercise of every power, not contravening constitutional inhibitions, connected with a proper and efficient government of the municipality, but are subject to the general laws of the state, except as to municipal matters of strictly local concern. When the legislature has enacted a law affecting municipal affairs, but which are also of state-

wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. This same principle is set forth in *Axberg v. City of Lincoln,* 141 Neb. 55, 2 N. W. 2d 613: "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."

Eminent domain is the right or power to take private property for a public use. It belongs to the state and it may be exercised either directly by the legislature or through the medium of corporate bodies, which includes municipalities, or of individual enterprises to whom it sees fit to delegate such power in the public's interest. While this power may be delegated, it belongs to the state and subject to its control and regulation and is a matter of state concern. Condemnation is the procedure whereby this power is exercised. The exercise thereof may affect every property owner of the state in the matter of his property being taken for a public purpose and fixing the compensation he is to receive therefor.

Uniformity of this procedure, since it may affect every person in the matter of the ownership of his property and the compensation he is to receive, is a matter of state-wide concern and not of strictly municipal or local concern. We have therefore come to the conclusion that the statute providing for condemnation procedure is a matter of state-

wide concern applicable in all cities within the class therein designated, which includes the city of Grand Island, whether they be home rule cities or not and the provisions of the home rule charter of the city of Grand Island must yield thereto.

The action of the lower court in dismissing the action was in error and is reversed with directions that the action continue under section 16-602, Comp. St. 1929.

REVERSED.

BEN A. GOBLE, APPELLEE, V. NATHAN ZOLOT, APPELLANT: JOSEPH D. GOLDBERG, APPELLEE.
12 N. W. 2d 311

FILED DECEMBER 21, 1943. No. 31635.

1. **Fixtures.** Removable chattels annexed to the freehold may remain personalty where the intent that they shall do so is evident from the conduct or actions of the parties.
2. **Taxation.** The assessment of property and the collection of taxes are governmental as distinguished from proprietary functions.
3. **Estoppel.** Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state growing out of the conduct and representations of its officers.

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

Rinaker, Hevelone & McCown, for appellant.

Dean R. Sackett, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

NUSS, District Judge.

The sole question in this case is whether certain property is personal property and, as such, subject to distraint for taxes, or whether it is real estate and not subject to distraint.

It appears that some 20 years ago the John H. Von Steen Company, being the owner of certain real estate in Beatrice, constructed a building thereon for the purpose of conducting a wood-working shop and bought and put into the building in question the property involved in this case, to wit: 1 planer, 1 edger, 1 band saw, 1 Buffalo post drill, 1 Buffalo forge, 1 bench vise, 1 Peter Wright anvil, 1 power rip saw, 1 blade grinder, 1 knife grinder.

According to the findings of the trial court, who viewed the premises by agreement of the parties, the building was not specially designed for the equipment nor for a wood-working shop; that any building of suitable size would have served as well; that the machinery was not designed to operate together in the sense of an assembly line, but each piece thereof was designed separately and used for its particular purpose without regard to the other equipment; that each machine, except the post drill, had a separate motor and was therefore an independent unit, not requiring a line shaft for its operation. Each did, however, require wiring which in some instances was by cable or conduit beneath the earthen floor, or in others was attached to posts and rafters. None of the machines, except the post drill, were fixed or attached to the real estate.

They were simply bolted to planks or timbers which rested on the ground by the force of gravity alone.

Commencing with the year 1932, the John H. Von Steen Company defaulted in the payment of its personal taxes and continued to be delinquent to and including the year 1940, except for the year 1935. On August 22, 1941, a distress warrant was issued to the sheriff based on such delinquent taxes and on the 12th day of September, 1941, he levied upon the property in question. However, on September 10, 1941, the defendant Zolot bought the real estate in question from the Von Steen company or its trustees and claims thereby to have acquired the property in question as a part of said real estate.

The trial court decreed the property to be chattels and

not fixtures and the defendant appeals. We believe the trial court was right.

The manner of annexation, the adaptability of the property to the use and purpose for which the building was appropriated and the intention of the Von Steen company, all lead to the conclusion that the machines in question were chattels. There was no physical annexation, except as to the post drill, and that, doubtless, was merely bolted to a post or upright timber. The building was not designed for the property in question, nor were the machines designed for the building, but were merely placed therein and so used.

Although the evidence is quite inconclusive, it is fair to infer therefrom that the Von Steen company considered the property not real estate but personal property and listed the same for taxation, as such. This seems to be indicated by the fact that during the first four years of the tax delinquency the personal property return made by the company was over $1,000, and it was stipulated that at no time did the company have to exceed $1,000 worth of other personal property.

" * * * removable chattels annexed to the freehold may remain personalty where the intent that they shall do so is evident from the conduct or actions of the parties." 22 Am. Jur. 719, sec. 6, note 20; *Frost v. Schinkel*, 121 Neb. 784, 238 N. W. 659, 77 A. L. R. 1381.

The defendant seems to make some claim of estoppel by virtue of certain statements claimed to have been made to one Wier, a trustee for the Von Steen company, during the negotiations for the sale of the real estate from the company to the defendant in which the county board is claimed to have informed said Wier that it considered the property real estate and not personalty. Taxation and the collection of taxes are strictly governmental activities as distinguished from private and proprietary activities, and the public as to such activities cannot be estopped. *Philadelphia Mtg. & Trust Co. v. City of Omaha*, 63 Neb. 280, 88 N. W. 523, 93 Am. St. Rep. 442, 57 L. R. A. 150; 19 Am. Jur. 818, sec. 166; 26 R. C. L. 364, sec. 321; note, 87 A. L. R. 988. See, also,

Volker v. McDonald, 120 Neb. 508, 233 N. W. 890, 72 A. L. R. 1267.

The judgment of the district court was right.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1944

WALTER O. LICKERT ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

12 N. W. 2d 644

FILED JANUARY 7, 1944. No. 31606.

1. **Appeal and Error.** It is a rule of universal application in appellate proceedings that the examination of the reviewing court, whether on appeal or writ of error, will be confined to the questions determined by the trial court.
2. **Action.** The above rule applies to appeals under the declaratory judgment act.
3. **Municipal Corporations.** The existence of legislation making pension and retirement provisions for members of a police department and the acceptance or retention of employment as a member of a police department does not establish a contract, between the member and the city, that such members will thereafter be granted the retirement and pension benefits provided in such legislation.
4. ———. The right of the legislative body to amend the pension law is not affected by the fact that a given sum was required by law to be, and was deducted each month from the police officer's pay by the disbursing officer and paid into a pension fund; such a provision in legal effect says that the officer shall receive each month the net amount payable to him.
5. **Constitutional Law.** Until the particular event happens upon which the pension is to be paid there is no vested right in the police officer to such payments.
6. ———: **Municipal Corporations.** The legislative change amending the pension provisions, previous to the happening of one or more of the conditions mentioned in the act, impairs no absolute right of property in the police officer.

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

Harold C. Linahan, W. W. Wenstrand, G. H. Seig and *Edward Sklenicka*, for appellants.

Thomas J. Sheehan, Jr., and *Yale C. Holland, contra.*

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

SIMMONS, C. J.

In this action the plaintiffs, as members of the police force of the city of Omaha, sought a declaratory judgment declaring their rights, duties and liabilities under the pension provisions of the Omaha city charter, a declaration that a charter amendment was unconstitutional and void and for other relief. The trial court entered a judgment declaring the status of plaintiffs under the charter provisions. From that judgment the defendants appealed. We reverse the judgment of the trial court.

In 1921 the Legislature adopted "An act to incorporate Metropolitan cities, and pertaining to the government, powers and duties of such cities" and to repeal certain provisions of existing law. This act contained article V, entitled "Police Department." See Laws 1921, p. 496 and following. This act is now found in sections 14-601 to 14-619, inclusive, Comp. St. 1929, being chapter 14, art. 6.

In 1922 the city of Omaha, being a metropolitan city, adopted the provisions of said article as a part of its home rule charter under the provisions of section 5, art. XI of the Constitution of the state of Nebraska.

Subsequently, in 1940, the city of Omaha proposed to amend its home rule charter in, among others, the provisions of part of said chapter 14, art. 6. The district court for Douglas county enjoined the placing of the proposal upon the ballot at the election to be held on November 5, 1940. On appeal this court dissolved the injunction and dismissed the petition upon which it was issued. *Munch v. Tusa*, 140 Neb. 457, 300 N. W. 385. In that opinion we

held: "The police relief and pension fund, set forth in article 6, ch. 14, Comp. St. 1929, may be amended by a proposed ordinance adopted by the city council and submitted to the electors, where the proposed ordinance affects merely the form of the relief and pension law and does not destroy the purpose for which such fund was created."

Further, in *Munch v. Tusa, supra,* we considered the proposition that provisions for pensions of policemen and firemen in the Omaha city charter could not be amended by the city in the manner contemplated, and this, on the contention that to do so, would make the charter provisions in conflict with the state law on the matter; in other words that the amendment "should give way to state legislation on the subject." For reasons stated in the opinion we held when the city adopted its 1922 charter that "as to the city of Omaha," the legislative act of 1921 (which includes chapter 14, art. 6, *supra*) "lost its qualities as a statutory charter or law imposed by the sovereign power of the state, and in lieu thereof, by virtue of an explicit constitutional grant, its terms then existing became a home rule charter created and to be thereafter continued in force at the will of the grantee municipality lawfully expressed, every section of which was expressly made subject to its own lawful amendments. No other legislative charter, as such, was thereafter applicable to Omaha than the law thus adopted." We further held "Outside of the provisions contained in the Omaha charter, there is no statutory provision whatever relating to the subject-matter of the proposed amendment, the adoption of which is enjoined in this proceeding. * * * And furthermore, the sovereignty of the state having refrained from directly expressing its will by applicable statute on the subject here involved in this litigation, we may not, until such expression actually occurs, consider the matter of firemen's relief and pensions defined and regulated by the Omaha charter as 'a matter of exclusively state concern.'"

Thereafter the city, by ordinance, passed on March 3, 1942, submitted the amendments at an election held on May 12, 1942. The amendments were passed and became a part

of the city charter effective on June 30, 1942, at midnight. So far as it affects the police department the changes effected by the amendment are set out in the discussion in *Munch v. Tusa, supra*, and will not be restated here, except in so far as it may be necessary to discuss the questions presented.

The provisions of the charter as originally adopted provided, in effect, that when any member had served twenty years or more in the police department and was fifty years or over of age, he had the "absolute right" on application to retire and be allowed a pension equal to half his salary at the time of retirement. The charter, as amended, changed the period of service to 25 years or over and the age to 55 years or over and reduced the pension to be allowed.

The plaintiffs, as members of the police department of the city of Omaha, brought this as a representative action seeking a declaratory judgment to determine their rights, duties, and liabilities.

It was alleged that plaintiff Lickert had served for over 22 years but was 46 years of age and hence ineligible for retirement and pension; that plaintiff Berger was 50 years of age but had served 19 years and was likewise ineligible; that plaintiff Shoehigh was 49 years of age and had served 19 years and was likewise ineligible.

Plaintiffs alleged the capacities of the various defendants, the passage of said chapter 14, art. 6; its provisions including the deduction, by the city comptroller, of $1 per month from their pay to be, by the comptroller, paid into the police relief and pension fund; and the provisions hereinbefore recited as to the age and length of service necessary as a basis for retirement.

Plaintiffs further alleged that they entered the service in the police department of the city with the agreement that the pensions provided by the statutes above cited were a part of the compensation for their services; that they permitted the city to withhold the $1 monthly to assist in the creation of the pension fund; that thereby there was created a contract between the plaintiff and defendant city; that

plaintiffs have performed their part of the contract and desire to continue to perform; that the city is obligated to perform the contract under the terms of the law as it existed when they entered the service; that they have rights and interests in the pension fund which may not be denied or disturbed so long as plaintiffs comply with the contract and the law as it existed when the alleged contract was made.

Plaintiffs further alleged the approval of the amending ordinance by the vote of the electorate and set out an analysis of its terms. They alleged that the adoption of the amendments was an attempt to cancel their contract and they have thereby been deprived of their property rights.

They further alleged that the proposal to amend as adopted was unconstitutional as violative of four separate sections of our state Constitution and of two separate sections of the Constitution of the United States. They further allege that chapter 14, art. 6, *supra,* is a part of the general laws of the state of Nebraska, of state-wide concern and not subject to repeal or amendment by the city of Omaha or its electors.

Finally it is alleged that a controversy exists between the plaintiffs and defendants with respect to the validity of said amendment and that the defendants threaten to enforce its provisions.

Plaintiffs pray for a declaration of the rights, duties and liabilities of the parties, a determination that the proposed amendment is unconstitutional and void and for other relief.

Defendants answering denied generally, alleged that the defendant city was one of the metropolitan class operating under a home rule charter adopted in 1922 pursuant to section 5, art. XI of the Constitution; alleged the proceedings by which the amendment in question was adopted and that it went into effect at midnight, June 30, 1942; and that the pension program existing prior to the amendment was actuarily unsound and discriminating and the pension fund being rapidly depleted. Defendants prayed for a dismissal of plaintiffs' petition and other relief.

At the trial plaintiffs offered evidence of their ages and length of service, as pleaded. They and other members of the department testified that when they entered the employment of the city as policemen they were familiar with the provisions of law relating to salaries and pensions; that the pension provisions were taken into consideration when they applied for and accepted employment; that the pension was their main reason for entering the service and that they had relied upon receiving the pension as a protection to themselves and their families.

They also testified that moneys received from rewards, witness fees and special services had been paid into the pension fund, as provided in the law; that there had been deducted the $1 monthly from their salary and that it had been placed in the fund and that compliance had been had with the provisions relating to disability payments and deductions.

It further appears from plaintiffs' evidence that one of the plaintiffs, and other members of the department, entered the employment of the city before the enactment of chapter 14, art. 6, by the legislature and, of course, also before its adoption by the city as a part of its home rule charter.

Plaintiffs also offered "the Charter as contained in the statutes, at Article 6 of Chapter 14 of the Compiled Statutes of Nebraska for 1929, and all of the sections thereof * * * which constitute the provisions of the Charter of the City of Omaha, the rules of the police department, and the pension of the department, and the members thereof." Pursuant to said offer there were received in evidence sections 14-601 to 14-619, inclusive, Comp. St. 1929.

Plaintiffs offered "the amendment to the Charter * * * passed by the City Council * * * and submitted to the electorate * * * which proposed ordinance went into effect * * * and which amendment, by virtue of said election, was passed and became a part of the City Charter * * * and became effective on June 30, 1942, at midnight." Pursuant to said offer, ordinance 15036 was admitted in evidence.

Defendants offered testimony showing the receipts and disbursements of the pension fund for the five-year period before the trial which tended to show that the fund was being rapidly depleted and unable to meet the future fixed charges against it.

The trial court entered a "declaratory judgment" which we now set out in full:

"The court in passing on this case has followed the law established in the State of Nebraska and many other states of the Union. These courts have repeatedly held that pensions are not gratuities, but a part of the stipulated compensation, and that the purposes of pensions are to promote efficiency and encourage continuity of service. Pension is an integral portion of the contemplated compensation set forth in the contract of employment between the City and members of the Police Department, and the right to a pension becomes a vested one upon acceptance of the employment by the applicant.

"The court therefore finds that these plaintiffs and all others similarly situated who entered the employment of the City before the enactment of the new pension plan are not subject to the provisions of the new plan and are entitled to continue their services under the old plan. All applicants for employment as police officers and those appointed to the force since the passage of the Amendment, as well as those who were on probationary service at the time of the passage of the Amendment, are to continue their services under the provision of the new pension plan."

From this decree the defendants appeal assigning three errors. Plaintiffs as appellees, in their brief, discuss a number of propositions, however, they ask that the judgment of the trial court be affirmed.

This court has repeatedly said: "It is a rule of universal application in appellate proceedings that the examination of the reviewing court, whether on appeal or writ of error, will be confined to the questions determined by the trial court." *Central Nebraska Public Power & Irrigation District v. Walston,* 140 Neb. 190, 299 N. W. 609. This rule ap-

plies to appeals under the declaratory judgment act. Comp. St. 1929, sec. 20-21,146; 16 Am. Jur. 342; Borchard, Declaratory Judgments, 253.

What questions were determined by the trial court in its declaratory judgment? In the first paragraph of the judgment the trial court declared that pensions are not gratuities; that their purpose is to promote efficiency and encourage continuity of service; that pensions are a part of the stipulated compensation, and an integral portion of the contemplated compensation set forth in the contract of employment between the city and members of the police department, and that the right to the pension becomes a vested one upon acceptance of employment.

The finding in the second paragraph is that the plaintiffs and all others similarly situated, having entered the employment of the city before the enactment of "the new pension plan" (Ordinance 15036) are not subject to its provisions but are entitled to continue their service and to receive the benefits of the pensions provided in the "old plan" (charter provision adopted from chapter 14, art. 6, *supra*). The trial court further found that those appointed to the service since the passage of the "amendment" (Ordinance 15036) and those on probationary service are subject to the pension provisions of the new plan (Ordinance 15036). This finding necessarily presupposes a finding by the trial court that the charter provisions adopted from chapter 14, art. 6, have been amended and that the amendment is constitutional, valid and in full force and effect. The finding is that the amendment does not apply to these plaintiffs, and others similarly situated, who entered the employment of the city as policemen and had passed their probationary service before the effective date of the charter amendment.

The defendants here assign as errors relied upon that the trial court erred: "(1) * * * in holding that plaintiffs obtained vested rights in the pension provisions of the law existing at the date of their employment; (2) * * * in holding that plaintiffs, through their contract of employment, had obtained pension rights of which they never could be divest-

ed, even prior to their fulfillment of all the necessary requirements for retirement; (3) * * * in holding that all those who entered the employ of the city of Omaha as police officers prior to the enactment of the new pension plan were not subject to the provisions of this new law."

These assignments of error present the matters which we are called upon to decide.

We have heretofore set out that plaintiffs alleged they entered the service with the agreement that the pension as provided at the time was a part of their compensation and that they "permitted" the defendants to withhold from their salaries the sum of one dollar each month to assist in the creation of the pension fund; and that "thereby there was created * * * a contract." There was no evidence of any such agreement having been made. The charter provision as it existed prior to the amendment provided for payment to the treasurer of moneys from various sources "to constitute a police relief and pension fund, viz.: * * * sixth. A sum not to exceed one dollar of the monthly pay, salary or compensation of each member of the police department, which sum shall be deducted monthly by the comptroller from the pay, salary or compensation of each and every member of the police department, and the comptroller is hereby authorized, empowered and directed to deduct the sum as aforesaid and forthwith to pay the same to the treasurer of the said police relief and pension fund." Comp. St. 1929, sec. 14-610. The provisions of this act do not support the construction that the members "permitted" the deduction of sums from their pay. The deduction, by the clear provisions of the act, is mandatorily made before their salary is paid.

A provision of the charter, prior to the 1942 amendment, was "Whenever any person * * * shall have been duly appointed or selected and sworn and has served for twenty years or more, in the aggregate, as a member, * * * of the regularly constituted police department * * * being of the age of fifty years, or over, such person shall have the absolute right and be entitled * * * to retire from active service

on such police force, and shall be allowed a pension equal to half his salary at the time of retirement * * * ." Comp. St. 1929, sec. 14-613. Under this provision the "absolute right" "to retire" and "be allowed a pension" does not arise when the member is "appointed or selected and sworn" but *whenever* the member has served 20 years or more and has become 50 years, or over, of age. Clearly until those conditions are met the "right" is not "absolute."

The two propositions just above discussed and the contentions of the plaintiffs, to the extent accepted by the trial court in its declaratory judgment, have been before the courts of the country repeatedly. For reasons stated in the opinions, the holdings have been against the position taken by the plaintiffs here. The decisions fully sustain the following propositions. We have been cited to no authorities upon which a contrary holding could be based.

The existence of legislation making pension and retirement provisions for members of a police department and the acceptance or retention of employment as a member of a police department does not establish a contract, between the member and the city, that such members will thereafter be granted the retirement and pension benefits provided in such legislation.

The right of the legislative body to amend the pension law is not affected by the fact that a given sum was required by law to be deducted and was deducted each month from the police officer's pay by the disbursing officer and paid into a pension fund; such a provision in legal effect says that the officer shall receive each month the net amount payable to him.

Until the particular event happens upon which the pension is to be paid there is no vested right in the police officer to such payments.

The legislative change amending the pension provisions, previous to the happening of one or more of the conditions mentioned in the act, impairs no absolute right of property in the police officer. 40 Am. Jur. 981; 43 C. J. 818; 16 C. J. S. 754; 1 Dillon, Municipal Corporations (5th ed.) 754;

Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149; *Dodge v. Board of Education*, 302 U. S. 74, 58 S. Ct. 98; *Lage v. City of Marshalltown*, 212 Ia. 53, 235 N. W. 761; *Talbott v. Independent School District*, 230 Ia. 949, 299 N. W. 556; *State* v. *Board of Trustees*, 121 Wis. 44, 98 N. W. 954; *State v. Gantter*, 240 Wis. 548, 4 N. W. 2d 153; *Johnson v. State Employees' Retirement Assn.*, 208 Minn. 111, 292 N. W. 767; *Salley v. Firemen's & Policemen's Pension Fund Commission*, 124 N. J. Law 79, 11 Atl. 2d 244; *Bader v. Crone*, 116 N. J. Law 329, 184 Atl. 346; *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431; *Kern v. State*, 212 Ind. 611, 10 N. E. 2d 915; *Dodge v. Board of Education*, 364 Ill. 547, 5 N. E. 2d 84; *Jordan v. Retirement Board*, 35 Cal. App. 2d 653, 96 Pac. 2d 973; *State v. Board of Education*, 155 Kan. 754, 129 Pac. 2d 265; *Sweesy v. Los Angeles County Peace Officers' Retirement Board*, 17 Cal. 2d 356, 110 Pac. 2d 37; *Butterworth v. Boyd*, 12 Cal. 2d 140, 82 Pac. 2d 434, 126 A. L. R. 838; *Friel v. McAdoo*, 101 App. Div. 155, 91 N. Y. Supp. 454; *City of Birmingham v. Penuel*, 242 Ala. 167, 5 So. 2d 723; *State v. City of Tampa*, 119 Fla. 556, 159 So. 292; *Miller v. Price*, 282 Ky. 611, 139 S. W. 2d 450; *City of Dallas v. Trammell*, 129 Tex. 150, 101 S. W. 2d 1009; *Board of Education v. City of Louisville*, 288 Ky. 656, 157 S. W. 2d 337; *Arnold v. Browning*, 294 Ky. 164, 171 S. W. 2d 239; *MacLeod v. Fernandez*, 101 Fed. 2d 20. See Annotations, 54 A. L. R. 945; 98 A. L. R. 506; 112 A. L. R. 1010; 137 A. L. R. 252.

The authorities cited by the plaintiffs do not support their position on the issues here presented. Plaintiffs cite 19 R. C. L. 726 and 43 C. J. 813. These citations go to the constitutional validity of a pension act. That question is not presented here. Plaintiffs cite the statement found in *Hammond v. City of Fulton*, 220 N. Y. 337, 115 N. E. 998, to the effect that there was read into the contract of employment of "a call fireman" the provision of the statute providing for payment of certain sums to him if injured or his representatives in case of death. The question there presented was whether or not the widow of a deceased call fireman

had a valid claim against the city under the law as it existed when her husband was killed. The power of the law-making body to change the act before the injury and death of the fireman was not involved nor decided.

Plaintiffs cite the statement found in *Schieffelin v. Berry*, 127 Misc. 178, 215 N. Y. Supp. 341, that "The granting of a pension or retirement allowance is sustainable only on the ground that it is deferred compensation." The question presented and decided in that case was whether or not the municipal assembly had the power to amend a state statute relating to retirement allowances. Just why the quoted sentence appears in the opinion is not clear. Similar statements in the authorities cited by plaintiffs appear to be intended to show why a constitutional barrier to the payment of public funds for private purposes does not apply to pensions. In any event the quoted sentence does not go to the questions here presented. The same may be said as to the quote from *People v. Abbott*, 274 Ill. 380, 113 N. E. 696, that pensions are "in effect, pay withheld to induce long-continued and faithful service, * * * . Such pensions generally are not considered donations or gratuities." The quote is taken from 1 Dillon, Municipal Corporations (5th ed.) 750, sec. 430, and is a part of a statement dealing with the constitutionality of statutes granting pensions. That constitutional question was an issue in the cited case. It is not an issue in this appeal. The same situation existed in *Hayes v. Mayor & Council of City of Hoboken*, 93 N. J. Law 432, 108 Atl. 868, where a statute granting a pension was attacked on the ground that it was unconstitutional as violative of a provision prohibiting a city from giving any money to any individual. The court, holding against the contention, said: "The moneys paid for pensions are a part of the compensation to be paid for the services rendered by members of the force, and are an inducing cause to their enlistments."

The same situation applies to the quotation from *O'Dea v. Cook*, 176 Cal. 659, 169 Pac. 366. There a member of the police force was injured in line of duty in 1912. He died

as a result of his injuries in 1915. At the time of the member's injury, the law provided a pension for his widow. In 1913, and while the member was living, the law was amended to provide for a pension if death occurred within a year from the date of the injury. The court stated that if a pension were a gratuity it would be void under the Constitution but that "where, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself."

Plaintiffs next cite the statement found in *Aitken v. Roche,* 48 Cal. App. 753, 192 Pac. 464, that "the right to pension is a vested one, and that it enters into the contract of employment *when a man enters the police department.*" (Emphasis supplied.) The case of *O'Dea v. Cook, supra,* is cited. Subsequently in the opinion it is said: "In the *O'Dea* case it was held that the right to a pension entered into the contract of the employment of a policeman" and "Since, under the *O'Dea* case, the right to participate in the pension fund enters into the contract of employment * * * ." The issue decided in the *O'Dea* case was that the amendment of 1913 had a prospective and not a retrospective effect and hence, so far as the widow's claim was concerned, the act as it existed at the time of the injury, controlled. We do not find anything in the opinion holding that the right to the pension was a "vested one" nor that the right entered into the contract of employment "when a man enters the police department." These questions were not presented. The opinion itself negatives any such conclusions. The court there says: "Cases are abundant, many of them are cited by appellants, where pensions are predicated merely upon the death occurring during the period of service. As death, and death only, by the terms of these statutes fixes the right to a pension, a repeal before death operates to destroy the pension right." The court further said that the widow had "no vested right in the pension until the death" of her husband. The "when a man enters the police depart-

ment" has no sustaining language in the *O'Dea* opinion. If "a repeal before death operates to destroy the pension right" then it seems clear that the right to a pension, would not become a "vested one" before death in the sense that it was not subject to subsequent amendment or repeal of the authorizing law. It may be suggested here that if in a case where "death, and death only * * * fixes the right to a pension, a repeal before death operates to destroy the pension right" then in a case where 20 years or more of service and 50 years or over of age fix the right to a pension (Comp. St. 1929, sec. 14-613) that an amendment of those provisions before those conditions are met "operates to destroy the pension right" under the act as it existed prior to the amendment.

We return now to *Aitken v. Roche, supra.* In that case the petitioner had been retired when the pay of a patrolman was $102 a month. Subsequently the pay was increased to $140 a month. The petitioner sought to have his pension based upon the higher pay rate and accordingly increased. For reasons stated in the opinion the court held that he was entitled to a pension based upon the pay of a patrolman when the installments "successively become due." The reasoning of the court might sustain a conclusion that the petitioner had a vested right in a pension, but not in one for a fixed amount. It might also sustain a conclusion that, if a pension could be increased for the reasons stated in the opinion, if the voters saw fit to do so, they could also decrease the amount of the pension. Such is the holding in the later case of *Casserly v. City of Oakland,* 6 Cal. 2d 64, 56 Pac. 2d 237.

Plaintiffs also cite the statement found in *Dryden v. Board of Pension Commissioners,* 6 Cal. 2d 575, 51 Pac. 2d 177, that "It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, *and that the right to a pension becomes a vested one upon ac-*

ceptance of employment by an applicant. (Emphasis supplied.) This opinion was later adopted by the supreme court of California in *Dryden v. Board of Pension Commissioners,* 6 Cal. 2d 575, 59 Pac. 2d 104.

The citations of authority given in the opinion do not support the language quoted. The *O'Dea* and *Aitken* cases have been analyzed here. Additional citations are *French v. Cook,* 173 Cal. 126, 160 Pac. 411, and section 183 of the city charter. We find nothing in the *French* case to support the language used. It involved the right of a widow to a pension. The questions presented were questions dealing with procedure and the powers of the trustees of the pension fund to make a judicial determination of facts. The only reference in the opinion to vested rights which we find is "the widow has a vested right from the date of death of her husband" and "The party having a vested right in the performance of the act * * * has also the right to have his claim as to the facts judicially determined." The charter provision quoted in the *Dryden* case to sustain the language relied upon by the plaintiff is "Whenever any member * * * shall die * * * then an annual pension shall be paid * * * to his widow * * * ." The language of the court in the *O'Dea* case now becomes pertinent to our problem here. "As death, and death only, by the terms of these statutes fixes the right to a pension, a repeal before death operates to destroy the pension right."

In the case of *Risley v. Board of Civil Service Commissioners,* 140 Pac. 2d (Cal. App.) 167, the court quoted the language of the *Dryden* case hereinbefore set out, wherein the *O'Dea* and *Aitken* cases are cited, and said: "We do not find this statement controlling in our case because it is plainly *dictum* and the cases cited by the author of the opinion, which was not written in but was adopted by the Supreme Court, do not support the statement. *The cases, where the question is before the court, agree that the right to a pension is not a part of a contract which, having been entered into, cannot constitutionally be altered.*" (Emphasis supplied.)

In view of the strong reliance placed upon the California decisions by the plaintiffs we venture also to quote from three of the more recent decisions of that jurisdiction.

In *Jordan v. Retirement Board, supra,* the court said: "Pension rights do not vest at the time of the enactment of the law, but only upon the happening of the contingency or event upon which the right thereto accrues and at any time before the happening of the contingency upon which the right to the pension vests the law granting such right is subject to alteration or repeal."

In *Sweesy v. Los Angeles County Peace Officers' Retirement Board, supra,* the supreme court clearly recognized that the officer's "pension rights vested at the time he was retired from service, that is, upon the happening of the contingency upon which the pensionable right depended," citing both the *O'Dea* and *Jordan* cases as authority; and further with reference to the widow's pension (citing the *Jordan* case) held it to be "an increase of benefits which may be taken away before the right vests by the happening of the event calling for the fulfillment of the grant" and "as to any prospective grantee of the pension it * * * may be taken away at any time before it becomes vested in her."

In the case of *Butterworth v. Boyd, supra,* the supreme court of the state said: "It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority."

We are unable to accept the California cases cited by the plaintiffs as authority for the propositions advanced in the quotations.

Plaintiffs further cite *Stevens v. Minneapolis Fire Department Relief Assn.*, 124 Minn. 381, 145 N. W. 35. There the question was whether or not the pensions, payable from the pension fund of the association, were a gratuity. The court held that because of payments made by the member into the fund he had vested "in him substantial rights of which he cannot be deprived except by due process of law" that his rights were analogous to those "possessed by mem-

bers of mutual benefit societies" and that the pension was not a gratuity. The issue there determined is not presented in the instant case.

Plaintiffs cite the language in *State v. City of Minneapolis,* 174 Minn. 594, 219 N. W. 924, as to when pensions are not gratuities. There the question was whether or not the injured laborer was an employee of the city during the time that he was receiving compensation. The court stated rules as to when a pension was a gratuity and when it was not and found that to grant a pension would be a gratuity for the period covered by a part of the claim. The decision is not of assistance here.

Plaintiffs also rely upon three statements found in *State v. Love,* 89 Neb. 149, 131 N. W. 196, to the effect that a fireman's pension is not a gratuity, that it may be classified as compensation for services rendered and that it forms an inducement to enter and remain in the service and "in a sense is part of the compensation paid for those services." These statements were made in deciding the questions presented by a constitutional attack upon the act, similar to that presented in other cases cited by the plaintiffs. The statements do not go to the questions presented in the instant case. It is to be noted however that this court, in the course of the opinion, said, "Of course, the fireman must * * * have retired *while the law was in force* * * *," the relator "earned a right to his pension under that act *so long as it shall remain in force*" and "the legislature may transform that duty (moral obligation to its injured firemen) into a legal obligation * * * and, *so long as the law is not repealed,* that obligation will be enforced by the courts."

The syllabus, which was prepared by the writer of the opinion, says: "A fireman entitled to a service pension * * * may only receive the pension provided by law *at the time of his retirement.*" These statements negative any contention that this court determined that a fireman had vested contractual rights that could not be modified or taken away by amendment or repeal of the law prior to "the time of his retirement." See the discussion of *State v. Love, supra,* in *Lage v. City of Marshalltown, supra.*

Finally plaintiffs cite statements from *Allen v. City of Omaha*, 136 Neb. 620, 286 N. W. 916, that "while it is true that a policeman's pension is classified as a part of his compensation and not a gratuity, and for which a city is ultimately liable * * * " and "the moneys in the (police relief and pension) fund do not belong to the city * * * but are * * * held * * * in trust, for the benefit and protection of those who under the terms of the act may become claimants against such fund." It is obvious that this case did not decide any of the issues here presented.

For the reasons stated herein it is held that the pension rights of these plaintiffs are to be determined by the charter provisions of the defendant city which became effective at midnight June 30, 1942. The judgment of the district court is reversed and the cause remanded with directions to enter a declaratory judgment in accord with this opinion.

REVERSED, WITH DIRECTIONS.

PAINE, J., dissents.

JOHN MCCULLOUGH, BY JOHN W. MCCULLOUGH, HIS FATHER AND NEXT FRIEND, APPELLEE, V. OMAHA COLISEUM CORPORATION, APPELLANT.

12 N. W. 2d 639

FILED JANUARY 7, 1944. No. 31681.

1. **Appeal and Error.** It is sufficient, in assigning the grounds for a motion for a new trial, to assign the same in the language of the statute and without further or other particularity.
2. ———. The defendant properly raised the assignment of error to be submitted to this court in conformity with section 20-1142, Comp. St. 1929.
3. **Theaters and Shows.** An operator of a place of public amusement is not an insurer of the safety of his patrons, but he owes them that duty which, under the particular circumstances, is ordinary and reasonable care for their safety.
4. ———. The duty resting on such operator requires him to warn his patrons of any dangers known to him, or which he should know in the exercise of reasonable care, and not known

to his patrons, unless such dangers are observable to them in the exercise of reasonable care for their own safety.

5. ———. One who participates in ice skating in a public skating rink assumes the necessary and obvious risks incidental to the recreation.
6. **Negligence.** Negligence is the failure to do that which an ordinarily prudent person would do, or the doing of that which an ordinarily prudent person would not do, under the same circumstances.
7. ———. Negligence may not be proved by guess, surmise, speculation or conjecture.
8. **Appeal and Error.** While the findings of fact by a trial judge, when a jury is waived, have the same force and effect as a jury's verdict, the judgment will be set aside, on appeal, when it is clearly wrong.

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

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

Gordon Diesing, contra.

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

MESSMORE, J.

This is a law action. Plaintiff charged defendant with negligence in the maintenance, and in keeping in an unsafe condition the ice surface, of an ice skating rink, and in failing to limit the number of skaters thereon to a reasonable and safe number. Jury was waived, trial had to the court, and judgment rendered in favor of the plaintiff in the amount of $600. From this judgment and overruling of the motion for a new trial the defendant appeals.

Plaintiff's amended petition alleged, in substance, that plaintiff was injured while skating on rough, rutty and dangerous ice, where several inches of ice shavings had accumulated, covering the ruts so that they were not visible to his sight; that the defendant was negligent in permitting the rink to become congested by an immense throng of skaters in close proximity to each other, creating a dangerous

condition; that defendant failed to scrape or clean the surface of the ice from the time the rink opened on the night in question until the accident occurred; that defendant should have used, but failed to use, a steam and sprinkler machine to fill up, smooth over and refreeze the ruts in the ice at regular periods on the night of the accident; permitted the ice to become badly cut up and failed to have an adequate number of guards on hand, to limit the skaters to a reasonable number; that the plaintiff, a paid customer, fell face downward, with his hands extended, and a skater behind him skated over plaintiff's left hand, causing severe and permanent injury.

Defendant's answer alleged that the ice skating rink was of modern construction; that the plaintiff fell while making a turn, and the fall was due to his own negligence and lack of skill; further alleged that the injury was not proximately caused by the defendant but by a friend of plaintiff; that the plaintiff entered the rink and in doing so assumed the risks inherent in such sport. The answer contained a general denial, and the reply was a general denial.

The plaintiff and a friend, Donald Yechout, both about 16 years of age, on New Year's Eve, December 31, 1941, proceeded to Ak-Sar-Ben Coliseum in Omaha, to skate. Plaintiff was a good skater, with five or six years' experience, and had skated at the coliseum during its open sessions to the public from about November to March of each year for the past three or four years. He had received for Christmas a new pair of hard-toed hockey skates which he had used once previously. The two boys started to skate shortly after 8 o'clock; the surface of the ice was smooth and in first-class condition. At intervals they took time out for refreshments. During the course of the evening the crowd multiplied until there were 1,200 to 1,500 people skating, as estimated by plaintiff's witnesses, and 300 or 400 spectators. The evidence of the defendant in this respect showed 308 paid admissions and not to exceed 14 or 15 spectators. The number of season-ticket purchasers skating was not given.

During the course of two hours of skating, the skaters cut the ice, causing ruts on the surface over the rink generally. Plaintiff's witnesses testified that the ice shavings, so accumulated, were as deep as six inches, more generally at the edges and at the ends of the rink, and on occasions covered the toes of their skating shoes. The plaintiff at the time of the accident was attempting to negotiate a turn, had it about three-fourths completed, and was skating in a straight line at the time he fell. He testified that when he fell he did not see any ruts for the reason that the surface of the ice was covered with ice shavings, and as he proceeded around the turn and when about eight feet therefrom he fell; his "foot stuck. It hit something. * * * It felt like it went down and sunk into the ice when I fell;" that he extended his hands to break the fall, and his hands went out on the ice. Frank Berigan, a friend, who was skating behind him, skated over his left hand causing injury to the third and fourth fingers. Berigan proceeded to a distance of about six feet and stopped. Yechout was at plaintiff's right two or three feet and proceeded the same distance after plaintiff fell. Plaintiff testified that he did not see anything that his skate caught on because "there were shavings on the ice," and all he knew was that his foot went down and he fell. Yechout testified that he did not go back to examine the place where plaintiff fell, did not see anything in the ice with which plaintiff's foot came in contact and which caused him to fall; that any idea he might have on the subject was from a general inference of the condition of the ice. Berigan testified that right after the accident he saw no ruts or cuts at the place where the plaintiff fell; that the ice shavings had covered up any ruts, and he did not know what caused the plaintiff to fall.

There is further testimony that from 45 minutes to an hour prior to the accident, due to the continuous skating, ice shavings, causing snow to accumulate, made the ice rough, cut it, and the ruts were covered by shavings to such an extent that snowballs could be made out of the accumulated ice shavings. The skating was carried on normally;

the crowd was apparently well-behaved, and there were guards on the ice. There is no evidence that the plaintiff, at the time he fell, was jostled, or that any skater had pushed or touched him. There is evidence of a guard, whose duty it was to keep the ice in condition and to watch the conduct of the skaters. This guard testified, in substance, that there was no occasion to fill in the ruts or cuts, because the condition of the ice was such that it was not required.

At the close of plaintiff's evidence, defendant moved for dismissal of plaintiff's petition, which was overruled.

The manager of the rink testified for defendant to the construction and the method of freezing and caring for the ice. This evidence discloses that the rink was a modern artificial ice rink, with reduced hazards, both of surface and inequalities and underlying water, and that for skating a resilient, nonbrittle ice is desired; that this is a matter of ice temperatures, and ice shavings did not accumulate more than a quarter of an inch; that engineers were kept on the job constantly and made an hourly report.

Plaintiff adduced testimony that ice hockey games are played on this rink, and at the end of each playing period the ice is swept and a steam and sprinkler machine is used to smooth over and freeze the ruts in the ice; that on the night in question, when the skating session had been extended to 12:30 a. m., the defendant had not cared for or prepared the ice in such manner; that after the accident the rink was cleared and the process of rehabilitating the ice for the benefit of the skaters was carried on; that four truck loads of ice shavings were removed from the rink. In ice hockey games, it is true, the snow is removed between quarters, to speed the puck, and it is removed between public skating sessions of about two and a half hours' duration as a necessary preliminary to respraying the ice for the next skating session. The foregoing constitutes the material evidence.

The defendant assigns as error that the district court erred in finding that the accident was the result of negligence on the part of the defendant, rather than risk assumed

by the plaintiff. The plaintiff contends that this assignment of error cannot be argued before this court, for the reason that it was not called to the attention of the trial court in defendant's motion for a new trial; citing *Drainage District v. Dawson County Irrigation Co.*, 140 Neb. 866, 2 N. W. 2d 321, wherein it was 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." Other cases holding to the same effect are cited.

An examination of the motion for a new trial discloses that it was in the form required by section 20-1142, Comp. St. 1929. Among the assignments of error are one attacking the sufficiency of the evidence and another that the judgment is contrary to law.

Section 20-1144, Comp. St. 1929, provides in part: "It shall be sufficient, however, in assigning the grounds of the motion to assign the same in the language of the statute and without further or other particularity."

We deem the procedure followed by the defendant in raising the assignments of error, in view of the statute cited, sufficient to permit the presentation of the alleged error to this court.

The most recent case in this state, defining the duty of an operator of a place of public amusement, is *Tite v. Omaha Coliseum Corporation, ante*, p. 22, 12 N. W. 2d 90, wherein we held:

"An operator of a place of public amusement is not an insurer of the safety of his patrons, but he owes them that duty which under the particular circumstances is ordinary and reasonable care for their safety.

"The duty resting on such operator requires him to warn his patrons of any dangers known to him, or which he should know in the exercise of reasonable care, and not known to his patrons, unless such dangers are observable to them in the exercise of reasonable care for their own

safety." Citing on page 3 of the opinion the following authorities; *Shearman and Redfield, Negligence* (Rev. ed.), sec. 779; 2 *Restatement, Torts,* sec. 343; 38 Am. Jur. 754, sec. 96; *Welsh v. Jefferson County Agricultural Society,* 121 Neb. 166, 236 N. W. 331; *Emery v. Midwest Amusement & Realty Co.,* 125 Neb. 54, 248 N. W. 804; *James v. Rhode Island Auditorium, Inc.,* 60 R. I. 405, 199 Atl. 293; *Ivory v. Cincinnati Baseball Club Co.,* 62 Ohio App. 514, 24 N. E. 2d 837; *Danielson v. Reeves,* 211 Minn. 491, 1 N. W. 2d 597; *Hudson v. Kansas City Baseball Club, Inc.,* 349 Mo. 1215, 164 S. W. 2d 318, 142 A. L. R. 858; *Lemoine v. Springfield Hockey Assn., Inc.,* 307 Mass. 102, 29 N. E. 2d 716; *Shanney v. Boston Madison Square Garden Corporation,* 296 Mass. 168, 5 N. E. 2d 1; *Waddel's Admr. v. Brashear,* 257 Ky. 390, 78 S. W. 2d 31, 98 A. L. R. 553.

The plaintiff, participating in the sport of skating on defendant's rink, assumed the ordinary risks of that sport, which includes inequalities of surface, which can reasonably be anticipated.

In the case of *Welo v. Union News Co.,* 263 App. Div. 328, 32 N. Y. Supp. 2d 943, the court, in speaking of the plaintiff as an inexperienced skater, stated: "While plaintiff would possibly have assumed the risk of injury from falling on minor imperfections in the ice, especially when their presence was known to her (*Shields v. Van Kelton Amusement Corporation,* 228 N. Y. 396), she did not assume the risk incidental to a dangerous structural condition in a place where she was an invitee." The *Welo* case shows that even an inexperienced skater assumes the risk of injury by falling on minor imperfections in the ice when their presence is known.

In *Blizzard v. Fitzsimmons,* 193 Miss. 484, 10 So. 2d 343, the court held: "One who participates in diversion afforded by amusement or recreational device 'assumes the risks' of and the dangers that inhere in it so far as they are obvious and necessary."

We conclude that, where an experienced skater participates in skating in a public skating rink, such skater as-

sumes the necessary and obvious risks incidental to the recreation.

The plaintiff, in order to recover, must prove by a preponderance of the evidence negligence on the part of the defendant, as pleaded in his petition. The evidence adduced shows that at the time plaintiff started to skate the surface of the ice was smooth and in first-class condition. He skated for a period of approximately two hours and observed the gradual wearing and cutting of the ice by skates. The ice shavings, alleged to have accumulated, were not dangerous except that they concealed the alleged defects in the ice. None of the plaintiff's witnesses observed any defect in the ice at the place where the plaintiff fell, because the ice was covered with snow. There was an assumption on the part of the plaintiff's witnesses that there were cuts because, for an hour or such a matter, they had observed the ruts being made in the ice by the skaters. The plaintiff did not testify as to what made him fall; nor did he know.

Negligence is the failure to do that which an ordinarily prudent person would do, or the doing of that which an ordinarily prudent person would not do under the same circumstances. To hold that, under the evidence and the circumstances, and the respective duties of the parties in the instant case, plaintiff has proved negligence by a preponderance of the evidence would cause us to travel on guess or conjecture, or to surmise or speculate as to the proximate cause of the plaintiff's injury. Negligence cannot be proved by speculation or conjecture.

We take cognizance of the legal proposition that when a jury is waived and the case is tried to the court the findings of fact by the trial judge shall have the same force and effect as a jury's verdict and will not be set aside, on appeal, unless clearly wrong. We conclude that the judgment of the trial court in the instant case is clearly wrong for the reasons given. The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

MORRIS ZEVIN, APPELLANT, V. SCHOOL DISTRICT NO. 11 OF THE VILLAGE OF COZAD, APPELLEE.
12 N. W. 2d 634

FILED JANUARY 7, 1944. No. 31683.

1. **Schools and School Districts.** A school district has no authority to enter into a contract of employment with a teacher who is to teach in its public school unless he has a Nebraska teacher's certificate registered in the office of the county superintendent of the county in which he is contracting to teach.
2. ———. A school district cannot ratify a void contract entered into by its officers when the prerequisite essential conditions to the making of a valid contract at its inception are not present.

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

Dryden & Jensen and *Max Marshall,* for appellant.

R. E. Bannister, contra.

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

WENKE, J.

This action was commenced in the district court for Dawson county by Morris Zevin, as plaintiff, against School District No. 11 of the village of Cozad, as defendant, to recover the balance of salary claimed due by reason of a contract of employment to teach in the public schools of Cozad for the school year of 1942-1943. From an order sustaining a demurrer and dismissing his action, plaintiff has appealed.

For the purpose of this opinion plaintiff will be referred to as appellant and the defendant school district as appellee.

Appellant's amended petition alleges that he was a qualified teacher, having a teacher's certificate issued to him by the state of New Jersey. That on November 20, 1942, he entered into an oral agreement with appellee to teach in its public schools for the balance of the 1942-1943 term at the rate of $1,400 per year. That appellee knew appellant did not have a teacher's certificate issued to him by the state of Nebraska at the time the contract of employment was en-

tered into, but requested him to obtain one. This is evidenced by the letter of November 25, 1942, signed by the superintendent, stating the contract of employment and further containing the following: "Mr. Zevin must comply with the Nebraska School Laws and have his certificate issued by the State of Nebraska before he can be legally hired and paid." Pursuant to this agreement he commenced teaching. He then made application therefor and on November 27, 1942, a schoolteacher's certificate was issued to him but was lost in the mails and a substitute copy was issued but never filed in the office of the county superintendent of Dawson county. On December 17, 1942, he was notified of his dismissal as of December 18, 1942, by a letter from the superintendent. This letter stated that a check for his month's work was in the office and suggested that his services were no longer needed because he was not able to maintain discipline. The appellant further alleges that pursuant to action of the officers of appellee on December 25, 1942, he was discharged for the reason that he did not have proper discipline. Of this action he was orally notified by the president of the school board. This action is to recover $819 as salary for the balance of the school year 1942-1943.

The first question presented is whether or not appellant's failure to have a Nebraska teacher's certificate registered in the office of the county superintendent for Dawson county made the contract void. It appears from appellant's amended petition that at the time the contract of employment was entered into he had no Nebraska teacher's certificate and that none was ever registered in the superintendent's office of Dawson county. Section 79-1310, Comp. St. 1929, provides in part as follows: "Each holder of a teacher's certificate shall before contracting to teach, register the same in the office of the county superintendent of the county in which he is contracting to teach. Such registration shall be without fee and *no certificate to teach nor contract for a school shall be valid until the certificate is so registered.*" Section 79-1311, Comp. St. 1929, provides in part as follows: "A teacher violating the provisions of this

act *shall not recover any moneys for services while teaching during the time that said contract and certificate are invalid.*" (Italics ours.)

The effect of similar statutes is discussed in 24 R. C. L. 616, sec. 73: "There are statutes in many jurisdictions providing that persons teaching in the public schools must be holders of teachers' certificates and the question has frequently arisen as to the effect of a contract made by a board with a person not so qualified. Such provisions may be neither waived nor dispensed with and it has been held broadly that the possession of the certificate is a necessary prerequisite to appointment or employment and that any contract made with a teacher not having such certificate is void so as not even to be susceptible of ratification, and that a teacher who lacks the required certificate or license cannot recover on his contract for services rendered thereunder, because the right of a public officer to the compensation of his office is incident to and dependent upon his right and title to the office." See, also, *Richards v. Richardson*, 168 S. W. (Tex. Civ. App.) 50; *School District v. Kirby*, 27 Colo. App. 300, 149 Pac. 260; *McCloskey v. School District*, 134 Mich. 235, 96 N. W. 18; *Bryan v. Fractional School District*, 111 Mich. 67, 69 N. W. 74; *O'Connor v. Francis*, 42 App. Div. 375, 59 N. Y. Supp. 28; *Butler v. Haines*, 79 Ind. 575; *Jenness v. School District*, 12 Gil. (Minn.) 337.

The powers of the officers of the appellee are limited and can only be exercised as the statute provides. The appellant is legally charged with notice of the extent of such power and the manner in which it must be exercised. Appellant did not have a Nebraska teacher's certificate at the time he contracted with the appellee nor was such teacher's certificate ever registered in the office of the county superintendent of Dawson county. Therefore, under the express provisions of these statutes, the appellant was not qualified to enter into a contract with the appellee nor was the appellee, through its board, authorized to enter into a contract with the appellant and as provided in the statute such contract shall not be valid nor shall any recovery be had thereon.

Nor could there be a subsequent ratification thereof for the statutory requirements were never met and the certificate was never valid. As stated in *Markey v. School District*, 58 Neb. 479, 78 N. W. 932: "The contract being void for want of authority to make the same, it was incapable of ratification by the school district, or the voters thereof, only upon the observance of the conditions essential to the making of a valid contract in the first instance." Since the amended petition fails to state facts sufficient to show the authorization of a valid contract in the first instance or sufficient facts subsequent thereto to come within the prerequisite of the essential conditions provided in the statutes to permit such contract, a subsequent ratification thereof could not be made and therefore the appellant's amended petition did not state a cause of action and the demurrer was properly sustained.

In view of our holding the contract void, other matters raised in appellant's brief are not discussed.

AFFIRMED.

EMMA DICKINSON WEEKES, APPELLEE, V. RALPH RUMBAUGH, APPELLANT.

12 N. W. 2d 636

FILED JANUARY 7, 1944. No. 31631.

1. **Constitutional Law.** Every legislative act comes before this court surrounded with the presumption of constitutionality and this presumption continues until the act under review clearly appears to contravene some provision of the Constitution.
2. **Appeal and Error.** In order for this court to consider the question of the constitutionality of a statute, it must first be raised and placed in issue in the trial court.
3. **Mortgages.** Payment of interest is a "partial payment" within the provisions of section 20-202, Comp. St. 1929, barring partial payments from tolling or extending the ten-year limitation period for mortgage foreclosure.

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

A. F. Alder and *Munn & Norman*, for appellant.

Julius D. Cronin and *B. A. Rose, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

NUSS, District Judge.

This action was commenced by appellee on April 11, 1942, to foreclose a mortgage executed and delivered on November 12, 1926, and filed on November 23, 1926. By its terms the mortgage was due on November 3, 1929, but interest had been paid thereon November 24, 1933, to November 3, 1933. The original mortgage was never refiled nor was a copy thereof ever filed. On May 15, 1940, the defendant, appellant here, bought the land in question for value. Since more than ten years elapsed after the maturity of the mortgage debt before the action was brought the defendant claimed the action was barred by the statute of limitations, specifically section 20-202, Comp. St. 1929. The trial court ruled against defendant and he appealed.

The mortgage was by its terms due on November 3, 1929. It was therefore barred on November 3, 1939, and the defendant below acquired good title, relieved of the lien of the mortgage, by his purchase for value on May 15, 1940, unless the period of limitation was postponed, extended or tolled by the payment of interest on November 24, 1933. The defendant claims that the amendment of 1925 (Laws 1925, ch. 64) to section 6 of the Code of Civil Procedure, section 20-202, Comp. St. 1929, did so bar the mortgage and the lien and that he acquired a title therefor free and relieved of the said lien.

The plaintiff on the other hand contends that under the decision of this court in *Steeves v. Nispel*, 132 Neb. 597, 273 N. W. 50, the amendment of 1925 was invalidated or circumscribed so that the payment of interest tolled the ten-year period. There is no allegation that the amendment of 1925 was or is unconstitutional, nor is it claimed that the *Nispel* case so held. The amendment is therefore presumed to be

constitutional. "The basic principle which underlies the entire field of legal concepts pertaining to the validity of legislation is that by enactment of legislation, a constitutional measure is presumed to be created. In every case where a question is raised as to the constitutionality of an act, the court employs this doctrine in scrutinizing the terms of the law. In a great volume of cases the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment." 11 Am. Jur. 776, sec. 128.

In *State v. Adams Express Co.*, 85 Neb. 25, 122 N. W. 691, 42 L. R. A. n. s. 396, it is said: "In making the investigation we start with the presumption that the statute in question is a valid and constitutional exercise of legislative power. *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 395; *Ex parte Young*, 209 U. S. 123. The concurring opinion of Field, J., in *Ruggles v. Illinois*, 108 U. S. 526, 541; *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313; *Davis v. State*, 51 Neb. 301. In the case last cited the rule is well stated as follows: 'Every legislative act comes before this court surrounded with the presumption of constitutionality and this presumption continues until the act under review clearly appears to contravene some provision of the constitution.' "

The burden of proof of the invalidity of any statute is therefore upon the one so claiming. "In consequence of the general presumption in favor of the validity of acts of the legislature and the desires of the courts in resolving all doubts in favor of their validity, the rule has become established that courts will not search the constitution for express sanction or for reasonable implication to sustain a legislative enactment; the successful assailant must be able to point out the particular provision that has been violated and the ground on which it has been infringed." 11 Am. Jur. 795, sec. 132, and many cases cited.

The question relative to the constitutionality of the act must be presented to the trial court else it cannot be considered by this court. *Howarth v. Becker*, 128 Neb. 580,

259 N. W. 505; *State ex rel. Sorensen v. Knudtsen*, 121 Neb. 270, 236 N. W. 696; *Mergenthaler Linotype Co. v. McNamee*, 125 Neb. 71, 249 N. W. 92. In the first two cases above cited this court applied the rule notwithstanding that the person claiming the invalidity of the statute was successful in the district court. Thus in the case of *Howarth v. Becker, supra*, it was said:

"The appellee contends that the trial court rightfully denied the application for two reasons, first, that the moratory act, section 20-21,159, Comp. St. Supp. 1933, is unconstitutional * * *.

"We have carefully examined the record in this case and we fail to find that the unconstitutionality of section 20-21,159, Comp. St. Supp. 1933, was pleaded or presented to the trial court for determination. This court has consistently held that in order for this court to consider the question of the constitutionality of a statute, it must first be raised and placed in issue in the trial court. *First Trust Co. v. Glendale Realty Co.*, 125 Neb. 283; *Bell v. Niemann*, 127 Neb. 762. We therefore hold that the question whether the Nebraska moratory act violates the Nebraska Constitution is not determinable in this court on this appeal for the reason that it was not presented to the district court in this case."

For the foregoing reasons any question relative to the constitutionality of the amendment of 1925 cannot be considered, and this court must presume, for the purpose of this proceeding, that the amendment is valid and constitutional.

The question then arises as to the proper consideration to be given to the amendment in question. It is entirely clear, as established by an overwhelming array of authorities, that the cardinal principle of construction or interpretation of a statute is to arrive at and give effect to the intention of the legislature. 25 R. C. L. 960; *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N. W. 576; *Kearney County v. Hapeman*, 102 Neb. 550, 167 N. W. 792.

Since the act in question is clearly remedial it is well to call attention to several other pertinent rules, to wit: "In construing a remedial statute three things must be considered, viz.: The old law, the mischief and the remedy." *Clother v. Maher*, 15 Neb. 1, 16 N. W. 902. See, also, *City of Lincoln v. Nebraska Workmen's Compensation Court, supra*. Further, a remedial statute is to receive a liberal construction to carry into effect the purposes for which it was enacted. *City of Lincoln v. Nebraska Workmen's Compensation Court, supra*; *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313, 35 N. W. 118; *Becker & Degen v. Brown*, 65 Neb. 264, 91 N. W. 178. And that a statute of doubtful meaning should be construed, if reasonably possible, so as to carry out the purpose and intention of the legislature, and when this purpose is manifest it will prevail over a seeming conflict in the language. *City of Lincoln v. Nebraska Workmen's Compensation Court, supra*; *State v. Ure*, 91 Neb. 31, 135 N. W. 224.

With these rules in mind we proceed to a discussion of the law in question. Prior to the amendment of 1925 (Laws 1925, ch. 64) to section 6 of the Code of Civil Procedure, that section provided that an action for the recovery of the title or possession of lands, tenements or hereditaments, "or for the foreclosure of mortgages thereon," could only be brought within ten years after the cause of action shall have accrued. Comp. St. 1922, sec. 8507. By construing the above section with certain other sections, as this court held in *Teegarden v. Burton*, 62 Neb. 639, 87 N. W. 337, and *McLaughlin v. Senne*, 78 Neb. 631, 111 N. W. 377, should be done, the ten-year period was extended under section 22 of the Code (Comp. St. 1922, sec. 8522) by part payment, written acknowledgment of debt or promise to pay. It was likewise postponed by section 7 of the Code (Comp. St. 1922, sec. 8518) in favor of any person "under any legal disability;" under section 17 (Comp. St. 1922, sec. 8519) in favor of any person "within the age of twenty-one years, insane or imprisoned." Again, it was tolled by section 20 of the Code (Comp. St. 1922, sec. 8520) against any person "out of

the state, or shall have absconded or concealed himself." It is thus seen that the basic ten-year period provided in section 6 of the Code could be postponed almost indefinitely for a variety of reasons, not one of which necessarily appeared on the face of the record. In the course of time a great many old unreleased mortgages accumulated on the records and clouded the titles. Since it was possible to extend the basic ten-year period in the various ways above mentioned an examiner of titles in such case was compelled to assume that an old unreleased mortgage had been tolled in one of the ways mentioned and was still in effect.

On the contrary, in the case of mechanics' liens, every one dealing with any land knew that when the period of two years had elapsed the lien could be disregarded with impunity and would cast no cloud upon the title. *Goodwin v. Cunningham*, 54 Neb. 11, 74 N. W. 315; *Green v. Sanford*, 34 Neb. 363, 51 N. W. 967. Although the two-year period for the foreclosure of mechanics' liens was only one-fifth of the basic ten-year period for the foreclosure of mortgages, that period had proved entirely satisfactory for many years and there has apparently never been any attempt to change it. If a definite period of limitation, not subject to extension for any reason, was satisfactory and desirable in the case of mechanics' liens, there can be no reason why the same or a similar unqualified provision would not be equally desirable as to mortgages.

Evidently with some such thought the legislature in 1925 amended section 6 of the Code above mentioned by clarifying when the cause of action should be deemed to accrue. It provided that such cause should be assumed to accrue, "at the last date of the maturity of the debt or other obligation secured thereby, as stated in, or as ascertainable from the record of such mortgage * * * ." Later in the amendment it was provided: "At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be presumed to have been paid, and the mortgage and the record thereof shall cease to be notice of the mortgage as unpaid and the lien

thereof shall then cease absolutely as to subsequent purchasers and encumbrancers for value; said period of ten years shall not be extended by nonresidence, legal disability, partial payment, or acknowledgment of debt."

Bearing in mind the old law, the mischief and the remedy, there can be no doubt that the legislature intended by the above to fix a definite unconditional period of limitation which could be extended only as therein provided by a refiling of the mortgage or a sworn copy thereof. Clearly the legislature intended to bar all mortgages where, on the face of the record, the cause of action accrued more than ten years previously, and that, regardless of anything which might formerly have tolled or extended the period. Only by making the period completely immune from being extended for any reason except as provided in the act would the law serve any useful purpose. See 17 Neb. Law Bulletin, 137, 144. This being true the law should be so construed as to subserve the legislative purpose. The words of the act: "shall not be extended by nonresidence, legal disability, partial payment, or acknowledgment of debt" should not receive a narrow or strict interpretation, but should be broadly and liberally construed to exclude every method or manner of tolling the statute, unless the mortgage is refiled or a sworn copy thereof filed.

The beneficial features of this legislation so overwhelmingly outweigh the trifling inconvenience to holders of mortgages that no reason can be conceived of why the amendment should be strictly construed.

As applied to this case the words "partial payment" in the act clearly include payments of principal and interest. The notes in question provided for the payment of a certain amount of money as principal and a certain amount or rate of money as interest. The principal and interest together at any given time constituted the indebtedness. The payment of principal or of interest which does not pay and satisfy the entire indebtedness is clearly a partial payment and, therefore, within the very terms of the law. Consequently the period of limitations in this case was not ex-

tended or tolled by the partial payment of interest and the lien of the mortgage was barred.

The case of *Steeves v. Nispel, supra,* relied on by plaintiff does not sustain her. It merely held that unrecorded written extension agreements are not included under any of the terms, "Nonresidence, legal disability, partial payment, or acknowledgment of debt" in the amendment of 1925, and therefore, such written extension agreement will toll the ten-year period. It seems to the writer of this opinion that the court in that case gave to the amendment of 1925 and the terms just quoted altogether too strict and narrow an interpretation and application. The writer believes that the legislative intent is entirely clear that as against purchasers and lienors for value, nothing should toll the ten-year period unless the mortgage is refiled or a copy thereof filed. However, whether the writer's criticism is or is not valid, the *Nispel* case goes as far in restricting the operation of the amendment as the court is disposed to go. It does not justify the additional restriction upon the act sought to be imposed herein. While the 1925 amendment may not, in specific terms, exclude written promises or extension agreements from tolling the period, it does, expressly and specifically, prohibit "partial payments" from so extending it.

It is unnecessary to consider the effect of the 1941 amendment since the mortgage in question was fully barred many months before that amendment was adopted.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

TONY ODDO, APPELLEE, V. FRED F. SHIELDS COMPANY, APPELLANT.
12 N. W. 2d 659

FILED JANUARY 14, 1944. No. 31643.

1. **Stipulations.** Under the provision of section 7-107, Comp. St. 1929, a client is bound by the oral agreements of his attorney made out of court, when the same are established by the testimony of the attorney making the same.
2. ———. The only competent proof to establish an agreement made by an attorney in regard to the disposition of a cause is the evidence of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court.
3. ———. Where a party seeks to establish an alleged oral agreement, made out of court, by evidence other than the testimony of the attorney making the same, and proper objection is made, it is error to receive and consider the evidence.

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

Frederick L. Wolff, for appellant.

Edward J. Jelen and *Samuel P. Caniglia, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

SIMMONS, C. J.

In this action plaintiff, a judgment debtor, sought an injunction against the enforcing of a judgment, an order vacating the judgment, and the granting of a new trial in the action where the judgment was obtained. After trial the court granted the prayer of plaintiff's petition. Defendant appeals. We reverse the decree of the trial court and dismiss the petition.

The pleadings admit that on February 29, 1932, the defendant company sued the plaintiff and others in the district court for Douglas county to recover a money judgment; that on July 6, 1935, a default judgment was entered against the plaintiff and others; and that prior to the beginning of



that action, plaintiff had instituted proceedings in bankruptcy and was discharged on December 2, 1931.

Plaintiff alleges that the claim upon which the action was based was discharged in the bankruptcy proceedings; that when the summons was served he went immediately to the office of defendant's attorneys, notified them of the discharge in bankruptcy; that in his presence an attorney made a number of telephone calls and advised him that they had confirmed the discharge in bankruptcy; that they would proceed against the other defendants; that he could forget about the matter, that a notation to that effect was placed upon the summons and left with the attorneys. Plaintiff further alleges that he relied upon "said conversation," assertions and promise and failed and neglected to enter a defense in the action; that he had a complete defense, to wit, the discharge in bankruptcy which he was prevented from asserting by the promises of the defendant's attorneys; and that he did not learn that a judgment had been entered against him until August 17, 1942. After the overruling of a demurrer defendants answered, admitting that plaintiff had neglected to plead in the prior action, pleaded the statute of limitations and denied generally save as to those allegations recited herein as admitted.

At the trial plaintiff's evidence consisted of a stipulation that he had been discharged in bankruptcy on December 2, 1931, and that the "Fred F. Shields Company, a corporation, was one of those included in said bankruptcy proceedings." He testified that when he received the summons he went to the office of the attorneys then representing the Shields company (not their representative in this action), and was directed to the man who was handling the suit. He was then asked, and was allowed over defendant's objection, to recite the conversation had with the attorney substantially as set out in his answer. He then "went home and forgot about it." He further testified that he had no knowledge of the Shields judgment until proceedings in aid of execution were had. On cross-examination he was unable to name or describe the attorney to whom he talked.

Defendant's evidence consisted of the testimony of its then attorneys specifically denying the plaintiff's testimony.

Section 7-107, Comp. St. 1929, provides: "An attorney * * * has power: * * * Second. To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; *but no evidence of any such agreement is receivable, except the statement of the attorney himself,* his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court; * * * ." (Emphasis supplied.)

Without regard to other errors assigned, it becomes apparent that, if plaintiff's testimony of his conversation with the attorney was incompetent, the trial court erred in receiving the same when proper objection was made and plaintiff's action must fail for want of proof. It is just as apparent that the evidence was incompetent.

In *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692, this court construing the statute said: "A client is only bound by the oral stipulations of his attorney made out of court, when the same are established by the testimony of the attorney making the same." In the syllabus the rule is stated as follows: "The only competent proof to establish an agreement made by an attorney in regard to the disposition of a cause is the evidence of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof, upon the records of the court." Here the attorneys not only do not testify that the statements were made but do positively deny any such conversations or agreements.

Plaintiff's case fails for want of competent proof to sustain the alleged promise upon which it is based.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

MARIE VYBIRAL, APPELLEE, V. ROBERT SCHILDHAUER, APPELLANT: GRACE SCHILDHAUER ET AL., APPELLEES.
12 N. W. 2d 660

FILED JANUARY 14, 1944. No. 31650.

1. **Bankruptcy.** The defendant mortgagor in a foreclosure proceeding having availed himself of the relief offered under the Frazier-Lemke act, the ensuing bankruptcy proceedings halted the foreclosure action in the state court.
2. ———. When the trustee in bankruptcy abandons bankrupt's real estate as burdensome, and the federal court approves thereof, the state court is at liberty to proceed with the foreclosure action pending therein, for the jurisdiction over said real estate is again vested in the state court.
3. **Mortgages.** When the sole plaintiff who is the successful bidder at a foreclosure sale dies, and notice thereof is given the court during the pendency of the action, further proceedings cannot be had, upon objection being made, until the action is revived in the name of the proper parties.
4. ———. Where confirmation of the sale has been had after the death of a party thereto, and no objection was made prior to confirmation, it cannot be attacked collaterally.

APPEAL from the district court for Sheridan county: EARL L. MEYER, JUDGE. *Reversed.*

Charles A. Fisher, for appellant.

Edwin D. Crites, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

PAINE, J.

This is an appeal by one of the defendants from a decree and order confirming a foreclosure sale. A very brief statement of the facts will be helpful before the law points involved are discussed.

Plaintiff filed a petition for foreclosure on January 2, 1933, on note and mortgage for $8,500, dated March 13, 1926. The answer and cross-petition presented an issue as to damages growing out of an allegation in the petition that defendants were committing waste by removing growing

timber from the ranch. This issue was tried to a jury, which found against the defendants.

Decree of foreclosure was entered March 29, 1934, finding the amount due plaintiff $10,596.48, with 10 per cent interest and costs, which added to the principal made the amount due at the time of the last trial in the district court on March 16, 1943, about $20,309.82. After decree a regular stay had been taken and order of sale issued January 7, 1935. Sheriff's return reported that sale was held February 12, 1935, and the property bid in by the plaintiff for $8,500.

On April 3, 1935, the first stay under the moratorium was entered. An appeal was taken to this court by the defendant, and in *Vybiral v. Schildhauer*, 130 Neb. 433, 265 N. W. 241, the decree of foreclosure and dismissal of the cross-petition was affirmed. Judgment on mandate was entered June 3, 1936.

On March 15, 1937, an extension of the moratorium stay was entered. Thereafter the defendant filed a petition in the federal court for relief under the Frazier-Lemke act, and the prayer was granted. Thereafter the defendant filed an amended petition under the Frazier-Lemke act, and on this decree he was adjudged a bankrupt.

Plaintiff's exhibit No. 3 is the report of the trustee in bankruptcy, setting out the report of the three appraisers, who were appointed June 23, 1942, and who certified that the land of defendant herein consists of 1,160 acres, 122 acres of farm land appraised at $10 an acre, 1,038 acres of pasture land appraised at $5 an acre, and one set of improvements appraised at $1,000, making a total appraisement of land and improvements of $7,410. Said trustee's report then describes the amount of plaintiff's foreclosure decree and another lien on said property, and prays that he be authorized to disclaim title and abandon said property.

The three-year moratorium entered by the federal court having expired, upon application of the plaintiff an order was duly entered by Honorable John W. Delehant, judge of the United States district court, district of Nebraska, Chad-

ron division, directing that the trustee in bankruptcy, William H. Hein, be directed to disclaim title to and abandon all of the real property of the defendant as a farm debtor, and that a copy of the order be transmitted to the clerk of the district court in and for Sheridan county, Nebraska, where foreclosure suit is pending, and that further proceedings be had in that court to all intents and purposes as might be done had not the present proceeding in this court been filed herein, and that any stay resulting from the filing and pendency of these proceedings be and the same is hereby vacated.

Thereupon, in the lower court on March 16, 1943, an oral motion was made to confirm the sale, objections made thereto, and trial had.

The bill of exceptions consists of two pages of stipulations of all the facts relating to the foreclosure action, then appear many exhibits of the copies of proceedings in the federal court, then stipulation that plaintiff died August 13, 1938, and a copy of the will is made an exhibit. It was conceded that the files here produced are the original files of the county court of Sheridan county, Nebraska, in which the will was probated; that a decree of final account and distribution was entered in the estate of the plaintiff on March 27, 1939, and said decree provides that the interest of the plaintiff, Marie Vybiral, in said land, shown in said foreclosure decree, and her bid at said sheriff's sale, be and the same are hereby assigned to her daughters, Mary Kadlecek, Agnes Kutschara, Emma Valdyka and Anna Jirek, as tenants in common, share and share alike.

After the hearing in the lower court, an order of confirmation was entered, finding that plaintiff did bequeath all her property, right, and interest in and to the premises foreclosed to the four devisees named, and all such interest was, by decree of the county court, assigned and confirmed in them, and that they are now the owners thereof, and that the sheriff's deed should be executed and delivered to them as successors in interest of the said Marie Vybiral, plaintiff. The court further finds that the sale was made in con-

formity to law, and that the property sold for a fair value, and that a subsequent sale would not realize a greater amount; that the amount of valid liens against the land far exceeds the fair market value thereof, and that the objections to confirmation are not well taken, and should be overruled and denied, and that a resale would not result in a higher bid. The court thereupon directed the present sheriff to make a deed to the said four devisees named in the will, and that a writ of assistance be allowed to put them in possession.

Three errors are relied upon for reversal by the defendant: (1) That the trial court erred in holding that the state court had jurisdiction, when the matter was yet pending and undetermined in the United States district court; (2) that the trial court erred in confirming the sale and finding that the land sold for its fair value, although the sale had been had on February 12, 1935, and that a new sale would not bring a greater price; (3) that the trial court erred in confirming the sale without the action having been revived in the name of the personal representative of the deceased plaintiff, or in her heirs, no revivor having been had in the name of any person.

Taking these up in order, we will consider the first assignment of error, that the trial court erred in holding that it had jurisdiction when the matter was yet pending in the federal court. It appears in defendant's exhibit No. 3 that there was the sum of $463.86 on deposit, which was made up of moneys paid in to the state court as rentals of the land, under orders granting the moratorium stay, and which sum was transmitted by the clerk of the state court to the clerk of the federal court. Against this sum attorney Fisher filed an attorney's lien, and endeavored to establish the same in the federal court, but on September 17, 1942, the United States district judge denied the lien, and no appeal was taken therefrom.

The record shows that the title to the land of the bankrupt and possession thereof was, after appraisement had been made, rejected by the trustee, which rejection was confirmed by the federal court.

It has been held in many cases cited in the notes to *In re Frazin*, 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. n. s. 745, that the vesting of the title to real estate in the trustee in bankruptcy is dependent upon the acceptance thereof by the trustee, notwithstanding that the Bankruptcy Act states that the trustee shall upon his appointment be vested with the title of the bankrupt as of the date he was adjudged a bankrupt. These decisions show that there is an absolute right in the trustee to accept or reject such real estate as he should find after examination would be most beneficial to the creditors, and he is allowed to take a reasonable time to ascertain the facts and report his findings and judgment for confirmation by the United States court, which was done in the instant case.

The trustee in bankruptcy having abandoned the land under foreclosure, the federal court directed its clerk to notify the state court that it was at liberty to proceed in the foreclosure action, therefore the trial court did not err in proceeding with the case at bar, even though certain minor details in the bankruptcy case against defendant were still pending in the federal court, because this land and any interest of the bankrupt therein was absolutely released from the federal court jurisdiction, and jurisdiction legally attached in the state court.

Having reached the conclusion that the state court had entire jurisdiction to proceed with the foreclosure proceedings again pending on its docket, we are first met with the objections to confirmation, filed by defendant on March 15, 1943, the first paragraph thereof reading as follows: "That the plaintiff herein Marie Vybril died on the 13th day of August, 1938, and this action has never been revived in the name of her executor, or personal representative or the heirs of Marie Vybril. That no order of revivor of any kind has been had in this cause."

It was thus brought to the attention of the court that the sole plaintiff had died and no revivor had been had. Did the court err on March 18, 1943, in overruling these objections and confirming the sale?

At the hearing on confirmation the original files of the county court for Sheridan county, Nebraska, were introduced, showing that the will of the plaintiff had been probated, and that a final decree of account and distribution had been entered in plaintiff's estate on March 27, 1939, and said decree provided that all of the interest of the plaintiff in said land, as shown in the decree of foreclosure secured by the plaintiff and in her bid at the sheriff's sale, was assigned to her four daughters as tenants in common, share and share alike; therefore, this decree of final account and distribution having been entered long before the hearing on the confirmation, it was provided under section 20-1410, Comp. St. 1929, that revivor could be had in the name of four devisees to whom all interest in this property had been passed by the will of the plaintiff.

In *Vogt v. Daily*, 70 Neb. 812, 98 N. W. 31, involving issuance of an execution after the plaintiff had died, and requiring that the action should be revived, it was said: " * * * actions * * * should be prosecuted in the name of the real party in interest, and that this party should be a living, breathing entity, a person of legal responsibility."

A Nebraska statute reads in part as follows: "In the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." Comp. St. 1929, sec. 20-322.

It was held in the case of *Cutler v. Meeker*, 71 Neb. 732, 99 N. W. 514, that "The interest of a vendee in possession of real estate under a contract of sale, part of the purchase price of the land having been paid, at his death, descends to his heirs, and does not pass to his administrator. It is alienable, descendible and devisable in like manner as if it were real estate held by a legal title."

In *Urlau v. Ruhe*, 63 Neb. 883, 89 N. W. 427, it is said: "When a party to an appellate proceeding dies, and his in-

terest in the litigation passes to his heirs, the heirs are necessary parties to the proceeding."

" * * * an equitable right to have a conveyance of land in fee, an equity of redemption, goes to the heir as land held in fee, though the statute of descents may only speak of land of which the decedent died seized." 1 Dembitz, Land Titles, sec. 28.

There are a few cases which indicate that a revivor is not necessary. In *Van Camp v. Weber*, 27 So. Dak. 276, 130 N. W. 591, Silas Newton was the assignee of a mortgage given by one French. The mortgage was foreclosed, and Newton became the owner of the certificate of sale, and then died. No redemption of the property was made by the mortgagor. Newton had not conveyed the certificate of sale prior to his death, and while he had been entitled to a sheriff's deed, no deed had been issued.

By the last will and testament of Newton, all of his property was devised to Elizabeth Ann White and Nelson Tracy White in equal shares, and these devisees conveyed the land by warranty deed to Herbert N. Gifford, who conveyed the same by special warranty deed to Andrew N. Van Camp, the plaintiff. The sheriff then in office as successor delivered a deed to the plaintiff, Van Camp. It was held that Van Camp was the owner of the legal title to the premises in dispute. However, it is shown in this opinion that section 648 of the Code of Civil Procedure of South Dakota provides that, if the mortgaged premises are not redeemed, it is the duty of the sheriff or his successor to complete the sale by executing a deed to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest therein. No such special statute is found in Nebraska. See *Cronkhite v. Buchanan*, 59 Kan. 541, 53 Pac. 863, 68 Am. St. Rep. 379.

From an examination of these and many other cases, it appears to be the considered law of Nebraska that, when the sole plaintiff, who is the successful bidder at the foreclosure sale, has died, and this matter is properly brought to the attention of the court before confirmation, no further

proceedings can then be had, if objection be made, until the action has been revived in the name of the proper parties. See *Street v. Smith*, 75 Neb. 434, 106 N. W. 472.

In *Keefe v. Grace*, 142 Neb. 330, 6 N. W. 2d 59, the various methods of revivor are set out, and sections 20-1406, 20-1407 and 20-1408, Comp. St. 1929, are discussed. In the case at bar, more than one year having expired from the death of the plaintiff, it will require compliance with the section of the statute relating thereto.

On the other hand, we find that in *Childs v. Ferguson*, 181 Fed. 795, Sanborn, circuit judge, reviewed many early Nebraska cases relating to the death of a party in an equity case, and said: "In the case at bar the sale under the decree was made and confirmed without a revivor. No appeal was taken from the order of confirmation of the sale, no motion or petition to avoid it was made, and it is not now directly, but is collaterally, assailed." "It was the settled law of Nebraska, when certain mortgages were made, that an order of sale, a sale, and a confirmation of the sale, made after the death of the party to a suit in equity, subsequent to the decree, were impervious to collateral attack." See *Omaha Nat. Bank v. Ferguson*, 99 Neb. 131, 155 N. W. 220.

We therefore hold that the trial court had jurisdiction of the case at bar, and that no defect has been pointed out in the sheriff's sale, wherein the plaintiff was the successful bidder, several years prior to her death, but that it was prejudicial error for the trial court to overrule proper objections and to enter the order of confirmation when the action had not been revived in the name of the proper plaintiffs.

REVERSED.

STANLEY LIND, APPELLEE, V. NEBRASKA NATIONAL GUARD ET AL., APPELLANTS.
12 N. W. 2d 652

FILED JANUARY 14, 1944. No. 31641.

1. **Militia.** An enlisted member of the National Guard when called for training by the governor through order of the adjutant general under section 94 of the National Defense act is in the service of the National Guard of the state of Nebraska.
2. **Workmen's Compensation.** For a person to be eligible for compensation under the workmen's compensation law he must be an employee of an employer within the meaning and definition of section 48-106, Comp. St. 1929.
3. ———. The Nebraska National Guard is a governmental agency of the state within the meaning of the workmen's compensation law.
4. ———. Members of the Nebraska National Guard are not employees of the state or any agency created by it within the meaning of the workmen's compensation law.
5. ———. Members of the Nebraska National Guard, when on duty, are engaged in the performance of the duty which the citizen owes to the sovereign of which he is a part along with every other citizen.
6. ———. Failure to make claim upon an employer for compensation within six months is not a defense if the accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable. In such case, however, claim must be made within six months from the time the employee acquires knowledge of a compensable disability as a result of the accident.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Reversed and dismissed.*

Walter R. Johnson, Attorney General, and *Carl H. Peterson,* for appellants.

Dwight W. Dahlman, Bertrand V. Tibbels and *Paul E. Haberlan, contra.*

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

YEAGER, J.

This is an action originally instituted by Stanley Lind,

appellee, in the workmen's compensation court against the Nebraska National Guard and the state of Nebraska for recovery under the workmen's compensation laws for injuries sustained by appellee while he was engaged in line of duty as a regularly enlisted member of the Nebraska National Guard at the National Guard camp at Ashland, Nebraska. An award of compensation was made by the workmen's compensation court in favor of appellee. On appeal to the district court the award was sustained and judgment was entered accordingly. From this judgment the appeal here has been taken.

There is little, if any, dispute about the material facts in the case. Appellee, at the time of the occurrence which is the basis of the action, was a regularly enlisted member of the Nebraska National Guard with the grade of private, first class. His enlistment contract or agreement was entered into by the use of a form provided by the war department of the United States government. By the terms of the enlistment appellee became subject to the provisions of the Constitution of the state of Nebraska (art. IV, sec. 14) pertaining to the Nebraska National Guard, the statutes creating and controlling it (Comp. St. 1929, ch. 55, art. I as amended in art. I, ch. 55, Comp. St. Supp. 1941), and the National Defense act of the United States adopted in 1916 and amendments thereto (32 U. S. C. A. secs. 1 to 194, inclusive).

Under authorization of the secretary of war of the United States the adjutant general of the state of Nebraska, by order of the governor, on June 14, 1939, issued an order for the training of the National Guard unit, of which appellee was a member, at Ashland, Nebraska. The period of training began August 6, 1939, and ended on August 20, 1939. Appellee responded to the call and remained in active service for the entire period. For this service appellee was paid by the United States government at the rate of $1.15 per day. In addition to this amount the National Guard, from legislative appropriation for that purpose, made an allowance to him and all others of $1 per day. This allowance

appears not to have been considered by the adjutant general as pay for service but in the nature of a bonus or deserved gratuity.

On or about August 12, 1939, in line of duty, appellee was ordered to engage in a baseball game, commonly called soft ball. In receiving a thrown ball from another player the ball struck the end of the second finger on appellee's left hand. Pain immediately followed but he finished the game. The following morning he reported on sick call and was sent to the camp hospital where his finger was examined. There having been no X-ray equipment at the camp, he was sent to a physician at Ashland, Nebraska, where X-ray pictures were made. The pictures appear not to have disclosed a fracture. The Ashland physician reported a probable sprain. Treatment for sprain was given. The finger was bandaged with splints. These were changed at the camp but finally removed completely by appellee himself. From that time on appellee suffered disability and impairment in the use of the hand and pain, the exact nature and extent of which is not made clear by the evidence. On December 2, 1939, he was examined by Dr. H. Winnett Orr. X-ray pictures taken by Dr. Orr revealed a fracture. In January, 1940, he called upon the adjutant general, the purpose of which call was to seek compensation from some source for his injury. The source from which he thought he was entitled to compensation is not disclosed and no formal or informal claim was made. It appears however that the adjutant general communicated with the war department concerning the matter. On March 21, 1940, an operation was performed by Dr. Orr. On May 20, 1940, another operation was performed under direction of Dr. Orr.

On these facts the appellants contend that the award and judgment for workmen's compensation cannot be sustained. Three principal grounds on which this contention is based are the following: 1. At the time of the accident appellee was not in the service of the Nebraska National Guard or the state of Nebraska but was in the service of the United States; 2. If at the time he was in the service of the Ne-

braska National Guard or the state of Nebraska he was not an employee within the meaning of the workmen's compensation law; 3. If he was an employee within the meaning of the workmen's compensation law he is barred of an action thereunder for failure to file claim within six months from the date of the accident and for failure to file petition within one year.

The first ground noted is dependent on an interpretation of the acts and doings of the war department in authorizing the call, and the call by the governor through the adjutant general and service contemplated thereunder in the light of the provisions of the National Defense act.

On April 14, 1939, the war department, by and through the chief of the National Guard Bureau, under section 94 of the National Defense act, issued an order designated "Training Authority" for a period of training for the National Guard unit of which appellee was a member. The part of the order which is of importance here is the following: "Under the provisions of section 94, National Defense act, the Secretary of War authorizes field training for the following units of the National Guard as prescribed below: * * * ." The order does not characterize the service either as Nebraska National Guard service or otherwise.

Section 94 of the National Defense act is the following: "Under such regulations as the President may prescribe the Secretary of War is authorized to provide for the participation of the whole or any part of the National Guard in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction, either independently or in conjunction with any part of the Regular Army, and there may be set aside from the funds appropriated for that purpose and alloted to any State, Territory, or the District of Columbia, such portion of said funds as may be necessary for the payment, subsistence, transportation, and other proper expenses of such portion of the National Guard of such State, Territory, or the District of Columbia as shall participate in such encampments, maneuvers, or other exercises, including out-

door target practice, for field and coast-defense instruction." 32 U. S. C. A. sec. 63.

In the light of the section of the National Defense act quoted and the reference in the order to the provisions of the act it appears that there was but a grant of authority to the state of Nebraska for participation of its National Guard unit in training offered and afforded by the war department. No burden is impressed upon or power granted to the war department in this particular connection beyond provision for training of the National Guard organizations of the states and territories under the auspices and by the use of the federal facilities. The language of the act appears to us to admit of no other interpretation. Our conclusion has been independently arrived at but it is supported by very considerable precedent. *Oregon-Washington R. & N. Co. v. United States*, 60 Ct. Cls. 458; *Illinois Central R. Co. v. United States*, 60 Ct. Cls. 499; *Bianco v. Austin*, 204 App. Div. 34, 197 N. Y. Supp. 328; *Gibson v. State*, 173 Misc. 893, 19 N. Y. Supp. 2d 405; *Baker v. State*, 200 N. Car. 232, 156 S. E. 917; *Andrews v. State*, 53 Ariz. 475, 90 Pac. 2d 995; *State v. Industrial Commission*, 186 Wis. 1, 202 N. W. 191.

It may be said further that the general order of the governor of Nebraska issued by the adjutant general was issued in terms specifically in pursuance of and with reference to the war department order granting authority for training hereinbefore referred to. It must therefore follow that this general order was issued with reference to the purport, effect and limitation of section 94 of the National Defense act.

We hold therefore that the appellee during his period of service was in the service of the state with the Nebraska National Guard.

Having determined that appellee was in the service of the state as a member of the Nebraska National Guard it now becomes necessary to determine whether or not he was an employee within the meaning of the workmen's compensation law.

To be eligible for benefits under the workmen's compensation law appellee must be an employee of an employer or workman within the meaning of the following which is the first sentence of section 48-106, Comp. St. 1929: "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."

This court has decided that the Nebraska National Guard is a governmental agency of the state within the meaning of the workmen's compensation law and that an employee in consequence of injuries growing out of an accident arising out of and in the course of his employment is entitled to compensation. *Nebraska National Guard v. Morgan*, 112 Neb. 432, 199 N. W. 557. The question of whether or not an enlistee of the National Guard is an employee within the meaning of the workmen's compensation law of Nebraska is here one of first impression. The opinions of other jurisdictions are divided.

In *Andrews v. State, supra*, it was held that members of the National Guard were employees within the meaning of the workmen's compensation law of that state. Benefits however were denied on the ground that under the workmen's compensation law where injury or death was in consequence of service outside the state, as was true in that case, compensation could not be awarded.

In *Baker v. State, supra*, it was held in the following language that members of the National Guard were employees within the meaning of the workmen's compensation law: "The record shows, in any event, that the plaintiff was voluntarily in the service of the State and subject to its direction and control. This is one of the tests of employment; and under the liberal interpretation given to the Compensation Law we should hesitate to hold that there can be no employment within the meaning of the act unless there happens to exist the technical relation of master and servant."

In *Globe Indemnity Co. v. Forrest*, 165 Va. 267, 182 S. E.

215, and *State v. Industrial Commission, supra,* recoveries were allowed under the workmen's compensation laws of the respective states but from the opinions it would appear that the question of whether or not members of the National Guard were employees was not presented. At least the subject was neither decided nor discussed.

On the other side of the proposition attention is directed first to *Goldstein v. State,* 281 N. Y. 396, 24 N. E. 2d 97. The state of New York had a law similar to our own (Comp. St. 1929, sec. 55-101) making all able-bodied males between the ages of 18 and 45 years members of the state militia. The court in the opinion addressing itself to this subject and others pertinent there as well as here, said:

"In determining whether particular persons or classes are covered it is necessary to consider the statute as a whole and the purpose embodied in its enactment. When so considered it seems to us to be apparent that it was never intended to cover militiamen while engaged in active service. There are many reasons which lead to that conclusion.

"Working men and women, employees of others, under our system of government are free men and women. They have the same standing, rights and privileges possessed by other members of our body politic. They may work or not according to their own free will. If engaged in work they may quit working at any time if they desire without liability therefor unless prevented by the terms of some express contract. They may organize labor unions for the purpose of improving their working conditions. They may engage in strikes against their employers to compel their employers to grant them certain rights or privileges which they deem themselves entitled to. They may even engage in peaceful picketing of their employers' places of business to induce their employers to grant them the rights which they claim.

"Upon the other hand, when a man becomes a member of the State militia he must, when in active service, surrender for the benefit of the State certain of the privileges enjoyed by working men who are employees. Under the Military

Law (Cons. Laws, ch. 36) a member of the militia may be tried for various military offenses, for acts which are not illegal under any other law. He may be tried and punished by a military tribunal and if found guilty may be punished by fines and in certain cases by imprisonment. He is at all times subject to the commands of his superior officers. He cannot quit while in active service without consent of his superiors. Members of the State militia do not become members for the purpose of receiving the small per diem allowances awarded them by the State while they are in active service. 'The militia of the state shall consist of all able-bodied male citizens * * * between the ages of eighteen and forty-five, who are residents of the state * * * ' (subject to certain exemptions). (Military Law, Par. 1.) The Governor has power, in case of necessity, to order into active service of the State any part of the militia that he may deem proper. (Id. Par. 8.) Thus every man who is a resident of the State between the ages of eighteen and forty-five years, subject to certain exceptions, may in case of necessity be required, upon the call of the Governor, to enter the active service of the State as a part of the militia. It seems clear that one who joins the State militia and is engaged in active service therein is in no sense an employee of the State. He is simply performing a duty which he owes to the sovereign State as a resident and citizen. It makes no difference whether he does that voluntarily in time of peace or in response to the call of the Governor in time of trouble."

The supreme court of Illinois had before it this question in *Hays v. Illinois Terminal Transportation Co.*, 363 Ill. 397, 2 N. E. 2d 309. That court in the following words came to the same conclusion as the New York court: "The relation between the State and those who are in the voluntary military service is essentially different from the relation which obtains between master and servant. Military service is based upon the duty which every citizen owes to the sovereign and differs from ordinary employment in this: that the enlisted man cannot terminate his service at will. * * * It thus appears that although an enlistment is a

contract, it is not the usual contract of employment contemplated by the Workmen's Compensation act." From a reading of the entire opinion it may reasonably be said that the court in arriving at its conclusion was influenced by the fact that compensation other than workmen's compensation is allowable to a member of the Illinois National Guard for injury in service and benefits are allowable to dependents for death but clearly the criterion for the determination is the failure to come within the meaning of the term employee as used in the workmen's compensation law.

We are disposed to agree with the conclusion arrived at by the courts of New York and Illinois. We adopt the view that members of the Nebraska National Guard are not employees of the state or any agency created by it within the meaning of the workmen's compensation law but that as members of the National Guard, when on duty, are engaged in the performance of the duty which the citizen owes to the sovereign of which he is a part along with every other citizen.

We think it not out of place to suggest here that the framers of the Constitution recognized the existence of the state militia as a constituent element of sovereignty without in terms creating it. Article XIV of the Nebraska Constitution is the only one pertaining to the militia. It is the following: "The Legislature shall determine what persons shall constitute the militia of the state, and may provide for organizing and disciplining the same." This provision does not create but recognizes the existence of the militia and authorizes legislative provision for its components. It would appear therefore that a militia was constitutionally considered an attribute of sovereignty and that any legislative provision for call of personnel to the militia would be a call to sovereign service rather than to employment by the state or an agency of the state.

If we found that appellee was an employee within the meaning of the workmen's compensation act still it would be necessary to deny a recovery on the ground that his action is barred for the reason that he failed to file claim within the time fixed by statute.

Section 48-133, Comp. St. 1929, as amended by section 21, ch. 57, Laws 1935, contains the following provision with regard to notice of injury and the filing of claim for compensation: "No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same, or in case of death of the employee, or in event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity: * * * ."

Section 48-138, Comp. St. 1929, setting forth the time within which action may be instituted is the following: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in Section 3680 (48-139) hereof. In case of death, all claims for compensation shall be forever barred unless, within one year after the death, the parties shall have agreed upon the compensation under this act, or unless within one year after death, one of the parties shall have filed a petition as provided in Section 3680 (48-139) hereof. Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment. In the event of legal disability of an injured employe, said limitation shall not take effect until the expiration of one year from the time of removal of such legal disability."

As disclosed by the record no formal notice was ever given of the accident and injury and no formal claim for compensation was ever made except the petition filed in the workmen's compensation court. The only notice to appellant of any kind was a call, or perhaps two calls, at the of-

fice of and conference with the adjutant general in January of 1940. The evidence fails to disclose that formal or informal claim was made on that or those occasions. The petition was filed October 7, 1940, almost 14 months after the injury was sustained.

It is the claim of the appellee that the statutory limitations did not apply to him since the injury was latent and its true character was not known until examination by Dr. Orr in the early part of December, 1939. No claim was filed thereafter and action was instituted almost ten months thereafter.

It will be observed from an examination of quoted provisions of the statute that there are two specific limitations upon the right of recovery by action under the workmen's compensation law. The first is the filing of claim by the employee within six months of the injury. The second is the filing of petition with the workmen's compensation court within one year.

This court in cases where the substantial character of the injury was known at the time has uniformly upheld the literal terms of these two limitations. *Kurtz v. Sunderland Bros. Co.*, 124 Neb. 776, 248 N. W. 84; *Welton v. Swift & Co.*, 125 Neb. 455, 250 N. W. 661; *Park v. School District*, 127 Neb. 767, 257 N. W. 219; *Dunlap v. City of Omaha*, 131 Neb. 632, 269 N. W. 422; *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N. W. 425. However in a group of cases where it was found that the true character of the injuries was not known at the time and that they were progressive the limitations did not literally apply. *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N. W. 316; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615; *City of Hastings v. Saunders*, 114 Neb. 475, 208 N. W. 122; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N. W. 449; *Astuto v. Ray Gould Co.*, 123 Neb. 138, 242 N. W. 375; *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925; *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734. It is clear however that under such conditions the limitations of these sections

apply to the date of discovery of the true character of the injury.

In *Flesch v. Phillips Petroleum Co., supra,* it was stated: "Liberally construing the workmen's compensation law to give effect to its provisions and purposes, it has often been held that failure to give the employer notice of a claim for compensation within the statutory period of six months is not necessarily a defense, if the accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable, where notice is given within six months from the time the employee acquires knowledge of a compensable disability as a result of the accident."

In *Montgomery v. Milldale Farm & Live Stock Improvement Co., supra,* it was stated: "The delay in making a claim during this period, while he had reason to believe his injury was temporary and not of a serious nature, did not bar the proceeding for compensation until six months from the time he discovered through scientific examination by his physician by means of X-rays that his disability was total and permanent, the workmen's compensation law being liberally construed to give effect to its purposes, as it should be." Obviously the proceeding here referred to is the filing of claim for compensation.

The conclusion is inescapable that appellee, if an employee of appellants, is barred of a recovery under the workmen's compensation law by his failure to file claim within the limitation of time for such filing fixed by such law.

The judgment of the district court is reversed and appellee's action is dismissed.

REVERSED AND DISMISSED.

GLENN PRINCE, ADMINISTRATOR, APPELLANT, V. WALTER PETERSEN, DOING BUSINESS AS NIELSEN & PETERSEN COMPANY, ET AL., APPELLEES.
12 N. W. 2d 704

FILED JANUARY 14, 1944. No. 31689.

1. **Evidence.** The admissions and declarations of a party to an action against his own interest, on a material matter, may be proved as original evidence, and it is not necessary to lay foundation therefor by cross-examination of such party.
2. ———. The admissions and declarations of a party to an action against his own interest, on a material matter, contained in a deposition, may be proved as original evidence, and it is not necessary to lay foundation therefor by cross-examination of such party.
3. **Automobiles.** Where negligence is predicated on speed of a motor vehicle at the time of an accident the question of the admissibility of evidence of speed of a vehicle shortly prior to the time of the accident rests largely in the discretion of the trial court.
4. ———. Before evidence of speed shortly before an accident is admissible for the purpose of being considered in determining speed at the time of the accident it must appear, either that the point was of such close proximity that a reasonable inference could be drawn that it was continued to the point of the accident, or, if more remote, that from evidence of other fact or circumstance a reasonable inference could be drawn that speed was continued at approximately the same rate over the intervening distance.

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

Harold A. Prince and *R. A. Haggart*, for appellant.

A. J. Luebs and *Chambers, Holland & Locke, contra.*

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

YEAGER, J.

This is an appeal in an action for damages by Glenn Prince, administrator of the estate of Lawrence H. Prince, deceased, plaintiff and appellant, against Walter Petersen,

doing business as Nielsen & Petersen Company, and Charles D. Watson, defendants and appellees, originally instituted in the district court for Hall county, Nebraska, for the death of Lawrence H. Prince, deceased. Lawrence H. Prince was killed in a collision of two motor vehicles on February 28, 1942, at Darr, Dawson county, Nebraska, and it is claimed that death was caused by the negligence of the defendants. The case was tried to a jury which resulted in a verdict and judgment in favor of the defendants. From an order overruling motion for new trial and this judgment the plaintiff has appealed. Numerous assignments of error are set forth in the brief of appellant.

Certain uncontroverted facts as disclosed by the record are the following: On the evening of February 28, 1942, the deceased, Lawrence H. Prince, and his wife were riding in a Buick sedan with one Leonard Curren and his wife. The sedan was the property of Curren. They were proceeding westward on the Lincoln Highway or United States Highway No. 30 in Dawson county, Nebraska. Prince and Curren were in the front seat and the wives of the two men were in the rear seat. When they arrived at the town of Darr, which was near 9:30 p. m., they had a head-on collision with a truck, or as it is termed, a semi-pickup truck, which was at the time being driven by defendant Watson in an easterly direction. The truck weighed about 13,000 pounds and it had on it a load of about 3,000 pounds. Watson at the time was in the employ of the defendant Petersen and was in the performance of service in the line of his employment. As a result of the collision Prince, Curren and Mrs. Curren received injuries as a result of which they died before any one appeared on the scene. Mrs. Prince received injuries as a result of which she died two days later. The night was dark and the highway was covered with snow and was slippery therefrom. Heavy wet snow was falling at the time as it had been for some considerable period before. It appears that the outlines of the paving, which was about 20 feet in width, were not discernible.

The claim of the plaintiff is that the collision was the re-

sult of the negligence of the defendant Watson which was attributable also to the defendant Petersen because of the employer-employee relationship. The specifications of negligence, briefly stated, are the following: That the truck was operated carelessly, recklessly and at a dangerous, excessive and unlawful rate of speed taking into consideration the condition of the highway, its use and the traffic thereon; that the truck at the time was being operated on its left side of the highway; that the defendant Watson failed to accord the automobile in which the deceased was riding an equal portion of the highway; that the defendant Watson failed to have the truck under control; that defendant Watson failed to keep a proper lookout; that defendant Watson failed to divert the course of the truck when he saw, or, in the exercise of ordinary care, should have seen the automobile, in which plaintiff's decedent was riding, in a position of peril; that the defendant Watson failed properly to apply the brakes of the truck; and that defendant Watson failed, neglected and refused to bring the truck to a stop in the presence of imminent danger which he perceived or should have perceived.

The answers contained general denials of negligence and to the extent necessary to be set forth here, allegations that the collision was caused by the negligence of the driver of the automobile in which Prince was riding, as follows: That he operated it at a rate of speed which was not reasonable and proper under the circumstances; that he suddenly crossed the center of the highway into the path of the truck; that he failed to have the automobile under reasonable control; and that he failed to drive on the right-hand side of the highway.

It is also alleged in the answers that the deceased was guilty of contributory negligence but this issue was not submitted, therefore the specifications do not require mention here.

In support of his tendered issues the plaintiff sought to show by evidence that the defendant Watson was at the time of the collision driving on his left-hand side of the

highway. There were no eyewitnesses except the defendant and the occupants of the automobile in which Prince was riding. These latter, as has already been pointed out, were dead. Proof depended upon testimony as to the physical facts, that is, tracks, location of vehicles, condition of the vehicles, debris, etc., and legitimate inferences to be drawn therefrom, and statements, if any, of the defendant Watson.

The first assignment of error to which we direct our attention is that the court erroneously refused to admit in evidence on offer of plaintiff what was claimed to be an admission or admissions against interest by the defendant Watson. Prior to the trial of this case, but in another case pertaining to the accident in question, the deposition of Watson was taken. In his deposition the following questions and answers appear: "Q. Regardless of what anything shows you know and you testify now as a positive fact that from the time you saw this Buick car up until the time of the accident was all over and the cars came to a stop you had not turned your car in either direction? A. That's right. * * * Q. On what side of the road, will you tell the court and the jury, your car was and the other car was after the accident? A. Well, sir, both on the north side of the road. * * * A. I know where I was all the time. * * * Q. And so then as near as you can tell us after the cars came together your truck continued to move forward to the east, did it? A. Yes, sir. Q. And as near as you can tell us in a straight line? A. Yes, sir. Q. And you pushed the other car, the Buick, back towards the east? A. Yes, sir." There is no contention that this testimony, if admitted, would have been binding on the defendant Petersen. The offer was specifically limited to defendant Watson.

That this evidence was material on the matter of the negligence can hardly be questioned. It was informative as to the position of the truck on the highway at the time of the accident as well as to the side on which it was moving immediately prior thereto. As already set out it is the claim of plaintiff that Watson was driving on his left side of the highway. His left side would be the north side.

This evidence was clearly admissible as original evidence. In *Young v. Kinney*, 79 Neb. 421, 112 N. W. 558, in concluding that evidence given at another hearing in the nature of admission against interest was admissible as original evidence without foundation, it was stated: "The admissions and declarations of a party to an action against his own interest, in a material matter, may be proved as original evidence, and it is unnecessary to lay any foundation in the cross-examination of such party, where he has testified in his own behalf." This rule applies as well where the admission against interest is contained in a deposition. *Berggren v. Hannan, O'Dell & Van Brunt*, 116 Neb. 18, 215 N. W. 556; *Luikart v. Korbmaker*, 128 Neb. 199, 258 N. W. 263; *Brown v. Mulready*, 140 Neb. 500, 300 N. W. 421.

The appellees contend that if the refusal to admit this evidence when offered was error it was cured, because on cross-examination, while a witness for the defendants, Watson admitted that he made the statements. In support of their position defendants cite *Lamb v. Briggs*, 22 Neb. 138, 34 N. W. 217, and *Epley v. Lovell*, 5 Neb. (Unof.) 251, 97 N. W. 1027. Neither of these cases deals with a comparable situation. The former has no reference to admission against interest. In the latter a bill of sale was not admitted in evidence. The court held that this was not error since the bill of sale was pleaded in the answer and admitted by the reply. The inevitable conclusion to be arrived at from this is that because of the pleading and the admission the bill of sale was before the court for all purposes without necessity for its introduction in evidence.

We hold that plaintiff was entitled to have this offered evidence admitted as a part of his case in chief and that its rejection was prejudicially erroneous.

Complaint is made that the court erred in refusing to give instruction No. 1 tendered by the plaintiff or one of like import. The tendered instruction is the following: "You are instructed that the evidence with respect to the speed of the car in which plaintiff was riding, when it is claimed that the car passed either and both the Cline car

and the Bishop car, is withdrawn from your consideration, and you are instructed to disregard the same as though said evidence had never been introduced."

The background for this tendered instruction is testimony that about two miles east of the scene of the accident an automobile partially identified as the automobile in which plaintiff's decedent was riding passed one which was being operated by Elmer Cline. Mrs. Cline was riding with Mr. Cline. Mrs. Cline was permitted to express the opinion that the automobile was proceeding at a speed of about 50 miles per hour. At some point within 5 miles east of the scene of the accident an automobile again partially identified as that in which plaintiff's decedent was riding passed the automobile in which Charles W. Bishop and Marjorie Burchell were riding. Mrs. Burchell was driving and Mr. Bishop was with her in the front seat. Mrs. Burchell was allowed to give as her opinion that the automobile was proceeding at about 50 miles per hour. Mr. Bishop said it was going very fast and that it cut in sharply.

The plaintiff requested by the tendered instruction that the jury be instructed to disregard this testimony as to speed, first, because the automobile which passed these other automobiles was not sufficiently identified as the one in which plaintiff's decedent was riding and, second, because no proper inference could be drawn that the automobile in which plaintiff's decedent was riding was proceeding at 50 miles per hour at the time of the accident from the fact that it was proceeding at that speed at points two and five miles distant.

On this subject this court said in *Schwarting v. Ogram,* 123 Neb. 76, 242 N. W. 273: "This question of the admissibility of the speed of a vehicle shortly prior to the time of the accident rests largely in the discretion of the court." This rule was approved in *Showers v. A. H. Jones Co.,* 126 Neb. 604, 253 N. W. 902. The rule as announced in *Schwarting v. Ogram, supra,* was dependent upon an estimate of speed at a point about 600 feet from the point of the accident. The approval of the rule in *Showers v. A. H. Jones*

Co., supra, was dependent on an estimate of speed at a point about 180 to 200 yards from the point of the accident. Here the distances were two and five miles and there is an entire absence of testimony as to fact or circumstance from which a reasonable inference could be drawn that a speed of 50 miles per hour was maintained from the time the automobile in which plaintiff's decedent was riding passed these other automobiles, if it was the automobile in which plaintiff's decedent was riding that did pass.

The rule of these cases is hereby approved but the discretion therein contemplated does not permit the admission of evidence of speed at other points unless the points are of such close proximity that a reasonable inference could be drawn that it was continued to the point of accident, or unless, if more remote, there is evidence of fact or circumstance from which a reasonable inference could be drawn that speed was continued at approximately the same rate over the intervening distance.

Evidence of fact and circumstance from which a reasonable inference could be drawn that the speed of the automobile in which plaintiff's decedent was riding was maintained at about 50 miles per hour being absent it becomes necessary to hold that the trial court abused its discretion in permitting the evidence complained of under this assignment of error to be considered by the jury.

The other assignments of error deal with admission and rejection of evidence, and instructions given and refused. They are without substantial merit and will be thus disposed of without further discussion.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

IN RE ESTATE OF J. F. WORTMAN. JOHN E. WORTMAN ET AL., APPELLANTS, V. EDWIN A. FRICKE, SPECIAL ADMINISTRATOR, APPELLEE.

12 N. W. 2d 701

FILED JANUARY 14, 1944. No. 31703.

1. **Executors and Administrators.** The right of a widow or next of kin to nominate a suitable person to administer the estate of a deceased person exists only for a period of 30 days after the death.
2. ———. An administrator is not chargeable with interest on money which he holds as administrator subject to the order of the court, unless he received interest thereon, or the circumstances are such that he might and ought to have received such interest.

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

C. S. Wortman, W. L. Dwyer, A. L. Tidd and *L. B. Fuller,* for appellants.

Walter H. Smith and *W. A. Robertson, contra.*

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

YEAGER, J.

This is an appeal by John E. Wortman, C. S. Wortman, Beth Barnes Gregg, Verna Barnes Pfeiffer and Selma Barnes Missner, appellants and objectors, from an order of the district court for Cass county, Nebraska, approving the final report of Edwin A. Fricke, appellee and special administrator of the estate of J. F. Wortman, deceased. This report and the objections thereto present the only issue to be determined here. The appellants contend that the regularity and propriety of the appointment of appellee as special administrator is also before the court but the record fails to sustain this contention.

J. F. Wortman died testate on November 28, 1938, while a resident of the state of Oregon. At the time of his death he had property in the state of Oregon and in Cass county,

and other counties in the state of Nebraska. The will was admitted to probate in Jackson county, Oregon, on December 8, 1938. Ancillary proceedings were instituted for the purpose of probate of the will in the county court of Cass county, Nebraska, by petition filed on or about June 5, 1939, by Harold W. Richards. Pursuant to this petition and nomination by the said Harold W. Richards, Edwin A. Fricke was duly appointed administrator with the will annexed of the estate of J. F. Wortman, deceased, on August 4, 1939. The appointment was objected to by appellants and from the order of appointment they promptly appealed to the district court. On September 9, 1939, Fricke was appointed special administrator of the estate and thereafter and until the order, which is the basis of this appeal, was entered proceeded to act in that capacity. The appeal from the order appointing Fricke administrator with the will annexed remained untried and undisposed of until August 12, 1941. On August 12, 1941, a stipulation with regard to the appeal was entered into and made a part of the records of the district court, as follows: "It is hereby stipulated by and between W. A. Robertson, Attorney for Harold W. Richards, petitioner, and C. S. Wortman, Attorney for objectors; that the appeal in this case shall be dismissed and said cause remanded to the County Court, with directions that the proceedings in the County Court be had to require the special administrator to make final report and that hearing be had upon said final report and final settlement of his accounts and said estate settled thereon without the appointment of a regular administrator." Order was entered pursuant to this stipulation and the matter remanded to the county court.

In pursuance of this stipulation and the order thereon and mandate to the county court by the district court, Edwin A. Fricke, special administrator, filed his report. The county court approved the report. Appeal was taken to the district court from the action of the county court. On hearing in the district court the report was approved in part and disapproved in part. The appeal here is from this order of the district court.

The special administrator without question accounted for all of the money coming into his hands. The only questions are as to certain disbursement for administration expense and a claim that interest should be accounted for on funds coming into his hands. As expense of administration the county court allowed the following: Court costs, $91.10; administrator's fees, $79.76; administrator's expense, $10; and attorney's fees, $125. The district court reduced the cost item by $17.42 and with that change approved the report. Appellants object to the items allowed.

The objection is not that the items of costs were not proper or that the fees were excessive, but that the special administrator was an interloper, had no right to his appointment and that the fees were improper under special administration, and that the county judge was biased and prejudiced and thereby disqualified.

If we were to assume or to find from the record, which we do not, that the special administrator in the beginning was an interloper and that the county judge was prejudiced, still that would avail appellants nothing.

By their stipulation on which the court acted appellants have not only waived objection to the appointment but have specifically approved the manner of handling and the closing of this estate. They will not now be permitted to complain that the proceedings were irregular.

The basis for the charge that the county judge was prejudiced is the fact that he appointed as special administrator the person from whose appointment as administrator with the will annexed appellants were appealing. The appeal was not based upon an allegation of incompetency of Fricke but on the ground that there was no need for administration and the further ground that appellants had the right of nomination which was denied them. It is evident that the court concluded otherwise and with that conclusion we are in accord. In the light of the conclusion arrived at with regard to the necessity for probate of the will and in the light of the appeal from the appointment of an administrator with the will annexed the county judge had not only the

right but was under the duty to appoint a special administrator. Comp. St. 1929, sec. 30-316. The appointment of a special administrator is a function to be performed by the county judge without any statutory direction that he look to any interested party for nomination. In this wise the county judge acted and in the light of the manner in which the special administrator performed his trust it cannot be said that discretion was abused. There is nothing on which a finding of prejudice could be grounded.

Even in the absence of the stipulation it would still be necessary to hold that there was no irregularity. One assertion of irregularity is based upon the claimed right of next of kin to nominate an administrator. No executor was named in the will, hence the county court was required to proceed to the appointment of an administrator with the will annexed as if J. F. Wortman had died intestate. Comp. St. 1929, sec. 30-306. So proceeding, the right of the widow or next of kin to nominate a suitable person to administer the estate existed for a period of 30 days. Comp. St. 1929, sec. 30-314. No effort was made to secure the appointment of an administrator until April 21, 1939. It follows that this failure to nominate within 30 days by the next of kin barred them of any such right thereafter. There were no creditors, therefore by the specific terms of statute it was proper for the county court to commit administration to any person found by the county judge to be a proper person to administer the estate. Comp. St. 1929, sec. 30-314.

It is contended that the appointment of an administrator was improper for the reason that there was no necessity for administration. The basis for the contention is that the estate was solvent and that all claims were paid or payable out of the original probate in Oregon, that there was no personal property in Nebraska but only real estate which descended directly in accordance with the terms of the will.

This contention fails to take into consideration the terms of the will. The will contained a provision for payment of expense of last illness, funeral expenses and just debts and one specific bequest of $1,000. After payment of these

items it placed the rest, residue and remainder of the estate in trust with the Medford National Bank, Medford, Oregon, as trustee, for the use and benefit of the widow of J. F. Wortman during her lifetime, with power of sale in the trustee. None of the residue was subject to distribution until the death of the widow. Obviously necessity existed to administer, preserve, and protect the trust in order that the income might be paid to and for the benefit of the widow under the terms of the will. The contention of appellants in this connection is without merit.

The proposition that the special administrator should be charged with interest under the circumstances such as are disclosed by this record finds no support in the decisions. By the stipulation referred to the same duties and liabilities devolved upon him as would have devolved upon an administrator with the will annexed. As administrator with the will annexed Fricke would not have been chargeable with interest. The applicable rule is stated in the eighth point of the syllabus in *In re Estate of Wilson*, 97 Neb. 780, 151 N. W. 316, as follows: "An administrator is not chargeable with interest on money which he holds as administrator subject to the order of the court, unless he received interest thereon, or the circumstances are such that he might and ought to have received such interest."

The briefs of appellants, for the most part, instead of being a discussion of pertinent issues of law and of fact, are a personal attack upon the judicial and personal integrity of A. H. Duxbury, county judge of Cass county, Nebraska, and the personal and professional integrity of W. A. Robertson, attorney for the administrator. From a careful examination of the record we do not hesitate to say that these attacks are made without the slightest bit of excuse or justification.

The conduct of attorneys for appellants in thus attacking an able and respected judicial officer of the state and a capable and highly respected member of the legal profession under the guise of presentation of litigable issues should not and does not escape the censure of this court.

An attorney's fee of $100 is allowed against the estate for services for attorneys for appellee in this court.

The judgment of the district court is affirmed.

AFFIRMED.

BRUNO B. ASBRA, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
12 N. W. 2d 845

FILED JANUARY 25, 1944. No. 31690.

Arson. In this case, involving a conviction of the crime of arson, we have considered the assignments of error and find that no error prejudicial to the defendant occurred.

ERROR to the district court for Cedar county: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Clarence E. Haley, for plaintiff in error.

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

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

SIMMONS, C. J.

Defendant was charged, in four counts, with the crime of arson. He was tried on two counts, and found guilty on one. He prosecutes error to this court, presenting by argument the contention that the evidence was insufficient to sustain the verdict and that the court should have sustained a motion for a directed verdict when the state rested and again when both parties rested; that the verdict of guilty on one count and not guilty on another is inconsistent; that there was error in the instructions to the jury and finally that the sentence imposed by the court was excessive. We sustain the judgment of the trial court.

It is not questioned but that the crime of arson was committed by some one. The question presented is the sufficien-

cy of the evidence to go to the jury and to sustain the jury's verdict that defendant was guilty.

The state's evidence detailed the following situation: The defendant operated a liquor store and recreation parlor in Wynot. He lived in a rented house. On the afternoon of January 10, 1941, his wife and son left the home at four p. m. and drove to Sioux City, Iowa, for a visit with her mother, taking personal property with her and leaving no one in the house. The defendant left his place of business about 6 or 6:30 p. m. and went home where he remained for 30 to 40 minutes, firing the furnace and eating a lunch. He locked the house and returned to his place of business sometime after 7 p. m. where he remained until the fire was discovered in his home. This discovery was made between 10 and 10:30 p. m. When notified that his house was afire, defendant apparently said nothing, went to the scene of the fire, arriving there some 20 or 30 minutes after the volunteer fire department reached the scene and had the fire extinguished. He told of money hidden in the house, which he recovered after his arrival, but showed to no one. When members of the fire department and neighbors arrived they found the house locked and a fire in the living room in and around a day bed and radio. They broke in, threw the bed out the window and put out the fire by the use of chemicals and water. There was a strong odor of kerosene on and about the day bed, on the floor of the kitchen, on rugs in two places in the house, in the basement and on a bed and bedding on the second floor. Binder twine was tied in a zigzag manner across the basement stairway, then strung across the kitchen to a bed in a room on the first floor and under a kerosene-soaked rug in an inside hallway, up the stairway to the second floor and tied to several articles of furniture there. The twine was burned in places on the second floor. An empty five-gallon can was found in a closet off the kitchen the night of the fire. When interviewed after the fire, defendant stated he had only $10 in outstanding debts, but some days later totaled this to something over $800 of debts. His furniture was mortgaged. On November 11, 1940, just

60 days before the fire, without an inspection or valuation by the agent, he had it insured for $1,400. The state's evidence showed that the furniture was overinsured. Electricity was ruled out as a possible cause. The state's experts, describing the situation they found, testified that the fire could have been started several hours before it was discovered.

At the close of the state's case they had established by evidence and by admissions of the defendant that some one, well acquainted with the inside arrangement of the house, had planned and set the fire; that the defendant was the last person known to have been in the house before the fire; that defendant left the house some two to three hours before the fire was discovered; that he locked the house securely and that the house was locked when firemen and neighbors reached it after the fire was discovered; that defendant first denied and then admitted his debts; that the property was overinsured; and, although clearly of incendiary origin, the fire could not have been started by defective electric wiring.

There is little conflict between the state's and defendant's evidence. The evidence for the defendant was largely devoted to showing that pictures, keepsakes and valuable possessions of the wife were in the house at the time of the fire, that the wife and son took nothing of particular value to Sioux City and that the property was not overinsured. The wife's testimony was that the house was in proper order when she left at four o'clock, having been fully cleaned and floors waxed that day; that the house was locked before she started for Sioux City and the key was left with the defendant at his place of business. The defendant detailed his day about as the state established by his admissions. He testified he had $365 hidden in the house that was being accumulated to pay for a renewal of his license. This he claims he salvaged and later gave to his wife. He needed, as we read the record, about $500 to secure another license for his business. He was in arrears in his rent. Although the fire was "out" by 11 o'clock that night he did not notify his wife or the owner of the house of the fire until

after 9 o'clock the following day. He denied any connection with the fire. Further recital of the evidence is not necessary. We consider it sufficient to carry the case to the jury and to sustain the verdict of guilty.

The defendant next complains that the verdict is inconsistent in that he was found guilty of setting fire to his personal property and not guilty of setting fire to the house in which it was located. However, as to that we have said the defendant cannot complain because he was acquitted of one offense and that he "was not prejudiced by the findings returned in his favor." *Weinecke v. State,* 34 Neb. 14, 51 N. W. 307.

It appears that there was some confusion as to the name of the insurance company that carried the risk on the household goods. There was no actual confusion as to the identity of the company. No issue was made as to it. The policy was in evidence. During the progress of the trial the true name was stipulated and by agreement the information was amended to set it forth. The trial court in his instruction number one erroneously named the company. The court did correctly name the company in his instruction number eight, wherein he recited the elements of the offense which the state was required to prove. We do not see how this error could have been prejudicial to the defendant.

On the matter of the credibility of witnesses the trial court instructed the jury, in part, as follows: "You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witness as absolutely true, if for any good reason it appears to you unreliable or untrue. Yet you have no right to reject the testimony of any of the witnesses without good reason and should not do so unless you find it unreconcilable with other testimony which you find to be true." The defendant attacks the last sentence of this instruction and argues that the jury have the right for good reason to reject the testimony of any witness and that,

as a condition to rejection, it is not necessary that the jury find it "unreconcilable with other testimony" which they "find to be true." We are unable to see where the instruction was prejudicial to the defendant. The evidence was circumstantial and there was in it but little dispute on material matters. The question to be determined from the circumstantial evidence was whether or not the defendant was guilty of the offense. The defendant testified in his own behalf and denied that he had "anything to do with the setting of the fire." When applied to his denial the jury were directly instructed that they should not reject his denial as untrue unless it was found unreconcilable with other testimony which they found to be true.

Finally the defendant argues that the sentence is excessive. The statute authorized a sentence "for not less than one nor more than five years." Comp. St. Supp. 1941, sec. 28-5,102. The trial court fixed the sentence at two years. We do not consider the sentence to be excessive.

The judgment of the trial court is affirmed.

AFFIRMED.

ROSE RIEKES, APPELLANT, V. ALBERT L. SCHANTZ, APPELLEE.
12 N. W. 2d 766

FILED JANUARY 25, 1944. No. 31634.

1. **Appeal and Error.** In determining the correctness of a directed verdict on the ground of plaintiff's contributory negligence sufficient to bar a recovery, the testimony most favorable to plaintiff will be accepted as true.
2. **Automobiles.** A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it.
3. **Negligence.** Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.
4. **Evidence.** The physical facts are sufficient to bar a recovery for negligence only when they indisputably demonstrate that the

collision out of which the cause of action arose was not caused by the party charged.

5. Negligence. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to a jury.

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

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

Kennedy, Holland, DeLacy & Svoboda, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

CARTER, J.

This is an appeal from a judgment in favor of the defendant in a personal injury action growing out of an automobile accident at a street intersection in the city of Omaha. The record shows that defendant moved for a directed verdict at the close of plaintiff's evidence, which motion was overruled. The motion was renewed at the close of defendant's evidence and it was then sustained. From the judgment of dismissal, entered in accordance therewith, the plaintiff appeals.

In considering the evidence, for the purpose of reviewing the correctness of the trial court's order directing a verdict for the defendant, we will assume the existence of every material fact which the evidence of plaintiff tends to establish, as well as all reasonable inferences to be drawn therefrom. *Anderbery v. Katz,* 142 Neb. 872, 8 N. W. 2d 207. It is just as fundamental that where different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to a jury. *Parks v. Metz,* 140 Neb. 235, 299 N. W. 643. The question to be determined is whether the action of the trial court in directing a verdict was correct in view of the foregoing rules.

The evidence shows that on December 9, 1941, plaintiff left her home at about 10 a. m., and proceeded east on Farnam street. As she approached the intersection of Farnam street and 51st avenue she observed an automobile approaching from the south. When she first observed this car it was about 100 feet south of the stop sign, the stop sign itself being about 20 feet south of the south curb of Farnam street. Plaintiff was about 25 feet west of the east curb line of 51st avenue when this observation was made and was traveling at a speed of 20 or 25 miles an hour. Plaintiff testifies that she then slowed down, looked to the north and, seeing no cars coming from that direction, again looked to the south. Defendant's car was then 10 feet south of the stop sign advancing at a speed of 40 miles an hour. Plaintiff's testimony is that defendant's car continued at the same rate of speed, failed to stop at the stop sign, and crashed into the side of plaintiff's car. Plaintiff's evidence is that she expected the defendant to stop at the stop sign and when he failed to do this she stepped on the accelerator and turned to the left in an attempt to avoid the collision. The evidence is clear that defendant did not change his direction and that the accident occurred in the northeast quadrant of the intersection.

The physical facts disclose that plaintiff's car suffered material damage on the right side. The right front fender was badly bent and the body badly damaged back of the right front fender and in front of the right door. The evidence clearly indicates that this was the point of impact with defendant's car. There is evidence that the frame was bent in, the manifold broken, the rear motor hangars broken and the motor pushed to the left. The record also discloses that plaintiff's car continued on after the collision and ran into a tree located about 33 feet east of the curb of 51st avenue. As a result of the impact with the tree the bumper of plaintiff's car was bent in the middle so that it resembled a "U."

Defendant's car was damaged mostly at the front. The headlights were bent to the right, all indications being that

the force of the impact was from the left. After the accident the car was lying on its left side in the northeast quadrant of the intersection. The testimony of defendant conflicts materially with that of the plaintiff. He testifies that he stopped at the stop sign, proceeded into the intersection when it was clear and was struck by plaintiff's car traveling at a high rate of speed.

There is evidence in the record that the vision of the parties was partially obstructed, but we find no evidence in this respect which is material in determining the question here presented.

Plaintiff's evidence indicates that she approached and entered the intersection prior to the defendant. She testifies that she knew the location of the stop sign and assumed that defendant would stop. We think that a person traveling a favored street protected by stop signs may properly assume that oncoming traffic will obey them. The evidence shows that plaintiff approached the intersection from defendant's left, but in view of the fact that plaintiff's evidence is that she entered the intersection first with knowledge of the stop sign protecting her from the right, we do not think this fact is at all material here. Defendant contends that plaintiff was negligent in speeding up in an attempt to avoid the collision. If the plaintiff's evidence be true, she was faced with an emergency when defendant's car came through the stop sign at a high rate of speed. We have said many times that, where one is confronted suddenly with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. All the law requires is that one conduct himself as an ordinary, careful and prudent person would have done under similar circumstances, and if he does that he is not held to be negligent, even though he committed an error of judgment. *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689. We cannot say therefore that the act of plaintiff in speeding up her car under the situation disclosed by her testimony constituted contributory negligence sufficient to bar recovery as a matter of law.

Defendant relies upon the physical facts to sustain his position. A careful examination of them reveals nothing that is wholly inconsistent with the theory of either party. For the physical facts to be sufficient to bar a recovery they must indisputably demonstrate that the collision out of which the cause of action arose was not caused by defendant's negligence. The physical facts shown by the record in the present case do not so show.

There were only two witnesses to the accident, the plaintiff and the defendant, and their testimony is very conflicting. The physical facts recited in the record are not undisputed or conclusive and, though properly admissible, are not sufficient upon which to direct a verdict. After considering plaintiff's evidence in the light of the rules hereinbefore set out we think it was sufficient to receive the consideration of the jury. We conclude, therefore, that the trial court erred in directing a verdict for the defendant. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF AUGUSTUS STATZ.
LILLIE M. FILER, APPELLANT, CROSS-APPELLEE, V. HAZEL J. STATZ, ADMINISTRATRIX, APPELLEE, CROSS-APPELLANT.

12 N. W. 2d 829

FILED JANUARY 25, 1944. No. 31630.

1. **Courts.** By the Constitution, article V, sec. 16, and section 27-503, Comp. St. 1929, the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons.
2. **Executors and Administrators.** The county court has the power to require executors or administrators to exhibit and settle their accounts, and to account for the estates and property that have come into their possession as such. If the executor or administrator is deceased the court may require his personal representative to make such an accounting.
3. **Courts.** County courts are without general equity jurisdiction

but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction, and render to the parties interested in the assets of the estate such relief as their respective situations may justify.

4. **Executors and Administrators.** If a third party, who has himself planned, or who has participated in, the wasting of an estate, and is before the court, as on objections to the final account, the court may compel him to refund to the representative what he has unlawfully received.
5. ———. Any person beneficially interested in the estate embraced in an administration account may cite the executor or administrator to file an account, object, or file objections to the terms or matters contained in the account, and the representative may in a proper proceeding be surcharged with losses occurring because of a breach of trust.
6. ———. Legatees and distributees come within the scope of this rule, and when they positively allege their status in a petition or objections to the account, which is admitted by demurrer, they then have such an interest as will permit the action to be maintained by them.
7. ———. An executor or administrator cannot set up the statute of limitations against the next of kin or persons entitled to the distribution of the assets of the estate, unless he repudiates the trust or sets up claims in his own right, or until the trust is terminated.
8. ———. An executor or administrator should preserve the property of the estate entrusted to him, separate and apart from his own, to give it an earmark so that it will always be technically in the custody of the county court and readily known and traceable. The violation of this duty is a breach of trust which may entail consequences of pecuniary liability upon him for profit to himself or loss to the *cestui que trusts*, although acting in good faith.
9. ———. The rule against a trustee (executor or administrator) borrowing money from a trust fund in his charge at the expense of the beneficiary or advantage or profit to himself, applies to cases wherein the spouse of the trustee is the recipient of such loan, advantage or profit.
10. ———. An intelligible statement of facts under oath showing an existing substantial right by reason of such a breach of trust which the court has jurisdiction to enforce, concluding with a prayer for general equitable relief, is a sufficient allegation of all matters necessary under our code to state a cause of action and sustain a judgment in the county court.
11. **Courts.** Jurisdiction of the subject matter in a court of record

is to be tested by the authorized extent of the powers of the court in respect to the cause of action before it.

12. ———. While on appeal to the district court the plaintiff must prosecute the same cause of action as in the court of original jurisdiction, yet, in drafting his petition, he is not confined to the allegations contained in his pleading in the court below, so long as the identity of the original cause of action is preserved.

APPEAL from the district court for Nuckolls county: STANLEY BARTOS, JUDGE. *Reversed, with directions.*

Kuns & Van Steenberg and *H. G. Wellensiek*, for appellant.

H. A. Brubaker, contra.

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

CHAPPELL, J.

This litigation originated in the county court of Nuckolls county, Nebraska. For clarity it seems necessary to review certain preliminary proceedings. The county court appointed William Statz executor of the estate of Augustus Statz, deceased. William Statz, the executor, died, and Hazel J. Statz, his wife, was appointed administratrix of his estate. Certain legatees under the will made application for the appointment of an administrator *de bonis non*, c. t. a., of the Augustus Statz estate and F. M. Harris was so appointed. Thereafter two legatees made request in writing to the county court that Hazel J. Statz, administratrix of the estate of the executor deceased, and his sureties, be required to render a final account of the executor's administration of the estate of Augustus Statz, deceased. The administratrix thereafter filed an extensive showing which included an itemized statement and account of all money and assets received and expended by the deceased executor between April 11, 1938, the date of his last report to the county court, and the date of his death on July 26, 1938, including balances then remaining in her hands. Among other things she alleged that she had accounted to the administrator *de bonis non* for all of the assets coming into her hands. Upon this

showing the county court denied the request of the legatees. The order, however, did not adjudge the legality, sufficiency or finality of the showing made by the administratrix. Thereafter Lillie M. Filer filed a pleading in the county court entitled, "Objections to the showing of Hazel J. Statz, administratrix of the estate of William Statz, deceased," which we will call a petition. In this petition she stated that she was one of the legatees under the last will and testament of Augustus Statz, deceased; objected to the showing of Hazel J. Statz, administratrix; and alleged, in substance, that on November 29, 1929, William Statz, as executor of the estate of Augustus Statz, deceased, failed to perform his duties as executor, violated his duties as executor, and without authority or approval of the county court, and without exercising the care, prudence, and discretion required of him as executor, wrongfully loaned $8,700, funds of the estate, to his wife, Hazel J. Statz, who is now the administratrix of his estate; alleged that the loan was secured by first mortgage on a farm (described), not previously owned by either of them, but purchased for $9,700 at the time of making the loan; that the value of the land at that time did not exceed the sum of $9,700 and was inadequate security; that its value had decreased until the land was not worth to exceed $3,000, and although the mortgage was due and payable December 1, 1939, no action had been brought to foreclose the same; that the executor himself was personally interested in the land and his annual reports to the county court showed that he had personally paid the interest on the loan, and once paid $200 on the principal; that on September 11, 1939, after the death of the executor, and after she was made his administratrix, Hazel J. Statz paid $50 on the principal. Among other things petitioner prayed that the showing of the administratrix be not approved, that the amount due on the loan be determined, for judgment therefor against the estate of William Statz, deceased, and Hazel J. Statz, administratrix, and for such other and further relief as may be just and equitable.

Special appearance of the administratrix, and demurrers

of the administrator *de bonis non* and Hazel J. Statz, administratrix, were respectively overruled, and the latter filed answer, the allegations thereof being immaterial here. Reply was filed and the matter was tried on the merits. Thereupon the county court adjudged the showing insufficient, and found generally for the petitioner, but surcharged the executor's account with only petitioner's proportionate share of the assets involved. In other words, the county court's decree found the transaction to be voidable under the law but repudiated only a part thereof instead of the entire transaction.

The case was appealed to the district court where the parties stipulated, among other things, that the case be tried on the pleadings filed in the county court; that the matter be heard first on the special appearance, next on demurrer, and, if overruled, then on its merits on the pleadings. Special appearance was overruled by the district court, but demurrer was sustained, and upon request of Lillie M. Filer in open court, leave was granted to file an amended petition within twenty days, with which she complied. Motion was then filed to strike the amended petition as in violation of the stipulation, which motion the trial court overruled. Incidentally appellee complains of this ruling, but the general rule is that such stipulations are not absolute, even though in writing, and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion in the promotion of justice. *Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897; *State Ins. Co. v. Farmers Mutual Ins. Co.*, 65 Neb. 34, 90 N. W. 997; 60 C. J. 94.

Motion was then filed to strike the amended petition because of variance, contending that it set up a new and different cause of action. This motion was sustained, and, upon the petitioner's election not to plead further, the action was dismissed at costs of the petitioner, who appeals to this court, assigning as error that the trial court erred in sustaining the demurrer of appellee to the original petition, and in striking the amended petition and dismissing the action.

The issues here involve the original petition, demurrer thereto, and dismissal of the amended petition for variance. Bearing this in mind, questions for decision are, whether the county court had jurisdiction of the subject matter and authority to grant the relief prayed; whether appellant had legal capacity to maintain the action; whether the allegations of the original petition stated a cause of action; and whether the amended petition stated a new and different cause of action than that pleaded in the county court.

For the purposes of this opinion, the county court had jurisdiction of the subject matter, and authority to grant such equitable relief as would do exact justice between all the parties in interest. At the outset we conclude that the denial of the summary application requesting that Hazel J. Statz, administratrix, be required to file a final account after her showing was made and filed, is not *res judicata* as contended by appellee, since the matter affected by the application was only interlocutory and incidental or collateral to the determination of this controversy on its merits which were not in any manner previously adjudicated. 34 C. J. 763.

A demurrer to a petition admits only facts well pleaded therein and the court will not consider extrinsic facts admitted or alleged by the parties or their counsel. As a general rule only the demurrer and the pleading demurred to may be considered in passing thereon. *Griffin v. Gass*, 133 Neb. 56, 274 N. W. 193. "A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant." *Burnham v. Bennison*, 121 Neb. 291, 236 N. W. 745. We have recently held that a prayer for equitable relief is as broad as the pleadings and the equitable powers of the court. *Gibson v. Koutsky-Brennan-Vana Co.*, 143 Neb. 326, 9 N. W. 2d 298; 21 C. J. 679; 30 C. J. S. 1000, sec. 607. When a petition is filed alleging an original cause of action directed against administration proceedings to obtain relief by the application of equitable principles, on demurrer

thereto, other records in the probate proceeding which are not a part of the petition or demurrer are not before the court until some issue of fact or law is properly raised requiring an investigation thereof. *Genau v. Abbott,* 68 Neb. 117, 93 N. W. 942. Therefore, whether as contended by appellee, the executor had filed a full and final report and account as executor, obtained decree of final settlement and distribution to him as trustee, was finally discharged as executor and served thereafter as trustee under the will, depriving the county court of jurisdiction, is a factual and legal question which cannot be determined by this court upon demurrer to the petition. By the same token we cannot decide whether the county court retained jurisdiction over the estate or trust as authorized in section 30-611, Comp. St. 1929, or section 30-1801, Comp. St. Supp. 1935.

The county court is a court of record. Const. art. V, sec. 16. "Jurisdiction of the subject matter is to be tested by the authorized extent of the powers of the court in respect to the cause of action before it." Dame, Probate and Administration (3d ed.) 16, sec. 16. "In a court of record, it is not essential that every jurisdictional fact appear upon the face of the record, and if a petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts appear upon the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act." *Brandeen v. Lau,* 113 Neb. 34, 201 N. W. 665.

By the Constitution, article V, sec. 16, and section 27-503, Comp. St. 1929, the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons. *In re Estate of Jurgensmeier,* 142 Neb. 188, 5 N. W. 2d 233. Section 27-504, Comp. St. 1929, provides, in part: "The county court shall have power: * * * Fifth. To require executors, administrators, and guardians to exhibit and settle their accounts, and account for the estates and property that have come into their possession as such." This court recently held in *In re Estate of Jurgensmeier, supra,* "In carrying out this statutory au-

thorization, it is to be remembered that county courts are without general equity jurisdiction, but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction (and render to the parties interested in the assets of the estate such relief as their respective situations may justify). *In re Estate of Frerichs,* 120 Neb. 462, 233 N. W. 456; *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316." See, also, 34 C. J. S. 965, sec. 840; 33 C. J. S. 1011, sec. 79; Dame, Probate and Administration (3d ed.) 12-15, secs. 13, 14, and 15. Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves. *In re Estate of Wilson,* 98 Neb. 852, 154 N. W. 717; *In re Estate of Hansen,* 117 Neb. 551, 221 N. W. 694; 3 Woerner, American Law of Administration (3d ed.) 1756, sec. 506, and 1963, sec. 572; 1 Woerner, American Law of Administration (3d ed.) 513, sec. 150; Dame, Probate and Administration (3d ed.) 578, sec. 567.

The present action is not one to recover a money judgment as excepted in section 30-801, Comp. St. 1929, but to require a true and just accounting as required by law, and recover possession of a trust fund, personal property of the estate, by surcharging the executor's account therefor and to require his administratrix to account for such assets of the estate coming into her possession after his death and such assets of the estate coming into her possession wrongfully, with knowledge, during administration thereof before his death and still retained thereafter. By statute, section 30-1401, Comp. St. 1929, "Every executor and administrator shall be chargeable in his account with the whole of the goods, chattels, rights and credits of the deceased which may come to his possession; * * * and with all the interest, profit and income that shall in any way come to his hands from the estate of the deceased." Other appropriate sections in the same chapter of our statutes provide the time, manner, duty, and necessity of making a true and just accounting of the property of the estate to the county court.

Therefore, the county court has the power to require an executor or an administrator, whose office is ended, to render a true and just account of all the assets and property that have come into his possession as such (34 C. J. S. 952, sec. 833), and if the executor or administrator is deceased, the citation may issue to compel his personal representative and his bondsmen to make such an accounting. Dame, Probate and Administration (3d ed.) 11, sec. 12; 24 C. J. 933; 34 C. J. S. 949, sec. 831. To promote justice in behalf of persons interested in the assets of an estate it is now established that, if a third party who has himself planned, or who has participated in, the wasting of an estate, and is before the court, as on objections to the final account, the court may compel him to refund to the representative what he has unlawfully received. See Dame, Probate and Administration (3d ed.) 592, sec. 579. See, also, 33 C. J. S. 1248, sec. 242; 34 C. J. S. 1331, sec. 1049; *Blake v. Chambers*, 4 Neb. 90; *McGlave v. Fitzgerald*, 67 Neb. 417, 93 N. W. 692; *Howells State Bank v. Estate of Muller*, 113 Neb. 177, 202 N. W. 450.

The only conclusion that can be drawn from the allegations of the petition and demurrer is that the administratrix, Hazel J. Statz, appellee, still possesses and owns the real estate which was purchased with the alleged unlawful loan obtained from her husband, the executor, and the mortgage thereon inadequately securing its payment is still owing, unpaid and unsatisfied by her in the amount of $8,450 and interest which belongs to and is a part of the assets of the estate. Under such circumstances, this action may be maintained in the county court for the purpose of an accounting of the trust property, which is still traceable and technically and legally in the possession of the county court, and appellant is not limited to the filing of a claim against the executor's estate or an action in the district court to enforce the trust against the administratrix of his estate. 2 Woerner, American Law of Administration (3d ed.) 1333, sec. 402.

Contention by appellee that this action cannot be main-

tained by appellant because she does not have such an interest in the estate as qualifies her to do so, is without merit. There is a distinction in the cases between representing the estate in litigation and litigation with the representative of the estate. *Rine v. Rine*, 91 Neb. 248, 135 N. W. 1051. Administration proceedings to settle the estate of a decedent are proceedings *in rem*, and every person interested in such settlement is a party in the county court whether he is named or not. He may appear for the purpose of protecting his interests in the county court, and an appeal to the district court removes the whole case to the district court. Dame, Probate and Administration (3d ed.) 16, sec. 17; 33 C. J. S. 890, sec. 12; *In re Estate of Nilson*, 126 Neb. 541, 253 N. W. 675; *Nilson v. Tekamah Investment Co.*, 133 Neb. 180, 274 N. W. 465. The general rule is that any person beneficially interested in the estate embraced in an administration account may cite the executor or administrator to file an account, object, or file objections to the terms or matters contained in the account, and the representative may in a proper proceeding be surcharged with losses occurring because of a breach of trust. 21 Am. Jur. 664, sec. 506, and 665, secs. 507 and 508. Legatees and distributees come within the scope of this rule, and when they positively allege their status in a petiton or objections to the account, such objections should be disposed of in a legal manner and not be summarily dismissed on the assumption without proof that the objectors are not heirs, legatees, or distributees. 24 C. J. 1007; 34 C. J. S. 1067, sec. 884. Further, since Lillie M. Filer positively alleged in the petition that she was one of the legatees under the last will and testament of Augustus Statz, deceased, which is admitted by demurrer, she has such an interest as will permit the action to be maintained. 34 C. J. S. 983, sec. 848. It is immaterial also whether this action was brought by one legatee or by all of them, if the application now before us is meritorious on the facts pleaded and under the law, since the loan is merely voidable and each of the persons interested in the assets of a loan wrongfully made by an executor to himself or his

wife, has an individual election to repudiate or ratify the transaction, and ratification by some of the heirs or devisees who are *cestui que trusts* will not preclude a repudiation of the entire transaction by others. *In re Estate of Jurgensmeier, supra.*

With reference to the statute of limitations, of which appellee claims the benefit, the rule is that the trust of an executor or administrator is a continuing one, and he cannot set up the statute of limitations as against the rights of the next of kin or persons entitled to the distribution of the assets of the estate unless he repudiates the trust or sets up claims in his own right, or until the trust is terminated. A plea of the statute of limitations is not open to an executor or administrator, or the personal representative of a deceased executor or administrator, in an action for an accounting of the assets of the estate. 37 C. J. 921; 21 Am. Jur. 658, sec. 495; 34 C. J. S. 756, sec. 733; 34 Am. Jur. 290, sec. 374, and 291, sec. 376; Dame, Probate and Administration (3d ed.) 574, sec. 565; 2 Woerner, American Law of Administration (3d ed.) 1333, sec. 402.

The original petition filed herein states a cause of action. In this connection, the law is that an executor or administrator should preserve the property of the estate entrusted to him, separate and apart from his own, to give it an earmark so that it will always be technically in the custody of the county court and readily known and traceable. The violation of this duty is a breach of trust which may entail the consequences of pecuniary liability upon him for profit to himself or loss to the *cestui que trusts*, although acting in good faith. An executor or administrator cannot contract with himself. 1 Woerner, American Law of Administration (3d ed.) 602, sec. 177. An executor or administrator should not employ the assets of the estate in his own business or in speculation on his own account since he is not permitted to reap any gain, profit, or advantage from use of the trust fund. 33 C. J. S. 1243, sec. 239; 2 Woerner, American Law of Administration (3d ed.) 1107, sec. 336. In making investments of the funds of the estate the executor

or administrator acts as a trustee and his duties and liabilities are governed by the same rules which apply to other trustees. 33 C. J. S. 1190, sec. 206; *In re Estate of Jurgensmeier, supra.* A trustee may not borrow from a trust fund in his charge. 2 Scott, Trusts, 888, sec. 170.17; *Lancaster County Bank v. Marshel,* 130 Neb. 141, 264 N. W. 470; *Baird v. Lane,* 115 Neb. 413, 213 N. W. 512; *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670. There is a principle in the law of trusts, sustained by reason and authority, which we hereby accept, to the effect that the rule against a trustee (executor or administrator) borrowing money from a trust fund in his charge at the expense of the beneficiary, or advantage or profit to himself, applies to cases wherein the spouse of the trustee is the recipient of such loan, advantage or profit. *Driver v. Blakeley,* 165 Or. 312, 107 Pac. 2d 524, 131 A. L. R. 985. See, also, note, 131 A. L. R. 990-1003; 65 C. J. 653. An intelligible statement of facts under oath showing an existing substantial right by reason of such a breach of trust, which the court has jurisdiction to enforce, concluding with a prayer for general equitable relief, is a sufficient allegation of all matters necessary under our code to state a cause of action and sustain a judgment in the county court. *Genau v. Abbott, supra.*

On the question of variance, we do not deem it necessary to set out the allegations of the amended petition. It is the general rule that the same issues must be tried on appeal as in the original proceedings in the county court. However, in view of propositions of law heretofore stated, the case at bar clearly comes within the rule that, "While on appeal to the district court the plaintiff must prosecute the same cause of action as in the court of original jurisdiction, yet, in drafting his petition, he is not confined to the allegations contained in his pleading in the court below, so long as the identity of the original cause of action is preserved." *Levi v. Fred,* 38 Neb. 564, 57 N. W. 386. See, also, *Sells v. Haggard & Co.,* 21 Neb. 357, 32 N. W. 66; *Ball v. Beaumont,* 59 Neb. 631, 81 N. W. 858; *McPherson v. Commercial Nat. Bank,* 61 Neb. 695, 85 N. W. 895; *Brockway v. Reynolds,* 77

Neb. 225, 109 N. W. 154; *Zelen v. Domestic Industries*, 131 Neb. 123, 267 N. W. 352.

We conclude that the trial court erred both in sustaining the demurrer to appellant's original petition, and in striking the amended petition and dismissing the action. Therefore, the judgment is reversed and the cause remanded with directions to hear the appeal on its merits.

REVERSED, WITH DIRECTIONS.

COVERDALE & COLPITTS, A COPARTNERSHIP, APPELLANT, V. DAKOTA COUNTY, APPELLEE.
12 N. W. 2d 764

FILED JANUARY 25, 1944. No. 31646.

1. **Counties.** A petition for the allowance of a claim against a county is demurrable where it shows on its face that the claim was not filed with the county clerk within the time limited by a mandatory statute.
2. **Appeal and Error.** Before error can be predicated upon the refusal of the court to permit an amendment to a petition, after demurrer thereto is sustained, the record must show that under the circumstances the ruling of the court was an abuse of discretion.

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

George W. Leamer, for appellant.

Malcolm R. Smith and *S. W. McKinley, Jr., contra.*

Heard before SIMMONS, C. J., PAINE, CARTER and CHAPPELL, JJ., and POLK and NUSS, District Judges.

CHAPPELL, J.

Coverdale & Colpitts, a copartnership, appellant, hereinafter called plaintiff, filed a claim with the county clerk of Dakota county, Nebraska, to obtain payment for a traffic survey and report on a prospective bridge construction project. The claim was rejected by the county board and ap-

peal taken to the district court. Appellee, defendant county, demurred to plaintiff's petition on appeal for the reasons, that the petition shows on its face that the alleged claim was not filed within the time required by law, and that its allegations do not state facts sufficient to constitute a cause of action. The trial court sustained the defendant's demurrer *in toto* and dismissed the action at plaintiff's costs. Plaintiff appealed to this court, assigning as error the sustaining of the demurrer, and dismissal of the action without giving plaintiff the right to amend.

The petition on appeal alleges, in substance, that plaintiff and defendant entered into a contract whereby plaintiff, for a consideration, was to conduct a traffic survey over the bridge spanning the Missouri river between Dakota county, Nebraska, and Woodbury county, Iowa; that plaintiff performed the contract and completed the survey and report during the year 1937, which was accepted by defendant, and plaintiff filed a claim therefor with the county clerk of Dakota county on May 3, 1940, which was disallowed and rejected by the county board. Certain relative exhibits, "A" and "B," are attached to and made a part of plaintiff's petition. A copy of the claim filed with the county clerk appears in the transcript but is not attached to or made a part of plaintiff's petition. The prayer of the petition is for judgment against the county for the amount of the claim with interest from May 3, 1940, and costs.

Section 26-119, Comp. St. Supp. 1941, provides in part: "All claims against a county must be filed with the county clerk within ninety days from and after a time when any materials or labor, which forms the basis of the claim, shall have been furnished or performed: * * * ." In *Consolidated Chemical Laboratories v. Cass County*, 141 Neb. 486, 3 N. W. 2d 920, we held this provision constitutional, reasonable, and mandatory, both as to the filing of the claim and the time within which the filing thereof must be made. In that opinion we said: "A petition for the allowance of a claim against a county is demurrable where it shows on its face that the claim was not filed with the county clerk within the

time limited by a mandatory statute." See, also, *Verges v. Morrill County*, 143 Neb. 173, 9 N. W. 2d 221; *Case v. Fall River County*, 64 So. Dak. 375, 266 N. W. 728; 15 C. J. 649; 20 C. J. S. 1255, sec. 298. The words of the statute, "All claims against a county" necessarily include all claims arising *ex contractu* whether express or implied. See *Skidmore v. Alameda County*, 13 Cal. 2d 534, 90 Pac. 2d 577. To hold otherwise, as suggested by plaintiff, would in effect nullify the statute.

It is immaterial here whether exhibit "A," a letter from the defendant to plaintiff, was an offer or an acceptance, since exhibit "B," a letter from plaintiff to defendant, was an offer or counter-offer thereto and plaintiff relies for recovery upon this exhibit and its alleged acceptance by defendant. Exhibit "B," among other things, contains this significant statement by plaintiff: "(3) The Board of County Commissioners has legal authority to appropriate money from funds other than the proceeds of a revenue bond issue for this particular bridge and will pay our fees and expenses regardless of the favorable or unfavorable character of our report or in the event that, for any reason, the proposed bridge is not constructed." We can only decide that plaintiff seeks by the allegations and prayer of its petition to recover a general money judgment against defendant county which without question would be payable from taxation, and the petition shows on its face that the claim is barred by the statute.

Plaintiff admits in the brief, "There is no question but that the law is we cannot get our money from taxes, it must come from the revenue of the bridge." Nevertheless, the allegations of plaintiff's petition are insufficient to state a cause of action upon such a theory, or to charge that the claim arose by reason of, or was contractually payable from, revenue bonds, or from the revenue or funds or tolls derived from any bridge ever constructed by defendant county, as provided in sections 39-2101 to 39-2112, Comp. St. Supp. 1935, inclusive. Therefore, contentions made by plaintiff that the statute of limitations did not commence to

run until funds were available from the sale of revenue bonds or from revenue, funds, or tolls of a bridge, or that the statute (sec. 26-119, Comp. St. Supp. 1941), did not apply because the claim did not arise by reason of the governmental functions of the county but in its proprietary capacity, are not presented for decision by the deficient allegations of the plaintiff's petition.

The assignment that the trial court erred in dismissing plaintiff's petition without the right to amend, is without merit. Brief of counsel for plaintiff does not contain either argument or citation of authorities in support of the assignment. The statute, section 20-854, Comp. St. 1929, provides: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct." See, also, Comp. St. 1929, sec. 20-852. Since the jurisdiction of the district court on appeal in such matters is derivative and not original (*Verges v. Morrill County, supra*), we are unable to observe how the "defect can be remedied by way of amendment" without filing, in effect, an original and different claim with the district court than the claim originally filed with the county clerk and presented to and rejected by the county board, from which the appeal was taken.

In any event, the record does not disclose that plaintiff ever tendered an amendment to the district court, or indicated the character of any amendment which it desired to make, which brings the contention within the rule established by this court in similar cases. In *Fidler v. Adair*, 109 Neb. 404, 191 N. W. 683, we held: "An application to amend a pleading is always addressed to the sound legal discretion of the court, and, as it is essential to the exercise of that discretion that the court be informed of the nature and purpose of the proposed amendment, before error can be predicated upon the refusal of the court to permit an amendment the record must show that under the circumstances the ruling of the court was an abuse of discretion." Likewise, in *Minton v. Palmer*, 79 Neb. 351, 112 N. W. 610,

this court said: "But, when the character of the amendment is not disclosed by the record, it is impossible for us to say whether it should have been allowed or denied." In each of the two latter cases the question of the right to amend arose after the trial court had sustained a demurrer to the petition.

We can only conclude that the trial court did not err when it sustained defendant's demurrer and dismissed the action. Therefore, the judgment is affirmed.

AFFIRMED.

ABBIE M. CHEW, APPELLEE, V. ADELBERT LYNN COFFIN, ALSO KNOWN AS ALBERT LYNN COFFIN, ET AL., APPELLANTS.
12 N. W. 2d 839

FILED JANUARY 25, 1944. No. 31668.

1. **Trial.** Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court.
2. **Automobiles.** The operator of a motor vehicle in backing the same onto a street or highway must look backward, not only before he begins his operation, but also while he is in the act of backing, and must give a signal of his intention to back when a reasonable necessity for it exists, in order that he may not collide with or injure those lawfully using such street or highway.

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

Lyda & McGriff, for appellants.

William H. Heiss, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

WENKE, J.

This action was commenced in the district court for Scotts

Bluff county by Abbie M. Chew, as plaintiff, to recover for damages sustained which she claims were caused by the automobile of defendant Adelbert Lynn Coffin while being negligently operated by the defendant Ruth Eloise Coffin, wife of defendant Adelbert Lynn Coffin. From a verdict for the plaintiff and judgment rendered thereon, defendants have appealed.

Plaintiff, Abbie M. Chew, will be referred to as appellee, Adelbert Lynn Coffin and Ruth Eloise Coffin as appellants and, when referred to individually, Ruth Eloise Coffin will be referred to as Mrs. Coffin.

It is the appellants' first contention that the appellee was guilty of negligence which contributed to the injury and that as a matter of law she is precluded from recovering under the comparative negligence statute.

The rule is correctly stated in *Wentink v. Traphagen,* 138 Neb. 41, 291 N. W. 884, quoting from *Morrison v. Scotts Bluff County,* 104 Neb. 254, 177 N. W. 158, as follows: "If plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery."

Whether the question is one of fact for the jury or one of law for the court, this court has often announced the rule to be as stated in *Hickey v. Omaha & C. B. Street Ry. Co.,* 140 Neb. 665, 1 N. W. 2d 304: " 'Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to determine; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one

of law for the court.' *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426, 150 N. W. 374. See 64 C. J. 338." And in *Whittaker v. Hanifin*, 138 Neb. 18, 291 N. W. 723: "This court has held many times that, where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but where the evidence shows beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant. *Sindelar v. Hord Grain Co.*, 116 Neb. 776, 219 N. W. 145."

The facts, which are in little dispute, are as follows: Appellee is an elderly lady 66 years of age and a nurse by profession. On the afternoon of December 3, 1941, while trying to sell dresses by house to house solicitation, she called on the home of appellants in Gering, Nebraska, at 1325 Sixteenth street at about 2:00 p. m. Appellants had been living at this address for approximately a year and a half. The house, in which they lived, faces east being on the west side of Sixteenth street. N street runs east and west on the north side of the block and M street on the south side. The residence is located south of the alley which runs east and west through the block. There is a cement sidewalk in front of this house for a distance of some 40 feet, being the width of the lot, but does not extend further toward either N or M streets. The garage is located just southwest of the house facing east, the front being a few feet west of the west side of the residence. Two cement slabs are used as a driveway and connect the garage with the south end of the sidewalk and extends slightly beyond. These cement slabs run close to the south side of the house. Sixteenth street is graveled and the driveway apron from the end of the cement slabs is likewise graveled. The sidewalk is some 20 feet from the house and is connected by another walk to the porch which is on the east side of the house and in the center thereof.

On the day in question appellee knocked at the front door of appellants' home but no one answered as Mrs. Coffin had

apparently gone out of the house by the back door at about the same moment. She was going to the garage to get the car, a two-door Ford sedan, which the appellants owned and used for family purposes. No one answered so appellee left the porch and proceeded down the steps and followed the sidewalk out to the street walk and proceeded south thereon. Just after appellee left the porch she took an address book from her purse and was looking into it for an address. She did not again look up until she was hit by appellants' car at the place where the driveway crosses the sidewalk. She neither heard nor saw the car until she was hit.

Mrs. Coffin, after she left the house and before she went into the garage to get the car, looked east along the south side of the house and did not see any one or anything on the driveway or street. She then got in the car and slowly backed out, looking out of the left side of the car to see that it stayed on the cement slabs. She continued thus until the car reached the east edge of the house when she turned and looked to her right or north and east to see if there was any traffic on the north side. As she turned to look to her right she could see the street but very little of the sidewalk and none of that part of the sidewalk just north of where it is crossed by the driveway. Seeing nothing, she turned back to look to her left for traffic and to see that her car stayed in alignment with the driveway but did not again look to her right or north nor did she at any time sound her horn. She continued to back very slowly at what she estimated at about two or three miles an hour. The first she knew, with reference to the accident, was a slight impact as if she had hit a paper box and she immediately stopped. The rear wheels of the car stopped just east of the sidewalk, it being approximately in the center between the front and rear wheels. Appellee, after the accident, was lying just back of the car in a slightly diagonal position at a northwest and southeast angle, her feet to the south and her head to the north. Immediately after the accident appellee told Mrs. Coffin and others that it was her own fault, that she was not

looking but was looking for an address in the book, and that she did not see or hear the car. She testifies that she made these statements because she felt sorry for Mrs. Coffin. As a result of the accident appellee sustained the injuries for which she here seeks recovery.

In *Taulborg v. Andresen*, 119 Neb. 273, 228 N. W. 528, we stated: "The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. It is his positive duty to look backward for approaching vehicles and to give them timely warning of his intention to back, when a reasonable necessity for it exists; and he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway." And as stated in *Vandervert v. Robey*, 118 Neb. 395, 225 N. W. 36: " 'Backing out from private property onto a public highway is an operation demanding a high degree of skill and caution to avoid danger or injury to any person on the highway or collision with any vehicle thereon, and one engaged in such operation must use greater care than would be required of one driving along the highway.' 42 C. J. 1022, sec. 759."

"A pedestrian on the sidewalk crossing a private driveway is not a trespasser, but has the right of way over a motor vehicle emerging from private property, and is bound to exercise only reasonable and ordinary care to avoid injury. He is not required, as a matter of law, to be on the lookout for such automobiles, and the fact that he fails to see such vehicle approaching does not as a matter of law render him guilty of negligence." 42 C. J. 1158, sec. 932. See, also, *Ottaway v. Gutman*, 207 Mich. 393, 174 N. W. 127; *Crawley v. Jermain*, 218 Ill. App. 51.

Therefore, under the facts of this case, the question of

the negligence of Mrs. Coffin while driving the car and the contributory negligence of the appellee is one of fact to be determined by the jury and likewise the degree or quality thereof and not one of law. The question was properly submitted to the jury under the comparative negligence statute.

Appellants further contend that the court erred in giving instruction No. 10 which is as follows: "A motorist is required by law in the State of Nebraska to have his car equipped with a horn or other suitable warning device. The statute contemplates the use of these warning devices to warn pedestrians or other travelers who may be in the path of an approaching car. A person entering a public highway or crossing a public highway where his view is obscured should not only slow down but should give a timely signal with his horn or other signaling device. If the jury find from the evidence that the person in charge of defendants' automobile was backing the same with her vision obscured as to that part of the public sidewalk where plaintiff was walking, and failed to give a timely signal with her horn or other signaling device, and in consequence thereof ran into and injured plaintiff, then the fact that said defendant did not see plaintiff does not excuse her, and said defendant was guilty of negligence." Our statute, section 39-1170, Comp. St. Supp. 1941, provides in part as follows: "Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order * * * ." In construing a similar statute in *Christoffersen v. Weir,* 110 Neb. 390, 193 N. W. 922, we stated: "The statute is not meaningless. It was enacted for a purpose. Of course, it contemplates the installation of warning devices to be used to caution pedestrians and other travelers on the highway who may be in the path of an approaching car. Otherwise the provisions would be a mockery." In *Taulborg v. Andresen, supra,* we have held the duty of drivers of automobiles in backing onto streets or highways to be: "The operator of a motor vehicle in backing the same onto a street or highway must look backward, not only before he begins his operation, but also while he is in the act of backing, and must

give a signal of his intention to back when a reasonable necessity for it exists, in order that he may not collide with or injure those lawfully using such street or highway." As stated in 42 C. J. 1022, sec. 760: "Pedestrians have the right of way on a sidewalk, and it is incumbent on one who is driving an automobile across a sidewalk to notify persons who are properly using the sidewalk of his approach and to take particular care to avoid endangering or injuring them." And as stated in 42 C. J. 936, sec. 649: "It is also the duty of the operator to give a signal of his intention to back when any reasonable necessity therefor exists. These precautions must be observed not only when backing along a highway but also when backing out into a highway."

"While it is not generally proper to group together certain facts and state to the jury that if they are found to exist they constitute negligence, still it is not reversible error to do so provided the facts so stated are such as to induce an inference of negligence in all reasonable minds." *Omaha & Council Bluffs Railway & Bridge Co. v. Levinston*, 49 Neb. 17, 67 N. W. 887.

Under the facts as disclosed by the record and these principles of law we do not find any error in this instruction nor is it in conflict with instruction No. 12.

The appellants further contend that the court erred in excluding their testimony offered to show the condition of the lot north of the alley and that it was not used as a walk. While it would have been proper to have received this evidence since other evidence was received to show the condition of the surrounding neighborhood both by exhibits and oral testimony, however, it did not directly affect the issues involved and was not in any way prejudicial to the parties' rights.

From an examination of the record as a whole we think the case was fairly tried and submitted and is therefore affirmed.

AFFIRMED.

ARNOLD H. THUMAN, PLAINTIFF IN ERROR, V. BERTHA M. THUMAN, DEFENDANT IN ERROR.
13 N. W. 2d 117

FILED FEBRUARY 4, 1944. No. 31743.

1. Divorce. Generally the affidavit, in a civil contempt proceeding to enforce an alimony decree, should contain an allegation of the order of the court and the defendant's failure to comply therewith; an allegation that the defendant has sufficient ability to comply with the order and an allegation that his failure to do so is without just cause and wilful.
2. ———. The strict rules applicable to a proceeding for criminal contempt do not apply to a civil contempt proceeding.
3. ———. In a civil contempt proceeding a substantial and general statement in the affidavit will suffice to give the court jurisdiction to proceed.
4. ———. Remarriage does not relieve a defendant from the obligations fixed by an alimony decree.

ERROR to the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Morrow & Miller, for plaintiff in error.

Mothersead & Wright, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

This is a contempt proceeding. Plaintiff in error will be referred to herein as the defendant. The defendant has not complied with the alimony provisions of a divorce decree. The district court for Scotts Bluff county ordered the defendant confined in jail until he purged himself of contempt. He prosecutes error here advancing generally two contentions to wit: The sufficiency of the affidavit to confer jurisdiction in the contempt proceedings and the sufficiency of the evidence to sustain the finding of the ability of the defendant to pay. We affirm the judgment of the trial court.

May 7, 1941, in an action entitled Bertha M. Thuman, plaintiff, v. Arnold H. Thuman, defendant, the district court for Scotts Bluff county entered a decree granting the

plaintiff an absolute divorce, the custody of two minor children, aged six and two years, and decreed the ownership of personal property. The defendant was ordered to pay plaintiff temporary alimony, then in default, attorney's fees, and $10 a week for the support of the plaintiff and said children.

Basing its action on a supplemental petition, answer, reply and evidence taken, the court on April 16, 1942, entered a decree finding that defendant was unemployed when the original decree was taken, that he was, as of the date of the second hearing, employed at $175 a month, and that he was in default of payments under the original decree. It was ordered that he should forthwith pay the delinquent alimony and thereafter pay the plaintiff alimony at the rate of $75 a month. An appeal was not taken from this decree.

July 30, 1943, the plaintiff filed her affidavit reciting that defendant was in default of payments under both decrees, setting out the amounts and "That the defendant is of sufficient means and ability to make said payments and that the failure and refusal to pay the same are intentional, wilful, unlawful and contemptuous" and praying that the defendant be cited to answer and show cause why he should not be punished for contempt. On the same day defendant filed his answer and petition for modification of the decree in which he set out that he had paid the costs and attorney's fees and alimony at the rate of $10 a week since the original decree; denied that he had the ability or means to pay more, alleged that on January 1, 1943, his salary had been increased to $200 a month; that he had remarried, that with the deduction of many taxes, expenses of an automobile, cost of maintaining a home and costs of living it was "utterly impossible" for him to pay more than $10 a week alimony. The plaintiff filed her reply and the matter went to hearing on July 30, 1943.

The trial court found the defendant to be in default in the sum of $495.70, that the defendant was of sufficient means and ability to make the payments, that his refusal to do so was intentional, wilful, unlawful and contemptuous and that defendant was in contempt and ordered defendant confined

in the county jail until he purged himself of the contempt. The trial court refused to modify the decree of April 16, 1942, holding that the evidence showed an increased ability to pay since the decree was entered. A motion for new trial was made and overruled. Defendant served notice of an intent to prosecute error to this court and furnished a recognizance in the sum of $1,000 conditioned that if in the proceedings in error the judgment is affirmed he will perform the judgment and sentence of the court.

Defendant contends first that the affidavit of plaintiff was insufficient to confer jurisdiction upon the court to punish for contempt for the reason that it failed to allege that defendant's failure to pay "was without just cause." This issue was not presented to the trial court, and the affidavit was there treated as sufficient.

Defendant relies upon *Wright v. Wright,* 132 Neb. 619, 272 N. W. 568, and *Thomas v. Thomas,* 132 Neb. 827, 273 N. W. 483. In the *Wright* case it was said: "While the strict rules applicable to criminal cases do not apply in this proceeding, the affidavit upon which the action is based should have stated facts which, if proved, would constitute a 'civil' contempt. This it does not do. The only allegations material to the case are that an order was made and that the defendant failed to comply with the order. A party is not in contempt of court for a failure to comply with an order to pay alimony unless it is shown that he had sufficient ability to pay and that his refusal was wilful and contumacious and without just and reasonable ground."

Does the absence of an allegation that the failure to pay was "without just cause" (from the syllabus) or "without just and reasonable ground" (from the opinion in the *Wright* case) render the affidavit insufficient to confer jurisdiction on the court?

The decisions point out the elements that constitute the constructive civil contempt in this class of cases. Generally the allegations that should appear in the affidavit are an allegation of the order of the court and the defendant's failure to comply with the order, that his failure to do so is

without just cause and wilful. The language of the decisions does not call for a worship of words in the drafting of the affidavit.

In the *Wright* case, as is there pointed out, the only allegation was the order of the court and the defendant's failure to comply with it. The *Wright* case rests upon *Hawthorne v. State,* 45 Neb. 871, 64 N. W. 359. There the affidavit was held faulty for two reasons. It did not allege that the plaintiff had the power to comply, nor did it allege that he had property which could be applied to the payment of the judgment against him. The same reason plus the absence of an allegation that the failure to pay was wilful and contumacious caused the holding that the affidavit was fatally defective in the *Thomas* case. The failure to allege "without just cause" is not mentioned as a reason for dismissal in any of the cited cases.

Here plaintiff, by her affidavit, alleged the two decrees and the failure of the defendant to make the required payments. She alleged that the defendant was "of sufficient means and ability to make said payments," and that "the failure and refusal to pay the same are intentional, wilful, unlawful and contemptuous." "The rule generally favored is, that a substantial and general statement will suffice to give the court jurisdiction to proceed * * * ." 13 C. J. 66. See 17 C. J. S. 91. In *Nebraska Children's Home Society v. State,* 57 Neb. 765, 78 N. W. 267, and in *Kammer v. State,* 105 Neb. 224, 180 N. W. 39, we held that the failure to use the word "wilful" in an information in contempt did not require a holding that the information was "bad" where the facts stated clearly charged a wilful disobedience. So here the facts stated, together with the quoted statements, must be held to assert that the failure to pay was without just cause, the procedure being "remedial to compel obedience to a judicial order." *Kammer v. State, supra.* This is particularly so in view of the fact that the defendant so construed the affidavit, did not challenge its sufficiency in the trial court and joined issue by pleading facts which he asserted showed it was "utterly impossible for him to pay more" than he had been paying.

Defendant states the issue to be determined here as follows: "whether or not the defendant was able to pay more than he actually paid * * * and wilfully and contemptuously failed and refused to do so."

When the original decree was entered defendant was unemployed. The alimony payments were fixed at $10 a week. He became employed September, 1941, at $175 a month. He did not meet all of the payments required by the original decree. He resisted the petition for additional alimony on the ground that $10 a week was the maximum he could pay regularly "and be assured of making said payments when due." The court on April 16, 1942, increased the alimony payments to $75 a month and ordered him to pay "forthwith" all sums theretofore adjudged against him. The amount of the delinquencies does not appear. Apparently since that time he has paid the $10 a week, has not paid more, and had accumulated as of July 30, 1943, a delinquency of $495.70. Defendant calculates the $10 weekly payments to equal $43.33 a month which he has been paying. His delinquencies then amount to $31.67 a month. It is only this increased amount which he says he is unable to pay. Indefinitely and by approximations and averages he accounts for the expenditure of his entire salary.

Before his remarriage he lists his expenditures as in excess of his salary. Here he includes $39.39 a month as payment and expense on a car used for both business and pleasure. He lists an insurance premium on a policy then payable to his first wife, he lists other items of personal expenditures. For the period from June 1, 1942, to January 1, 1943, he shows expenditures over $30 each month in excess of his income. This is made up by an increase of $29.50 for rent and telephone, by doctor bills and a decrease in laundry and cleaning bills. Although he admitted on the witness stand that the financing charges on his car were "cleaned up" before the end of the year, he continues them in his tabulations as an expense up to January 1, 1943.

Beginning January 1, 1943, he had an increase in pay of $25 a month. He made a new loan on his car payable $10 a

month—so that roughly he had an increase in income and decreased outgo resulting in a net gain of $40 a month. During this period he submits he was just able to break even.

On the witness stand defendant admitted that during the period from January to June, 1943, he had obligations other than his own. He does not list these payments in his expenditure items. He testified to a total indebtedness of $110 and lists in his brief figures which show that he has no property and had accumulated deficits of over $200 in the last half of 1943. He does not show what value he may have in either his insurance or his car. His attitude is shown by his answer to the question "Yet you made no effort to pay more than $10 a week on this alimony, did you?" And he answered "Yes, I did, but I just was being bothered, and one thing and another I just couldn't honestly pay any more; just didn't have any left." The net of all this is that the defendant comes into court and seeks to justify his failure to comply with the decree by saying after I have paid all my other bills and spent what I felt the situation required, I just "didn't have any left" to pay more on alimony.

His expenditures for rent and insurance alone arising from his second marriage more than equal the monthly delinquencies. Remarriage does not relieve the defendant from the obligations fixed by the alimony decree. The first wife and children have first consideration. *McIlwain v. McIlwain*, 135 Neb. 705, 283 N. W. 845. The sum saved on car payments and increased pay, more than equal his delinquent payments. By his pleadings here he has admitted an ability to pay $10 a week under his former salary and expense. He has shown no reason why he cannot comply with the court's order. This record shows that defendant has had a fixed, deliberate purpose not to pay more than $10 a week alimony and to ignore the decree of April 16, 1942. He has persisted in that purpose. The record fully sustains the finding of the trial court in the contempt proceeding and it is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF JEAN PAULINE PHILLIPS. JEAN PAULINE BEATY (NEE PHILLIPS), APPELLEE, V. HARRY I. HYLTON, GUARDIAN, APPELLANT.

13 N. W. 2d 99

FILED FEBRUARY 4, 1944. No. 31661.

1. **Guardian and Ward.** A guardian must apply to and receive from the county court an order authorizing him to loan the funds of his ward, and if he loans his ward's funds without such authority, and a loss ensues, he is liable therefor.
2. ———. The approval by the county court, without notice to those interested, of the reports of the guardian, wherein he reports such loans of his ward's funds made without an order of the court, is not equivalent to an order of the court authorizing the guardian to make such loans.
3. ———. Before investing a ward's funds in a mortgage security, the guardian should file a written application with the probate court, the proper notice should be given by that court, and a written order entered by the court authorizing the specific investment.
4. ———. The law does not require that a guardian have unusual ability in management of his ward's estate, but he must employ such diligence and prudence as men of ordinary intelligence employ in their own affairs.
5. ———. The duties of a guardian are similar to those of a trustee in the handling of trust funds, and every violation of a duty required of him by law, whether wilful or fraudulent, or done through negligence or mistake, is a breach of trust.
6. ———. A guardian is not protected because he acts in good faith or upon the advice of counsel. If he is in doubt as to his duties, he can always obtain an order of court for his guidance.
7. **Estoppel.** When one of two innocent parties must suffer, that one must suffer who, by his own acts, conduct, or laches, has made the loss possible.
8. **Guardian and Ward.** Guardian's claim that ward is now estopped to question his illegal handling of the assets of her estate, because as a minor she appeared to acquiesce in his actions, is rejected as unsupported by any evidence of her consent to his acts after she reached her majority.

APPEAL from the district court for York county: EDMUND P. NUSS, JUDGE. *Affirmed.*

Benton Perry, for appellant.

Kirkpatrick & Dougherty, contra.

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

PAINE, J.

This is an appeal by a guardian from a judgment against him in an action involving his final accounting in guardianship. This action involves the question of guardian's liability for depreciation in value and loss on a real estate mortgage of $10,000 made by a former guardian and turned over on his resignation to his successor, the one now appealing.

Jean Pauline Phillips, the ward, was born August 16, 1918, and upon the death of her father and mother her uncle, Joseph S. Phillips, was first appointed her guardian by the Essex county orphans' court for the state of New Jersey. As he lived in Seward county, Nebraska, he thereafter was appointed guardian by the county court for Seward county, and brought the ward out to Seward county, with her estate of the value of slightly over $10,000.

The ward reached majority by her marriage on June 3, 1938, which automatically closed the guardianship and discharged the guardian (*Goble v. Simeral*, 67 Neb. 276, 93 N. W. 235), and prior to the expiration of four years from that date objections to the guardian's final report were filed in the county court, and on June 9, 1942, more detailed amended objections were filed in said court, followed by other pleadings. A trial was had, and the county judge found that the ward should keep the real estate, with the right to an accounting for the last year's rents.

From this decision the ward appealed to the district court, and it was stipulated that no new pleadings should be filed, and that the case should be tried in the district court upon the files, proceedings, pleadings and issues as originally tried in the county court.

The transcript sets out some 55 pages of pleadings and record, and to understand the issues in the case it will be necessary to set out a very brief summary thereof.

The first guardian, Joseph S. Phillips, on May 12, 1932,

filed a petition in the county court for York county, setting out that he has been acting under letters of guardianship issued by the county court for Seward county, and has had the care and custody of the minor and her property, but that owing to ill health he has resigned as guardian, and asks to be relieved of the duties, and that said minor is now a legal resident of York county, and has personal property in York county of the value of approximately $12,000; that as he has always handled the affairs of said guardianship with the help and under the advice of Harry I. Hylton, of the First National Bank of Gresham, in York county, he therefore asks that said Hylton be appointed guardian of the personal property of the minor, and thereupon said Harry I. Hylton was appointed guardian of the person and estate of the minor on May 12, 1932, and gave bond in the sum of $12,000, on the same day.

On August 14, 1933, said guardian, Harry I. Hylton, filed an inventory, showing that the property of the ward consisted of $964.82 on deposit in the Gresham State Bank and a $10,000 note given by Wilhelm Peterson and wife, secured by a first mortgage on 120 acres of land in Seward county, and also on 8.44 acres of land in Sonoma county, California.

On June 9, 1942, the ward filed amended objections to the guardian's final report, as well as to his earlier reports. The ward admitted that the guardian is entitled to credit for the sums expended by him for her support, maintenance and education, but objected to every other item of credit claimed by the guardian in his reports.

Said ward alleges that on November 20, 1928, Joseph S. Phillips invested $10,000 of her money in certain notes secured by a real estate mortgage in the sum of $10,000 upon 120 acres of farm land, and that said mortgage was excessive and an "overloan;" that said investment was made without notice to the ward, and without any order of the county court for Seward county, and was wholly unauthorized, negligent, imprudent and unlawful. She further states that Harry I. Hylton, the present guardian, accepted said real estate mortgage as a part of the ward's estate instead

of requiring an appropriate and lawful accounting by his predecessor guardian, and that his acts and omissions in the premises were unlawful and negligent, and he thereby became liable for the negligent and unlawful acts and investments of his predecessor, Joseph S. Phillips, and is liable to account in his stead.

It is further alleged that the guardian Harry I. Hylton surrendered the mortgage and the notes secured thereby, and received from the mortgagors conveyance of the mortgaged premises, all without notice to the ward, and without any order of court providing for such notice, and said transaction was illegal and void; that afterwards the guardian, without notice to the ward, mortgaged the lands so received by him, without authority of court.

The ward further alleges that she became 21 years of age on August 16, 1939, and shortly thereafter requested Harry I. Hylton to make final report and accounting of his trust, which he failed and neglected to do, and remains in possession and control of the ward's estate, and continues to manage the same and exercise authority over it. She further claims that said guardian has permitted the lands in California to be sold for taxes.

The ward further alleges that, by reason of the guardian's unlawful and negligent acts, her estate has been depleted, and has been so entirely changed in character, kind, value and location of the property into which the guardian has reduced and converted it that the ward no longer wishes to have or receive it in settlement of her guardian's account; wherefore she prays that said guardian be required to account to her for her said sum of $10,562.52 in money, with interest thereon, that he may have credit only for the items of expenditure set forth in exhibit "A" attached, and that all the other credits claimed by him in his final report may be disallowed.

Harry I. Hylton, guardian, filed answer thereto, admitting that he expended for the interest and care of the ward, and for the preservation of her estate, the amounts set forth; admits the investment by Joseph S. Phillips of $10,-

000 in notes secured by a real estate mortgage on 120 acres of land in Seward county; admits the resignation of Joseph S. Phillips as guardian and the allowance of his final account, and his discharge, but denies every other allegation in the objections.

The guardian further states that at the time of his appointment he deemed it for the best interest of the ward to place her in the home of her uncle, H. C. Phillips, at Mitchell, Nebraska, and that she made her home with said uncle until November 11, 1935, when he notified the guardian that he was no longer able to care for her, and the guardian went to Mitchell and returned his ward to York county, taking her into his own home, and she made her home with her guardian until August 1, 1937; that during this time she completed the regular high school course at Gresham and took a year of graduate work in the York high school, and that the guardian and his wife gave the ward all the care and careful attention of parents; that on August 1, 1937, at the request of said ward and with the approval and upon the order of the county court, she took a course of instruction at a beauty school in Lincoln, and on June 3, 1938, was married to George Beaty of York, and took up residence with her husband in Scotts Bluff county.

The guardian further states that he has given the affairs of his ward his most careful attention, and endeavored to handle same in the most prudent manner; that all sums expended were for the best interests of the estate and person of said ward, and were made with the approval and upon the order of the county court for York county; that the guardian has filed several reports, and vouchers for all expenditures shown on said reports, and that these reports constitute an accurate account of all his receipts and disbursements, and he is entitled to have all his accounts approved.

It is further alleged by the guardian that, prior to the time of his appointment, farm incomes in York, Seward and neighboring counties in Nebraska had been large, crops were abundant, and prices relatively high, but that in the

fall of 1932 farm prices suddenly dropped to an abnormally low level; that drouth conditions persisted, and prices remained low through 1941, and as a result farmers became insolvent, and real estate and farm values depreciated to a very low level. The guardian states that he did not make the original loan of $10,000, but the mortgage was turned over to him merely as a part of the assets of the estate of said ward, and he is not responsible in any manner for said loan and said investment of funds; that owing solely to the drouth conditions, which were beyond his control, the note and mortgage became in arrears and the taxes delinquent, but guardian believed that farming conditions would improve, and that with one or two good crops all arrears would be made good.

However, the drouth continued until mortgagor was unable to pay arrears, delinquencies and taxes, or the principal of said loans, and foreclosure was the only remedy. Thereupon, the owner of the land offered to deed same to the ward and thus save the expense of foreclosure, so the guardian caused the real estate to be deeded to Jean Pauline Phillips, his ward, and the notes and mortgage were canceled and released, and the former owner of the real estate was given the option of redeeming and repurchasing same for a period of two years, by the payment of all arrears, but conditions became worse, and the former owner was unable to redeem, and the option to purchase lapsed. The guardian has diligently collected and accounted for all incomes and rentals from said real estate since same was deeded to his ward, has kept the real estate rented to a good tenant, and kept it in as good a condition of cultivation as possible.

When the land was deeded to his ward she was living in his home, and the matter was fully discussed with her, she examined the real estate, and stated she was glad to take it over, and never stated to her guardian any disapproval, or made any objection to his action in the matter.

Thereafter, in a proceeding had in the district court, the guardian was empowered to execute a loan and mortgage on the real estate deeded to his ward in the sum of $2,700, and

the proceeds of said loan were expended by the guardian for his ward for her care, welfare, education and maintenance, and in the preservation of her property, and said expenditures were accounted for in full; that the title to the real estate is in the name of Jean Pauline Beaty, nee Phillips; that the farm is well tilled, and with good crops will now increase in value.

The guardian further alleges that at the time of the marriage of said ward she and her husband visited at his home, and he advised her that she was of legal age and he desired to have an accounting and terminate the guardianship; that both the ward and her husband urged the guardian to continue to look after the farm until a satisfactory sale could be had; that prior to her marriage the guardian had expended more than the income from the real estate, and had advanced considerable funds for her maintenance and education, and wanted to have a final settlement.

He alleges that on October 4, 1938, he sent the ward a copy of all reports made and filed by him, excepting the first one, and offered to procure and send her a copy of that, and thereafter he did prepare his final account and papers necessary for the signature of the ward, in order to effect a complete accounting and settlement of said estate and discharge of guardianship, and shortly thereafter he went to her home in Scotts Bluff county and left all of said papers with her, and filed final account on February 14, 1939.

The guardian alleges and claims that the ward is now barred by laches and delay from questioning the final account of the guardian, and is estopped from objecting to said final accounting or any action taken by the guardian in the premises.

The guardian alleges that he paid some taxes assessed against the California real estate belonging to the ward, but made a thorough investigation and determined that the real estate had no value; that the ward procured the services of another attorney, and made a separate investigation of her own at that time, and consulted with the guardian about the advisability of redemption, and he advised against re-

demption, but told the ward and her husband that, while he had advanced considerable sums for her, if they wanted the taxes paid on the California property he would advance enough for that purpose; that after careful consideration they elected not to redeem said real estate. Therefore, the ward is estopped from asserting any claim against the guardian in regard to said California real estate, as the failure to redeem and pay the taxes was her sole responsibility, exercised by her more than two years after she became of legal age, and the guardian has no responsibility of any kind in the premises.

The guardian prays the court to determine that the ward, Jean Pauline Beaty, nee Phillips, has no cause of action of any kind against the guardian; that all her purported objections be held without merit and dismissed; that the court find in favor of guardian and against said ward on all her purported causes of action; that the court approve all the reports filed by guardian, and confirm all his actions in the premises; that the court find that all property coming into the guardian's hands for said ward has been properly accounted for, and that all items of expenditure shown on all his reports were made for the best interests of said ward, and that he be given credit in full therefor; that the court determine the amounts advanced for the support of the ward, and allow the same as a claim against said ward and her estate, together with a reasonable sum for guardian's expenses and for his attorney's fees, and render judgment therefor; that the court will determine that guardian has a lien on the real estate now standing in the ward's name for the payment of said judgment and costs, and for such other and different relief as may be just and equitable.

On November 13, 1942, the cause was tried in the district court for York county to Judge Edmund P. Nuss, of the tenth judicial district, and on March 20, 1943, the court found that the ward is entitled to accounting, and found generally upon the issues for the ward and against the guardian, and that the investment by Joseph S. Phillips, the guardian's predecessor in said trust, of $10,000 of the

ward's estate in the real estate mortgage was unauthorized and was negligently and illegally made, without notice, hearing or order of court; that the guardian Harry I. Hylton did not take the legal steps necessary to protect himself and his ward in the premises, and that his act in receiving said mortgage from his predecessor on May 17, 1932, in its then defaulted condition, and without requiring accounting for same from his predecessor, was improvident, negligent and unlawful, and that thereby the guardian became liable to make accounting in his predecessor's stead for the amount invested in said mortgage, and that the guardian's account should therefore be surcharged with said loan in the sum of $10,000, with 5 per cent interest from May 17, 1932, and should be further surcharged with $964.82 received from his predecessor in cash, but without interest thereon, the total amount so surcharged being $16,385.57.

The court further finds that all items paid by the guardian to the ward for her use and benefit, as set forth in his several reports and accountings, are just and correct, and are approved, and that he have credit therefor, and finds that they amount in the aggregate to $3,102.51, and that items of expenditure incidental to the guardianship, such as bond premiums, court costs, attorney's fees, and allowances to the guardian, are correct and the guardian should have credit therefor upon his final accounting in the aggregate sum of $1,018.85.

The court further finds that the guardian is not entitled to credit upon his accounting for taxes, insurance or repairs upon the real estate, or for expenses incurred to obtain a license to borrow money upon the real estate, nor for interest paid by him on money borrowed, nor to any allowance for his services, or for attorney's fees, or costs since June 3, 1938 (except as hereinbefore allowed to him), nor for any expenditures made by him since the ward's marriage June 3, 1938, except such as were made either directly to the ward or for her direct use and benefit.

It is therefore ordered and adjudged that the guardian's account be surcharged with the sum of $16,385.57; that the

guardian have credit as hereinbefore found; that the ward recover from the guardian the balance thus left due upon his accounting in the sum of $12,264.21, with interest at the rate of 6 per cent; that upon paying the sum of $12,-264.21 into court the said Jean Pauline Beaty and her husband shall execute and deliver to the clerk of the court, for the use and benefit of Harry I. Hylton, a quitclaim deed to the real estate mentioned, and that, until the amount of the judgment is satisfied in full with interest, the ward shall have a lien upon the real estate in question to secure the amount due her upon said judgment with costs.

The assignments of error set out by the guardian, and relied upon for reversal, are the general charges that the judgment of the district court is contrary to the evidence, is not sustained by sufficient evidence, and is contrary to law.

The brief abstract of the pleadings indicates their great length. It is very evident that the conventional rules of pleading were not followed. No motions were made to strike out all except the material facts, and both parties were content to state at length every allegation which they thought would be beneficial.

The material facts set out in our summary were generally supported by the evidence, and there is no material dispute in the testimony as to any important facts in the case. It is clear that there is a very serious loss to the ward, and the decision in the case may be narrowed down to whether the guardian or the ward shall bear the loss, for there can be no middle ground.

A careful study of the entire record in this case shows that this ward, who was left an orphan at about ten years of age, with property of the value of about $11,000, has been exceedingly fortunate in that her first guardian, who was her uncle, as well as her second guardian, who was her uncle's banker and adviser, and who signed the uncle's bond, each have honestly handled the affairs of her estate, and that there is no reflection in the evidence touching the good faith or honesty of any transaction of each of the guardians. In addition to that, each of these guardians took the ward

into his own home, and the last one, although not related by blood, treated her as his own child, and assisted her in securing a high school education, including one year of post-graduate work, and at his own expense advanced sums for her clothing and maintenance when the real estate, upon which he held a mortgage, because of the drouth, produced no income whatever for her support.

Joseph S. Phillips, the ward's uncle and first guardian, was a farmer, in very modest circumstances, owning only a small farm of 60 acres, and was in failing health, and for that reason resigned, and died after his final report in guardianship had been approved. He invested in a $10,000 mortgage upon 120 acres of land, on the advice of the present guardian. This Peterson land was at that time encumbered with a mortgage of $7,000, which was released so that the loan of $10,000 of the ward's money might become a first mortgage, whereupon the $7,000 mortgage was refiled and became a second mortgage, and from the proceeds of this loan of $10,000 the Petersons paid a debt of $1,558.90 to the bank with which Mr. Hylton, the second guardian, was connected.

If the proper investigation had been made, with full disclosure of the facts, irregularities would have been shown in the making of the original loan and of the failure to follow the provisions of law for making such loans, but Mr. Hylton assisted Mr. Phillips to make out all of his reports, including the final report, and as successor guardian accepted the mortgage under which the loss occurred.

The trial court found that the action of the present guardian in receiving the mortgage from his predecessor on May 17, 1932, in its then defaulted condition, with over $850 unpaid and defaulted interest, and without requiring an accounting of the assets in the estate from his predecessor, was improvident, negligent and unlawful.

It appears that no notice, as required by section 38-506, Comp. St. 1929, was ever given to those interested by the county court for Seward county before the original investment of the ward's fund in the mortgage in question was

made, and therefore such investment is not binding upon the ward. *Seward v. Danaher,* 105 Neb. 787, 181 N. W. 941, 37 A. L. R. 441; *Hendrix v. Richards,* 57 Neb. 794, 78 N. W. 378; *Wilkins v. Deal,* 128 Neb. 78, 257 N. W. 486; *Olsen v. Marsh,* 142 Neb. 800, 8 N. W. 2d 169.

In the case of *In re Estate of O'Brien,* 80 Neb. 125, 113 N. W. 1001, it was held that a guardian must apply to and receive from the county court an order authorizing him to loan the funds of his ward, and if he loans his ward's funds without such authority and a loss ensues he is liable therefor. The approval by the county court, without notice to those interested, of the reports of the guardian, wherein he reports such loans of his ward's funds made without an order of the court, is not equivalent to an order of the court authorizing the guardian to make such loans.

Under the facts in this case the duty devolved upon the second guardian to examine with the utmost care the condition of the ward's estate. He should have required a strict accounting from his predecessor, and thereby could have protected himself from liability. But the record shows that the first guardian petitioned the county court for York county (not Seward county, in which he was appointed) to resign, and that Hylton be appointed his successor. This was done, and Hylton accepted and filed his bond of $12,000, all on the same day, May 12, 1932, before the Seward county guardianship was closed.

In this state "A guardian has no authority to sell personal property or invest the funds of the ward's estate without proper order of the county court." *Wilkins v. Deal, supra.*

An investment of a ward's funds in mortgage securities should only be made after application to the probate court and the proper notice given by that court, and after an order has been made by the court authorizing the specific investment and the terms thereof, including the rate of interest to be received therefor.

If a guardian carefully follows an order of the court so made, he will not be held liable, except for loss of the securities themselves through his own negligence. See Dame,

Probate and Administration (3d ed.) 719, sec. 708; *Medow v. Riggert*, 132 Neb. 429, 272 N. W. 238.

The law does not require that a guardian have unusual ability, but he must employ such diligence and prudence as men of ordinary intelligence employ in their own affairs of a similar nature. The accountability of a guardian for the safe keeping and investment of the ward's funds is not measured by his own conceptions of his duty, but he is required at his peril to strictly follow all the requirements of the law enacted by the legislature for the protection and security of a ward's estate.

The duties of a guardian are similar to those of a trustee in the handling of trust funds, and every violation of a duty required of him by law, whether wilful and fraudulent, or done through negligence, or even a violation of those duties which arise by mere mistake, oversight, or forgetfulness, is a breach of trust. See *Whaley v. Matthews*, 134 Neb. 875, 280 N. W. 159.

In such cases, he is not protected merely because he acts in good faith, or upon the advice of counsel. If he is in doubt as to his duties, he can protect himself by obtaining a formal order made by the court according to the provisions of law. 1 Restatement, Trusts, 531, sec. 201.

The case is, therefore, one of those unfortunate ones where one of two innocent parties must suffer. As between two innocent persons, the one must suffer who, by his own acts, conduct, or laches, has made the loss possible. See *Bauer v. Bauer*, 136 Neb. 329, 285 N. W. 565.

The guardian insists that the ward, who had been living in his home, knew every step taken in the investment of her funds, and the borrowing of money for her education, and all other transactions, and that she was willing to have the title of the mortgaged property put in her name. Immediately after her marriage on June 3, 1938, she went to her husband's farm between Scottsbluff and Mitchell, and remained there. The guardian testified that in the latter part of November, 1938, he drove from York county to their farm and delivered to the ward a copy of the reports he had

filed as guardian, and the petition for the final settlement of the estate, and talked the whole matter over with her.

Counsel for guardian in his supplemental brief insists that a ward who receives reports of her guardian concerning investments, and has full knowledge of all transactions, and for a long period of time fails to repudiate his actions is held to have ratified them, and is therefore estopped to question them at a later date, citing 25 Am. Jur. 88, sec. 143, and 128 A. L. R. 46-48, Annotation. To see whether these citations apply to the facts in this case, we will examine the evidence of the husband, George Beaty.

"Q. What was the conversation with reference to this settlement business? A. He came out there and he brought a release for us to sign and a note, and he informed us that we could get a settlement of my wife's estate by signing a note and release and signing it back to him. Q. What, if anything, did he say about holding the land? A. He informed us the land would be held until the note and release was signed; no other settlement."

The testimony of the guardian, Harry Hylton, was as follows: "Q. You had some conversation with Jean Phillips Beaty at the time you were out there in the fall of 1938? A. Yes sir. * * * Q. Didn't you at that time tell them you wouldn't settle it up until approximately $800.00, had been paid to you? A. No. Q. Why did you take out that mortgage and note? A. I took them out to have them executed to pay me for advancements I had paid the estate and for money I had borrowed for the estate. * * * Q. Did you ever tell Jean Phillips Beaty that you wouldn't make a settlement with her except upon conditions? A. Not that I recall. Q. What did you tell her? A. I told her that this money had been advanced and that this much money was coming to me. If she would sign the note and mortgage I would deliver the estate and they could take over the management of it. Q. So you wouldn't surrender the securities or whatever you had until she signed the note and mortgage? * * * A. Yes. Q. And that was in 1938? A. Yes sir."

Also in Mr. Hylton's direct examination when he was re-

called as a witness on behalf of the ward: "Q. I hand you what have been marked exhibits 20 and 21, is that the note and mortgage that you requested her to sign as part of the settlement and adjustment in November, 1938, and as a condition to the settlement, is that right? * * * A. Yes."

This evidence fails to show any ratification of the ward of the acts of the guardian, and shows a demand of the guardian that they must sign a note and mortgage or he would retain possession of the farm. She told the guardian they would think the matter over before they would sign the note and mortgage, and they never did sign the instruments.

The husband of the ward testified that about twice a year after their marriage they drove from their home at Mitchell, Nebraska, to see the guardian at the bank in Gresham, and always for the purpose of demanding the payment to her of the full amount of her estate. The ward never acquiesced therein. It is immaterial what she may have said and done in reference to the guardian's acts while she was a minor. See 25 Am. Jur. 103, sec. 165.

The law relating to estoppel of the ward is that "A sale, though irregular or void, may be validated by the ratification of the party after attaining majority, and cannot, in such case, be disturbed. Thus, the appropriation by the parties, when of age, of the proceeds of the sale, with full knowledge of the facts and circumstances, or acquiescence for many years, will estop them from claiming the land." Woerner, American Law of Guardianship, 293, sec. 88. See, also, *Southwestern Surety Ins. Co. v. Holt*, 88 Okla. 281, 213 Pac. 80.

"Courts watch with great jealousy transactions of guardians with their wards or any dealings between them affecting the estates of the wards. The equitable rules concerning dealings between guardian and ward are very stringent." 25 Am. Jur. 130, sec. 208.

The findings of the trial court are supported by the evidence in every regard, and the judgment is according to law, and it is hereby affirmed.

AFFIRMED.

BESSIE G. RODERICK, EXECUTRIX, APPELLANT, V. P. G. WIENS, REAL NAME UNKNOWN, APPELLEE.
12 N. W. 2d 843

FILED FEBRUARY 4, 1944. No. 31670.

1. Sales. A bill of sale conveying the stock of hardware, fixtures, tools, book accounts and equipment of every kind and nature belonging and being a part of the P. G. Wiens and Company Hardware Store, located on Lots 7 and 8, Block 5, Original Town of Hubbell, Nebraska, is not void for insufficient description.
2. ———. The description of property in a bill of sale is sufficient, where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property.
3. ———. The evidence examined and *held* sufficient to sustain plaintiff's right to possession as against a motion for a directed verdict.
4. ———. The fact that a stock in trade may change by sales and replacements of merchandise after the delivery of an unconditional bill of sale by the seller does not constitute such a variance, as between the parties, which would defeat an action in replevin where it appears from the bill of sale and surrounding circumstances that such changes were contemplated.

APPEAL from the district court for Thayer county: STANLEY BARTOS, JUDGE. *Reversed.*

Melvin Moss, W. J. Moss and *Hartigan & Skultety,* for appellant.

Baldwin & Pike, contra.

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

CARTER, J.

This is an action in replevin brought by the executrix of the estate of John W. Roderick, deceased, to recover possession of a stock of hardware and fixtures located in a certain building in Hubbell, Nebraska. A writ of replevin was issued and the property turned over to the plaintiff. The trial court directed a verdict for the defendant on the question of the right of possession of the property and submitted the question of defendant's damages to a jury. The jury

returned a verdict, finding the value of the property to be the sum of $4,100, that defendant was entitled to $1,845 for loss and depreciation, and that he was further damaged in the amount of $360.11. From a judgment entered on this verdict the plaintiff appeals.

The petition alleges that John W. Roderick, in his lifetime and on December 2, 1935, became the owner of the hardware stock and fixtures involved in this action by virtue of a bill of sale executed and delivered to him by the defendant Wiens. The answer admits the execution and delivery of the bill of sale and alleges affirmatively that the bill of sale was given without consideration, that it was not accompanied by a delivery of possession of the stock of hardware and fixtures and that it was given to Roderick as a matter of accommodation to improve his credit with parties from whom he was seeking financial assistance. The answer further alleges that said property has at all times since the giving of the bill of sale remained in the exclusive possession of the defendant Wiens, that the property described in the bill of sale was not the property taken under the writ of replevin, and that the action is barred by the statute of limitations.

In considering the evidence, for the purpose of reviewing the correctness of the trial court's order directing a verdict for the defendant on the question of the right of possession of the property replevied, we will assume the existence of every material fact which the evidence of plaintiff tends to establish, as well as all reasonable inferences to be drawn therefrom. *Anderbery v. Katz*, 142 Neb. 872, 8 N. W. 2d 207. Where different minds may reasonably draw different conclusions from the same facts, the issues which such facts tend to support should be submitted to a jury. The first question to be determined is whether the trial court properly instructed the jury that the right of possession of the property replevied was in the defendant as a matter of law.

The trial court appears to have directed a verdict for defendant as to the right of possession on the theory that

plaintiff did not establish that the property replevied was the same property as that described in the bill of sale. The pertinent part of the description contained in the bill of sale is as follows: "and said P. G. Wiens has hereby bargained and sold and by these presents does grant and convey unto J. W. Roderick, * * * all of the stock of hardware, fixtures, tools, book accounts and equipment of every kind and nature and with all appurtenances thereunto belonging and being a part of the P. G. Wiens and Company Hardware Store, located on Lots 7 and 8, Block 5, Original town of Hubbell, Nebraska, * * * . The intention herein being to convey to the said J. W. Roderick all of the interest of P. G. Wiens in the Hardware Store and Implement Store with all appurtenances thereunto belonging, to the said J. W. Roderick." The itemized list of the property replevied consists of several pages showing in detail the items of merchandise and fixtures found in the store building described in the bill of sale. Does the bill of sale describe the property sufficiently to sustain plaintiff's case? We think it does. The recited description is sufficient as between the parties to convey the title to all the items located in the store building on Lots 7 and 8, Block 5, Original Town of Hubbell, Nebraska, which can properly be classified as a part of the stock of hardware, fixtures, tools, book accounts and equipment of every kind and nature and which is a part of the P. G. Wiens and Company Hardware Store.

It is not necessary that the chattels to be assigned should be specifically enumerated in the bill of sale, or that an inventory or schedule of them should be annexed. It is sufficient to use a general description where a third person might identify the property by the aid of inquiries which the instrument itself suggests. This rule has been repeatedly announced with regard to chattel mortgages and we think the same rule applies to bills of sale. *Buck v. Davenport Savings Bank*, 29 Neb. 407, 45 N. W. 776; *Love v. Putnam*, 41 Neb. 86, 59 N. W. 691; *Security State Bank v. Schomberg*, 119 Neb. 598, 230 N. W. 487. A chattel mortgage which would be invalid as against creditors and pur-

chasers in good faith by reason of defective description of the property mortgaged may be good as between mortgagor and mortgagee, where the property in fact mortgaged can be identified. *First Nat. Bank of Holdrege v. Johnson,* 68 Neb. 641, 94 N. W. 837. We think this rule likewise applies to bills of sale.

It is urged that the property taken under the writ of replevin is not the same as that described in the bill of sale, for the reason that sales of merchandise had been made therefrom and replacements made by purchases of new goods. We think the circumstances indicate that this was the intent of the parties. Ordinarily a bill of sale is used to transfer chattel property from one person to another when the sale is not accompanied by actual delivery, for if delivery is made no writing is necessary, except where required by our statutory law. We think the parties contemplated the transfer of the title to the stock of hardware, fixtures, tools, book accounts and equipment constituting a part of the P. G. Wiens and Company Hardware Store located on the land specifically described in the bill of sale to the plaintiff without the delivery of possession and with the intention that it should continue to operate as theretofore. Changes in the stock by sale and purchase were therefore contemplated. The intention of the parties must be given effect under these circumstances. This rule came to us from the common law of England. In the early case of *Jarman v. Woolloton,* 3 T. R. 618, the court said: "The objection arising from the want of a schedule annexed has no weight: if a schedule were necessary, here was an inventory which will sufficiently answer the purpose. But I think it is unnecessary, considering the nature of the property; it was not always to remain in the same state; the very object of the settlement was that the wife should sell the goods and purchase others, in order to make a profit of them." As between the parties, therefore, there can be no question that the description contained in the bill of sale was sufficient to identify the property taken under the writ of replevin. This being true, the bill of sale, admitted to

have been executed and delivered by the defendant, is sufficient in the absence of contradictory evidence to make a case for the plaintiff.

The allegations of the defendant to the effect that there was no consideration, that the bill of sale was given for credit accommodation and that the action was barred by the statute of limitations are affirmative defenses which the defendant and not the plaintiff will be required to establish.

We conclude that the trial court was in error in directing a verdict for the defendant on the theory that the defendant was entitled to the right of possession of the property replevied as a matter of law. The judgment is reversed and the cause remanded for a new trial in accordance with the view expressed herein.

REVERSED.

JOHN D. STOCKER, ADMINISTRATOR, APPELLEE, V. BEATRICE DICKSON HILGER, APPELLANT: GERALD A. HILGER ET AL., APPELLEES, VOSS WALLPAPER COMPANY ET AL., INTERVENERS, APPELLEES.

13 N. W. 2d 106

FILED FEBRUARY 4, 1944. No. 31644.

1. **Homestead.** Where a husband and wife are the fee owners of real estate from which a homestead has been selected, and reside thereon with their minor daughter, the husband being the head of the family, and the wife subsequently predeceases him, and he and the daughter continue to occupy the homestead until his death, the homestead interest vests, on his death, in the daughter as sole and only heir at law and is not subject to the payment of any debt or liability, contracted by or existing against him previous to or at the time of his death, except such as exists or has been created under the provisions of the homestead law.
2. ———. Where rents are collected from a homestead, in which the sole surviving heir owns a one-fourth interest in the fee and, in addition, a homestead interest in the amount of $2,000, free from debts contracted by the ancestor during his lifetime, such heir is entitled to the *pro rata* share of the rents in the

ratio that such homestead interest bears to the value of the fee interest of which the ancestor died seised, when the excess over and above such homestead interest will be absorbed by debts of the estate.

3. ———. Money expended for repairs and improvements on homestead property may be recovered *pro rata* on the basis of the ownership of the fee.
4. **Fraudulent Conveyances.** While it is established that a homestead right of the value of $2,000 or less is not the subject of fraudulent alienation, where it appears that the value of the homestead, exclusive of a one-fourth fee interest owned by a daughter, is in excess of $2,000, within the homestead limits, a conveyance of such surplus may be set aside when made in fraud of creditors.
5. **Appeal and Error.** A request for the appointment of a receiver is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed, on appeal, unless an abuse of discretion is shown.

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

Thomas E. Dunbar, for appellant.

Tyler & Frerichs, Lloyd E. Peterson and *Landis & Landis, contra.*

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

MESSMORE, J.

The administrator of the estate of Clark Dickson, deceased, brought this action to set aside a deed, given by him to his daughter (appellant), and to subject the interest conveyed by the deed to the payment of indebtedness incurred by him after the death of his wife, and to require an accounting for the value of the use of the real estate since his death for rents paid and received for the use and occupancy thereof. Creditors intervened and set up their claims. The issues presented may be determined from the facts as here set out.

Lucille Dickson and her husband, Clark Dickson, acquired lot 12, block 74, Nebraska City, Nebraska, as tenants in

common. On April 25, 1923, Lucille Dickson died intestate, leaving as her sole and only heirs at law her husband and daughter, Beatrice Dickson, now Hilger. The husband inherited the one-half interest of the half interest in the fee owned by the wife, which gave him three-fourths interest in the fee title. The remainder, a fourth interest, went to the daughter. It is undisputed that after the death of the wife and mother the father and daughter continued to occupy the real estate as a home. The father died March 8, 1941. Thereafter the daughter, then unmarried, occupied the real estate for a period of time, subsequently removing to the state of California. She is the sole and only heir of Clark Dickson, deceased.

On January 23, 1941, Clark Dickson, a widower, by warranty deed conveyed the real estate involved to his daughter for the purpose of perfecting the title to the premises in the grantee. The consideration was "$1.00, love and affection." At the same time a bill of sale of the fixtures and stock of merchandise in the wallpaper and paint store was executed by Dickson for the benefit of the daughter. From the record it is apparent that this personal property was converted into cash by the administrator.

A letter written by the appellant to the intervener, Voss Wallpaper Company, dated February 21, 1941, appearing in the record, has been examined and taken into consideration. The record also discloses an expenditure of $313 by appellant for repairs and remodeling and collection of rents by her until the clerk of the court was appointed receiver.

The court decreed that in addition to the undivided one-fourth interest in the real estate owned by Beatrice Dickson Hilger she was entitled to a 1,000-dollar exemption on account of the homestead character of the property, and to a refund of three-fourths of disbursements made by her for repairs and improvements, and that the appellees were entitled to one-half share of the rents collected by appellant from the real estate and collected by the receiver, less the expenses.

The appellant contends that her father's interest in the

real estate descends to her, clear of debts or the right of possession, in the amount of $2,000, instead of $1,000 as decreed by the court.

It is clear from the record that the homestead was selected from the separate property of the husband and wife and that the husband, at the time, was the head of a family, within the meaning of the homestead law. The daughter was 18 years of age at the time of the death of her mother. The father continued to occupy the real estate as his home, and his daughter kept house for him, taking care of the premises and assisting him in his business until his death.

Section 40-117, Comp. St. 1929, provides in part: "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter: * * * ."

Under the provisions of the homestead act, a homestead is exempted in the amount of $2,000. It is therefore clear, under the provisions of section 40-117, *supra,* that appellant's contention, heretofore stated, is correct.

This court in *United States Nat. Bank v. Simonds,* 133 Neb. 42, 274 N. W. 187, held: "Where a husband is the fee owner of land from which a homestead has been selected, and his wife predeceases him, and he continues to reside thereon to the time of his death, it vests on his death in his heirs and devisees, and is not subject to the payment of any debt or liability contracted by or existing against him previous to or at the time of his death, except such as exists or had been created under the provisions of the homestead law." We are unable to find any decision of this court prorating the amount of homestead exemption, as defined in

the homestead law, between the respective fee title interests, as decreed by the trial court.

United States Nat. Bank v. Simonds, supra, is similar in fact to the instant case. Simonds at the time of his death owned 320 acres of land; the bank was a creditor of the estate. Tract one was set aside as a homestead of less value than $2,000 and not subject to sale to pay debts. When this tract was purchased Simonds was a married man, with four children. He and his wife resided on such tract of land until her death in September, 1927. She left surviving her husband and four sons. All of the children had left home except an adult son, Harry, who continued to live with his father on the same tract of land until the father's death. After the death of the wife Simonds had no dependents living with him.

United States Nat. Bank v. Simonds, supra, and the instant case are not in conflict with the case of *Lewis v. McAdams,* 130 Neb. 62, 263 N. W. 480. In the latter case the surviving wife was not the fee owner of the land selected as a homestead, and took a life interest in the remainder devised to her by will, free of the debts of the husband (testator) and her debts, existing at the time. There was an adult son at the time the husband and father died. It is apparent that in the *Lewis* case the wife and mother was not the head of a family after her husband's death and did not, therefore, have a homestead interest in her own right.

Respecting the rents, the appellant is entitled to one-fourth thereof absolutely, as the owner of one-fourth of the fee title. Her interest in the remaining three-fourths of the fee is, as heretofore stated, in the amount of $2,000, free from debts contracted by her father in his lifetime. Therefore, she is entitled to the *pro rata* share of the rent in the ratio that such 2,000-dollar interest bears to the value of the three-fourths fee interest, subject to the payment of taxes, for the reason the debts of the estate will absorb the excess. The record discloses that the appellant expended $313 for repairs and improvements. There is no evidence

as to the reasonable value of such improvements, but it is undenied that such amount was expended. One-fourth of this amount was expended on that part of the fee title owned by appellant. She should be reimbursed in three-fourths of the amount so expended as decreed by the trial court.

This court has held in numerous cases that a homestead of less value than $2,000 cannot be disposed of at an administrator's sale for the payment of debts against the estate of decedent, and a license granted by the district court, purporting to authorize such sale, is absolutely void; further, that the homestead of a debtor to the extent of $2,000 is not the subject of fraudulent alienation. See *Gordon v. Gordon,* 140 Neb. 400, 299 N. W. 515, and cases cited; *Scheel v. Lackner,* 4 Neb. (Unof.) 221, 93 N. W. 741. However, if above any valid encumbrance thereon there be a surplus in excess of the sum of $2,000 within the homestead limits, a conveyance of such surplus can be set aside when made in fraud of creditors.

We hold that, under the circumstances of this case, the deed should be set aside and the property sold at an administrator's sale in the event the value of the three-fourths fee interest, of which the father died seised, exceeds $2,000, constituting the homestead exemption, to which amount the appellant is entitled, free from debts of the father.

Certain creditors, as interveners in the action, filed application for the appointment of a receiver, to which there were objections. There was a stipulation between the parties for the clerk of the district court to collect rents, with a reservation by the appellant that the stipulation was made without prejudice to the contention of the parties in reference to the issues concerning the appointment of a receiver, and reserving exceptions to the decision of the court to appoint a receiver.

The request for the appointment of a receiver is addressed to the sound discretion of the trial court, and its ruling thereon will not be reversed, on appeal, unless an abuse of discretion is shown.

The cause is remanded to the district court to enter judgment in conformity with the opinion.

REVERSED, WITH DIRECTIONS.

CARRIE JOHNSEN, APPELLEE, V. JOHN HENRICK JOHNSEN, ALSO KNOWN AS JOHAN HENRICK JOHANSEN, APPELLANT.
12 N. W. 2d 837

FILED FEBRUARY 4, 1944. No. 31642.

1. **Divorce.** It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
2. ———. Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of justice and equity may require.
3. ———. Record examined, and decree of the trial court modified as to division of property and awarding of alimony; otherwise it is affirmed.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed in part and reversed in part, with directions.*

O. M. Olsen and *John M. Berger*, for appellant.

Monsky, Grodinsky, Marer & Cohen, contra.

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

CHAPPELL, J.

The trial court granted plaintiff a decree of divorce and as alimony, or in lieu thereof, awarded her the home, subject to encumbrance, together with all the household goods, furniture and fixtures located therein; an undivided one-half interest in certain apartmental property; the custody of a son, 18 years of age, and $15 a month for his support until self-supporting or until further order of the court; $6,000 alimony payable $40 a month, and $150 attorney's

fees, and costs. Defendant was awarded the fee simple title to his bakery business and property, together with its furniture, fixtures, machinery, and equipment, but was ordered to assume and pay all outstanding current obligations of the parties, which total $1,142.68.

Defendant appeals, contending that plaintiff's petition does not state a cause of action; that the evidence is insufficient to support a decree of divorce; that the decree makes an unjust and inequitable division of the property and awards plaintiff excessive alimony.

While plaintiff's petition is not a model pleading, its allegations are sufficient to state a cause of action for divorce on the grounds of extreme cruelty. Under the circumstances, *Dakin v. Dakin*, 1 Neb. (Unof.) 457, 95 N. W. 781, *Fagan v. Fagan*, 82 Neb. 388, 117 N. W. 992, and *McLane v. McLane*, 88 Neb. 833, 130 N. W. 745, are controlling.

With reference to the sufficiency of the evidence, this court has held: "It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances." *Felton v. Felton*, 131 Neb. 488, 268 N. W. 341. An examination of the record discloses that there is sufficient evidence to support the decree of divorce. True, there have been aggravating property conflicts, and mental and physical incompatibility, for which both parties are in part at fault. However, we must find that defendant has, upon occasions, been guilty of extreme cruelty by words and acts, for which there is no justification in the law.

The important question involved relates to the division of the property and the awarding of alimony by the trial court, which we decide is inequitable, unjust, and excessive. The parties have lived together as husband and wife for approximately 30 years. This is the second divorce action filed by plaintiff in the latter years. She is approximately 57 years of age and in good health except for some disability to her left side resulting from infantile paralysis suffered when a child. The parties have a grown daughter, unmarried, and well employed, who lives with the plaintiff. The son, 18

years old, also lives with the plaintiff. He is still in high school and not in vigorous health. The defendant, approximately 60 years of age, is admittedly ill and seriously disabled with arthritis, but still able with difficulty to conduct his bakery business, the income from which is not impressive. The income from the apartmental property, under the supervision of a rental agent, is more substantial. Both produce a net income of approximately $1,600 a year.

During the marriage the parties acquired by their joint efforts a home, household goods, furniture and fixtures, at 949 North 26th street, Omaha, Nebraska, described as lot 54, Nelson's addition; apartmental properties at 6051-53-55 Military avenue, Omaha, Nebraska, described as lot 1, block 2, Halcyon Heights addition; and a place of business for a bakery, equipped with office furniture, fixtures, machinery, and equipment, at 2309 Cuming street, Omaha, Nebraska, described as the middle one-fifth of lots 1 and 2, block 208½, Original City Lots. The real estate is all encumbered by mortgages, but the present equity will approximate $8,000.

In this situation, the rule established in *Bigelow v. Bigelow*, 131 Neb. 201, 267 N. W. 409, and followed in *Resnick v. Resnick*, 137 Neb. 256, 288 N. W. 816, is applicable. In these cases, the court held: "Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of equity may require." Rules of guidance for justly and equitably fixing the amount of alimony to be awarded have been established in *Felton v. Felton, supra; Phillips v. Phillips*, 135 Neb. 313, 281 N. W. 22; and *Hild v. Hild*, 135 Neb. 896, 284 N. W. 730.

Bearing these rules in mind, we decide that justice and equity will prevail if plaintiff is awarded the home, subject to the encumbrance thereon, to be paid by her, together with all the household goods, furniture and fixtures therein; the custody of the son, with right of visitation by defendant at reasonable times and places, together with $15 per month for his support, payable one-half on the 1st and

one-half on the 15th of each month, so long as he is attending school regularly until he is of age or unless self-supporting, or until further order of the court; and $4,000 permanent alimony, payable $30 a month, one-half thereof on the 1st and one-half on the 15th of each month until fully paid; however, any payments of permanent alimony heretofore paid shall apply thereon. Further, fee simple title to the other two real estate properties, together with all the furniture, fixtures, machinery, and equipment therein shall be vested and quieted in defendant absolutely by quitclaim deed and bill of sale from plaintiff, or otherwise in the alternative by decree of the trial court. Outstanding debts of the parties, amounting to $1,142.68 at the time of the trial, shall be assumed and paid by defendant, and plaintiff is allowed $100 as attorney's fees for services rendered in this court, together with costs.

The judgment is, therefore, affirmed in part and in part reversed, and the cause is remanded with directions to the trial court to enter decree in compliance herewith.

AFFIRMED IN PART AND REVERSED IN PART, WITH DIRECTIONS.

MATILDA CUNNINGHAM, APPELLANT, V. WILLIAM HOMES BREWER ET AL., APPELLEES.

13 N. W. 2d 113

FILED FEBRUARY 4, 1944. No. 31658.

1. **Pleading**: DEED. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause. The allegations and proof must agree. However, the party may allege as many different grounds for cancellation and vacation of the deed as he desires and failure to prove one of the grounds will not prevent a recovery on the others.
2. **Contracts**. The acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a

deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence.

APPEAL from the district court for Nemaha county: VIRGIL FALLOON, JUDGE. *Reversed, with directions.*

Ernest F. Armstrong, Edgar Ferneau and *Lowell E. Hahn,* for appellant.

J. H. Falloon and *Dwight Griffiths,* guardian *ad litem, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

WENKE, J.

This action was commenced in the district court for Nemaha county by Matilda Cunningham, as plaintiff, to cancel a deed to William Homes Brewer, John James Brewer, and Edna May Brewer, defendants, to a certain tract of land located within the corporate limits of Auburn, Nebraska, on the ground that plaintiff was induced by fraud to execute the deed for an inadequate consideration. From a judgment in favor of the defendants and dismissing her petition, the plaintiff has appealed.

William Cunningham, husband of the plaintiff, filed a petition of intervention, to the same effect as the plaintiff, which was dismissed and from which action the intervener has taken no appeal.

For the purpose of this action the plaintiff will be referred to as Mrs. Cunningham, her husband as Mr. Cunningham, the defendant William Homes Brewer as Brewer, and the three defendants collectively, William Homes Brewer, John James Brewer, and Edna May Brewer, as grantees.

The first question is whether or not there is such a variance between the pleadings and the proof as to defeat Mrs. Cunningham's right to recover. The rule is announced in *Foote v. Chittenden,* 106 Neb. 704, 184 N. W. 167, as follows: "A party will not be permitted to plead one cause of

action and upon the trial rely on proof establishing a different cause. The allegations and proof must agree." However, the party may allege as many different grounds for cancellation and vacation of the deed as he desires and failure to prove one of the grounds will not prevent a recovery on the others.

In her petition seeking to cancel and annul the deed Mrs. Cunningham alleged that she was the owner of the property and that Mr. Cunningham had no interest therein. The evidence discloses that she, together with Mr. Cunningham, were the owners of the property as joint tenants with right of survivorship and that the same was their homestead. While the interest of Mrs. Cunningham is not the full title, it is, however, a substantial interest therein and sufficient to sustain her action to cancel and annul the deed.

Mrs. Cunningham's petition alleges a conspiracy between Brewer and Mr. Cunningham to defraud and deprive her of her property. The evidence fails to sustain this allegation. The grantees contend that this is such a variance between the pleadings and proof as will defeat the action. In so far as this contention is concerned it is applicable to the allegations of conspiracy. If that was the only allegation contained in the petition, then the grantees' contention would have to be sustained. But from an examination of the petition as a whole we find it alleges that Mrs. Cunningham is a woman, who, because of her advanced years, is in an enfeebled mental and physical condition; that she did not know the value of her property; that she was not advised as to the amount of the consideration she was receiving; that Brewer and Mr. Cunningham informed her that she was about to lose her property because of the taxes; that these statements were false in that while the taxes were delinquent on the property it could not be sold for more than two years; that they failed to inform her of her rights; that she believed and relied thereon; that Brewer knew the value of the property and that the amount he was offering was inadequate; that Brewer knew she did not realize that she was conveying her property for an inadequate considera-

tion, together with many other similar allegations, and then praying that the deed be canceled and annulled. These allegations are sufficient to sustain the action and find support in the evidence.

This being an equitable action it will be tried here *de novo*. The record discloses that Mr. and Mrs. Cunningham, who had been married for about 22-23 years and during that time lived in Auburn, purchased the property involved on the 27th day of February, 1932, for a recited consideration of $5,000. The deed was taken to William Cunningham and Matilda C. Cunningham, husband and wife, as joint tenants with the right of survivorship and that since its purchase they have been occupying it as their home. This was the second marriage of Mrs. Cunningham, her first husband having died leaving her some property and from the proceeds of which this property was purchased.

At the time of the transaction herein involved Mrs. Cunningham was approximately 88 years of age and suffering from senile dementia due to extreme age. Her eyesight had been affected so that she was unable to read or write and had difficulty recognizing her friends. She had become partially physically incapacitated and it generally appears from the record that she was afflicted with the conditions usually affecting people of this extreme age. Mr. Cunningham was a man 70 years of age who was illiterate and was addicted to the excessive use of intoxicating liquors.

William Homes Brewer is the father of John James Brewer and Edna May Brewer who are his minor son and daughter and who are all named as grantees in the deed.

The property involved consists of an acreage tract located in the outskirts of Auburn of some 10 or 11 acres in area and improved with a two-story dwelling, which was in need of repairs, a garage, a good sized barn, a cave, fenced, serviced with electric lights and water, and located on a graveled road. It had a reasonable market value of somewhere between $1,500 and $2,000.

The taxes on the premises were delinquent since 1937 and Brewer purchased a tax sale certificate on October 21, 1942,

in the sum of $400. Then he contacted Mr. Cunningham with reference thereto. Shortly after the conversation with Mr. Cunningham, Brewer went to the home of the Cunninghams to negotiate with reference to a deed for the premises. It appears that Brewer had agreed to give Cunningham $150 in cash but Mrs. Cunningham was not informed of this fact. She was advised that they would be removed from the premises shortly because of these delinquent taxes but if they deeded the land to the grantees that she would be given a lease on the house for her lifetime. The Cunninghams and Brewer then went to the office of Mr. Rutledge, an attorney in Auburn, and while she remained in the car, Mr. Cunningham and Brewer went up to the office and there advised Mr. Rutledge to make out a deed to the grantees which recited a consideration of one dollar, but told him the consideration actually was the taxes Brewer had paid and the life use of the house to be given to Mrs. Cunningham. Mr. Rutledge then went down to the car and Mrs. Cunningham signed the deed. He then made out a lease on the home for the period of Mrs. Cunningham's life. They then got back into the car and drove to the Cunninghams and after Mrs. Cunningham got out of the car and went into the house Brewer paid Mr. Cunningham $150 in cash.

It appears from the record that Mrs. Cunningham had no knowledge at any time of the fact that her husband was receiving $150 and that she was informed by both Mr. Cunningham and Brewer that she would be dispossessed of the property by reason of the taxes. Whereas, all that Brewer had was a tax sale certificate on which he could take no action for two years and then it would require the necessary legal proceedings to obtain title and possession. It also appears from this transaction that all Brewer was paying for the property was a total consideration of $550 in cash plus the use of the house for the duration of Mrs. Cunningham's life. The medical testimony shows that Mrs. Cunningham, because of the fact that she was suffering from senile dementia due to old age, was not fully competent to transact business.

"Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable means, the conveyance may be set aside." *Bennett v. Bennett,* 65 Neb. 432, 91 N. W. 409.

"A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind, and has been abused." *Bennett v. Bennett, supra.* See, also, *Scott v. Swank,* 132 Neb. 720, 273 N. W. 25.

"While, generally speaking, a court of equity cannot undertake to inquire into and measure the difference in the business sagacity of men in their dealings, yet it is obvious that mental weakness, although not sufficient to show an absolute disqualification, is a very important circumstance in determining whether a contract has been obtained through fraud, imposition, or undue influence, and when the contract is of such a nature as to justify the conclusion that a party has been imposed upon by cunning, artifice or undue influence, a court of equity will not hesitate to set the contract aside. *Clough v. Adams,* 71 Ia. 17; Story, Equity Jurisprudence (4th ed.) sec. 337; *Meyer v. Fishburn,* 65 Neb. 626." *Wilson v. Bergmann,* 112 Neb. 145, 198 N. W. 671.

"The acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence." Story, Equity Jurisprudence, as approved in *Meyer v. Fishburn, supra.*

Under the facts of this case, Brewer, a man 57 years of age and experienced in business, purchased a tax sale certificate on the homestead of Mr. and Mrs. Cunningham for $400, the property being worth from $1,500 to $2,000; then proceeded to negotiate with Mr. Cunningham, a man 70 years of age who could neither read nor write and who was an habitual drunkard, and through him led Mrs. Cunning-

ham to believe that she was to be evicted from the property; secretly offered and subsequently paid Mr. Cunningham $150; then obtained Mrs. Cunningham's signature to the deed for the consideration of a life lease to her of the house located on the premises and thus took from her the homestead for a grossly inadequate consideration, she being a woman 88 years of age, physically and mentally weak because of her extreme age, unable to read or write or recognize people because of her failing eyesight and who was afflicted with senile dementia which impaired her mental faculties such that she was not fully competent to transact business. This court has no hesitancy in setting aside a deed thus obtained.

In doing so we have not overlooked the rule as announced in *Bingaman v. Bingaman*, 85 Neb. 248, 122 N. W. 981: "While it is the rule in this state that a preponderance of the testimony is all that is required to sustain a finding in a civil case, still what constitutes a preponderance may vary largely according to the circumstances of each case. Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome." Nor have we overlooked the fact that the trial court observed the witnesses and their manner of testifying.

The decree of the lower court is vacated and set aside with directions to the lower court to enter a decree that if Mrs. Cunningham, within 90 days from the entry thereof, pay into court the sum of $150 for the appellee, William Homes Brewer, being the amount he paid to Mr. Cunningham and which amount she offered to pay in the trial court, same to be without interest, that the deed and lease be va-

cated and set aside. That if Mrs. Cunningham fails to pay said amount into court within the time fixed, then the deed and lease be held in full force and effect. That in either event all costs be taxed to William Homes Brewer. Mrs. Cunningham is given the further right, during the above period of 90 days, to pay into court for the use of William Homes Brewer the sum of $400, without interest, in full satisfaction for all taxes paid by him as shown by the tax sale certificate which the record shows he surrendered to the county treasurer.

REVERSED, WITH DIRECTIONS.

The following supplemental opinion was filed December 8, 1944. *Reversed, with directions.*

1. **Rescission**: CANCELLATION OF INSTRUMENTS: PARTIES. The general rule is that in suits for rescission or cancellation all persons whose rights, interests or relations with or through the subject matter of the suit would be affected by the cancellation or rescission should be brought before the court so that they can be heard in their own behalf.
2. **Parties.** A defect of parties must be taken advantage of by demurrer or answer, or the defect will be deemed waived.
3. ———. When the determination of a controversy cannot be had without the presence of new parties to the suit, the statute directs the court to order them to be brought in. Comp. St. 1929, sec. 20-323.
4. ———. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
5. **Appeal and Error**: PARTIES. When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the supreme court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant.

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

WENKE, J.

The original opinion in this case was released on February 4, 1944, and is reported, *ante,* p. 211, 13 N. W. 2d 113. We granted a rehearing on the question of defect of parties which was not presented and therefore not considered in the original opinion.

William Cunningham and Matilda Cunningham, the plaintiff, are husband and wife and were the owners of the property, the deed to which the plaintiff seeks to cancel, as joint tenants with right of survivorship, the same being their homestead. William Cunningham was not made a party to the original action, either as plaintiff or defendant. After trial, but before decree, he attempted to intervene but his petition of intervention was dismissed and he did not appeal therefrom nor was he made a party to the appeal. The failure to make William Cunningham, one of the grantors to the deed sought to be canceled, a party was not raised by the defendant grantees either by demurrer or answer.

The general rule is that in suits for rescission or cancellation all persons whose rights, interests or relations with or through the subject matter of the suit would be affected by the cancellation or rescission should be brought before the court so that they can be heard in their own behalf.

As stated in 12 C. J. S. 1027, sec. 52: " * * * All persons whose rights, interests, or relations with or through the subject matter of the suit would be affected by the cancellation or rescission are proper and necessary parties in order that they may have an opportunity to be heard; and unless they are made parties the court is precluded from rendering a judgment or decree of cancellation. * * * All parties to the instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants, unless it is obvious that the one not joined has no interest whatever in the subject matter of the suit." See, also, 9 C. J. 1225. These principles find support in the decisions of Alabama, California, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New York, North Carolina, Oklahoma,

Oregon, Texas, Virginia, Washington, West Virginia, Wisconsin and Federal.

But section 20-806, Comp. St. 1929, provides in part: "The defendant may demur to the petition only when it appears on its face, * * * Fourth. That there is a defect of parties, plaintiff or defendant; * * * ." And section 20-808, Comp. St. 1929, provides: "When any of the defects enumerated in section one hundred and seven (20-806) do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitue (constitute) a cause of action."

As stated in *Nason v. Nason,* 79 Neb. 582, 113 N. W. 139: "A defect of parties must be taken advantage of by demurrer or answer, or the defect will be deemed waived," and further, that "No objection was taken in the trial court of a defect of parties, and, under the provisions of our code, if Nattinger was a necessary party the defect has been waived. Code, sec. 96 (now Comp. St. 1929, sec. 20-808)." See, also, *Fitzgerald v. Fitzgerald & Mallory Construction Co.,* 44 Neb. 463, 62 N. W. 899; *Edney v. Baum,* 70 Neb. 159, 97 N. W. 252; *Johnson v. Platte Valley Public Power and Irrigation District,* 133 Neb. 97, 274 N. W. 386.

Whether or not the defect appeared on the face of the petition by the allegation that the property, which plaintiff and her husband conveyed, was their home and therefore requiring such defect of necessary parties to be raised by demurrer, need not be here determined for the defendant grantees did not raise it by either demurrer or answer.

However, as stated in *Reformed Presbyterian Church v. Nelson,* 35 Ohio St. 638: "The proposition that, where no objection is made by demurrer or answer on account of the defect of parties, the objection is to be deemed as waived, applies only in cases where it is competent for the party pleading to waive the objection. But where the presence of an absent party is essential to the determination of the

controversy, the parties can not waive the objection. The court, in such case, must order the party to be brought in."

Section 20-323, Comp. St. 1929, provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy can not be had without the presence of other parties, the court must order them to be brought in." In *Phoenix Mutual Life Ins. Co. v. City of Lincoln*, 87 Neb. 626, 127 N. W. 1069, we held: "When the determination of a controversy cannot be had without the presence of new parties to the suit, the code directs the court to order them to be brought in. Code, sec. 46 (now Comp. St. 1929, sec. 20-323)." We have defined indispensable parties in *Jordan v. Evans*, 99 Neb. 666, 157 N. W. 620, as follows: "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." See, also, *Florida Land Rock Phosphate Co. v. Anderson*, 50 Fla. 501, 39 So. 392; *Bonsal v. Camp*, 111 Va. 595, 69 S. E. 978; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158.

As stated in *Smith v. Shaffer*, 29 Neb. 656, 45 N. W. 936: "When it appears that all the parties necessary (and indispensable) to a proper and complete determination of an equity cause were not before the district court, the supreme court may remand the cause for the purpose of having such parties brought in."

One of the conditions upon which the remedy of rescission is granted is that the parties be restored to their original status. That cannot be done unless all indispensable parties are properly brought before the court. Both grantors of this property, which constituted their homestead and which they owned as joint tenants with right of survivorship, were not parties to the action and before the court.

Their rights to this property are such that a final decree canceling the deed could not be made without materially affecting both of them. They were both indispensable parties in an action to cancel their deed because of fraud. When this appears neither the court of original jurisdiction nor the appellate court should proceed further in the matter until the omission is corrected, even though, as here, no proper objection was made by any party litigant. It is therefore ordered that the cause be remanded to the district court with directions to make William Cunningham a party to this action and proceed with a retrial of the cause.

The plaintiff failed to make William Cunningham a party and no proper objection to such defect was raised by the defendant grantees. Therefore, the costs of this proceeding to date are taxed equally, one-half to the plaintiff and one-half to defendant grantees.

REVERSED, WITH DIRECTIONS.

A. M. MODISETT, APPELLEE, V. KENNETH JOHN CAMPBELL ET AL., APPELLANTS: FIRST NATIONAL BANK OF HAY SPRINGS, APPELLEE.

13 N. W. 2d 126

FILED FEBRUARY 4, 1944. No. 31678.

1. **Receivers.** Where parties appear in court resisting an application for a receiver on grounds other than the want of proper notice, they waive such notice.
2. **Pleading.** Both a special appearance and a special demurrer must specifically point out the defects complained of.
3. **Receivers.** A court of equity having authority to act upon the person may, by receivership, indirectly act upon real estate in another state through the instrumentality of its authority over the person.
4. ———. Lack of approval of receivership bonds is not a jurisdictional error and where no objection thereto is made in the district court it is waived and will not be considered by this court.
5. **Mortgages.** In an action for the foreclosure of a mortgage on

real estate upon a showing that the mortgaged premises are probably insufficient to discharge the mortgage debt, it is not error for the court to appoint a receiver for the premises.

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

Lee Card and *Charles A. Fisher*, for appellants.

A. C. Plantz, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

NUSS, District Judge.

Proceeding for the foreclosure of a mortgage on certain lands in Sheridan county, Nebraska, and South Dakota, and for the appointment of a receiver. The petition alleged the execution of a mortgage in the principal sum of $4,056.55, on February 27, 1933, by John and Maggie Campbell; that no part of said principal had been paid nor any interest except two payments aggregating $268.40; that the makers agreed to pay the taxes on the mortgaged property, but none of said taxes had ever been paid. The petition further alleged that both of the makers had died and that the defendant, Kenneth John Campbell, a son, was the sole owner of the property in question. Because of the facts alleged the plaintiff prayed for the appointment of a designated person as receiver and named certain other persons as bondsmen for the receiver and for the plaintiff. The summonses upon the defendant, Kenneth John Campbell, and wife, were served in Medina county, Texas. The defendants filed an "objection to jurisdiction," a special appearance, which was by the trial court overruled and the said defendants allowed 30 days to plead; the defendants thereafter filed a demurrer which was overruled by the court on March 15, 1943. On that date, the plaintiff being present with counsel and the defendants being represented in court by counsel, the court, without objection by defendants, took up the matter of the appointment of a receiver. On such hearing the attorney for the defendants Campbell freely

participated by objection to testimony, cross-examining witnesses, and offering evidence of their own. The trial court ordered a receiver appointed, fixed the bonds and approved the sureties mentioned in the petition. Defendants Campbell appealed.

The defendants rely upon four errors, to wit: (1) Lack of notice for appointment of a receiver; (2) Error in appointing a receiver for the South Dakota land; (3) Error in the approval of the receiver's bond; (4) Insufficiency of evidence to support the appointment of a receiver.

The first point made is that the receiver was appointed without notice to defendants, and therefore such appointment is void. "The statute requiring the giving of notice of an application for a receiver is mandatory, and an appointment made without such notice, in the absence or without the consent of the party affected thereby, is invalid. See Code of Civil Procedure, sec. 274; *Johnson v. Powers*, 21 Neb. 292. But the requirements of the statute in regard to notice may be waived, and should be so regarded where the parties have appeared in court, and resisted the application for receiver on grounds other than the want of proper notice. The object of the statute relative to the giving of notice was to afford the parties interested an opportunity to resist the application, and where there has been a voluntary appearance without notice the purpose of the statute is accomplished, and the giving of the statutory notice is waived unless the want of notice is at the time urged as a reason why a receiver should not be appointed." *Farmers & Merchants Bank v. German Nat. Bank*, 59 Neb. 229, 80 N. W. 820. See, also, *Lackey v. Yekel*, 113 Neb. 382, 203 N. W. 542; 45 Am. Jur. 80, sec. 88.

Although there was a total failure of any receivership notice herein, the defendants Campbell through their attorneys, without any objection for lack of such notice, submitted themselves to the court, participated in the hearing, objected to evidence (on other grounds), cross-examined a witness and called opposing counsel as a witness on defendants' behalf. Nowhere in the record is there anything tend-

ing to show an objection or remonstrance because of such lack of notice, nor anything to show that defendants did not voluntarily, deliberately and advisedly waive notice. The defendants had the full benefit of a fair and impartial hearing precisely as if a formal notice had been given. The defendants do not make any claim that the special appearance or the demurrer raised any question as to the lack of notice of receivership nor do they claim error because of the overruling of said special appearance or demurrer. Nevertheless, we have examined each of them to determine whether any objection to the receivership was therein made. Granting that which is extremely doubtful, to wit, that lack of notice of application for appointment of a receiver may be raised by special appearance or demurrer, nevertheless we find they are insufficient in this case to raise the question. Both the special appearance (*Wendt v. Yant Construction Co.*, 125 Neb. 277, 249 N. W. 599; *Brown v. Goodyear*, 29 Neb. 376, 45 N. W. 618; *Freeman v. Burks*, 16 Neb. 328, 20 N. W. 207; *Gretch v. Maxfield*, 4 Neb. (Unof.) 256, 93 N. W. 934) and a special demurrer (Comp. St. 1929, sec. 20-807; *Colby v. Lyman*, 4 Neb. 429; see, also, *Central Nebraska Public Power & Irrigation District v. Walston*, 140 Neb. 190, 201, 299 N. W. 609; 41 Am. Jur. 451, sec. 226) must specifically point out the defects complained of. There is nothing in the special appearance or the demurrer which raises any question as to the lack of receivership notice.

The next contention of the defendants is that the court erred in appointing a receiver because some of the land is located in South Dakota. They claim that a Nebraska court cannot affect South Dakota land and that the attempt so to do invalidates the receivership. It is settled that a court of one state cannot directly affect real estate situated in another state. *Fall v. Fall*, 75 Neb. 104, 120, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767; *Fall v. Eastin*, 215 U. S. 1, 30 S. Ct. 3, 23 L. R. A. n. s. 924, 17 Ann. Cas. 853. It should be borne in mind that the mortgage in question covered land both in South Dakota and in Sheridan county, Nebraska. This is not a case, therefore, where the court, in a

nontransitory action, attempted to act upon land entirely outside its jurisdiction as in *Rober v. Michelsen*, 82 Neb. 48, 116 N. W. 949; *First Nat. Bank v. McFerrin*, 142 Neb. 627, 9 N. W. 2d 166; *Hampton v. O'Shea*, 116 Neb. 230, 216 N. W. 668, and similar cases. Those were local actions relating to real estate which was not in the counties where the actions were brought. Such cases are readily distinguishable from the instant in which some of the land was in the county where the action was brought. The court had undoubted jurisdiction over the subject matter for the purpose of foreclosure and receivership of that part. And since defendants voluntarily submitted themselves to the court upon the receivership matter it is certain that the receivership, in so far as the Sheridan county land is concerned, is unobjectionable. But defendants claim that the inclusion of the South Dakota land in the receivership invalidates the appointment, at least as to that out-state land. To this contention we cannot subscribe. Defendants have cited us to no such authority and after rather extensive research we have been able to find none. True, the receivership of itself as an attempt to directly affect the South Dakota land is ineffective. *Fall v. Fall, supra*; *Fall v. Eastin, supra*; *Carpenter v. Strange*, 141 U. S. 87, 11 S. Ct. 960; 19 Am. Jur. 53, sec. 25. The district court in appointing the receiver doubtless knew that by that order alone it could not affect the South Dakota land. But it had jurisdiction of the subject matter, of part of the *res* and of the parties and it could make the appointment of a receiver, and enforce proper submission by the defendants. "A court of equity having authority to act upon the person may indirectly act upon real estate in another State, through the instrumentality of this authority over the person. Whatever it may do through the party it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to effect it with liens or burdens." *Fall v. Eastin, supra*. See, also *Bates v. Bodie*, 245 U. S. 520, 38 S. Ct. 182, L. R. A. 1918C, 355; *Corbett v. Nutt*, 10 Wall. 464, 475, 19 L. Ed. 976; *Penn v. Baltimore*, 1 Ves. Sr. (Eng.) 444; 19 Am.

Jur. 53, sec. 25; 15 C. J. 818; 21 C. J. 151. The rule has often been applied in receivership cases. "Several cases are reported where a court of equity has appointed a receiver of land situated in a foreign state. There is no doubt in such cases but that the court can enforce its order against those who are subject to its jurisdiction, either territorially or by having submitted themselves to the court in the proceeding in which the receiver has been appointed." 4 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1678. See, also, *Huston v. Cox,* 103 Kan. 73, 172 Pac. 992; *In re Maudslay,* 1 Law Rep. (Ch. Div.) (1900) 602; *Berger v. Loomis,* 169 Or. 575, 131 Pac. 2d 211, 144 A. L. R. 636, and note; *Pouliot v. West India Fruit Co.,* 283 Mass. 182, 186 N. E. 52; *Bailey v. Ryder,* 10 N. Y. 363; *Towne v. Campbell,* 35 Minn. 231, 28 N. W. 254.

In the case last cited the plaintiff had recovered a judgment against the defendant with execution returned unsatisfied and caused the examination of defendant on supplementary proceedings. It developed that the defendant had an interest in land in the territory of Dakota, title to which land was in defendant's wife and had never been in the name of the defendant. The trial judge denied the plaintiff's request for the appointment of a receiver "solely on the ground that he had no jurisdiction to either make an order applying the said real-estate interest for the benefit of the plaintiff, or to appoint a receiver herein in reference thereto or in aid of the plaintiff's rights." On appeal the supreme court of Minnesota reversed the order of the district court, saying: "To reach, for that purpose, real estate lying out of the jurisdiction, the court of chancery could appoint a receiver, and compel the debtor to execute to him such conveyances as would be effectual to pass the real estate according to the law of the state or country where it was situated. (Citing cases.) This it could do by virtue, and in the exercise, of its jurisdiction over the person of the debtor, and it did not thereby assume any power over the real estate itself. * * * The judge ought, therefore, to have determined whether the interest claimed to have been disclosed

was of such character that it could be made available by a receiver, with a proper transfer from the judgment debtor, and, if so, to have appointed a receiver, and required such transfer."

The district court in that case was reversed for doing what the defendants claim the court should have done in this case. We are not prepared to hold that the district court in this case, in the exercise of a reasonable discretion, could not have appointed a receiver only for the Nebraska land and refused to appoint him also for the South Dakota land; but we do hold that what the judge did do was proper. Thus far there is only a naked appointment of a receiver. Yet under the above authorities, and many others which are available, the court could and can, if the ends of justice require, make such other or additional orders, enforceable upon the defendants *in personam,* as will make the receivership effective. That the court has not made, and may never make, such additional orders does not deprive it of the power so to do.

In support of the third assignment of error the defendants claim that the judge, and not the clerk, should approve the bonds and that in any event the clerk should have required justification of the sureties. While it is claimed that section 20-1084, Comp. St. 1929, makes it the duty of the judge and not the clerk to approve such receivership bonds, as distinguished from merely approving the sureties, nevertheless, we express no opinion in regard thereto, nor to the question as to the justification of sureties, since the defendants did not raise any such question in the district court. It has been repeatedly held, at least against sureties, that a defect in, or even a total failure of, approval of judicial bonds does not invalidate them; that the requirement for approval is for the benefit of the parties affected and may be waived by them. *State v. Paxton,* 65 Neb. 110, 122 *et seq.,* 90 N. W. 983; *Holt County v. Scott,* 53 Neb. 176, 73 N. W. 681; *Paxton v. State,* 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689; Ann. 77 A. L. R. 1479. Thus, in the first case

above cited at page 128, it is said, " * * * it is thoroughly settled that failure to procure approval in time, or even to procure it at all, may be waived." Accordingly, this court has held that any objections with reference to approval of receivership bonds must be made first in the district court or they will not be considered here.

In a case where similar contentions were made as herein this court said that such claims "should have been presented to the district court for its consideration. So far as appears from the record, appellants made no objection in the lower court either to the form of the order appointing the receiver, to the amount or conditions of his bond, or to the approval * * * . Having failed to present these questions to the lower court, they are not now in a position to urge them." *Robertson v. Ostrom,* 1 Neb. (Unof.) 200, 95 N. W. 469. See, also, *Lancaster County v. Graham,* 120 Neb. 785, 235 N. W. 338; *Weber v. Wiley,* 111 Neb. 587, 197 N. W. 384; 3 Am. Jur. 25, sec. 246. In speaking of the failure of the clerk to require the justification of the sureties the defendants in their brief say: "If the court or judge had been presented the bonds in question he most certainly would have insisted upon this." This statement of the defendants would seem to leave no doubt that if the question of approval of the bond had been presented to the district judge he would have passed on it. By failing to object to the approval of the bonds in the district court the defendants have waived the same and cannot now complain in this court.

With reference to the fourth assignment of error, the facts hereinbefore set forth, which were satisfactorily established at the hearing, together with the undisputed fact that the amount due under the mortgage was over $6,000; that no taxes at any time had been paid and only a small amount of interest; and that the reasonable value of the land was not to exceed $4,500, leave no doubt that the security is probably insufficient to discharge the mortgage debt, and under the provisions of section 20-1081, Comp. St. 1929, justify the appointment of a receiver. *Ecklund v. Willis,* 42 Neb. 737, 60 N. W. 1026; *Waldron v. First Nat. Bank,*

60 Neb. 245, 82 N. W. 856; *Prudential Ins. Co. v. Bliss*, 123 Neb. 578, 243 N. W. 842; *Lackey v. Yekel, supra.*

The judgment of the district court is right.

AFFIRMED.

BETHINE W. BARNEY, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
MARTIN ROBLES, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
13 N. W. 2d 120

FILED FEBRUARY 9, 1944. Nos. 31716, 31717.

1. **Appeal and Error.** The supreme court has no power to exercise appellate jurisdiction in proceedings to review the judgment of a district court in civil cases unless the appellant shall have filed a notice of appeal and deposited the docket fee in the office of the clerk of the district court within the time fixed and as provided in section 20-1912, Comp. St. Supp. 1941.
2. ———. Appellate jurisdiction in such a case cannot be conferred upon a court by any action of the parties.

APPEAL from the district court for Buffalo county: ELDRIDGE G. REED, JUDGE. *Motion to dismiss appeal sustained.*

Beeler, Crosby & Baskins, for appellant.

Dryden & Jensen, contra.

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

SIMMONS, C. J.

These cases come on for consideration on a motion to dismiss for failure of the appellant to deposit the docket fee with the clerk of the district court as provided by section 20-1912, Comp. St. Supp. 1941. We sustain the motion to dismiss.

The actions are for damage to crops and lands from waters discharged upon plaintiffs' land. Plaintiffs were successful in the trial court and defendant appeals.

On August 10, 1943, separate transcripts were filed in this court in each of the above entitled causes. The transcript shows that motions for rehearing were overruled in the trial court on May 14, 1943.

Copies of the notice of appeal, showing that it was filed with the clerk of the district court on August 9, 1943, were received by the clerk of this court from the clerk of the district court on August 10, 1943. On the same date there was paid to the clerk *of this court*, by the defendant, a docket fee of $20 in each case.

Thereafter the cases were docketed here.

August 19, 1943, there was filed a motion for consolidation supported by a stipulation providing that the actions should be consolidated in this court for briefs and argument. Pursuant to that stipulation this court, on September 18, 1943, entered an order of consolidation for briefing and argument. Also on August 19, 1943, there was filed a stipulation agreeing that defendant's brief day should be continued until October 10, 1943. Pursuant thereto, this court on September 18, 1943, entered an order extending the defendant's brief day to that date.

October 6, 1943, defendant, as appellant, filed its "consolidated brief" herein and proof of service made showing service upon attorneys for plaintiffs as appellees.

November 3, 1943, there was filed a stipulation providing that plaintiffs', as appellees, brief day should be extended until December 6, 1943. Pursuant thereto, this court on November 3, 1943, entered an order extending the plaintiffs' brief day to that date.

November 13, 1943, there was filed by the plaintiffs, as appellees, a motion to dismiss on the ground that the defendant, as appellant, had not deposited the docket fee with the clerk of the district court and that therefore this court had "no jurisdiction over said appeal."

December 3, 1943, there was filed a stipulation showing that a motion to dismiss was pending and stipulating that appellees' brief day may be continued until December 21, 1943. This court on December 3, 1943, entered an order

extending the plaintiffs' brief day to that date. The motion to dismiss herein was submitted by oral argument on December 6, 1943.

December 16, 1943, a further stipulation was filed extending appellees' brief day to January 21, 1944. This court on December 21, 1943, entered an order extending the plaintiffs' brief day to that date.

The precise question therefore presented is this: Where, under the circumstances set out in this opinion, an appellant, in appealing to this court, fails to deposit the docket fee with the clerk of the district court, does pay it to the clerk of this court, and thereafter the appellee treats the appeal as perfected, enters appearances in this court, and participates in the progress of the appeal proceedings here, does this court then have jurisdiction of the cause?

The constitutional provision regarding the jurisdiction of this court is "The supreme court shall have jurisdiction in all cases * * * in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." Const. art. 5, sec. 2.

Section 20-1911, Comp. St. 1929, provides as follows: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the supreme court, for errors appearing on the record."

The Constitution also provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error or otherwise, shall not be denied." Const. art. 1, sec. 24. Under the long established construction of this section it has been held that it "does not prohibit the legislature from prescribing reasonable rules and regulations for the review of a cause by appeal, * * * ." See *In re Estate of Mathews*, 125 Neb. 737, 252 N. W. 210. The clearly stated and easily followed requirements of the legislature as set out in said section 20-1912, *supra*, are reasonable.

Previous to the enactment of chapter 32, Laws 1941 (now sec. 20-1912, Comp. St. Supp. 1941), the statute provided: "The proceedings to obtain a reversal, vacation or modification of judgment and decrees rendered or final orders made

by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing 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, within three months from the rendition of such judgment or decree or the making of such final order or within three months from the overruling of a motion for a new trial in said cause; the filing of such transcript shall confer jurisdiction in such cause upon the supreme court."

The above provision of the statute was amended in the 1941 act so as to provide that "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within three months after the rendition of such judgment or decree, or the making of such final order, or within three months from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, and by depositing with the clerk of the district court the docket fee required by law in appeals to the supreme court. An appeal shall be deemed perfected, and the supreme court shall have jurisdiction of the cause, when such notice of appeal shall have been filed, and such docket fee deposited, in the office of the clerk of the district court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional. The clerk of the district court shall forthwith forward such docket fee, and a certified copy of such notice of appeal, to the clerk of the supreme court, whereupon the clerk of the supreme court shall forthwith docket such appeal. Within the same period of three months the appel-

lant 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. Neither the form nor substance of such transcript shall affect the jurisdiction of the supreme court."

It will thus be noted that under the act as it existed prior to 1941 the filing of the transcript within the time set out was necessary to confer jurisdiction of the cause upon this court; and that under the provisions of the 1941 act the appeal shall be "deemed perfected, and the supreme court shall have jurisdiction of the cause, when such notice of appeal shall have been filed, and such docket fee deposited, *in the office of the clerk of the district court,* * * *."

These "constitute the only jurisdictional steps to get a case into the supreme court." *Glissmann v. Bauermeister,* 141 Neb. 288, 3 N. W. 2d 555.

Under the provisions of the act, prior to the 1941 amendment, it had been consistently held that this court did not acquire jurisdiction of a cause unless the transcript was filed here within the three-month period. This holding is based upon the principle that this court, " * * * except in those cases wherein original jurisdiction is specially conferred upon it by section 2, art. V of the Constitution, exercises appellate jurisdiction only, and such appellate jurisdiction can only be conferred in the manner provided by statute." *Larson v. Wegner,* 120 Neb. 449, 233 N. W. 253. In the earlier case of *State ex rel. Ayres v. Amsberry,* 104 Neb. 273, 178 N. W. 822, this court on motion for rehearing used language similar to the above and further said that appellate jurisdiction " * * * cannot be conferred by stipulation * * * of the parties, nor does the filing of briefs constitute a waiver. Nothing but the filing of a transcript in this court within the time prescribed can vest this court with jurisdiction of the subject-matter. No stipulation, consent, or waiver of the parties can take the place of the filing of the transcript." Applying the same reasoning to the act as amended in 1941, it must necessarily be held that this court

has no power to exercise appellate jurisdiction in proceedings to review the judgment of a district court in civil cases unless the appellant shall have filed a notice of appeal and deposited the docket fee in the office of the clerk of the district court, within the time fixed and as provided in section 20-1912, Comp. St. Supp. 1941.

The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. Failure to comply with the required conditions terminates the potential power of an appellate court to acquire thereafter any jurisdiction to review the judgment below. An appeal is not perfected until the jurisdictional steps required by statute or constitutional provision have been taken within the time fixed by the applicable provisions. Appellate jurisdiction of a case cannot be conferred upon a court by any action of the parties. The want of such jurisdiction may be taken advantage of at any stage of the proceedings. An appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by Constitution or statute. See 3 C. J. 316, 356, 371, 1040; 4 C. J. S. 81, 116, 126, 881, 922; 15 C. J. 847; 21 C. J. S. 167, sec. 110; 2 Am. Jur. 846, 854.

In *Greb v. Hansen*, 123 Neb. 426, 243 N. W. 278, this court had before it for construction section 20-1914, Comp. St. 1929. We there held that the giving of the cash bond was mandatory and jurisdictional, stated that "it was the intent of the legislature that only by the performance of certain acts could the appellate power of the supreme court be invoked" and it was not the intention of the legislature to refer the matter of furnishing a cash bond within a certain time to the discretion of appellant or to the court; and that when such a bond was not filed as provided the appeal must be dismissed. In the course of the *Greb* opinion we discussed the provision of section 20-1702, Comp. St. 1929, and stated that it was not the intention of the legislature, in that section, to make mandatory and jurisdictional the requirements of the giving of a cash bond by a nonresident.

The difference in the provisions is that section 20-1702, *supra,* provided for dismissal on motion and notice "unless in a reasonable time to be allowed by the court, such security for costs be given or cash bond be furnished." By the same bill by which section 20-1912, *supra,* was amended, the legislature also amended section 20-1914, *supra,* so as to provide: "The appeal or error proceedings may be dismissed on motion and notice in the supreme court if no bond has been given and certified in the transcript, *or within such additional time as may be fixed by the supreme court for good cause shown.*" Laws 1941, ch. 32, sec. 2. (The emphasized matter is new in the amendment.) No such language was written into section 20-1912 as amended.

It is clear that the 1941 legislature intended to remove the giving of a cash bond from the mandatory and jurisdictional requirements in perfecting an appeal. It is just as clear that the legislature intended that the filing of the notice of appeal and the depositing of the docket fee "in the office of the clerk of the district court" should be both mandatory and jurisdictional.

It must necessarily be held that it was the intent of the legislature that only by the performance of those certain acts could the appellate power of this court be invoked, and that where those steps have not been taken this court has no jurisdiction to determine the merits of the controversy and no alternative but to dismiss the appeal. To hold otherwise would be for this court to judicially amend the statute, and that we have no constitutional power to do.

The motion to dismiss the appeal is sustained.

CHAPPELL, J., dissenting.

I cannot agree with the conclusions arrived at in the majority opinion on the motions to dismiss appeals. Without question section 20-1912, Comp. St. Supp. 1941, contains directory provisions which, if complied with, confer jurisdiction on the supreme court to entertain appeals, and doubtless it was the design of the legislature to simplify and to make certain the procedure in this respect. However, in the absence of specific declaration or clear implica-

tion, which I do not find in the section, I cannot believe that the legislature intended that appeals should be defeated and judicial review denied by failure to comply with a mechanical detail when all of the substantial requirements are met and within the time provided by law for perfection of appeals.

Specifically section 20-1912, Comp. St. Supp. 1941, provides that in cases of this kind the proceedings to obtain reversal, etc., shall be by filing, within three months, in the office of the clerk of the district court in which the judgment is obtained, notice of appeal and by *depositing* with that clerk the docket fee which section 33-105, Comp. St. Supp. 1941, provides shall be paid to the *clerk of the supreme court.* Section 20-1912, *supra,* with regard to jurisdiction provides in part: " * * * and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional."

Construing the foregoing statutes literally, unless these two steps are taken no jurisdiction is ever conferred in any event. However, considered constructively, if notice of appeal is filed in the office of the clerk of the district court, then depositing there the docket fee is not a step exclusively required to ultimately confer jurisdiction.

In the light of the circumstances as disclosed by the record, and the consequences resulting in these and other like cases, I commit myself to the latter view. The proper notice was filed and the fee which was *payable* under the terms of section 33-105, Comp. St. Supp. 1941, to the clerk of the supreme court was there *paid* within the time required for *deposit* with the clerk of the district court. The appellees appeared generally and by their affirmative acts treated the appeals as having been perfected, and in all other respects requirements for perfection and prosecution of appeal were complied with. Therefore, it is my opinion that the motions to dismiss these appeals should be denied.

I am authorized to state that Yeager, J., joins in this dissent.

CARTER, J., concurring.

I am in full accord with the majority opinion, but I cannot permit the dissenting opinion to remain unchallenged.

The method of perfecting an appeal to the supreme court is provided by section 20-1912, Comp. St. Supp. 1941. It is a statute with which compliance must be had to give the supreme court jurisdiction of an appeal. As such its provisions are mandatory. In the early case of *Hurford v. City of Omaha*, 4 Neb. 336, 351, this court said: "When a fair interpretation of the statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory." See Maxwell, Interpretations of Statutes, 316; *Greb v. Hansen*, 123 Neb. 426, 243 N. W. 278; *Glissmann v. Bauermeister*, 141 Neb. 288, 3 N. W. 2d 555. In the early case of *District Township of the City of Dubuque v. City of Dubuque*, 7 Ia. 262, it is said that "Affirmative words may, and often do, imply a negative of what is not affirmed, as strongly as if expressed. So, also, if by the language used, a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise. Affirmative expressions that introduce a new rule, imply a negative of all that is not within the purview." The statement that the provisions of section 20-1912 are directory is not supported by any authority in the dissent and I assert that every case on the subject which has been before this court has been decided directly to the contrary. The very first premise of the dissent being unsound, the result is bound to be likewise illogical.

The writer of the dissent states that he can find no specific declaration or clear implication that compliance with the jurisdictional requirements of the statute is mandatory. In the first place our Constitution provides that the supreme

court shall have "such appellate jurisdiction as may be provided by law." Const. art. 5, sec. 2. The law, section 20-1912, provides the method by which the supreme court obtains jurisdiction of a civil case on appeal. The right of appeal is not of common-law origin and it is therefore dependent upon constitutional and statutory authority for its existence. Consequently, the jurisdiction of the supreme court is dependent upon a compliance with section 20-1912, for otherwise no right of appeal exists. To say that jurisdiction may be lodged in the supreme court in any other manner than that provided by the plain words of the statute amounts to judicial legislation. The statute in part says: "The proceedings to obtain a reversal * * * shall be by filing in the office of the clerk of the district court in which such judgment * * * was rendered * * * a notice of intention to prosecute such appeal * * * and by depositing with the clerk of the district court the docket fee required by law in appeals to the supreme court. An appeal shall be deemed perfected, and the supreme court shall have jurisdiction of the cause, when such notice of appeal shall have been filed, and such docket fee deposited * * * *." The words are plain and unambiguous and, therefore, not subject to construction. Every rule of statutory construction requires that the statute be given its plain meaning and not be rewritten by judicial pronouncement under the guise of construing that which requires no interpretation. If we may escape the provisions of a mandatory and jurisdictional statute by the simple expedient of calling it directory, it would be a fruitless effort to attempt any distinction between a mandatory and a directory statute; and, by the same token, any legislative attempt to limit the appellate jurisdiction of the court could be similarly avoided.

I submit that the filing of the notice of appeal and the depositing of the docket fee with the clerk of the district court lodges the appeal in the supreme court, whether or not the notice of appeal or docket fee ever reaches the office of the clerk of the supreme court. I further submit that section 33-105, Comp. St. Supp. 1941, is merely a fee stat-

ute and no more jurisdictional in character than the statute which requires the clerk of the supreme court to pay docket fees into the hands of the state treasurer.

The lodging of jurisdiction in an appellate court is usually by some statutory affirmative act determined by the wisdom of the legislature as sufficient to invoke the appellate power of the court. Whatever act is determined upon to invoke the appellate powers of the supreme court, there will be those who for one reason or another will fail to follow it. This apparently works a hardship upon the litigant who has failed to properly invoke the provisions of the statute to obtain an appeal. The present act, section 20-1912, Comp. St. Supp. 1941, was evidently enacted to reduce the number of jurisdictional features in an appeal, to make them plain and simple so that they could be readily understood, to require their performance at the office of the clerk of the district court rather than the office of the clerk of the supreme court to overcome geographical inequalities, to enable the successful litigant to determine locally if an appeal is to be taken, and to reduce to a minimum by this means the number of ineffectual appeals. It is the duty of the supreme court to carry out the plain intent of the legislature, whether or not such action coincides with personal views.

The contention that appellees waived jurisdictional defects by their affirmative acts is without precedent in this state, or any other, in so far as I have been able to discover. Defects not going to the jurisdiction of the court may, of course, be waived by the parties. It is otherwise, and the courts uniformly so hold, where the defect goes to the jurisdiction of the court. Cases in this court to that effect are cited in the majority opinion.

I submit that the dissent filed is not supported by authority, that every point raised therein has been expressly decided by this court to the contrary and that it is violative of every rule of construction of statutes conferring a grant of appellate jurisdiction.

"It is, of course, a well-settled rule that when a court transcends the limits prescribed for it by law and assumes

to act where it has no jurisdiction, its adjudications will be utterly void and of no effect, either as an estoppel or otherwise." 2 Am. Jur. 850. To assume jurisdiction of appeals where mandatory provisions of the statute granting appellate jurisdiction have not been met would result in the entry of final orders subject to collateral as well as direct attack. To escape such a result would require the overruling of numerous opinions of this court and a complete revision of our judicial thinking on jurisdictional questions. The dissent expresses the concern that is felt for any litigant who fails to properly comply with jurisdictional requirements in perfecting an appeal. Further than that it has no merit.

I am authorized to state that Paine, J., joins in this concurring opinion.

SCHOOL DISTRICT NO. 70, RED WILLOW COUNTY, APPELLEE, CROSS-APPELLANT, V. ARTHUR B. WOOD, ADMINISTRATOR, ET AL., APPELLEES, CROSS-APPELLEES: FRED HATHORN ET AL., APPELLANTS, CROSS-APPELLEES.

13 N. W. 2d 153

FILED FEBRUARY 9, 1944. No. 31656.

1. **Charities.** A gift upon condition to a charitable corporation to further the purposes of such corporation is governed by the same principles of law as a bequest upon a charitable trust.
2. ———. A charitable bequest to a school district is valid if it is made for the furtherance of one or more of its corporate purposes.
3. ———. Where a charitable bequest to a school district for the construction of a new school building is impracticable because a new and adequate building had already been constructed after the death of the donor and prior to the happening of the event which made the bequest available, a court of equity in the exercise of the judicial *cy pres* doctrine may properly change the mode of effectuating the charitable bequest within the more general purpose of the donor where a more general purpose is disclosed with reasonable clearness.

4. ———. Under such circumstances the directions of the donor relating to the details to be followed in accomplishing the purpose of the bequest, which are not intended as limitations, will be regarded as directory only where it is necessary to do so to carry out the dominant charitable purpose of the donor.
5. ———. Where a definite charity is created, the failure of the particular mode by which its dominant purpose is to be effected will not defeat the charity, for a court of equity is required under such circumstances to substitute another mode when it can be done within the scope of the donor's dominant purpose.
6. **Wills.** Where an administrator is required to make a charitable gift available to the donee upon the happening of certain events and he fails to so do, such administrator is required to account to the donee for the principal and all interest, profits, or other accumulations arising out of said fund. Such accumulations may be demanded in lieu of interest at the election of the donee.
7. **Pleading.** A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court.
8. **Judgment.** A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence, even though he may have misconstrued his remedy and prayed specially for lesser relief.
9. **Pleading.** A will incorporated into a pleading as part of a cause of action controls allegations which it contradicts, or which are inconsistent therewith.
10. **Costs.** It is only where many persons have a common interest in property, and one of them, for the benefit of all, at his own cost and expense, takes legal action to protect it, that the court of equity in which the suit was brought may order the successful litigant reimbursed for costs, expenses and counsel fees from the common property in order that all benefited may share proportionately in that expense.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Butler, James & Morrison, for appellants.

Perry, Van Pelt & Marti, Arthur E. Perry, Cordeal, Colfer & Russell and *L. H. Cheney, contra.*

Heard before SIMMONS, C. J., CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

CARTER, J.

This is a suit in equity brought by the plaintiff school district to compel the performance of a provision in the will of one John E. Hathorn by having the same construed to authorize the payment of $50,000 to plaintiff in lieu of erecting a school building at a similar cost as directed by the will. From a decree ordering the administrator to pay $51,633.35 with interest at 6 per cent per annum to the plaintiff, the defendants appeal. The plaintiff has cross-appealed on the theory that the trial court erred in not awarding the $50,000 and all accumulations thereto to the plaintiff.

The record discloses that John E. Hathorn died in 1920, leaving a will which was admitted to probate and which contains the following provision: "After my wife and myself are both dead and the legacies have been paid as above directed it is my desire that when my property shall have reached the sum of ($50,000) fifty thousand dollars (and School Dist. No. (70) Seventy of which Bartley Red Willow Co. is a part.) shall have purchased not less than one full block of land, then my administrator with the advise and direction of his advisory board shall cause to be erected upon said lot a modern up to date fifty thousand dollar school house all complete which will be the gift or legacy to Dist. No. 70 Bartley, Red Willow Co. Nebraska by Dr. J. E. Hathorn and wife Ella D. Hathorn, and such inscription if any may be placed on the building as the administrator & advisory board think advisable."

The record further shows that the deceased was a highly esteemed citizen of Bartley, Nebraska. He had engaged in the practice of medicine in that community for many years, had served for years as a member of the school board and as president of the local bank. It appears that Ella D. Hathorn, the wife of the deceased, died in 1936, that the property of the deceased reached a valuation of $50,000 at or prior to 1938, and that the school district had purchased more than one block of ground on and prior to November 26, 1915, and had purchased an additional half block in July, 1923.

The record further shows that the plaintiff school district was in need of a new school building in 1923, that the old building was unfit to carry on the school work of the district, and that the district was threatened with the loss of its accredited rating with the state university unless new building facilities were provided. The evidence shows that bonds were voted in the amount of $58,500 to erect a new school building and that it was constructed in 1924. It is further shown that the public had a general knowledge of the provisions of the Hathorn will and there is some evidence to the effect that the construction of the new school building was considered by the school board to be in accordance with the provisions of the will. The administrator of the estate, the defendant Wood, was the president of the local bank and had knowledge of all the matters herein recited. An advisory board was appointed in the will, consisting of the directors of the Bank of Bartley and the members of the School Board of District No. 70, the plaintiff herein. On June 26, 1942, the advisory board ratified the construction of the new school building as being in accordance with the will of John E. Hathorn, and demanded that the defendant Wood, as administrator, turn over the sum of $50,000 as by the will provided. It is clear from the evidence that the school building constructed in 1924 adequately serves the school district and that there is no need for another building. The defendant Wood stands ready to comply with a final order of the court with respect to said funds. The question to be determined is whether the plaintiff district is entitled to any funds by virtue of the will and the conditions as they existed when the suit was filed and, if so, in what amount. Defendants contend that the provisions of the will have lapsed and that said funds have become a part of the residuary estate of the deceased.

Defendants contend that the trial court was in error in holding that the will created a charitable trust when it is in fact a gift upon condition. The contention of the defendants appears to be supported by the holdings of this court. *Allebach v. City of Friend,* 118 Neb. 781, 226 N. W. 440;

Hobbs v. Board of Education, 126 Neb. 416, 253 N. W. 627. But this fact in itself can avail defendants nothing, for this court has held, and we think the authorities hold generally, that such a gift to a charitable corporation is equivalent to a bequest upon a charitable trust and will ordinarily be governed by the same rules. *Rohlff v. German Old People's Home,* 143 Neb. 636, 10 N. W. 2d 686. We again reiterate that a gift upon condition to a charitable corporation to further the purposes of such corporation is governed by the same principles of law as a bequest upon a charitable trust. This is so because the want of the trust relation in the former is overcome by the fact that the purpose of the charitable corporation coincides with the charitable purpose of the gift.

A charitable bequest to a school district is valid if it is made for the furtherance of one or more of its corporate purposes. The furtherance of education is held generally to be a charitable purpose in this country, unaffected by the fact that education is largely under public control and supported generally by taxation. The bequest in the instant case was clearly for a public purpose and properly made to the school district for the accomplishment of one of its corporate purposes.

The appellants in the present case are the heirs at law of the donor. The will provided that each should receive a specific legacy of $500. The legacies have been paid and the receipts of each of the legatees appear in the record. It is the contention of appellants that where a gift is made by will to a governmental body to be used for a specific charitable purpose, the accomplishment of that purpose is a condition subsequent and upon the failure of which the gift reverts. We believe this to be a correct statement of the law. *Marble v. City of Tecumseh,* 103 Neb. 625, 173 N. W. 581; *Allebach v. City of Friend, supra.* Appellants further contend that where a bequest is made to construct a building for a designated charitable institution it is a gift for a particular purpose and does not indicate a general charitable intent and where, as here alleged, the particular

purpose contemplated is impossible of fulfillment, or has already been carried out, the doctrine of *cy pres* will not be applied and the bequest will revert to the donor or his heirs. It is the contention of appellees that the donor evidenced a more general charitable intent in his will than to merely provide for the construction of a new school building, and this being true, the more general intent should be carried out by a court of equity by directing the application of the property to some charitable purpose which falls within the more general charitable intention of the donor. It is the correctness of the positions assumed by the parties in this respect which is of primary concern in the present case.

The most serious question is whether the express provision of the will that the bequest shall be used to construct a new school building must be literally executed, even though a new school building, meeting all needs, had been built by the school district after the death of the donor and prior to the time the bequest became available. Would it violate the intention of the donor to apply the fund to other educational purposes of the plaintiff school district, or did the donor intend a reversion if the school building was not constructed? Can it not be said that the education of the youth of the plaintiff district was regarded as the leading and dominant purpose of the charity and that effect should be given to it by such a variation of the donor's scheme as to make it practical and successful?

It is evident from the will itself what the donor intended. He first provided for his wife throughout her lifetime. He further provided for $500 legacies to each of his two nephews, his only remaining heirs. He then provided that after the death of his wife and himself, and the payment of the two $500 legacies, when his property shall have reached the sum of $50,000 and School District No. 70 shall have purchased one full block of land, then his administrator with the advice and direction of his advisory board named in the will should cause a modern, up-to-date schoolhouse to be erected upon said block of land, the building to bear such

an inscription concerning the benevolence of the donor and his wife as the advisory board might direct. The will contains statements which in themselves indicate that the donor's charitable intent was more general than the mere construction of a building. In the fifth paragraph of the will he suggests that all his books, which are suitable and not desired by his wife, be turned over to the school library of District No. 70. In paragraph six he suggests that "as this property is finally to go for the benefit of Bartley and School District No. 70" the expense of handling his estate should be at the lowest terms possible. There is no provision in the will regarding a reverter, nor does the will contemplate the existence of a residuary estate, or purport to dispose of such an estate. It is evident that the donor, after providing for his wife and having no children of his own, wished to devote the rest of his property to a charity. His benevolent and philanthropic purpose was a contribution to the education of the youth of School District No. 70, the school district in which the village of Bartley is located. At the time he made his will and at all times thereafter until his death he, as a member of the school board of District No. 70, knew of the need for a new school building in that district. It was his thought, no doubt, that he could best contribute to the education of the youth of the district by building a new school building for their use. He did not contemplate, however, that a new building would have to be constructed before his bequest became available under the terms of his will. His dominant purpose is clear and it is not defeated because he failed in the perfection of detail as to all eventualities and changed conditions which might come about. A literal construction of the will makes his scheme impossible and defeats the dominant purpose of the gift, while a more liberal construction saves it through a mere change of detail and thus gives effect to the more general charitable purpose of the donor as shown by the will.

Such a situation calls for the exercise of the general equity powers of a court of chancery and the application

of the judicial *cy pres* doctrine. This doctrine has been defined as meaning " * * * that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; * * * ." 14 C. J. S. 512, sec. 52. "The doctrine of judicial *cy pres* is in reality a principle of construction based on a judicial finding of the donor's intention as applied to new conditions." *Rohlff v. German Old People's Home, supra.* It is true that this doctrine will not be applied if the donor indicates an intent that it shall be used for a narrow specific purpose, for that would defeat the purpose of the donor. But where, as here, the specific purpose recited cannot be accomplished because of changed conditions, and a more general charitable purpose is shown by the will, the judicial *cy pres* doctrine may be resorted to, not to defeat the donor's intention, but to effectuate it. Any other rule would sometimes defeat the very purpose of the charity, disappoint just expectations and destroy gifts of great public importance. Where a main charitable purpose is disclosed with reasonable clearness, directions of the donor relating to the details to be followed in accomplishing the purpose of the donor, which are not intended as limitations, will be regarded as directory only where it is necessary to do so in order to carry out such main charitable purpose. In such cases it must be presumed that specific details as to carrying out the purposes of the gift were not intended to defeat the charity when changed conditions made them impracticable or impossible of performance, and there is no language in the bequest indicating that the donor intended a literal compliance with recited details to avoid a reverter. Whether or not the principle invoked by the trial court in arriving at this result be designated as the judicial *cy pres* doctrine, or whether it is considered only as a principle of construction based on a judicial finding of the donor's intention as applied to new conditions, and in this respect courts generally do not appear to be in accord, the result must necessarily be the same.

We conclude, therefore, that when a definite charity is created, the failure of the particular mode by which its dominant purpose is to be effected will not defeat the charity, for a court of equity is required under such circumstances to substitute another mode. In this respect the *cy pres* doctrine as commonly understood has two main features; the right to exercise prerogative authority enabling a court to deal with a charitable bequest having no designated particular purpose as a bequest to charity generally, and the other, the right by liberal rules of construction to deal with a charitable bequest having a designated purpose and enforce it within the limits of such purpose, supplying that which is necessary to accomplish the donor's intention. The *cy pres* doctrine as indicative of prerogative authority does not prevail in this state and is not exercised here, but the latter is recognized as within the powers of a court of equity and was properly exercised in the present case.

The foregoing principles are generally supported by text writers and the decisions of the courts. *Matteson v. Creighton University,* 105 Neb. 219, 179 N. W. 1009; *Hobbs v. Board of Education, supra*; *Rohlff v. German Old People's Home, supra;* Restatement, Trusts, sec. 399; 10 Am. Jur. 680; 14 C. J. S. 510, sec. 50.

The trial court, after arriving at the same conclusions as we have heretofore expressed, directed the administrator to pay $51,633.35 with interest thereon from the date of the decree at 6 per cent per annum to the plaintiff district to be used by it in carrying out the purposes of the donor in the manner which the trial court prescribed in the decree. This amount consists of the original gift of $50,000 with interest at 6 per cent per annum from June 26, 1942, the date on which demand was first made by the plaintiff district for the payment of the amount due under the terms of the will. The school district has cross-appealed, claiming that it is entitled to the whole of the fund in the hands of the administrator.

The appellants contend that there is no merit in the cross-appeal for the reason that the basis of the cross-appeal was

never raised by the pleadings. The prayer of plaintiff's petition in so far as the amount claimed to be due is as follows: "That the said A. B. Wood * * * be required to carry out the trust under the terms and conditions of said will by paying over to the plaintiff, or causing the same to be paid over, said $50,000; * * * " and "For interest on said $50,000 since said sum became available and for such other, further and different relief as to the court appears to be just and proper." It is urged that the claim of the plaintiff for all of the fund, including that in excess of $50,000, is not in response to the pleadings or the prayer of the petition and that this court cannot consider the question raised by the cross-appeal.

The evidence shows that the will of John E. Hathorn was attached to and made a part of plaintiff's petition. If the will, properly construed, provides that the fund of $50,000 and all accumulations thereto belonged to the plaintiff district, we are of the opinion that this court is not foreclosed from so declaring, even though the school district may have misconstrued the will and prayed for a lesser amount than that actually due, where the prayer of the petition includes a request for such other, further and different relief which to the court appears to be just and proper. "A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court." *Gibson v. Koutsky-Brennan-Vana Co.*, 143 Neb. 326, 9 N. W. 2d 298. The prayer for general relief is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence. *Kelley v. Wehn*, 63 Neb. 410, 88 N. W. 682. The prayer is no part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required of either party. *Jordan v. Jackson*, 76 Neb. 15, 106 N. W. 999. We have also said that a written instrument, incorporated into a pleading as part of a cause of action or defense, controls allegations which it contradicts or which are inconsistent therewith. *American Surety Co. v. School District*, 117 Neb. 6, 219 N. W. 583. We are of the opinion therefore that the will itself controls the allegations of the

petition which it contradicts, or which are inconsistent with the provisions of the will itself.

It is evident from the will itself that the donor knew, when he drafted his will, that his estate did not amount to $50,000 after the payment of the legacies which he set up in the will. He therefore directed his administrator to hold and invest all of the remainder of his estate until the death of his wife and until the total amount of the fund reached $50,000. When both of these events took place, the administrator, with the advice of the advisory board, was to construct a modern, up-to-date $50,000 school building. The evidence shows that the donor's widow died in 1936 and the only evidence adduced as to the time when the fund reached $50,000 was that it had reached that amount in 1938. Consequently, the fund having arrived at the amount of $50,000 after the death of the widow, and all other conditions having been met, the donee school district became entitled to the benefit of the fund at that time. The administrator, contrary to the provisions of the will, failed to carry out the terms of the will and continued to invest the fund as he had theretofore done, no complaint being made as to the manner of his so doing. The question is: To whom do the earnings belong which were accumulated over the period during which the administrator failed to carry out the terms of the will after all events and conditions precedent to his so doing had occurred or had been met?

We think it is clear that the administrator is accountable to the school district for any profit made by him through, or arising out of, the administration of the fund. In this respect the administrator is in the same position as the trustee of a charitable bequest. If he makes a profit out of the trust property he is accountable to the beneficiary for such profit, even though he commits no breach of trust in making the profit. It seems clear that if the fund belonged to a beneficiary, as in the present case, with possession to be delivered upon the happening of a designated event, and the administrator or trustee improperly withheld it after the event had occurred, all earnings and other accumula-

tions coming into the fund after the happening of the event belong to the beneficiary. It seems to us that when the fund reached the sum of $50,000, the administrator was required by the will to carry out the purpose of the gift. When he failed in his duty, and in violation of the bequest he continued to invest the fund, he is bound to account to the beneficiary for the profits and other accumulations to the fund. The administrator apparently concedes the possibility of this being true, as he stands ready to distribute all of said funds in whatever manner the court may direct. We think the authorities sustain this principle. Restatement, Trusts, sec. 210; 26 R. C. L. 1388. We necessarily conclude under the record in this case that the plaintiff school district is entitled to a decree awarding it the fund of $50,000 and all the earnings, profits and other accumulations to the fund which have acceded thereto since the duty devolved upon the administrator to build the school building, or, as we here held, to carry out the more charitable intent of the donor. The trial court was in error in awarding only $50,000 with interest from June 26, 1942, and determining a scheme which contemplated the charitable use of that sum only. We find it necessary therefore to remand the cause to the district court for the determination of additional facts and the entry of a decree in accordance with such facts and this opinion. We direct the district court to require an accounting by the administrator of the $50,000 and all interest, earnings, profits and other accumulations arising from said fund, that plaintiff be awarded same under the doctrine of judicial *cy pres*, and that a scheme for its use be devolved and decreed within the scope of the more general intent of the donor expressed in the will as herein found to exist.

The plaintiff district also complains of the failure of the trial court to allow it an attorney's fee from the residuary estate. This question has been largely removed by the holding of this court that the whole of said fund belongs to the plaintiff by the terms of the will and the evidence adduced and, consequently, that no residuary estate exists.

Even if this were not so, the trial court was correct in denying the attorney's fee. The basis for the allowance of attorney's fees in this class of cases is: Where many persons have a common interest in property, and one of them, for the benefit of all, at his own cost and expense, takes legal action to protect it, the court of equity in which the suit was brought may order the successful litigant to be reimbursed for his costs, expenses and counsel fees from the common property in order that all benefited may share proportionately in that expense. *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N. W. 836. In the present case there was but one party interested in the fund sought to be reached by plaintiff's suit and that was the plaintiff itself. There is no reason for a court of equity to grant any relief in the matter of counsel fees. The school district and its counsel can adjust them in the same manner as any other litigant who has retained counsel to represent him personally.

The judgment of the district court is reversed and the cause remanded for further proceedings in accord with holdings and directions of this court herein contained.

REVERSED.

PAINE, J., participating on briefs.

H. M. NICHOLSON, ADMINISTRATOR, APPELLEE, V. OTTO ALBERS, APPELLEE: A. R. OLESON, APPELLANT.
13 N. W. 2d 145

FILED FEBRUARY 9, 1944. No. 31712.

1. **Attorney and Client.** An attorney has no lien for services performed by him except as provided by section 7-108, Comp. St. 1929.
2. ———. An attorney's charging lien is confined by section 7-108, Comp. St. 1929, to fees and costs due for services rendered in the particular action or proceeding in which it is sought to enforce the lien.

APPEAL from the district court for Cuming county: FAY H. POLLOCK, JUDGE. *Affirmed.*

A. R. Oleson, pro se.

W. A. Ehlers and *Zacek & Nicholson, contra.*

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

CARTER, J.

This is an action in interpleader wherein H. M. Nicholson, administrator of the estate of Mary Lemke, deceased, filed his petition to have determined the respective claims of Otto Albers and A. R. Oleson to certain funds in his possession. The trial court sustained plaintiff's right to an interpleader, directed the payment of the fund in plaintiff's possession to be paid into court and discharged the plaintiff from further liability. The trial court, after a trial upon the issues between the defendants Albers and Oleson, found for the defendant Albers and ordered the fund, amounting to $759.65, paid to him. From this judgment the defendant Oleson appeals.

The record shows that in 1932 the defendant Albers was the owner of a note of George Worrell in the amount of $1,690, which was secured by a second mortgage on certain property in Wisner, Nebraska. The defendant Oleson, an attorney at law, was retained by Albers to collect this second mortgage which was of doubtful value. The evidence shows that Oleson thereupon induced Mary Lemke, the mother of Mrs. Worrell, to release her first mortgage for the benefit of Albers and secured a first mortgage for him in the amount of $1,250. This mortgage was delivered by Oleson to Albers. The claim of Oleson in the instant case is for professional services rendered in connection with the obtaining of this first mortgage.

The record further shows that Mary Lemke subsequently acquired the title to the property and assumed the first mortgage. Upon her death Albers filed a claim against her estate for the amount due on the mortgage. On March 11,

1936, the claim was allowed in the amount of $913.56. A partial distribution was subsequently made, leaving a balance due of $735.70 on July 9, 1940, at which time Oleson served notice on the administrator of a claim for an attorney's lien. The parties being unable to adjust their differences, the administrator commenced the action in interpleader to have the rights of the parties determined.

The sole question for determination is the right of Oleson to assert an attorney's lien. It is not disputed that he was not employed by Albers to file or prosecute the claim in the probate proceedings. His claim for an attorney's lien was based on his unpaid claims for services rendered in procuring the first mortgage on the Worrell property, as heretofore recited.

It is provided by statute that an attorney may assert a lien for compensation due him upon papers of his client which have come into his possession in the course of his employment, upon money in his possession belonging to his client, and upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party. Comp. St. 1929, sec. 7-108.

It will be observed that the claim of Oleson does not fall within any provision of the foregoing statute. The statute does not give an attorney a lien for services rendered in other cases, or for any fees not connected with the case. A charging lien is confined to the fees and costs due for services rendered in the particular action in which the judgment was obtained. *Reynolds v. Warner*, 128 Neb. 304, 258 N. W. 462. It does not appear that the lien was asserted by Oleson by reason of this employment in filing and prosecuting the claim in the administration proceedings. Consequently, the claim for an attorney's lien on funds in the hands of the administrator is without merit.

It is the settled law of this state that an attorney has no lien for services performed by him except as provided by statute. *Card v. George*, 140 Neb. 426, 299 N. W. 487; *Marshall v. Casteel*, 143 Neb. 68, 8 N. W. 2d 690.

It appearing that Oleson's claim for an attorney's lien does not come within the provisions of section 7-108, Comp. St. 1929, the trial court properly denied his claim.

AFFIRMED.

MARO D. LYHANE, APPELLANT, V. RUDOLPH DURTSCHI ET AL., APPELLEES.

13 N. W. 2d 130

FILED FEBRUARY 9, 1944. No. 31701.

1. **Indemnity.** A contract of indemnity is an obligation or duty resting upon one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.
2. **Limitation of Actions.** A cause of action to recover on an indemnity contract accrues when the loss occurs.
3. ———. The statute of limitations bars an action on a written indemnity contract when the loss has occurred five years previous to the bringing of the action.
4. ———. Where a loss on an indemnity contract occurs and no counterclaim then exists in favor of the defendant, the statute of limitations is not tolled, but begins to run from the time plaintiff's loss occurs.

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

H. G. Wellensiek, for appellant.

Harold A. Prince and *William P. Mullen, contra.*

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

MESSMORE, J.

Plaintiff in this action prays that an accounting be taken, and the amount of loss sustained by plaintiff and defendants and each of them, on notes purchased from the Farmers State Bank of Wood River, Nebraska, be ascertained and determined; that the liabilities of the parties be fixed

for their shares of such losses as provided by contract, and that judgment be entered against the defendants and each of them for the amount of their liability in excess of the loss sustained, and each of them be required to account for all money collected on the notes assigned to them for the use and benefit of plaintiff and defendants.

It will be necessary, in determining this case, to detail the substance of the amended petition which alleges: In November, 1929, for the purpose of building up the reserve of the Farmers State Bank, plaintiff and defendants orally agreed to purchase certain notes of the bank without recourse, in such amounts as they, or either of them, may thereafter determine, and that, in the event of loss sustained by any of them, they would each contribute their proportionate shares of the total of such losses sustained, which agreement was reduced to writing. Pursuant to the agreement, plaintiff and defendants A. E. Hauke, Otha Oldfather and M. J. McDermott each purchased notes totaling $10,000, and defendant W. A. Francis $6,000, in all $46,000, which amounts were paid by said parties to the bank. Defendants Durtschi and Schooley purchased no notes. Since the commencement of the action Schooley has died, and the action was revived, so far as he was concerned, against the executrix of his estate. All of such notes were left with the bank for payment.

On April 10, 1930, at a meeting of the board of directors of the bank, attended by all except plaintiff, a state bank examiner requested the elimination from the assets of the bank of doubtful notes, totaling $29,580.28, and, in lieu thereof and without the knowledge or authority of the plaintiff, substituted notes of the plaintiff, totaling $4,610, of defendant A. E. Hauke totaling $4,600, of defendant Oldfather, $4,850, of defendant W. A. Francis, $4,400, all of which notes were purchased from the bank under the written agreement. On January 22, 1931, the bank paid the plaintiff $600; on August 5, 1931, $250, with interest, the amounts collected on plaintiff's notes, leaving a balance due him of $3,750, with interest. Thereafter the bank became

insolvent, a receiver was appointed, and plaintiff filed claim for such amount. At this point, in the case of *State v. Farmers State Bank,* 127 Neb. 139, 254 N. W. 728, the plaintiff in the instant case appeared as intervener. The decision was rendered in 1934. The intervener filed a claim for a trust fund; the same contract was involved; the amount stated was $4,610, with credits of $850, leaving a balance of $3,750. The district court and this court disallowed the claim.

To continue the allegations of the petition: The plaintiff makes claim for the same amounts and, in addition, the expenditure of $544.75 for presentation of his claim in the former action, thereby sustaining a total loss of $4,294.75. Defendant McDermott purchased a note secured by a real estate mortgage which was not paid but was foreclosed on January 23, 1937, and decree entered March 30, 1937, in the sum of $11,003.36. On March 10, 1938, the real estate was sold for $8,600 to satisfy the decree, and the sale was confirmed May 13, 1938. Defendant McDermott sustained a loss of $2,403.36. Plaintiff has been informed that defendants Hauke, Oldfather and Francis have sustained losses on such notes purchased from the bank, but said defendants have refused to inform the plaintiff of the amount of such losses.

In the eighth paragraph of the amended petition, plaintiff further alleges: At a meeting of the board of directors April 10, 1930, the eliminated notes were assigned to plaintiff and defendants Hauke, Oldfather and Francis, and left with the bank for collection, the proceeds to be distributed among them, with interest, proportionately to the notes taken from each of them, and placed in the bank in lieu thereof, and any amount collected in excess to be paid the bank (then the insolvency of the bank is pleaded). Defendants Hauke, Oldfather and Francis, without the knowledge and acquiescence of plaintiff, secured possession of said notes at a secret meeting held March 8, 1934, of which plaintiff had no notice, and wrongfully turned the notes over to Hauke for collection and distribution among them-

selves. On February 22, 1936, Hauke had collected a total of $1,185.79, and wrongfully distributed the same as follows: $503 to himself, $529.79 to Oldfather, and $153 to Francis, and he has since that time collected the sum of $603.98, which he has wrongfully distributed, and, in addition, received payments in 1941 in amounts unknown. Defendants refused to pay plaintiff his proportionate share or furnish him with a statement or accounting. Included in the notes of defendant Francis, totaling $4,400, which were put in the bank in lieu of the notes eliminated, was the note of Francis for $2,100, now barred by the statute of limitations, and the amount Francis contributed towards the elimination of the doubtful paper was $2,300, all of which was known to the defendants some time prior to April 10, 1930. Defendants since that date have been hostile and noninformative and wrongfully promised plaintiff that, as soon as McDermott could ascertain his loss, a complete settlement would be made, in accordance with the written contract, at a directors' meeting to be called. Defendants had no intention of making such settlement and wrongfully made such promise to induce the plaintiff to defer bringing suit until his cause of action was barred by the statute of limitations. Plaintiff relied on such promise and did defer bringing action until the McDermott loss could be determined. Defendants refused to meet with plaintiff and make settlement, in accordance with the written contract, and the first knowledge plaintiff had with reference to the transactions, above stated, was February 2, 1943, when the deposition of defendant Hauke was taken in this action. The time for determining the loss of the parties to the written agreement was not fixed therein, was left to further agreement of the parties, and prior to November 1, 1934, plaintiff made a demand on defendants for a statement of their loss and a determination of the liability of the parties to the written agreement, and payment of his loss. Each of the parties orally requested him to defer settlement under the written agreement until the foreclosure proceedings by McDermott had been completed, and he could ascer-

tain his loss and the loss of each of the parties, and the recovery on the $29,580.28 (notes assigned by the bank to defendants) could be ascertained and determined, and defendants so agreed and promised. Plaintiff again recites the McDermott matter, and pleads an estoppel precluding the defendants from claiming that this action is barred by the statute of limitations and that plaintiff has been guilty of laches in bringing this action; that plaintiff sustained a loss of $4,294.75, with interest at 7 per cent from August 5, 1931, no part of which has been paid; prays for an accounting in accordance with the facts pleaded, as heretofore noted, as to the nature of the action.

The contract, made a part of the petition and the basis of this action, after naming the parties thereto, reads as follows:

"That, Whereas, the above named parties are all directors and financially interested in the Farmers State Bank of Wood River, Nebraska, and

"Whereas, each of the above named parties are desirous of and have agreed to purchase certain notes from The Farmers State Bank of Wood River, Nebraska, without recourse, in such amounts as they or either of them may hereafter determine, and

"Whereas, all of the above named parties have agreed that if there should be any financial loss to either or any of the above named persons by reason of having purchased notes from said Bank, as aforesaid, and in consideration of the mutual promises of the parties hereto, and in consideration of the covenants and agreements hereinafter to be kept and performed by the parties hereto, the above named parties hereby mutually agree as follows:

"That each of the parties above named shall purchase from the Farmers State Bank of Wood River, Nebraska, notes, either secured or unsecured, without recourse, and pay therefor the face value thereof to such an amount as each may determine for himself and to carry said note or notes until such time as the said Bank may, at its discretion, desire to repurchase the same or to purchase renewal

notes if said notes should be renewed, and to exercise due diligence in collecting said note or notes and render all assistance possible to each of the other parties hereto in collecting the notes purchased by them or either of them, and further agree to carry said notes until maturity or for a period of ——— months from the date hereof, and

"It is further mutually agreed that in the event that either or any of the parties hereto should not be able to collect said note or notes so purchased, in full, then each of the other parties hereto will contribute equally to said loss, if any sustained, in the collection of said notes in equal shares, that is each of the parties hereto agree to stand one-seventh (1/7) of the total loss that may result to the parties hereto by reason of having purchased the notes above referred to.

"It is further agreed and understood that the signing of this contract does not in any way obligate or bind The Farmers State Bank of Wood River to repurchase any of said notes and the purpose of this agreement is that each of the parties signing the same will stand an undivided one-seventh of any and all loss which may be sustained by the parties hereto through the purchase of said notes. It is agreed that said loss shall be determined within a period of ——— months from the date hereof, unless otherwise mutually agreed upon by the parties hereto."

On the defendant Durtschi there was no service; he bought no notes; nor did defendant Schooley. In addition to the contract appears in the record exhibit B, signed by defendants Oldfather and Francis, which reads as follows:

"Wood River, Nebraska.
"March 8th, 1934.

"At a meeting of the Directors of the Farmers State Bank, Wood River, Nebraska, which has closed and gone into the hands of receivership, the directors were interested in a certain amount of eliminated notes which were the property of the directors who had advanced the money to such elimination. All directors were notified about such meeting to be held at the home of A. E. Hauke for to take

such action to the best interest of the directors who had advanced such money. Upon discussion of the same it was agreed by all present which represented 3/4 of directors interested by such advancement of money that A. E. Hauke be appointed Trustee of said notes and collection thereof and that each director receive his percentage of money advanced in the amount recovered until the reduction of the amount so advanced equaled the amount of $3,750 which being the amount that M. D. Lyhane still had advanced and it being the lowest amount as his amount had been reduced by payments which the other directors had not shared in. And when the amounts of all directors had been reduced to $3,750, M. D. Lyhane would be included if further recovery is made on the eliminated notes of said agreement. The matter of interest on unpaid balances has been dispensed with until principal has been recovered. The amount of principal advanced by interested directors at the time of this meeting was: Otha Oldfather, $4,850, A. E. Hauke, $4,600, W. A. Francis $4,400, all members above present at this meeting. And M. D. Lyhane Bal. $3,750 who was not present at this meeting but had been notified to be present. The purpose of this meeting was to work out a way for the best recovery in the most efficient manner of the money so advanced."

To the amended petition defendants demurred on several grounds, the principal ones being: The contract in question is a several contract of indemnity; the plaintiff does not have any action on the contract, for the reason that, on the face of the amended petition, a cause of action arose against each of the signers on April 10, 1930, and there are no facts to toll the statute of limitations; the petition shows on its face that the plaintiff has been guilty of laches and has no standing in a court of equity. The demurrer was sustained, plaintiff's action dismissed, and plaintiff appeals to this court, assigning as error that the judgment of the court is contrary to law.

Plaintiff contends that the action is based solely on the written contract. The pertinent paragraph in the contract

is that in which it is mutually agreed that if the parties should not be able to collect the notes so purchased in full, then each of the other parties would contribute equally to the loss, if any, sustained, in equal shares, each of the parties agreeing to stand one-seventh of the total loss occasioned by reason of having purchased the notes, referred to in the amended petition; plaintiff contending that, if the contract created a relationship under which the plaintiff is entitled to an accounting and distribution, then there is one cause of action stated in the amended petition; that the effect is that a joint adventure was created; the contract related to a single transaction, the purchase of the assets of the bank, to enable the bank to continue business; citing *Alexander v. Turner*, 139 Neb. 364, 297 N. W. 589, giving the definition of a joint adventure as follows:

"A joint adventure has been defined as an undertaking by two or more persons to carry out a single business enterprise for profit." The case of *Soulek v. City of Omaha*, 140 Neb. 151, 299 N. W. 368, is cited, wherein it was held:

"A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit." Plaintiff cites other cases where the facts disclose a joint adventure and in conformity with the definitions heretofore set out, and particularly cites 30 Am. Jur. 708, sec. 57, as follows:

"It is well settled, however, that an equitable action for an accounting is a proper remedy for a party to a joint adventure to recover his share of the profits, including secret profits which have been retained by a coadventurer, or to fix the liability for losses, and this is generally held to be true even though there may also be a right to sue at law, especially where the rights of the parties are so complex that they can better be adjusted in equity, or where a single action will not suffice to terminate the entire controversy."

Therefore, plaintiff contends, he properly premised this action in equity for an accounting, and that the notes de-

scribed in paragraph 8 of the amended petition were substituted for some of the original notes purchased from the bank; they were a part of the same transaction.

We conclude from an analysis of the contract that it is a contract of indemnity. The parties in the instant action are not interested in one note, nor jointly interested in several notes. The contract provides for the purchase of notes severally and individually, and each party agreed to stand one-seventh of the loss. The terms of the contract provide: "each of the above named parties * * * have agreed to purchase certain notes * * * in such amounts as they or either of them may hereafter determine;" "each of the parties * * * shall purchase from the (bank) notes," "each of the other parties hereto will contribute" etc.; that is, each of the parties hereto agrees to stand one-seventh of the total loss.

A contract of indemnity is defined in 31 C. J. 419, sec. 1, the writer adding: "it may be more specifically defined as the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit."

The distinction between the instant case and the cases cited by the plaintiff is that the contract in question provides for the purchase of the notes severally and individually, and then each of the parties agrees to stand one-seventh of the loss. No party was required by the contract to take all of the notes for the benefit of all, and when the notes were collected each party would have one-seventh of the profits and should pay one-seventh of the loss. This contract did not create a relationship analogous to partnership, but, as we view it, a several indemnity agreement.

Except for paragraph 8 of the amended petition, plaintiff sues on a written contract. He sets forth the loss, occasioned in April, 1930, by the conversion of certain notes; he gives credit for the payment he subsequently received, and he adds his claim, as stated in *State v. Farmers State Bank, supra.* He then pleads a separate transaction, eliminates defendants Schooley and Durtschi, and does not con-

nect defendant McDermott with the transaction pleaded in paragraph 8 of the amended petition. We need not concern ourselves with the proposition of misjoinder of causes of action, because it is conceded by the plaintiff that the basis of the action is on the contract and nothing more. This brings us to the question of the statute of limitations.

The plaintiff pleads that he was a party to the contract, agreed to pay one-seventh of the loss, and that on April 10, 1930, his notes were wrongfully converted. These notes totaled $4,610. The bank paid plaintiff $850; he acknowledges the credit. This left a balance due him of $3,750, with 7 per cent interest from August 5, 1931. He added the expense of his claim filed in the former action. It is apparent he suffered his loss on August 5, 1931, and his cause of action accrued against defendant Schooley at that time. Schooley purchased no notes, so a set-off in his favor is not involved. The present action was brought in 1941, 11 years after the alleged conversion, so the statute of limitations applies to defendant Schooley.

In the case of *Bankers Surety Co. v. Willow Springs Beverage Co.*, 104 Neb. 173, 176 N. W. 82, this court held: "It is the rule in the case of indemnity contracts that a cause of action to recover indemnity does not accrue until a loss occurs, and, it follows, the statute of limitations does not commence to run until that time."

We conclude that the plaintiff pleads his loss was, of August 5, 1931, determined in the amount of $4,294.75, and this would apply equally to defendants Hauke, Oldfather and Francis. The fact that these defendants obtained possession of the eliminated notes and attempted to collect the same, would not toll the statutes on an original contract. If there would be any merit to the plaintiff's claim it would be with reference to defendant McDermott, for the reason that the latter's loss was apparent in 1938, but the plaintiff could have sued McDermott, within the statute of limitations, from and after August 5, 1931. There would be no counterclaim in favor of McDermott under such circumstances.

By the provisions of section 20-812, Comp. St. 1929, the "defendant may set forth * * * as many grounds of * * * counterclaim, and set-off as he may have" etc. Section 20-813, Comp. St. 1929, provides:

"The counterclaim mentioned * * * (in section 20-812) must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

At the time of the plaintiff's loss, that is, August 5, 1931, there was no counterclaim existing in favor of McDermott that could have been pleaded, and plaintiff would not have been obliged to wait, under the contract, until McDermott's loss was known. As stated in 57 C. J. 394, sec. 45:

"A debt due at a future time cannot as a general rule be set off in equity against a debt presently due; and equity has no power to prevent a party from collecting at law a debt due him because he owes to defendant a debt not due and which defendant may not be able to collect when it is due, if this fund is not stayed in his hands. A set-off will, however, be allowed in equity on the application of complainant, where defendant is insolvent, even though the debt of complainant to defendant is not due, * * * but where plaintiff is insolvent defendant may set off in equity a demand, although not yet due or payable."

There is no question of insolvency here, respecting the loss to be taken under the contract. Since the plaintiff could have sued McDermott from and after August 5, 1931, the statute of limitations commenced to run at that time. The fact that McDermott later sustained his loss would not toll the statute. We are not concerned with McDermott's right to sue the plaintiff; McDermott had commenced no such action.

Calling attention to paragraphs 8 and 9 of the amended petition, and bearing in mind that the basis of this action is on contract, section 20-216, Comp. St. 1929, is applicable to any oral agreement stated in such paragraphs. It reads:

"In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, * * * ."

Any transaction that plaintiff pleads does not change his interest in the eliminated notes in any particular. No attempt was made to deprive him of his interest. His rights were recognized. He received his share of the collection proportionately. He pleaded when he sustained the loss. He attempted to create a trust claim in a former litigation, setting forth the same subject matter. He waited 10 years at least from the time his loss occurred under the contract and again asserted it in litigation in 1934, and waited seven years longer. In any event, he did not comply with the provisions of section 20-205, Comp. St. 1929, providing: "Within five years, an action upon a * * * contract or promise in writing," etc.

Under the circumstances of this case, we conclude that the trial court properly sustained the demurrer.

AFFIRMED.

JOAN HECKES, THROUGH AND BY HER MOTHER AND NEXT FRIEND, FRIEDA HECKES, APPELLANT, V. FREMONT NEWSPAPERS, INCORPORATED, APPELLEE.

13 N. W. 2d 110

FILED FEBRUARY 9, 1944. No. 31730.

1. **Libel and Slander.** A demurrer to a petition charging a libel admits the allegations of the petition and the implications flowing naturally or *per se* from the publication.
2. ———. A publication is libelous *per se* if the nature and obvious meaning of the language is such as to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, or to render him contemptible or ridiculous in public estimation, or to expose him to public hatred or contempt, or to hinder virtuous men from associating with him.

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

Boyle & Boyle, for appellant.

Sidner, Lee & Gunderson, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This is an action instituted in the district court for Dodge county, Nebraska, by Joan Heckes, by her mother and next friend, plaintiff and appellant, against Fremont Newspapers, Incorporated, defendant and appellee. The action is in damages for libel. A general demurrer to plaintiff's petition on the ground that it did not state a cause of action was sustained and the petition was dismissed. From this action of the court plaintiff has appealed.

The only question before this court is that of whether or not the petition states a cause of action. The portion of the petition necessary to be examined in order to determine whether or not it states a cause of action is the following:

"That in the Thursday, September 18th, 1941, issue of said Fremont Daily Tribune, the defendant, Fremont Newspapers, Incorporated, published on page 10 thereof the following false, libelous and defamatory matter of and concerning Joan Heckes, to-wit:

"Public Notice

"I will not again pay for any more bills or debts for either Mrs. Frieda Heckes or her daughter, Joan, for money, foods, clothing, university expenses, doctor bills, drugs, liquor, cigarettes, hotel or cabin camps, transportation to or from Florida, or any other bills of any nature again.

"Lovane L. Fitzsimmons

"That said articles was presented for publication to the said Fremont Daily Tribune by one Lovane L. Fitzsimmons, who was the author of said article. That said article, herein referred to, was thereafter by the defendant, Fremont Newspapers, Incorporated, printed, published and circulat-

ed, as hereinbefore set forth, to-wit: on September 18th, 1941.

"That the said Lovane L. Fitzsimmons is not related in any degree, either by blood or affinity, to the said Joan Heckes, nor was the said Lovane L. Fitzsimmons ever under any legal or moral obligation to support, maintain or educate the said Joan Heckes, nor was the said Lovane L. Fitzsimmons ever, legally or morally, obligated to pay any debts, obligations or financial responsibilities incurred by the said Joan Heckes, all of which facts were known to the defendant, Fremont Newspapers, Incorporated, at the time said false, libelous and defamatory article was published.

"That the article herein referred to, as published by the defendant, Fremont Newspapers, Incorporated, was circulated in the State of Florida and after said publication and circulation the same became a part of the permanent records in the circuit court in and for Polk County, Florida. That said article was published and circulated in the city of Lincoln, Nebraska, where the University of Nebraska is located and which institution this plaintiff was attending at the time said article was so published and circulated. That as a direct result of said publication, the said plaintiff, Joan Heckes, was compelled to and did discontinue her connection with said University as a student and ever since said date has been denied the opportunity of receiving a higher education. That before attending said University, the said plaintiff graduated from the Fremont High School in June, 1941.

"That by reason of the publication by the defendant of the foregoing false, defamatory, malicious and libelous article, plaintiff has been held up to public contempt, ridicule, ignominy, shame and disgrace. Her reputation and good name has been destroyed and she has suffered and ever will suffer mental pain, anguish and emotional distress. She will be shunned and avoided; will be denied the privilege and pleasure of associates heretofore enjoyed, invitations to social functions, and to associate and mingle with many respectable acquaintances and citizens of Nebraska and

elsewhere. She has been greatly injured and damaged in her social standing and relations; has been made the subject of sensational talk and comment and ridicule; has been looked upon and discussed as a kept woman, a person of loose morals; as one addicted to the use of drugs, intoxicating liquors; a frequenter of cabin camps, hotel rooms; as one who was receiving and taking money for her education at the University; as one whose doctor bills were being paid; as one who had the authority and did contract bills and debts and charged them to the account of the said Lovane L. Fitzsimmons; as one whose clothing and wearing apparel were paid for by the said Lovane L. Fitzsimmons; as one who was transported in interstate commerce from the State of Nebraska to the State of Florida and from the State of Florida to the State of Nebraska;"

The particular ground on which the demurrer was sustained was that the publication was not libelous *per se*. Counsel for plaintiff agree that if the publication in the light of the other facts pleaded is not libelous *per se* the demurrer was properly sustained.

It will be noted that the petition alleges that Lovane L. Fitzsimmons, the author of the published statement and the person who tendered it for publication, was in nowise related to plaintiff or her mother and in nowise obligated to provide any of the items mentioned in the publication.

The effect of the demurrer was to admit the truth of these allegations as well as to admit the publication and the untruth of its statements and the implication flowing naturally or *per se* from it. With this as a basis and a starting point this court is called upon to determine whether or not the publication is libelous *per se*.

In a number of cases this court has established standards whereby to determine whether or not a publication is libelous *per se*. In *World Publishing Co. v. Mullen*, 43 Neb. 126, 61 N. W. 108, it was said: "The question here then is, what is the plain import, the ordinary meaning of the language of the article published? What would ordinary men of ordinary common sense understand from reading this article?"

And again in the same opinion it is stated: "The rule is that any language the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is actionable of itself."

In *Williams v. Fuller,* 68 Neb. 354, 94 N. W. 118, it is said: "Any false and malicious writing published of another is libelous *per se,* when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him." See, also, *Sheibley v. Huse,* 75 Neb. 811, 106 N. W. 1028; *Dalton v. Woodward,* 134 Neb. 915, 280 N. W. 215; *Nelson v. Rosenberg,* 135 Neb. 34, 280 N. W. 229.

Measured by these standards is there anything in this publication which would have a tendency obviously to subject plaintiff, in the eyes of ordinary men or women, to ridicule, ignominy or disgrace or to render her contemptible or ridiculous in public estimation or expose her to public contempt or hinder her in her associations with her fellow creatures?

If the publication had been limited to an inferential declaration that Fitzsimmons had previously furnished money for or defrayed expenses for those things necessary to normal living such as food, clothing, university expenses, doctor bills and drugs, it would be as easy to attribute to him charitable motives of which he had recanted as of ulterior motives and designs and on that basis conclude that no *per se* harm could flow from the publication, but when in addition a necessary implication is found that liquor, cigarettes, hotel and cabin camps and cost of transportation over great distances were supplied, we think the publication, by its terms, is calculated to throw upon this girl an opprobrium which even those of liberal thought or even of callous mind would conclude would cause this girl to suffer ignominy, ridicule and contempt at the hands of at least that portion of the public which holds to the moral and ethical view that indulgence in the use of intoxicating liquor and the accept-

ance of large intrinsic favors from men outside the relationship of blood or marriage are tokens of disrepute.

It is not difficult to believe, in fact it appears reasonably certain, that on reading by them of the publication, the associates of plaintiff at the University would attribute something of disrepute to her and in consequence in some measure avoid her society. It would be idle to attempt to conjecture the number of groups in Fremont society where this publication was the conversational piece de résistance but doubtless there were many, and who will say that the consequences were not detrimental to the standing of plaintiff in the community? Who would say that mothers and fathers in the Fremont community, adhering to the accepted precepts and traditions of polite society and having sons or daughters accustomed to the society of this girl, would not on reading this statement at least advise and urge against, if not indeed forbid, further association with her?

The foregoing are but a few of many illustrative situations and conditions which could without difficulty and without elasticity of imagination be set forth whereby and whereunder plaintiff would suffer contempt, ridicule and ignominy at the hands and in the eyes of ordinary men and women.

It is our conclusion that the publication which is the basis of the action here is libelous *per se*.

It may well be said that there is an implication that the practices suggested by the publication were engaged in by plaintiff with her mother, but we think this implication fails to remove any of the odium attaching to the daughter. It is but natural and reasonable for persons zealous in adherence to accepted moral and ethical standards to avoid association with a young girl charged with failure to adhere to such standards, and it is likewise a natural and reasonable conclusion that such avoidance would not be decreased by an express or implied charge that the failure of adherence had the approbation of the mother of the girl.

The judgment of the district court is reversed and the cause remanded with directions to the district court to over-

rule the demurrer and to require the defendant to answer the petition.

REVERSED, WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

CARTER, J., concurring.

The explanatory and illustrative matters contained in the opinion are not necessary to determine the effect of the publication. Measured by the standards correctly recited in the opinion, the publication is libelous *per se* and requires no explanation or illustration. For the foregoing reason I concur in the result only.

IN RE ESTATE OF FRANK A. WISE.
WARREN J. JONES, APPELLANT, V. HERBERT E. WISE, ADMINISTRATOR, APPELLEE: MCKESSON & ROBBINS, INC., INTERVENER, APPELLEE.
13 N. W. 2d 146

FILED FEBRUARY 25, 1944. No. 31653.

1. **Pleading.** For the purposes of determining the relevancy and materiality of allegations in a pleading, a motion to strike admits the truth of all facts well pleaded and any inferences fairly deductible therefrom.
2. ———. Redundancy consists of the needless repetition of material allegations, or of the insertion of irrelevant matter.
3. ———. Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and cannot affect the decision of the court.
4. ———. Under the Code system of pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense.
5. ———. A plaintiff has the right to set out his entire statement of facts constituting his alleged cause of action, and where such action is based on a series of acts, which together constitute the allegation of one complete transaction, a portion of the same may not be stricken out against plaintiff's objection.
6. **Contracts.** A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior there-

to between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former, so that they cannot subsist together.

7. ———. Deviations or changes in a contract do not necessarily abrogate it or imply its abandonment.

8. ———. Where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old, the old one is discharged, the fact that such was the intention of the parties must clearly appear.

9. ———. A new contract with reference to the subject matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto.

10. ———. Where a new contract is consistent with the continuance of the former one and only provides a new mode of discharging the same, it has no effect as a rescission unless or until it is performed.

11. **Novation.** An agreement, in order to result in a novation, must contain two stipulations: One to completely extinguish an existing liability, and the other, to substitute a new one in its place.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY and HENRY J. BEAL, JUDGES. *Reversed.*

Morrow & Miller and *Carl L. Sackett*, for appellant.

Straight Townsend, Cloid J. Wilson and *Paul I. Manhart, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

SIMMONS, C. J.

In this action, Warren J. Jones, herein called the plaintiff, filed a claim against the estate of Frank A. Wise. Objections were filed to the claim by the administrator and by certain creditors. The estate and the creditors will be referred to herein as the defendants. The claim was allowed by the county court in the sum of $44,116.67. The matter was appealed to the district court. Plaintiff filed his peti-

tion in that court, praying for judgment in the amount of the claim as allowed by the county court. The creditors then filed a motion, of some 25 paragraphs, to strike certain parts of the petition. The trial court, Judge Henry J. Beal presiding, sustained the motion to strike and granted plaintiff time to file an amended petition, or, in lieu thereof, ordered the cause to stand for trial on the petition as amended by the court. The plaintiff elected to stand upon his petition as originally filed. The defendants answered; a reply was filed; and, on motion of the defendants, judgment was granted plaintiff on the pleadings in the sum of $720.80. Plaintiff appeals. We reverse the judgment of the trial court.

Plaintiff's petition recited the following factual situation:

On May 21, 1920, plaintiff and decedent, hereinafter referred to as Wise, entered into a written agreement, reciting and acknowledging that Wise was indebted to the plaintiff in the sum of $23,234. Wise agreed to take out, assign to plaintiff, and keep in force a policy of life insurance in the sum of $10,000; this to be as partial security for the payment of the acknowledged debt. Wise agreed to make payments on the debt as his financial condition warranted; and plaintiff agreed not to take judgment on the contract so long as Wise acted in good faith and made a *bona fide* attempt to carry out the contract.

The policy of insurance was taken out and assigned to plaintiff. Later, in 1936, a different policy was taken out and substituted for the original. Wise paid the premiums and kept the policy in force. Wise paid, between July, 1921, and November, 1938, the sum of $540 on the indebtedness and made in writing several acknowledgments of the indebtedness. On August 3, 1939, there was due to plaintiff under the contract the sum of $49,052.50.

On the latter date, the plaintiff and Wise entered into a written agreement, to which we refer as the 1939 contract, referring to and making the 1920 contract "a part of this contract" and attaching it to the 1939 contract; reciting the payments made on the 1920 contract; that they had entered

into an agreement whereby Wise "shall liquidate and discharge" the 1920 contract by payment of $14,000 and the assignment of a $10,000 life insurance policy. The $14,000 was to be evidenced by 5 notes in the sum of $1,500 each, payable one on August 14, 1939, and one each year thereafter, and 65 notes for $100 each, payable monthly beginning September 1, 1939, the notes to bear interest after maturity.

The 1939 contract further provided that if Wise failed to pay the notes punctually, plaintiff had the right to declare the 1939 contract "null and void," and demand payment of the balance of the $14,000 remaining unpaid; and that if full payment was not made, then the 1939 contract was to be terminated and the 1920 contract "shall govern the liability" of Wise to the plaintiff. The 1939 contract further provided that plaintiff would not terminate it until at least 3 of the $100 notes were past due; and that plaintiff could declare the 1939 contract "null and void" and demand full payment of all the notes upon the failure of Wise to pay any $1,500 note within 30 days after due. The 1939 contract further provided that "when the notes herein described are paid in full, * * * (Wise) shall be released from any further obligation or liability" under the 1920 contract.

It was agreed in the 1939 contract that Wise should keep the $10,000 insurance policy in force until the notes had been paid in full; that in the event of death, the benefits should be paid to plaintiff and applied on the notes; and that "upon the full payment of said notes," the plaintiff could pay the premiums and carry the policy with himself as beneficiary, in reimbursement of any balance due plaintiff on the 1920 contract. Wise was not to encumber the policy, and if he failed to pay the premiums he was required to pay, plaintiff could pay them, and Wise was obligated to reimburse him, and if he failed to do so within a stated time, then any balance due on the 1939 contract became due and payable at once, and upon failure to pay said balance, the 1939 contract "shall terminate" and the 1920 contract "shall be reinstated and shall be payable by the terms there-

of, less any payments made under this (1939) agreement."

The 1939 contract concluded with two paragraphs, providing that if Wise "fails for a period of three months to pay any of the $100.00 notes, or shall fail to pay any $1500.00 note within thirty days from the date the same becomes due, * * * (plaintiff) shall have the right to terminate this contract and the contract of May 21, 1920, shall be reinstated and shall be payable in accordance with the terms thereof, less any payments made under the terms of this contract;" and upon Wise "paying said notes in full and paying any insurance premiums paid by * * * (plaintiff), then * * * (Wise) shall be released from further obligation to the * * * (plaintiff) under said contract dated May 21, 1920."

Thereafter Wise executed and delivered the notes called for in the 1939 contract; paid the first $1,500 note and the first 18 of the $100 notes. Wise committed suicide March 31, 1941. At that time the $1,500 note due and payable August 1, 1940, had not been paid, and the $100, due and payable March 1, 1941, had not been paid.

On August 7, 1941, the 1920 and 1939 contracts were exhibited to the administrator, together with the unpaid notes, the insurance policy and its assignment. The unpaid notes were then declared due and payable and demand was made for the principal sum of $10,700 and interest. It was not paid. The entire balance, less credits, due on the 1920 contract was then declared to be due. August 18, 1941, the insurance company paid plaintiff the sum of $10,064.46, which plaintiff credited upon the amount due on the 1920 contract.

The 1920 contract was made, executed and delivered in Wyoming. Plaintiff alleged the Wyoming law, as to the statute of limitations; as to when payments due under the 1920 contract became payable; interest rate, etc.; and the time when Wise ceased to be a resident of Wyoming and became a resident of Nebraska.

Plaintiff prayed judgment for the amount due on the 1920 contract, after allowing credits for the payments made by Wise and by the insurance company. To this petition

there were attached the 1920 and 1939 contracts, from which we have quoted. By the allegations of the petition, the 1939 contract was "made a part" of the petition. Also, the 1920 contract was "made a part" of the 1939 contract. Accordingly, we treat both contracts, as alleged, as incorporated in the petition. The parties so treated them.

To this petition the creditors filed their motion to strike various allegations of the petition on the grounds generally stated that they were "an irrelevant, incompetent and immaterial pleading of facts * * * inconsistent with other facts pleaded * * * ." The trial court sustained the motion as to "all of those matters pleaded therein, having relation to and bearing upon the contract pleaded in said petition dated May 21, 1920, between the plaintiff and the deceased, Frank A. Wise, upon which plaintiff relies and upon which contract a claim against this estate cannot be predicated or allowed." The court gave the plaintiff time to amend his petition or otherwise ordered that "the cause shall stand for trial on the petition as amended by this order."

Plaintiff elected to stand on his petition as filed, and declined to file an amended petition. His petition "as amended" by the court's order then stood with the following allegations: The death of Wise, the filing of plaintiff's claim, its allowance in the county court and the appeal; an allegation that Wise paid all the premiums on "the aforesaid" life insurance policy, its assignment, Wise's death and the payment of $10,064.46 to plaintiff (although all prior references to the insurance had been stricken); an allegation that on August 3, 1939, Wise "was in default of payment of the balance due to the said Warren J. Jones" (without any prior reference to a debt, a balance, or a default); that Wise executed a "written instrument" which was attached to and made a part of the petition; that he had executed and delivered the notes provided for in the instrument and made the payments as hereinbefore recited; and that no other payments had been made except the payment made by the insurance company; an allegation that "the original of the 3rd day of August, 1939, were exhibited" to the ad-

ministrator, together with the unpaid notes and insurance policy and assignment; that the notes were declared due and payable and demand made for payment; and that by reason of the default, "the said instrument of August 3, 1939, was terminated" and that claim was made to the insurance company and payment made.

The trial court by its order left the plaintiff where he was alleging and seeking to recover the balance of the $14,000 set out in the 1939 agreement, after the application of the sum received from the insurance company.

Thereafter, defendants filed an answer to the petition, as amended by the court, in which they denied generally; admitted the execution of the contract and notes of August, 1939; admitted an unpaid balance on the "last of said notes" in the sum of $720.80; and alleged that the balance had been "paid and satisfied," and offered no objection to an allowance of a claim in that amount. Plaintiff by reply denied that the notes had been paid as alleged by the defendants.

Defendants then moved the court for judgment on the pleadings "allowing plaintiff's claim in the sum of $720.80" and costs. This motion was sustained by the trial court, Judge C. G. Perry presiding.

Plaintiff's first assignment is that the trial court erred in sustaining the motion to strike. For the purpose of determining the relevancy and materiality of allegations in a pleading, a motion to strike admits the truth of all facts well pleaded and any inferences fairly deductible therefrom. 41 Am. Jur. 532; 49 C. J. 686; 1 Bancroft, Code Pleading, 901. See, also, *Brandeen v. Beale,* 117 Neb. 291, 220 N. W. 298.

In substance the defendants by their motion admit that in 1920 Wise was indebted to the plaintiff in the sum of $23,234; that plaintiff and Wise then executed the 1920 contract, wherein Wise acknowledged the debt and agreed to pay the same and to assign an insurance policy in the amount of $10,000 as security; that he did assign the insurance and kept it in force; that he paid upon said debt the

sum of $540, and at various times acknowledged the indebtedness in writing; that numerous demands were made for payment; that on August 3, 1939, there was due the plaintiff from Wise the sum of $49,052.50; that a reasonable time had then elapsed for the payment of the indebtedness; that on that date, and in order to give Wise an extension of time in which to pay the debt, a second contract was entered into, which made the 1920 contract "a part of said latter agreement;" that the 1920 contract was exhibited to the administrator; that demand for payment was made; that the entire balance due under the 1920 contract was demanded and not paid; that demand was made on the insurance company for payment and payment made and credited upon the amounts due under the 1920 contract. The motion also admitted that the 1920 contract was a Wyoming contract; that Wise was a resident of Wyoming until 1928, when he became and thereafter remained a resident of Nebraska; that the statute of limitations did not bar a recovery on the 1920 contract; that under the law of Wyoming, a reasonable time had elapsed for the performance of the covenants of the 1920 contract; and that the interest rate as pleaded was the legal rate in Wyoming.

Defendants in their brief rely upon section 20-833, Comp. St. 1929, which provides: "If redundant, scandalous, or irrelevant matter be inserted in any pleading, it may be stricken out on motion of the party prejudiced thereby." Defendants contend that the action of the trial court was proper under this statute. Certainly the allegations stricken are not scandalous; neither are they redundant or irrelevant in the commonly accepted meaning of those terms.

"Redundancy consists of the needless repetition of material allegations, or of the insertion of irrelevant matter." 49 C. J. 102.

"An irrelevant allegation in a pleading is one which has no substantial relation to the controversy between the parties to the action and cannot affect the decision of the court." 49 C. J. 101. The test is, does it tend "to constitute a cause of action or defense." 49 C. J. 102.

This court, in *Scofield v. State Nat. Bank,* 9 Neb. 316, 2 N. W. 888, said: "The word 'irrelevant' signifies 'is not pertinent,' or applicable. Matter is said to be irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and cannot affect the decision of the court."

"Under the Code system of pleading it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. (See Comp. St. 1929, secs. 20-804, 20-811.) All that the law requires is that there shall be a cause of action or defense. It looks at the real rights of the parties and aims at the protection and enforcement of such rights. In the case at bar the defendant set up the whole transaction by which he claims that he was defrauded. This he had a right to do, and the court should not have stricken out a part of his defense. By doing so it destroyed the whole." The above language is taken from the case of *Hovland v. Burrows,* 38 Neb. 119, 56 N. W. 800.

In the above case the motion to strike was directed at parts of the answer. We think it is applicable to the situation here. Plaintiff set out the whole transaction upon which his alleged cause of action is based. "This he had a right to do." As was said by this court in *Lincoln Mtg. & Trust Co. v. Hutchins,* 55 Neb. 158, 75 N. W. 538, "A party has no absolute right to have his adversary's pleadings pruned to suit his fancy." Here the trial court, by sustaining defendants' motion to strike, "destroyed the whole" of plaintiff's alleged cause of action. Applying the rule as stated in the syllabus in the *Hovland* case to the instant situation, we think the proper rule is: A plaintiff has the right to set out his entire "statement of facts" constituting his alleged cause of action, and where such action is based on a series of acts, which together constitute the allegation of one complete transaction, a portion of the same may not be stricken out against plaintiff's objection.

It is evident, however, that the trial court considered the motion as though it were a demurrer directed at a part of the petition. Without determining the correctness of that

procedure, we also consider the motion on that basis. Defendants recognize the demurrer theory by advancing the argument that all reference to the 1920 agreement was redundant and irrelevant because "a contract complete in itself will be conclusively presumed to supersede another one made prior thereto in relation to the same subject matter," citing *Price v. Platte Valley Public Power and Irrigation District*, 139 Neb. 787, 298 N. W. 746. The rule there relied upon is fully stated in 17 C. J. S. 886, sec. 395, as follows: "A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former so that they cannot subsist together. However, deviations or changes in a contract do not necessarily abrogate it or imply its abandonment, and where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear. Where the contracts may stand together a subsequent will not supersede a prior one. A new contract with reference to the subject matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto. Where a new contract is consistent with the continuance of the former one and only provides a new mode of discharging the same, it has no effect as a rescission unless or until it is performed."

It is obvious that that rule, as cited by defendants, is not applicable to the contracts here involved. The 1939 contract was not "complete in itself." By its terms, and by the admission following from defendants' motion, the 1920 contract was incorporated in and made a part of the 1939 contract. The 1920 contract is repeatedly referred to in

the 1939 agreement. The later agreement is largely meaningless without reference to the former. The terms of the 1939 agreement are not inconsistent with those of the former. The terms of the two contracts fit into each other and show a clear intent of the parties that the 1920 contract was to be satisfied only by the full performance of the covenants of the 1939 contract. The agreement was that Wise "shall liquidate and discharge" the 1920 contract by doing certain things and making certain payments. It was the performance and not the promise that was to produce the result. As the petition alleges and the motion admits, full performance of the 1939 contract has not been made. Plaintiff's cause of action rests basically upon the 1920 contract.

This court has twice stated the rule as follows: "A new contract with reference to the subject-matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto." *Uhlig v. Barnum*, 43 Neb. 584, 61 N. W. 749. "Before one contract is merged in another and superseded thereby, the last contract must be between the same parties as the first, and must embrace the same subject matter, and must have been so intended by the parties." *Walsh v. Lunney*, 75 Neb. 337, 106 N. W. 447.

Defendants further rely upon the rule: "Where a creditor accepts from his debtor any form of new agreement in place of a prior contract or obligation between them, with the intent to cancel the former and to substitute the new one therefor, novation by the substitution of an obligation takes place." 46 C. J. 586; *American Loan Plan v. Frazell*, 135 Neb. 718, 283 N. W. 836. There is no quarrel with that rule here. It is not applicable. There is evidenced here no "intent to cancel the former and substitute" the 1939 contract for the 1920 contract. A contrary intent is clearly indicated. It may be here pointed out also that the 1939 con-

tract, as we construe it, does not result in a novation. See *Thomas v. George*, 105 Neb. 51, 181 N. W. 646, where we held: "An agreement, in order to result in a novation, must contain two stipulations: One to completely extinguish an existing liability, and the other, to substitute a new one in its place." See, also, 1 C. J. S. 465, sec. 1.

There is one further matter here that requires consideration. Plaintiff alleged that Wise departed this life "by committing suicide." The quoted language was included in the motion to strike, and stricken from the petition by the trial court. Defendants, in their brief, sustain this action by contending that plaintiff "was in no pecuniary way prejudiced by the manner in which Wise met his death" and hence that language "was irrelevant, redundant, and perhaps tending to be scandalous." The 1920 contract provided that Wise was to make payments "as his financial condition will warrant," and that the plaintiff would not take judgment thereon so long as Wise "acts in good faith and makes a *bona fide* attempt to carry out the terms and conditions" of the contract. Plaintiff alleged, and defendants by their motion admitted, that under the Wyoming law, a contract so worded required payment within a reasonable time. It is the plaintiff's position that Wise, by his own act, had voluntarily placed it out of his power further to perform the contract. Under the rules of code pleading hereinbefore cited, plaintiff has the right to plead the facts of his cause of action. It may well be that the cause of death may become material and relevant, depending upon the issues as finally made up herein. At this stage of the proceedings, it was error to strike the language from the petition.

We conclude that the trial court erroneously sustained the motion to strike. This conclusion makes it unnecessary to decide other errors occurring subsequent thereto in the progress of the case.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

GWENDOLYN J. GEORGE, APPELLANT, V. GUARANTEE MUTUAL LIFE COMPANY, APPELLEE.

13 N. W. 2d 176

FILED FEBRUARY 25, 1944. No. 31654.

1. **Insurance.** Untrue answers in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy.
2. ———. An applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties.
3. ———. "The importance of a false statement by an applicant for a policy of insurance as to whether he has consulted physicians lies in the fact that he conceals from the insurer the fact of such consultations and thus deprives it of the opportunity of making an independent investigation and of obtaining further information, so as to enable it to decide for itself, in the light of the additional information, whether to enter into the proposed contract or what premium to charge." 131 A. L. R. 618, Annotation.
4. **Evidence.** "The proper rule of law is that in an action at law on an insurance policy an assured may not, by parol evidence, impeach the written statements of the assured in the application in those cases where the application has become a part of the contract by stipulation and in accordance with statute and a copy thereof attached to the policy at the time of delivery." *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 10 N. W. 2d 693.
5. **Contracts.** "Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentation." 2 Restatement, Contracts, 915, sec. 479.
6. **Insurance.** Where insured has made several misrepresentations in securing life insurance, each designed to deceive the company, a partial and incomplete disclosure of falsity to an agent of the company is insufficient to avoid the effect of the fraud, and such knowledge is an insufficient basis for a waiver of its right to cancel the policy on the ground of fraud.
7. **Estoppel.** There can be no waiver, unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it

has been committed, and that the effect of his action will be to confirm it.

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

Hoagland, Carr & Hoagland and *Ira D. Beymon*, for appellant.

Beatty, Maupin & Murphy and *Cranny & Moore, contra.*

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

PAINE, J.

The widow and beneficiary brought suit against defendant company to recover on two $5,000 life insurance policies, issued to the deceased May 22, 1941. At the conclusion of all the evidence, the trial court upon motion discharged the jury, and entered a judgment for the defendant.

Plaintiff's petition alleged that on May 22, 1941, Henry George made application to the defendant company for $10,000 life insurance, and under the same date two policies of $5,000 each were issued to him, the plaintiff herein being the beneficiary; that when he made the application, Henry George paid the premiums in the amount of $515, and said policies were delivered on June 3, 1941, and remained in full force and effect during his lifetime. The petition further states that Henry George died May 27, 1942, and proofs of death were sent to defendant on June 10, 1942, and demand made for the payment of the amount of said policies due plaintiff, but defendant refused payment; wherefore, plaintiff prays judgment against defendant in the sum of $10,000, together with interest from May 27, 1942, and costs.

Defendant's answer, of some 15 pages, admitted the application, issuance and delivery of the two policies, and the payment of premiums thereon, also admitted the death of Henry George on May 27, 1942, the receipt of proof of death, and the demand for payment on the policies, and the

refusal to pay, but denied every other allegation contained in the petition.

For further answer, defendant alleges that the applicant went before defendant's medical examiner, Dr. E. C. Stevenson, and made answers on medical examination blanks, stating that within the last ten years he had not consulted a physician, was in good health, and had never been under observation, care or treatment in any hospital, had not decreased in weight in the past three years, and that there had never been any cases of insanity, epilepsy or suicide in the family. Defendant claims that all of said answers were untrue, and that Henry George fraudulently concealed the truth, as he had been treated by physicians in North Platte and Omaha within ten years prior to May 22, 1941, for an illness of the gastro-intestinal tract; that he knew he was not in good health, and had been advised to have an immediate surgical operation as a result of a physical examination to which he had submitted at Omaha on May 19, 20 and 21, 1941, immediately prior to his making application for insurance; that he had been under observation, care and treatment in Immanuel Hospital, Omaha, on said dates; that the weight of Henry George had decreased; that there had been cases of insanity and suicide in the family, his sister, Emma George, being now confined in the Nebraska State Hospital for the Insane at Hastings, and his brother, William George, having committed suicide in Idaho on March 2, 1936, instead of dying of "flu" after a two weeks' illness in 1939, as stated in the application.

It is further alleged that the information sought to be elicited by the questions was material to the risk; that the defendant relied on the truthfulness of such answers and information, and was deceived to its injury, and that defendant would not have issued the policies of insurance if insured had truthfully answered the questions propounded, and had not fraudulently concealed the truth from defendant.

It is further specifically charged in defendant's answer that at least six months before May 22, 1941, the insured

became ill with cancer of the rectum, and consulted with Dr. T. J. Kerr of North Platte, and was continuously treated by said doctor for the diseases of colitis and diarrhea until May 17, 1941, when, having failed to respond to such treatment, he was advised by Dr. Kerr to consult either Dr. Louis E. Moon, of Omaha, or Mayo Clinic, of Rochester, Minnesota, for this disease in the rectum; that thereupon insured went to Omaha on May 19, 1941, and was examined by Dr. Louis E. Moon, who committed him to Immanuel Hospital for a biopsy and X-ray examination, and said examination disclosed that insured had a large cancer of the rectum, and Dr. Moon advised an immediate operation for the removal of same; that Henry George told the doctor he would go home and arrange his business affairs and then return for the operation in a few days.

Thereupon, the insured, well knowing that he was afflicted with a serious and probably fatal disease, for which he had been treated for months, and knowing that he was at once going to undergo a serious major operation, and with the express fraudulent purpose to deceive and defraud defendant by unlawfully procuring insurance from it, went to Gothenburg on May 22, 1941, and solicited the agent to sell him $10,000 worth of life insurance in defendant company.

Defendant further alleges that the insured, in furtherance of his unlawful and fraudulent purpose, falsely stated to the agent of defendant that he wanted said insurance because he planned to start on a vacation and pleasure trip, and therefore wanted additional protection and insurance, which statements were believed and relied upon to defendant's injury; that insured went immediately to the Mayo Clinic at Rochester, Minnesota, where an operation was performed on May 28, 1941, for the removal of a cancer which involved the entire rectum; that insured returned home about July 1, 1941, and thereafter concealed from defendant his true condition and the nature of his disease and operation, and the fact of a second operation for cancer of the bladder performed at the Mayo Clinic on March 3, 1942,

and fraudulently stated to defendant's agent in July, 1941, that he simply had a tumor removed from his rectum at the Mayo Clinic and had fully recovered from said operation, and was in the best of health and carrying on his usual work and duties on his farms; that defendant had no knowledge of any operation until September, 1941, when it was advised of the representations which Henry George had made to its agent, and thereupon defendant requested insured to direct the Mayo Clinic to inform defendant as to the nature of his disease and the operation therefor, but although insured promised to do so he failed and neglected to direct said Clinic to give defendant such information, and in fact secretly directed said Clinic and Dr. C. W. Mayo to give defendant no information of any kind concerning his condition and said operations; that in May, 1942, Henry George paid the second premium upon said policies, and had defendant known that insured was suffering from cancer and had been operated upon for that disease in May, 1941, and on March 3, 1942, it would have immediately canceled and rescinded said policies and returned said premiums, and would not have accepted the second premium.

The answer further alleges that when the above facts came to the knowledge of defendant it gave notice to plaintiff that it did not hold itself bound upon said policies of insurance on account of the false statements and fraudulent concealments, and had elected to rescind said contracts, and it tendered to plaintiff its checks for the amount of the premiums paid by Henry George, with interest, and demanded the return of said policies; that plaintiff refused to accept the checks or return the policies.

Many additional allegations of the answer would require too much space in this opinion, and are therefore omitted, and the prayer was that the petition be dismissed, the policies canceled, and the premiums paid thereon be ordered returned to plaintiff.

The plaintiff's reply, in addition to a general denial, alleged that when Henry George went to his banker, who was agent for the defendant, on May 22, 1941, he was again

solicited by such agent to take out insurance, and at that time Henry George made application for life insurance, on printed forms furnished by defendant, and that all the writing, with the exception of the signature, was the writing of defendant's agent, and the answers were the answers of defendant and its agents, and that the application did not properly record the information given them by deceased; that deceased was not experienced in insurance matters, and relied entirely upon defendant and its agents. Plaintiff states that at the time application was made Henry George was a strong, robust man, and that any affliction he may have had appeared to be of a trivial nature, and he believed he was in good health and had no serious ailments; that he was requested to submit to an examination by defendant's medical examiner, who confirmed his own belief that he was in good health and had no serious ailments.

Plaintiff states that shortly after said application was made, and while insured was on a trip, he became ill and went to the Mayo Clinic for a physical examination, and the doctors there performed an operation for the removal of a tumor from the colon; that the operation was successful, and the latter part of June, 1941, he returned home and resumed his normal activities as a rancher and farmer; that upon returning home he immediately reported to defendant company that he had been operated upon at the Mayo Clinic and a large tumor of the colon had been removed, and thereupon defendant through its agents frequently observed the insured and made inquiries of his health, and that insured was not informed by any of the surgeons who attended him that he had cancer until a few days before his death; that he believed that he had fully recovered and would live his normal life expectancy; that defendant, having observed the physical condition of insured and being anxious to collect the premiums on the insurance, waived any objections it may have had to the validity of the application and accepted a second premium of $515 and issued receipt therefor.

For further reply plaintiff alleges that Will George, a

brother of Henry George, died in March, 1936, in Idaho, and that it was reported in the papers and generally in the community that he had died of influenza; that Henry George and plaintiff had received no word from the family about his death, and believed that he had died a natural death of influenza; that the facts pertaining to the death of said Will George, or that his sister was in the State Asylum, did not in any way affect the insurability of the life of Henry George.

Plaintiff further states that defendant was informed during the lifetime of Henry George that he had been operated upon for the removal of a tumor of the colon within a few days after the insurance application had been executed; that defendant took no steps to cancel the policy, nor did it tender back to Henry George during his lifetime the premiums he had paid, but on the contrary accepted said premiums; that by reason of such conduct of defendant it has waived any invalidity that may exist in the application, and is estopped to set up the defenses alleged in its answer; that Henry George on May 1, 1942, paid a second premium of $515, all of which defendant accepted, and has not at any time made any proper and sufficient tender of said funds, and by reason of its acts has affirmed the contract of insurance. Wherefore, plaintiff prays that she may recover judgment as prayed.

On December 16, 1942, trial was commenced to a jury, and at the conclusion of the taking of evidence defendant moved the court to instruct the jury to return a verdict for defendant, or in lieu thereof to discharge the jury and enter a judgment for defendant and to order the sum of $1,070.62, the amount of premiums paid with interest thereon, to be returned to persons lawfully entitled thereto, which motion was sustained, and the court so ordered.

The plaintiff sets out a number of assignments of error as grounds for reversing the judgment of the trial court. It is set out that the court erred in withdrawing the case from the jury and entering judgment for the defendant; that the court erred in concluding that the question as to

whether misrepresentations had been made in the application was not a fact to be determined by the jury, and erred in holding that the acceptance of the premium, and defendant's failure to bring action during the lifetime of the deceased waived any misrepresentations that might have been made in the application, was not a question of fact which must be submitted to the jury; that the court erred in holding that it was not necessary for the company to attach the entire application to the policy; that the court erred in finding that the testimony of the doctors who treated Henry George was not privileged, and that said testimony was competent; that the court erred in holding that the policy did not constitute the entire contract between the parties, and that the medical part of the application which was not attached constituted a part of the contract; that the court erred in finding that the defendant was not barred from pleading and proving alleged falsity of representations in the medical part of the application which was not attached to the policy.

The trial of the case began on December 16, 1942, and the taking of the evidence was concluded six days later, and the evidence is found in a thick bill of exceptions and two packages of depositions, and it would extend this opinion beyond its proper length should we endeavor to set out a fair synopsis of the evidence of the many witnesses. We believe under the circumstances that the requirements of the opinion will be met by saying generally that each party tried to support the allegations of their respective pleadings by their evidence, and that the trial court held that the evidence produced by the defendant was sufficient in law so that if the jury had returned a verdict for the plaintiff it would not have been allowed to stand.

We will take up the evidence as to the knowledge of the deceased of his physical condition when he signed the application for insurance on May 22, 1941. The insured had been treating with Dr. T. J. Kerr, of North Platte, who had been their family physician for about 18 years. During the year preceding May 22, 1941, Dr. Kerr had pre-

scribed for a persistent diarrhea, which defendant had been troubled with for a long time. The deceased had also lost weight, which he explained by saying that he was on a diet. Insured had had a urinalysis made on November 27, 1940. When he was in Dr. Kerr's office on May 17, 1941, the doctor was alarmed over his continued diarrhea and colitis, and told him that, if he would not submit to his making a check-up, he should go to some place for a check-up, and he suspected that his persistent diarrhea and loss of weight was quite a serious situation, and he suspected indicated some form of malignancy, but did not tell that to the deceased. He advised him to see Dr. Louis E. Moon of Omaha, who was a specialist in rectal conditions, or to go to the Mayo Clinic at Rochester.

The evidence shows that on May 19 Mr. George was in Lincoln and had some deeds made, putting his property in survivorship with his wife, and that he then drove to Omaha to see Dr. Moon.

Dr. Louis E. Moon testified by deposition that he was a graduate of the University of Michigan, and his specialty was proctology, diseases of the anus, rectum and colon, and that he had Mr. George go to the Immanuel Hospital for an examination that same evening; that the following morning he performed a biopsy upon him, which means that they took some of the tumor tissue from within the rectum for microscopic examination. The next day the laboratory reported on the specimen taken, and the diagnosis was "adenocarcinoma," which means a cancerous tumor. He testified that Mr. George remained in the hospital for 24 hours until he got this report from the laboratory, and left the next day; that X-rays were also taken. Dr. Moon testified that he advised Mr. George to have this tumor taken out, and that he should be operated on. "Q. Did you tell him that he had cancer? A. That I don't know. In answer to that I will say this: The patient always says, 'Is it a cancer?' And as a rule we say, 'It is a tumor which will become cancerous if you leave it,' rather than say outright, 'You have a cancer.' And occasionally the individual will

pin you down and say, 'What I want to know is this a cancer?' and to some of them I will say, 'Yes', and to some of them we will evade the answer again, and I don't recall the conversation, but he was told he had a tumor that would become a cancer if he didn't do something to it—I don't know."

This evidence discloses that the biopsy was performed on May 20, and the next day the report of the microscopic examination and his talk with Dr. Moon advising an immediate operation on this large tumor, and the next day, May 22, Mr. George went out to Gothenburg and at once applied for this $10,000 worth of insurance, and in his answers in his application for insurance to the doctor he states that he has not consulted a physician in the last ten years; that two days later the insured arrived at the Mayo Clinic at Rochester, Minnesota, and four days later on May 28, 1941, Dr. C. W. Mayo removed this large malignant tumor, and with it his entire rectum, by an operation known as colostomy, fixing a new opening in his side for bowel movements. The two policies had been delivered by mail on June 3, 1941, and the insured returned from the Mayo Clinic on July 1, 1941.

It is very evident that the insured, when told by Dr. Moon of the seriousness of his condition, immediately went from Omaha to Gothenburg and secured $10,000 of life insurance and then started for the Mayo Clinic to be operated upon, and deliberately concealed all of these facts from the defendant.

Untrue answers in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy. See *Royal Neighbors of America v. Wallace*, 73 Neb. 409, 102 N. W. 1020; *Bryant v. Modern Woodmen of America*, 86 Neb. 372, 125 N. W. 621; *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 10 N. W. 2d 693.

Section 44-602, Comp. St. 1929, provides in the fourth paragraph thereof as follows: "A provision that all statements made by the insured shall, *in the absence of fraud,*

be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application, and a copy of such application shall be endorsed upon or attached to the policy when issued."

An examination of the bill of exceptions discloses that attorney for plaintiff objected to questions concerning the medical examination for the reason that the application was not attached to the policy *in its entirety* and therefore it is not competent to inquire concerning the medical examination, which appears to be a part of the application. "THE COURT: The objection is overruled, the exhibit, however, not being treated as any portion of the contract."

The answers made to the medical examiner consisted of a single sheet, but printed on both sides. The front side was marked "Part II," and also as exhibit 2, and it consisted of 26 questions and all of the answers thereto, and was signed at the bottom by Henry George, and this exhibit 2 was offered in evidence, and at first the objection to it was sustained. The next day it was again offered, with the statement by attorney Murphy, "I want it understood that we offer in evidence at this time only Exhibit No. 2, and not Exhibit No. 5," and the objection was overruled, and exhibit No. 2 was received.

A photostatic copy of this exhibit No. 2 was attached to the policy, as required, and included all of the answers referred to in this opinion. Dr. Stevenson was shown exhibit No. 5 and asked if Mr. George signed it, and he said he did not. This exhibit No. 5 was found on the back of the page, exhibit No. 2, and shows, among other things, a little picture of a pair of lungs, the result of the urinalysis, together with height, weight, pulse, blood pressure, and sounds of the heart of Mr. George. This exhibit No. 5 is not involved in any way in the charge of fraud as discussed in this opinion. We do not find that exhibit No. 5 was offered in evidence, and it was not attached to the policy. But exhibit No. 2 was offered in evidence, received by the court, and read to the jury.

The false representations accompanied and were essential parts of the policies delivered to the insured. He did not repudiate, and therefore adopted and approved, the representations upon which they were based. An applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties.

"The importance of a false statement by an applicant for a policy of insurance as to whether he has consulted physicians lies in the fact that he conceals from the insurer the fact of such consultations and thus deprives it of the opportunity of making an independent investigation and of obtaining further information, so as to enable it to decide for itself, in the light of the additional information, whether to enter into the proposed contract or what premium to charge." 131 A. L. R. 618, Annotation.

"Under the Kansas law, insurer was not liable on life policy where, in answer to questions in application, insured failed to disclose that within five years prior to date of application insured had consulted several physicians and had been hospitalized and treated for slight swelling in right testicle and uncontradicted evidence showed that death resulted from cancer having origin in right testicle. Gen. St. Kan. 1935, 40-418." *New York Life Ins. Co. v. McCurdy*, 106 Fed. 2d 181.

In *Scott v. National Reserve Life Ins. Co.*, 144 Kan. 224, 58 Pac. 2d 1131, decided July 3, 1936, it was held that where proof of alleged fraud becomes conclusive by uncontradicted evidence and written admissions showing falsehood, concealment, and misrepresentations on part of applicant to insurance company, question of existence of fraud becomes matter of law instead of issue of fact for jury, in which case the supreme court modified its former opinion and caused judgment to be entered for the defendant, the facts in the case showing that the insured had falsely answered question 6A in that he previously had applied for insurance in another company and had been rejected by it.

"The proper rule of law is that in an action at law on an

insurance policy an assured may not, by parol evidence, impeach the written statements of the assured in the application in those cases where the application has become a part of the contract by stipulation and in accordance with statute and a copy thereof attached to the policy at the time of delivery." *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 10 N. W. 2d 693.

"Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentation." 2 Restatement, Contracts, 915, sec. 479.

"The principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents, and even judgments." 23 Am. Jur. 770, sec. 19.

The insured waived the privilege of keeping his several doctors' testimony secret, which is granted by section 20-1206, Comp. St. 1929, by signing his name at the bottom of Part II entitled "Answers made to the Medical Examiner in continuation of and forming part of application for insurance in the Guarantee Mutual Life Company, of Omaha, Nebraska," and just above this signature of the deceased are these words: "I hereby declare that all statements and answers as written or printed herein and in Part I of this application are full, complete and true, whether written by my own hand or not, and I agree that they are to be considered the basis of any insurance issued hereon. I hereby authorize any physician or other person who has or may attend me to disclose to said Company any information thus acquired."

Therefore, the testimony of the doctors treating the insured was competent and admissible. See *Willis v. Order of Railroad Telegraphers*, 139 Neb. 46, 296 N. W. 443; *Parker v. Parker*, 78 Neb. 535, 111 N. W. 119; *Western Travelers Accident Assn. v. Munson*, 73 Neb. 858, 103 N. W.

688; *Wolski v. National Life & Accident Ins. Co.*, 135 Neb. 643, 283 N. W. 381.

The plaintiff insists that the collection of a second year's premium, with knowledge of the fact that insured had undergone an operation, was a waiver of any grounds of fraud in the application and issuance of the two policies.

The evidence discloses that on December 4, 1941, Ralph E. Kiplinger, an agent of the defendant company, went to the ranch home of the insured, and told him the company had heard that insured had been at the Mayo Clinic, and asked him to sign a paper giving permission for that Clinic to give out information about his condition. The insured replied that he had had a little operation, but it did not amount to much, and he was feeling fine, but he refused to sign the paper, although requested to several times thereafter by letter.

However, the insured did not forget the request, as on February 7, 1942, he wrote a letter, being exhibit No. 3 attached to the deposition of Dr. C. W. Mayo, saying: "Please never let any one ever find out anything about my operation. Some Insurance Co. is trying to find out all about my operation."

"Where insured has made several separate and distinct misrepresentations in application for life policy, each designed to deceive insurer and each material to the risk, a partial, fragmentary, or incomplete disclosure of falsity to insurer thereafter is insufficient to avoid the effect of fraud, and the knowledge thus acquired by insurer is insufficient basis for a 'waiver' of its right to cancel policy for any of the misrepresentations." *Martinson v. Prudential Ins. Co. of America*, 294 N. W. 525 (236 Wis. 110).

"It is a general and salutary custom of life insurance companies, in the interests of their policy holders as well as themselves, to obtain through various channels, information in respect to applicants for life insurance additional to that which the applicants themselves afford, and it would be unreasonable to hold that such an independent investigation of itself deprives an insurer of the protection of this

rule. To have this effect, the investigation, as we have seen, must disclose facts sufficient to expose the falsity of the representations of the applicant or to put the insurer upon further inquiry." *Provident Life & Accident Ins. Co. v. Hawley,* 123 Fed. 2d 479.

"Waiver" is an intentional relinquishment or abandonment of a known and existing right, benefit, or advantage, and there can be no waiver unless the party against whom it is invoked was in possession of material facts and acted with the intent to waive, in which respect it is different from estoppel.

The doctrine is well stated in 29 Am. & Eng. Ency. of Law at p. 1093: "There can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it." See, also, *Provident Life & Accident Ins. Co. v. Hawley, supra.*

In the case at bar, the deceased was not in good health, as Dr. Moon had told him the seriousness of his rectal tumor and had advised an immediate surgical operation. He had been under care and observation in a hospital, X-rays had been taken, and a biopsy made of the diseased tumor, all within two or three days of his applying for and securing this $10,000 worth of insurance, and the several representations which insured made over his own signature negatived each and all of the above facts. To permit a recovery under all the evidence and circumstances shown by this record would be to sanction fraud. See *Penn Mutual Life Ins. Co. v. Lindquist,* 130 Neb. 813, 266 N. W. 600.

We have examined each and all of the other assignments of error, and have discussed at so much length the ones which challenged our attention that we can only say that we find no merit in any of the others.

The losses paid by an insurance company fall ultimately upon the policyholders. It is in the interest of all insured

persons to have their insurers safeguarded in their right to select risks upon adequate and truthful information.

In the case at bar, we believe that the evidence, although conflicting on some minor points, was so conclusive that it was insufficient to sustain a verdict and judgment. That being true, the trial court properly took the case from the jury and entered a judgment for the defendant, for there was no issue to be submitted to the jury.

AFFIRMED.

IN RE ESTATE OF J. C. THOMASON.
CHARLES THOMASON, PROPONENT, APPELLANT, V. MARY ELIZABETH DANIEL, CONTESTANT, APPELLEE.

13 N. W. 2d 141

FILED FEBRUARY 25, 1944. No. 31592.

1. Wills. Whether or not a testator was of sufficient mental capacity to make a will is determined by the state of his mind at the time the will was executed.
2. ———. Where a testator, at the time he executed his will, knows the extent and character of his property, the natural objects of his bounty and the disposition he was making of his property, he is competent to make a will.
3. ———. In the contest of a will on the ground of incompetency of the testator at the time the will was executed it does not necessarily follow as a matter of law from proof of temporary mental infirmities before the will was made that the jury should be permitted to pass on the state of the testator's mind on the testamentary date in the absence of proof that there was on such date an existing mental disturbance.
4. ———. Where in such a will contest the proponent has made a *prima facie* case that the testator was mentally competent to make a will, contestant must produce sufficient evidence to support a contrary finding by a jury, otherwise there is no disputed question of fact to submit to a jury.
5. ———. In the contest of a will on the ground of mental incompetency of the testator the trial court should withdraw the issue from the jury and direct a verdict for the proponent where the evidence is insufficient to support a finding of testamentary incapacity.

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

William S. Padley, R. E. Bannister and *Herbert W. Baird,* for appellant.

W. A. Stewart, Jr., contra.

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

CARTER, J.

This is an appeal by Charles Thomason, proponent and executor of the will of J. C. Thomason, deceased, from a verdict and judgment finding that the testator was incompetent to make a will.

It appears that J. C. Thomason, commonly referred to in the evidence as Carl Thomason, was past the age of 78 years when he executed his will on March 6, 1941. He died on April 11, 1942. On June 5, 1942, the county court of Dawson county admitted the will to probate and an appeal was taken to the district court by Mary Elizabeth Daniel, the granddaughter of the testator. From a verdict and judgment finding the testator to have been incompetent when he executed his will the proponent appeals.

The record shows that Carl Thomason left surviving him two brothers, Charles and Jimmie; two half brothers, Robert and Jake; a half sister, Mary Ann Anderson; his granddaughter, Mary Elizabeth Daniel; and a great-granddaughter, Joe Eller Daniel. By his will he gave $200 to his brother Jimmie; to his two half brothers, Robert and Jake, $200 each; to his half sister, Mary Ann Anderson, $200; to his granddaughter, Mary Elizabeth Daniel, $1; to his great-granddaughter, Joe Eller Daniel, $1; and to his brother Charles and his wife Augusta, the residue of the estate in equal shares.

The evidence shows that Carl Thomason was born in Camel county, Kentucky, and lived in or near Glasgow, Barren county, Kentucky, most of his life. He engaged in farming, dealt some in real estate and engaged in other

ventures which enabled him to accumulate considerable property, the exact amount of which the record does not disclose. He was married three times. He had a daughter by his first wife, who is known in this record as Bess Atkinson. Mrs. Atkinson was the mother of Mary Elizabeth Daniel. He had a son by his second wife who passed away in a Veterans' Hospital at the close of the first World War. Carl Thomason continued to live in Kentucky until his third wife passed away in 1938. At that time his daughter, Bess Atkinson, was managing a store in Dalhart, Texas. Arrangements were made for Carl to go to Dalhart, Texas, to live with his daughter. For approximately 19 months they lived together at the Gushwa Hotel in Dalhart. In 1940 Mrs. Atkinson accepted the management of a store at Alliance, Nebraska, and in August of that year Carl Thomason also went to Alliance to live with his daughter. Shortly thereafter Mrs. Atkinson was taken ill, was taken back to Dalhart and in January, 1941, she passed away. Thereafter Carl lived with his granddaughter, Mary Elizabeth Daniel, for a short period and then requested Charles Thomason, his brother, to come and take him to his home in Cozad, Nebraska. This was done and Carl Thomason thereafter lived with Charles Thomason and his wife Augusta until his death.

The evidence produced resolved itself into a question as to the competency of Carl Thomason to make a will on March 6, 1941. The proponent produced the four persons who witnessed the execution of the will and signed as attesting witnesses, each of whom testified that they knew the testator during the 15 months he lived in Cozad and to facts indicating that testator was competent to make a will. Many other persons who knew the testator while he lived in Cozad testified to similar effect. The testimony of several witnesses who knew him for many years when he lived in or near Glasgow, Kentucky, was to similar effect. It cannot be questioned, and the appellee so concedes, that the evidence produced by the proponent is sufficient, if believed by the jury, to sustain the competency of the testator to make

the will. It is urged by the contestant, however, that the evidence on the question of testator's competency is conflicting and, consequently, a question for the jury. The material questions to be decided are, first, is the evidence of the contestant sufficient to sustain the finding of the jury, and second, if so, is the record free from error prejudicial to the rights of the proponent?

The evidence tending to show the incompetency of Carl Thomason was largely that of witnesses who knew him while he lived at the Gushwa Hotel in Dalhart, Texas. He lived at this hotel from October, 1938, to May, 1940. From May, 1940, to August, 1940, he and Mrs. Atkinson resided with Mary Elizabeth Daniel near Dallas, Texas. The evidence of these witnesses is generally to the effect that his mind rambled, that he had difficulty concentrating his thoughts, that he was inclined to talk in circles and make contradictory statements, that he acted rather foolish and childish at times, that he had moody and depressed spells, that he was very eccentric, that on one occasion he attempted to commit suicide with a gun, and many other similar statements tending to establish incompetency. Some of these witnesses testified, however, that testator was incompetent only at times while he lived in Dalhart.

There is much evidence in the record tending to show that Carl Thomason was competent to make a will during the time he lived at Cozad. The evidence shows generally that he continued to be mentally competent up to the very day of his death. One witness, C. T. Young, president of the local bank and an attesting witness to the will, testified that he was well acquainted with the testator through daily contact and from conversations and business transactions which he detailed. He was of the opinion that Carl Thomason was thoroughly competent prior to and at the time of the execution of the will. After a similar recitation of facts W. E. Young, cashier of the local bank and an attesting witness to the will, testified that Carl Thomason understood thoroughly the transactions pertaining to his business and that he knew exactly what he wanted done.

The only evidence in the record coming from a physician is that of Dr. L. H. Fachtman of Cozad. The testator called at his office in April or May, 1941, regarding a minor disability, at which time a rather extended examination and consultation was had. The doctor's evidence is to the effect that Carl Thomason was at that time mentally competent. His testimony was also to the effect that any despondency or mental incapacity evidenced while he was in Dalhart, Texas, had disappeared. This witness stated that despondency and mental shock are not unusual in persons following the death of a wife, husband or other close relative and that they have a tendency to continue until the persons become better reconciled and compensated to new surroundings and new environments. It was the opinion of Dr. Fachtman that Carl Thomason had entirely recovered from the condition testified to having existed in Dalhart, Texas, at the time he examined him in his office.

Many other witnesses were called who had known the testator while he lived at Cozad and their evidence was all to the effect that he was mentally competent. The only possible exception is the evidence of Jimmie Thomason that Carl was not himself, that he was not jolly and was not telling stories as usual. This was not, of course, evidence of testamentary incapacity.

From an examination of all the evidence we conclude that Carl Thomason, at the time he made his will, understood what he was doing, knew the extent of his property, remembered all of his relatives, understood the disposition he was making of his property, and was cognizant of the natural objects of his bounty.

There is evidence in the record as to the reasons he apparently had for giving the bulk of his property to his brother Charles and wife. It appears that he had given his daughter, Mrs. Atkinson, considerable sums of money during her lifetime, one gift being in the sum of $5,000. It appears also that he had given his granddaughter $819 on one occasion, in addition to many small gifts of $5 or less. It appears that Carl Thomason thought he was entitled to a

return of two time certificates after the death of his daughter, which he had given her. Some difficulties arose over this matter which were never adjusted to Carl Thomason's satisfaction. It was the contention of Mary Elizabeth Daniel that her father was handling her mother's estate and that she had no way of complying with her grandfather's wishes. Whatever the merits of the controversy may have been, Carl Thomason evidently lost his affection for his granddaughter, failed to answer her letters and never communicated with her again. Whether Carl Thomason was justified or not, it was evident he intended that Mary Elizabeth Daniel should not receive any of his property upon his death, something that he had a right to do if he was competent to make a will.

It also appears from the evidence that Carl Thomason was well satisfied with the home and surroundings provided by Charles Thomason and wife. He told several witnesses that he was going to leave the bulk of his property to Charlie and that he had made a will to that effect. It is true, also, that he had indicated to his other brother and half brothers that he was taking care of them in his will and to some he stated that he was dividing his property equally between them. We do not think that these partially conflicting statements necessarily indicate incompetency. Such statements are often made for the purpose of maintaining peace and tranquility in the family. While such statements constitute proper evidence, they are by no means conclusive, and when the competency of the testator, as here, is established as of the time the will was made, they must necessarily be disregarded. *Davidson v. Davidson,* 2 Neb. (Unof.) 90, 96 N. W. 409.

We think the evidence conclusively shows that Carl Thomason was competent to make a will. The evidence of all the people who knew him around Cozad prior to and after the will was executed was to that effect. All of his old friends and relatives in Kentucky who had known him most of his life testify that he was the same as ever when he visited them in the summer of 1941, after the will in

question had been executed. The conclusiveness of this evidence is such that we must conclude he had fully recovered from the disability with which he was afflicted during his stay at Dalhart, Texas. Assuming that his mental condition was such as stated by the witnesses who knew him in Dalhart until he left there in May, 1940, such evidence is not sufficient to sustain a finding of incompetency as against the evidence of all those who knew him from January, 1941, until his death, that he was mentally sound and competent to execute a will on March 6, 1941. It must be borne in mind that Carl Thomason had been away from Dalhart, Texas, for ten months before he executed the will in question, excepting only a short period immediately preceding his daughter's death. In view of the evidence in this record by those who knew him from January, 1941, until his death in April, 1942, the only conclusion that can be reached is that Carl Thomason had recovered from any mental disability that troubled him when he lived at Dalhart, Texas. We necessarily conclude that a directed verdict for the proponent should have been granted.

In a similar case we said: "It is clear that, even though there is a small amount of evidence to support the contestant's claim of incapacity, that is not alone sufficient to require the court to submit that issue to the jury, for there is a clear, decided, and overwhelming preponderance of evidence showing that the testator was of sound mind and disposing memory at the time he executed the will. He knew the amount and character of his property; he knew his other relatives, but had decided he wanted his brother Jim to have his farm. He told several people of his desire, and the court is convinced that this was an intelligent disposition of his property." *In re Estate of Frazier*, 131 Neb. 61, 267 N. W. 181.

Also, in *In re Estate of Laflin*, 108 Neb. 298, 187 N. W. 885, we said: "It does not necessarily follow as a matter of law from evidence of temporary mental infirmities before and after the date of the will that the jury should be permitted to pass on the state of testator's mind at that time,

in absence of any proof that there was then a mental disturbance."

In *In re Estate of Bayer*, 119 Neb. 191, 227 N. W. 928, we said: "Where a will is contested upon the ground that, at the time of its execution, the testator was of unsound mind, the proponents having established a *prima facie* case that the testator was of sound mind, contestants must introduce sufficient evidence to support a contrary finding by the jury, and, unless the evidence is conflicting there is no disputed question of fact for the court to submit to the jury."

We are of the opinion that the evidence shows that Carl Thomason, at the time he executed his will, understood and appreciated the nature and extent of his property, his relation to the persons who were the natural objects of his bounty and that he fully understood the import of his act in executing his will. This being true, he was competent to make a valid will. *In re Estate of Frazier, supra.* A testator who is competent to make a valid will may dispose of his property as he pleases. The law does not require that he recognize any of his relatives, lineal or otherwise. Whether or not Carl Thomason was justified in doing what he did in his will is of no concern of the courts if he had the mental capacity to make a valid will. The evidence being ample to sustain his mental capacity to so do, and there being no evidence of his mental incapacity at the time he executed his will sufficient to sustain a verdict finding that he lacked testamentary capacity, the trial court should have withdrawn the question from the jury and directed a verdict for the proponent of the will.

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

REVERSED.

RACHAEL I. SNYDER, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

13 N. W. 2d 160

FILED FEBRUARY 25, 1944. No. 31667.

1. **Eminent Domain.** A public power and irrigation district organized under chapter 86, Laws 1933, commonly referred to as Senate File No. 310, has the power of eminent domain in the acquisition of property and rights of way necessary to carry into effect the purposes for which it is organized.
2. ———. The purchase of property by a public power district, necessary for a right of way to carry into effect the purposes for which the district is organized, instead of acquisition by condemnation under its power of eminent domain carries with it all of the incidents of taking by eminent domain or condemnation in so far as the question of damages by reason of construction is concerned.
3. ———. In taking of property under the power of eminent domain the condemnor is required under section 21, art. I of the Constitution of the state to compensate for the property taken, and also for consequential damage to other property in excess of the damage sustained by the public at large.
4. **Waters.** For the purposes of this case and without attempting to give an all inclusive definition, "surface water" includes such as is carried off by surface drainage, that is, drainage independently of a watercourse.
5. ———. Water which has a definite source and which takes a definite channel is a "watercourse."
6. ———. A public power and irrigation district organized under chapter 86, Laws 1933, commonly referred to as Senate File No. 310, by its right of way has the same right as a railroad company has by its right of way and the same right as a farm owner has to his farm, or any other land proprietor, as to surface water.
7. ———. The following, which is the common-law rule with exceptions, is a statement of the rule with regard to defense against surface water obtaining in this jurisdiction: Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another.

8. ———. When water has a definite source and takes a definite channel, it is a watercourse, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another landowner by the diversion.
9. ———. The question of whether or not there has been negligence in diversion for defense against surface water is one for the jury under the facts and circumstances in evidence in the case.
10. **Eminent Domain.** If a party sufficiently pleads and proves a right of recovery under section 21, art. I of the Constitution, such party is entitled to a recovery notwithstanding a charge in the petition of negligence, which charge has failed of proof.
11. ———. The measure of damage to land damaged by a public improvement is the difference in value before and after the construction of the structure causing the damage, taking into consideration the uses to which the land was put and for which it was reasonably suitable.
12. **Damages: CROPS.** Damages based upon the value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured.

APPEAL from the district court for Keith county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins, Robert B. Crosby and *Horace E. Crosby,* for appellant.

Hoagland, Carr & Hoagland, contra.

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

YEAGER, J.

This is an action for damages in two causes of action, instituted by Rachael I. Snyder, plaintiff and appellee, against the Platte Valley Public Power and Irrigation District, a corporation, defendant and appellant. From a verdict in favor of plaintiff and against the defendant in the amount of $820 and judgment for $998.07 on the first cause, and from a verdict in the amount of $818.33 and judgment in

the amount of $996.03 in favor of plaintiff and against the said defendant on the second cause, the defendant has appealed. The difference between the respective verdicts and judgments is represented by interest computed by the court rather than the jury.

These two causes of action were before this court previously but because they were so combined with other causes of action on which a recovery was denied to plaintiff they were remanded to the district court with directions to permit amendment of pleading for separate presentment. The former case is reported as *Snyder v. Platte Valley Public Power and Irrigation District*, 140 Neb. 897, 2 N. W. 2d 327. The direction was complied with and an amended petition was filed setting forth the causes of action now before the court.

The first cause of action is for damages to land on account of claimed negligence in the construction and maintenance of a flume for the passage of waters over the right of way of defendant and onto lands of plaintiff. The second cause of action is for damages to crops upon these lands for the years 1936 to 1942, inclusive. Two sons of plaintiff were tenants on the lands and were owners of the crops, but they have assigned their cause of action to plaintiff.

The plaintiff is the owner of section twenty-one (21), township fourteen (14), north, range thirty-six (36), west of the sixth P. M. in Keith county, Nebraska, and other adjoining lands. This land is south of the North Platte river. Elizabeth Bassett is the owner of the east half of the northeast quarter of section twenty-eight (28), township fourteen (14), north, range thirty-six (36), west of the sixth P. M. in Keith county, Nebraska. The Bassett land adjoins the east half of the southeast quarter of section 21 along its south line. The defendant is a public power and irrigation district organized under chapter 86, Laws 1933, sections 70-701 to 70-715, Comp. St. Supp. 1941, commonly referred to as Senate File No. 310. By deeds dated January 28, 1935, and April 26, 1935, defendant obtained a right of way across the Elizabeth Bassett land on which to construct and

erect a canal for the passage and transportation of water generally from west to east. A canal was constructed on the right of way. The right of way and canal in so far as the Bassett land was concerned started from a point on the south line of section 21 about a quarter of a mile west of the southeast corner of said section 21 and extended across the Bassett land in a southeasterly direction. To the south of the right of way was a canyon having a drainage area of about 581 acres. The outlet for drainage from this canyon was to the northward and across the right of way and onto 120 acres of land in the southeast corner of section 21. To provide for drainage across the right of way and canal the defendant constructed thereover an overpass or flume of concrete, the inside height and width of which were, respectively, 5.5 feet and 15.6 feet. The length was 97 feet. The flume extended from south to north.

As a basis of claim for damages plaintiff alleges that prior to the construction of the flume the water came down from the canyon and spread out over her lands north of the right of way, and irrigated large areas beneficially. Further she says that by reason of what was done the water was concentrated in a narrow channel, in which the velocity in passage was so great that channels were cut in her lands, which channels interfered with farming operations, the spread of waters for irrigation purposes was prevented, crops were destroyed by flood waters and other crops failed in part on account of lack of previous manner of irrigation, since the waters flowed across instead of spreading out over the lands.

In its brief the defendant sets forth numerous assignments of error. The first assignment to be discussed will be the one charging that the court erred in overruling defendant's motion for a directed verdict made at the conclusion of plaintiff's case and renewed at the conclusion of the evidence. In this motion defendant contends that there was an absence of proof of the negligence alleged in the petition. A disposition of this question will dispose of a number of other assignments of error.

The defendant as a public power and irrigation district had the right to exercise the power of eminent domain in the acquisition of property and rights of way necessary to carry into effect the purposes for which it was organized. Comp. St. Supp. 1941, sec. 70-707 and sec. 70-609. The portion of right of way here over which the flume was constructed was one which the defendant could have obtained by condemnation under its power of eminent domain. *Snyder v. Platte Valley Public Power and Irrigation District, supra.* It did not so obtain it but obtained it by purchase. This purchase carried with it all of the incidents of taking by eminent domain or condemnation in so far as the question of damages by reason of construction is concerned. *Snyder v. Platte Valley Public Power and Irrigation District, supra.*

One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking but also is liable in this jurisdiction, by virtue of section 21, art. I of the Constitution of the state, for consequential damage to other property in excess of the damage sustained by the public at large. *City of Omaha v. Kramer,* 25 Neb. 489, 41 N. W. 295; *Mason City & Ft. D. R. Co. v. Wolf,* 148 Fed. 961, 78 C. C. A. 589; *Omaha Horse Ry. Co. v. Cable Tramway Co. of Omaha,* 32 Fed. 727, 140 U. S. 692, 11 S. Ct. 1025; *Cable Tramway Co. of Omaha v. Omaha Horse Ry. Co.,* 140 U. S. 674, 11 S. Ct. 1018. In *City of Omaha v. Kramer, supra,* the following significant statement is found: "Section 21, article I. of the constitution of this state provides that, 'The property of no person shall be taken or damaged for public use without just compensation therefor.' The section above taken, except the words 'or damaged,' was in the constitution of 1867. Under that constitution, if any portion of a person's real estate was taken for public use, he could recover all the damages sustained by the taking; but if none of his real estate was taken for public use he could recover nothing, although his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well known rule

that, in the construction of remedial statutes three points are to be considered, viz., the old law, the mischief, and the remedy, and so to construe the act as to suppress the mischief and advance the remedy, is to be applied. 1 Blackstone Com., 87. Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration. In other words, the words, 'or damaged,' in Sec. 21, Art. I. of the constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property."

It therefore follows that although the portion of the right of way on which the flume was constructed is not over and across the lands of plaintiff yet she may have her action against the defendant for damages.

As already pointed out the actions of plaintiff, by the terms of the petition, are grounded in negligence in the control of the water coming from the drainage area. Plaintiff claims this was surface water as that term is used in the law of this state as distinguished from a watercourse. For a determination of the question of whether or not she may recover under this theory it becomes necessary to review some of the previous decisions of this state. It appears expedient for our purposes to begin with *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406, 56 N. W. 946. The opinion in this case is an authoritative statement with regard to issues similar to ones involved in this case and it contains no reference to earlier decisions of this court except one wherein is defined a watercourse and wherein it was declared under the facts that a watercourse did not exist.

A watercourse is defined in this opinion by quotation from *Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370, as follows: "To constitute a water-course the size of the stream is immaterial. It must be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be constant." Further defining a watercourse and in declaration

of liability for diversion therein, by quotation from *Pyle v. Richards, supra,* it is stated: "When water has a definite source, as a spring, and takes a definite channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another land-owner by the diversion."

In the opinion (*Morrissey v. Chicago, B. & Q. R. Co., supra,*) a declaration in an instruction that the common-law rule with regard to control of surface waters obtained in this jurisdiction is approved. This rule is comprehensively restated with its recognized exceptions in *Lincoln & B. H. R. Co. v. Sutherland,* 44 Neb. 526, 62 N. W. 859. Surface water was defined in the third paragraph of the syllabus in *Morrissey v. Chicago, B. & Q. R. Co., supra,* as follows: "The term 'surface water' includes such as is carried off by surface drainage,—that is, drainage independently of a water-course, * * * ."

With regard to rights and liabilities as to surface water the court in the same opinion, at least inferentially, approved the following from an instruction given by the trial court: "A railroad company, by its right of way, has the same right as a farm owner has to his farm, or any other land proprietor within the law of the above instruction, as to surface water." No later decision that we have examined appears to have changed this rule. For the purposes of this opinion the rule is accepted and it appears that it should be and is extended to the defendant in this case.

In the light of these rules and definitions the court in that case, conforming to the common-law rule, held, again in the third paragraph of the syllabus the following: " * * * and for the construction of an embankment proper for railroad purposes, which deflects such surface water from its normal course, a railroad company is not liable in damages to the proprietor of neighboring lands thereby incidentally overflowed and injured."

The opinion in that case suggests no exceptions to the common-law rule except, if it may be considered an exception, where the construction is not in a manner proper for

the operation of its line of railway. The particular language containing the exception is the following: "The railroad company, in the absence of evidence to the contrary, must be presumed to have constructed its embankment in a manner proper for the operation of its line of railway." A ground of action for negligence in construction in application to neighboring lands as distinguished from negligence in construction for use by the railway is in no wise suggested.

The later cases recognize a departure from the strict common-law rule and the rule of *Morrissey v. Chicago, B. & Q. R. Co., supra,* with reference to surface waters. In the opinion in *Anheuser-Busch Brewing Assn. v. Peterson,* 41 Neb. 897, 60 N. W. 373, it is said: "Subject to that rule (common-law rule) every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter to his damage. The injury in such case is but a mere incident to the proper use of the owner's property; but if in the execution of the enterprise in hand he is guilty of negligence, which is the natural and proximate cause of injury to the adjoining proprietor, the law holds him accountable therefor." It will be observed by an examination of this quoted language negligence is recognized as an exception to the common-law rule, however the negligence contemplated is limited to negligence in construction. The effect on neighboring land seems not to be a matter for consideration unless the effect flows from negligence in construction.

In *Lincoln & B. H. R. Co. v. Sutherland, supra,* the exception was further extended. In this case it is pointed out that if by the construction the neighboring land was *unnecessarily* injured damages were recoverable. In the opinion it is stated: "These cases, and all of them, recognize the rule of the common law that surface water is a common enemy and that the proprietor may by embankment or dike

or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection or repulsion of such surface waters defended against, provided that the proprietor in making the defenses on his own land himself exercised ordinary care; but these cases, and all of them, also recognize the rule that a proprietor must so use his own property as not to unnecessarily and negligently injure another." It will be observed that by the rule of this case the exception is extended to include lack of ordinary care and unnecessary and negligent injury to the property of another whereas before the right to recovery of damages was made to depend solely on negligence in construction.

The rule substantially as stated in this case has been followed in all of the later cases except two wherein the effort was to recover damages for negligence on account of diversion or improper control over surface waters. See *Jacobson v. Van Boening*, 48 Neb. 80, 66 N. W. 993; *Town v. Missouri P. Ry. Co.*, 50 Neb. 768, 70 N. W. 402; *Todd v. York County*, 72 Neb. 207, 100 N. W. 299; *Shavlik v. Walla*, 86 Neb. 768, 126 N. W. 376; *Muhleisen v. Krueger*, 120 Neb. 380, 232 N. W. 735; *Jorgenson v. Stephens*, 143 Neb. 528, 10 N. W. 2d 337. The exceptions to the rule are *Gledhill v. State*, 123 Neb. 726, 243 N. W. 909, and *Leaders v. Sarpy County*, 134 Neb. 817, 279 N. W. 809. These cases and the rules therein announced will be discussed later in this opinion.

For plaintiff to recover on the theory of her petition the burden was on her to establish negligence on the part of the defendant in control of surface waters within the meaning of this rule. It may further be said that the record apparently limited the trial court and limits us to a consideration of the question of whether or not there was evidence of a failure of the defendant to exercise and employ ordinary care so as not to unduly injure and damage by the construction of its flume. The evidence is without dispute that there was no negligence in the construction of the flume itself for the defendant's purposes. It was constructed in conform-

ity with recognized and approved engineering principles from the viewpoint of defendant.

Had she abandoned her theory that these were surface waters and adopted the theory of defendant that the flume was constructed in a fixed and well-defined watercourse her burden probably would have been lessened since all that it would have been necessary for her to prove, at least as to her claim that the water was diverted from normal direction of flow, was that there had been a diversion from the natural channel in such manner as to cause injury to her land. In *Pyle v. Richards, supra,* it was said: "When water has a definite source, as a spring, and takes a definite channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another land-owner by the diversion." See, also, *Kane v. Bowden,* 85 Neb. 347, 123 N. W. 94; *Keifer v. Stanley,* 111 Neb. 822, 198 N. W. 144; *Gledhill v. State, supra; Leaders v. Sarpy County, supra.* This last cited case appears to extend the "watercourse" rule to "surface waters." We think that notwithstanding the broad statement of the rule, that is the extension of the rule relating to watercourses to surface waters, that as an authoritative precedent it must be limited to watercourses since the subject matter of the action was a watercourse rather than surface water. She did not so abandon her theory and adopt the theory of the defendant in this respect.

Without setting out any very definite guide for the determination of whether or not there has been negligence or lack of ordinary care in the control of surface water this court has said that the question is for the jury under the facts and circumstances in evidence in the case. In *Lincoln & B. H. R. Co. v. Sutherland, supra,* it is stated: "We think that any person who was acquainted with this draw, and the manner in which the embankment was constructed, and the manner in which it affected the waters run into this draw, was competent to state the facts; and it was for the jury to say, from all the facts and circumstances in evidence in the case, whether the embankment was negligently

constructed." In *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, 116 N. W. 859, it is stated: "The defendant contends that the verdict is not supported by sufficient evidence, in that there is no showing whatever as to its unnecessarily or negligently injuring plaintiff. If it is meant by this that no expert witness was called to pass judgment upon the method used by defendant in maintaining its roadbed at this point, the answer must be that such testimony was not necessary. The evidence sufficiently shows what was done and what the result was; and it was a question for the jury whether the defendant was chargeable with negligence."

In the case at bar the evidence of plaintiff showed that by the construction of the flume all of the water coming from the 581 acre drainage area except a small portion which flowed into defendant's canal was concentrated and caused to flow across the flume thus cutting channels in plaintiff's lands which had not theretofore existed, whereas prior thereto in its escape from the area it spread over wider areas depending upon the amount and rapidity of rainfall, the widest area being around 1,300 feet; that in its passage large quantities of erosive material were carried onto plaintiff's lands; that prior to the construction of the flume the water instead of passing onto and across plaintiff's land in channels it fanned out and was diffused over plaintiff's lands thus irrigating a large portion; that on more distant but adjoining lands to the north where water from the drainage area had not flowed before the construction of the flume the water flowed with such volume as to destroy pump irrigation canals or laterals thus hindering irrigation thereon; also the evidence of plaintiff shows that the direction of flow in what defendant contends was a fixed outlet or watercourse from the drainage area was changed thus causing water to flow on plaintiff's land which would have been dispersed in another direction. In addition to this the jury before the close of the trial had the benefit of a view of the premises.

In the light of the rule that the question of negligence is for the jury we are unable to say on the facts and circum-

stances disclosed in the evidence that the court erred in submitting the question of negligence to the jury for determination.

If we are to accept as a controlling precedent *Gledhill v. State, supra,* the plaintiff is not left to pleading and proof of negligence as a basis for recovery in this action. Under the authority of this case if her pleadings and proof are sufficient and she is not barred by her own limitation of her theory of action to negligence as disclosed by her pleadings she is entitled to recover under the terms of section 21, art. I of the Constitution, heretofore quoted, without regard to negligence.

The plaintiff pleaded substantially that the flume was constructed on a right of way which was acquired for a public use and that it was being used in conformity with the purpose for which it was acquired. She pleaded that her property was damaged thereby. Her allegations in this respect were supported by substantial evidence. On this pleading and this proof she would have been entitled to have the determination of her causes of action submitted to a jury if she had not pleaded negligence. Without regard to the charge of negligence she charged that she had been actionably wronged to her damage. The wrong and damage was in violation of the Constitution. May it be reasonably said that she should suffer because she had described the wrong as negligence? We think not. The holding of the opinion in *Gledhill v. State, supra,* summarized in the sixth paragraph of the syllabus as follows, is approved: "In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action *ex delicto* or *ex contractu.* If the fact is established that property has been damaged for public use, the owner is entitled to compensation."

The case of *Spurrier v. Mitchell Irrigation District,* 119 Neb. 401, 229 N. W. 273, is in conflict with *Gledhill v. State, supra,* on the proposition that there may be a recovery of damage under the Constitution occasioned by the construction of public works without regard to negligence.

An interesting statement with cited authorities in opposition to the holding in *Spurrier v. Mitchell Irrigation District, supra,* is found in the dissenting opinion in that case. In the view now taken we feel obliged, in the respect herein under consideration, to overrule the holding in that case.

We come now to the question of whether or not plaintiff has adduced proof in support of the proper measure of damages in such cases as this one. First, as to land, where land is not taken, the measure is the difference in value before and after the construction of the structure causing the damage, taking into consideration the uses to which the land was put and for which it was reasonably suitable. See *Applegate v. Platte Valley Public Power and Irrigation District,* 136 Neb. 280, 285 N. W. 585; *Asche v. Loup River Public Power District,* 138 Neb. 890, 296 N. W. 439. We think plaintiff's evidence in this respect was competent and sufficient for submission to a jury.

As to damage to crops we think the evidence meets the requirements as to measure of damage and sufficiency and clarity of proof to take it out of the realm of speculation for the purpose of submission to a jury within the meaning of the rule announced in *Gledhill v. State, supra,* and approved in *Snyder v. Platte Valley Public Power and Irrigation District, supra.* The rule therein announced and approved is the following: "Damages based upon the value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured." 17 C. J. 785; 25 C. J. S. 514, sec. 41.

There is no direct attack upon the amount or the size of the verdict as to either cause of action. Any attack made upon it in this respect, if any, is included within the claim that no proper criterion for the measurement of damage was submitted and no sufficient proof in support of a proper

criterion was supplied by the plaintiff. However that be, in the light of our holding that proper rules for measure of damage were submitted and that plaintiff adduced sufficient evidence for submission, we do not hesitate to say that the evidence so adduced amply supports the amounts of damage as found by the jury.

In appellant's brief are seven assignments of error predicated on instructions to the jury given by the court. In the light of the conclusions arrived at with regard to the propositions of law discussed and determined herein we observe no prejudicial error in any of these instructions. The same may as well be said with regard to the refusal of the court to give instructions tendered by the defendant.

No error prejudicial to the defendant having been found, the judgment of the district court is affirmed.

AFFIRMED.

HENRY A. SIEKERT ET AL., APPELLEES, V. THEODORE SOESTER ET AL., APPELLEES: R. R. WELLINGTON, REFEREE: HENRY WOHLERS, APPELLANT.

13 N. W. 2d 139

FILED FEBRUARY 25, 1944. No. 31675.

1. **Appeal and Error:** JUDICIAL SALES. A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and appeal from an order setting the sale aside.
2. **Partition.** A referee in partition is an officer of the court, subject to its lawful orders and directions, and every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court.
3. ———. In partition proceedings, it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale.
4. ———. Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial

court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered.

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

Porter & Porter, for appellant.

Edwin D. Crites, contra.

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

CHAPPELL, J.

This is a partition suit. The question presented for decision is whether the trial court erred in refusing to confirm the referee's sale. Appellant, Henry Wohlers, was the highest bidder in the sum of $3,525. He deposited 15 per cent thereof with the referee, as required by the order of sale. The referee made report of the sale in writing to the court and moved for confirmation. Thereafter Henry A. Siekert, a plaintiff and one of the heirs, filed in the proceedings a higher bid of $3,800, attached to which was a cashier's check for 15 per cent thereof payable to the referee. At the same time he filed a motion for order of acceptance of such increased bid and confirmation of sale to him. To this offer and motion appellant filed objections and motion for confirmation of sale to himself. Another plaintiff and heir, Scott D. Hebbert, then filed objections to confirmation alleging that the land did not sell for its reasonable value under the circumstances and conditions of the sale, and that a subsequent sale would realize a substantially greater amount.

A hearing was had by the trial court upon these issues wherein evidence was adduced by the parties. At the conclusion thereof the trial court, upon consideration of the motion of plaintiff, Henry A. Siekert, and the objections of Henry Wohlers, found that the motion should be overruled, but sustained Scott D. Hebbert's objections to confirmation, set the sale aside, and ordered that a new sale be held by the referee with dispatch; from which Henry Wohlers appeals.

The evidence discloses that the land involved, 320 acres, 106 acres of which are farm lands, and the rest grazing land, is the old family home, a quarter-section of which was patented by Henry A. Siekert's father. The other quarter-section was patented by the Hebbert family. Henry A. Siekert, now a tenant, has actually lived upon the land for 51 years. He testified that its value was equal to the amount of his increased bid, and that if the court ordered a new sale he would bid at least that amount, and would continue to keep the bid good. There is no evidence that the land sold for its reasonable value under the circumstances and conditions of the sale, or that a subsequent sale would not realize a greater amount. As a matter of fact, the evidence shows that a subsequent sale would realize a greater amount. We find no circumstances in the record or evidence justifying the application of any theory of waiver, ratification, or estoppel, and the record is devoid of any evidence that the increased offer was made through malice or prejudice against appellant.

We have held that a successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and appeal from an order setting the sale aside. *State ex rel Sorensen v. Denton State Bank,* 126 Neb. 486, 253 N. W. 670; *Dawson County v. Whaley,* 134 Neb. 509, 279 N. W. 164; *Kansas City Life Ins. Co. v. Neverve,* 135 Neb. 630, 283 N. W. 378.

A search of the authorities discloses that, "There are three doctrines as to the effect of the receipt of a higher bid after property has been struck off at a judicial sale, upon the confirmation of the sale. According to one theory, the mere fact that a higher bid has been received is sufficient reason to refuse confirmation and to open the biddings. According to another theory, the mere fact that a higher bid has been received is not a sufficient reason for refusal to confirm the sale. * * * The courts which adhere to the former regard the receipt of a higher bid as conclusive evidence that the property was sold for an inadequate price, * * * ; while the courts that adhere to the latter the-

ory take the view that judicial sales are rendered more stable and better prices are obtained for property generally when sold at judicial sale by making the highest bid which is accepted final." 11 A. L. R. 399, note. Each of these two theories has its weak points. Therefore, we find in the cases supporting them a certain amount of judicial discretion necessarily vested in the court to shield and promote justice under all circumstances. See 11 A. L. R. pp. 400 to 417, inclusive.

According to the third doctrine (See 11 A. L. R. note, pp. 417 to 419, inclusive), where there has been an advanced bid before confirmation, the entire matter of confirmation of judicial sales is left with the trial court, to be confirmed or not according to its judicial discretion. This doctrine is the one heretofore approved and adopted by this court. True, in several cases it has been held by this court that a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the court. But in these cases there was no evidence that others were willing to pay more. See *State ex rel. Sorensen v. Denton State Bank, supra.*

Under the law, a referee in partition is an officer of the court (47 C. J. 493; Comp. St. 1929, sec. 20-2180 *et seq.*), subject to its lawful orders and directions, and every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court. By analogy, from our own cases, in partition proceedings it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale. Therefore, substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered. See *State ex rel. Sorensen*

v. Denton State Bank, supra; *State ex rel. Spillman v. American State Bank,* 122 Neb. 42, 239 N. W. 214.

Finally, with reference to the refusal of the trial court to accept the increased bid of Henry A. Siekert and confirm the sale as to him, it is true that, under the facts and circumstances appearing in the case at bar, when all the parties were present in open court, the trial court could with judicial discretion have accepted such increased bid and then and there confirmed the sale. See *State ex rel. Spillman v. American State Bank, supra.* However, it was not error or an abuse of discretion to refuse to do so. See *State Bank v. Green,* 11 Neb. 303, 9 N. W. 36; *State ex rel. Sorensen v. Denton State Bank, supra.* Therefore, the relative contentions of appellees are without merit.

We can only conclude that the orders of the trial court were not erroneous. Therefore, the judgment is affirmed.

AFFIRMED.

NELL G. LANGDON ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

13 N. W. 2d 168

FILED FEBRUARY 25, 1944. No. 31673.

1. **Appeal and Error.** When the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong.
2. **Trial.** Each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend either to magnify or diminish it in the jury's estimation.
3. **Evidence.** Witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property, and all its surroundings may be shown and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the

owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, what is it worth in the market?

4. **Eminent Domain.** The proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for the court to reserve the question of interest for its determination and direct the jury not to include it in their verdict.
5. ———. Under section 21, art. I of the Constitution of Nebraska, the owner of property is entitled to interest on the amount of the compensation due him thereunder from the time of the taking, unless the condemnor brings himself within the provisions of a statute that would defeat his right thereto.
6. ———. Under section 74-307, Comp. St. 1929, where, on appeal from an award of damages for property taken, the verdict is less than the amount of the award, neither the condemnor nor the property owner will be liable for all of the costs of the appeal; but ordinarily such costs should be divided between the parties.
7. **Trial.** The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired.
8. **Evidence.** The weight to be given to expert testimony ordinarily is a question for the jury. Jurors are not bound by the testimony of experts; their evidence is to be weighed as that of all other witnesses.
9. **Trial.** Whether the jury shall be permitted to view the *locus in quo* is a question addressed to the sound discretion of the court.
10. **Eminent Domain.** In order that benefits may be set off against the damages in making an improvement, they must be special or local or such as result directly and peculiarly to the particular tract of which a part is taken.
11. **Evidence.** Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury.

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

August Wagner and *William P. Kelley,* for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before SIMMONS, C. J.; PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

WENKE, J.

This is an action by the Loup River Public Power District, appellant, to acquire by condemnation, through the power of eminent domain, an easement for an electric power transmission line across 50 acres of land in Douglas county, Nebraska, the property of Nell G. Langdon and J. Frederick Langdon, appellees. The appellees will be herein designated as plaintiffs and appellant as defendant.

In July, 1941, the defendant instituted this condemnation proceeding which was heard by five appraisers and resulted in an award for the plaintiffs in the amount of $3,500. From this award the defendant appealed to the district court and there a jury entered a verdict in favor of the plaintiffs in the amount of $3,875. From the judgment entered thereon appeal was taken to this court and the case reversed. It is reported in 142 Neb. 859, 8 N. W. 2d 201. Upon a retrial thereof in the district court the jury rendered a verdict of $2,500 in favor of the plaintiffs to which the court added interest from May 1, 1939, at 6 per cent and entered judgment in favor of plaintiffs in the amount of $3,093.73 with interest at 6 per cent from date thereof. From this judgment defendant has appealed.

The only issue is the damage the plaintiffs have sustained to their lands by reason of the construction of the transmission line.

As stated in *Northeastern Nebraska R. Co. v. Frazier,* 25 Neb. 42, 40 N. W. 604: "The question of the amount of damages sustained by a land owner for a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county, and the supreme court ordinarily will not vacate or modify the verdict, if it is based upon the testimony in the case." This

case has been submitted three times to determine the amount of damages; once to a board of five appraisers and twice to a jury in the district court, and the amount of damages to which the plaintiffs are entitled was determined in each instance. Under these circumstances, to justify this court in reversing the judgment entered thereon as being against the weight of evidence, it must be clearly wrong or there must have been such error in the giving or refusing of instructions or in the trial of the case as was palpably prejudicial to the rights of the parties complaining. See *Dunbar v. Briggs*, 18 Neb. 94, 24 N. W. 449.

The defendant contends that the damages allowed by the jury are excessive and not sustained by the evidence and cites many cases in support thereof. As damages the plaintiffs are entitled to recover full compensation for the land actually taken and for such damages to the remainder thereof as are equivalent to the diminution in the fair market value thereof. It has long been the rule in this state that, "Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted." *Bentley v. Hoagland*, 94 Neb. 442, 143 N. W. 465; *Stewart v. City of Lincoln*, 114 Neb. 362, 207 N. W. 511. However, "when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong." *Grimm v. Elkhorn Valley Drainage District*, 98 Neb. 260, 152 N. W. 374. It is the province of the jury to harmonize the testimony in so far as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. *Wahlgren v. Loup River Public Power District*, 139 Neb. 489, 297 N. W. 833. The witnesses of both the plaintiffs and the defendant testified as to the difference in the fair market value of the premises before and after the construction of the high-line. While the individual opinions of the witnesses widely differed on the question of the loss in value of the land, however, the witnesses were qualified to testify and their testimony was relevant to the question at issue. Therefore, the verdict being sustained by

the evidence, it is not so clearly wrong as would entitle the defendant to have it vacated and set aside.

The defendant further contends that the conduct of the trial judge in the presence of the jury in ruling on evidence, in making comments from the bench and his attitude in general, constituted prejudicial error. In jury trials the credibility of a witness and the weight of his testimony are matters for the jury and not for the court. As stated in 64 C. J. 90: "In accordance with the general rule that the judge presiding at a trial must conduct it in a fair and impartial manner, he should refrain from making any unnecessary comments or remarks during the course of a trial which may tend to a result prejudicial to a litigant or are calculated to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial; * * *." And as stated in Abbott, Civil Jury Trials (5th ed.) 1082: "Each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend either to magnify or diminish it in the jury's estimation."

This court has stated: " * * * it is the duty of the court, as well as of the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion or ill will." *Bourne v. State,* 116 Neb. 141, 216 N. W. 173. "In the trial of a cause before a jury, improper comments of the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony." *McCulley v. Anderson,* 119 Neb. 105, 227 N. W. 321.

The record discloses that the defendant was offering testimony of its witness, Chris Larsen, as to the use of land for farming purposes after the construction of the same high-line for the purpose of rebutting testimony on that subject offered by the plaintiffs. The following transpired:

"Q. Did you haul bundles under a line twenty-five feet from the ground? A. Yes, sir. Q. Did you have any trouble when you did so? The court: We don't care what this witness did. That is what I am trying to wake Mr. Crofoot up to." No objection had been made and the court should have refrained from taking an active part in the trial. Particularly is this true when the evidence, as here, was admissible. The defendant further offered a photograph of the premises involved and the surrounding community. The court, in overruling objections thereto and in receiving it in evidence, made the following statement: "We will receive it with the understanding that photographs are deceiving as to distance and angles. A photograph may exaggerate a slope or decrease it. They are not dependable on the question of the slope, or as to distance. They are deceptive." In the examination of the witness Rohrbaugh by the defendant, the following transpired: "Q. All right, we will say 115,000 volts. If a 115,000 volt line goes by the property. The court: This witness hasn't qualified as a real estate sales expert. Mr. Wagner: Well, I will qualify him. The court: I don't think you can." In the examination of its witness O. E. Edison, he testified that lightning was an abnormal condition and subsequent to the following question: "Then if a man drove under this line, more than four inches from the line, on a load of bundles, is there any danger to him when there is no lightning on the line?" Upon objection being made and sustained, the court stated: "You threw in there that there was no lightning condition. Mr. Wagner: Yes. The court: And I say this court will assume that that is a normal condition in this community. That is assumed." This went to the credibility and weight of the testimony of this witness who had testified lightning was an abnormal condition. Numerous other remarks of the court in ruling on objections and in reference to witnesses and their testimony is contained in the record together with an undue restriction of the defendant in his examination of the plaintiffs' witnesses and his own. It leaves a record that fails to show that defendant had a fair

and impartial trial. The statement as set forth in *In re Estate of Strelow,* 117 Neb. 168, 220 N. W. 251, is adaptable to this case: " * * * it is sufficient to say that under our practice the jury are the sole judges of the credibility of the witnesses, and the weight to be given their testimony. Hence, it is our conclusion that such remark made by the trial judge was without the province of the court, and was erroneous and prejudicial."

The defendant contends that the court erred in giving that part of instruction No. 4 as follows: " * * * and arrive at such an amount as in your judgment will fairly compensate the plaintiffs for the decrease in the market value of the land for its highest and best purposes, which, according to the testimony, appears to be the division into small tracts for suburban homes, and return your verdict in such amount." In this we think the defendant correct. " 'The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.' *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593." *Schulz v. Central Nebraska Public Power and Irrigation District,* 138 Neb. 529, 293 N. W. 409. The court properly admitted evidence of the nature of the community and its development into acreage or small tracts for country or suburban homes and the adaptability of the land in question for that purpose. The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted? The correct rule is as stated in *Alloway v.*

Nashville, 88 Tenn. 510, 13 S. W. 123: "' * * * witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?' Lewis, Eminent Domain, sec. 479."

Therefore, in its instruction to the jury, the court should not have told the jury to determine the value of the damage to the property because of its adaptability for any single purpose, but should have instructed it to determine the fair market value of the lands actually taken and the damages to the remainder thereof based on the decrease of its fair market value by reason of the taking of the easement and construction of the transmission line immediately before and after the taking and the construction thereof.

Defendant further complains of the court permitting the plaintiffs' witnesses to testify as to the sale of what is referred to as the Wilmarth acreage of about 1.4 to 1.5 acres and also the Mullen tract of .6 acre. Foundation was laid as to time, location, and nature of the premises sold. *Rushart v. Department of Roads and Irrigation,* 142 Neb. 301, 5 N. W. 2d 884, states the rule: " * * * where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof of the question of value." However, *Langdon v. Loup River Public Power District, supra,* after quoting the above, states: "Without departing from the strict letter of this rule we think it requires qualifications. The rule as stated however does not and should not exclude testimony in chief as to the sale of other lands where proper and sufficient foundation has been laid to make such testimony of value." Under our ruling that the plaintiffs could show the adaptability of their lands

for acreage tracts for country or suburban homes, we find this testimony properly admitted under the above holding of this court.

The defendant further contends that the court erred in adding interest to the amount of the award. At the close of the evidence the defendant requested the court to instruct the jury not to add interest to the amount of their verdict, but this request was denied. In view of our holding herein it is not necessary to discuss the question of whether or not the verdict, under the instructions, included interest. However, there are two questions relating to interest that are necessary to be determined under the facts herein.

First, what is the proper procedure in condemnation cases with regard to the question of interest? In *Langdon v. Loup River Public Power District, supra,* we held: "It is, however, the considered opinion of this court that, on a new trial of this case and in future condemnation litigation, evidence of the award of appraisers shall not be admissible as evidence to go to a jury. The proper and approved practice shall be, for the purpose of preserving the right of the landowner to interest, for the court, after verdict, to compute and add the interest to the judgment in those cases where the verdict of the jury exceeds the award of the appraisers." In view of this holding, the proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for the court to reserve the question of interest for its determination and direct the jury not to include it in their verdict. See *St. Louis, El Reno & Western Ry. Co. v. Oliver,* 17 Okla. 589, 87 Pac. 423.

Second, whether the court erred in adding interest to the amount of the verdict, it being less than the appraisers' award. The facts disclose that no deposit was ever made either in the county or district court of the amount of the appraisers' award, although the record discloses the easement has been taken and the transmission line constructed since the date from which interest was allowed. Under the

provisions of section 74-307, Comp. St. 1929, under which this proceeding is being had, it provides: "If such corporation shall, at any time before it enters upon said real estate, for the purpose of constructing its road, pay to the county judge for the use of the owner the sum so assessed and returned to him as aforesaid, it shall thereby be authorized to construct and maintain its said road over and across such premises: * * * ." Under this statute we have announced the rule with reference to interest in case of appeal, beginning with *Sioux City R. Co. v. Brown*, 13 Neb. 317, 14 N. W. 407, to *Langdon v. Loup River Public Power District, supra*, as follows: "If on appeal from an award of damage for land condemned and occupied for railroad purposes the damage be found to exceed that returned by the commissioners, the owner may have interest thereon from the time he was entitled to compensation." However, in none of these cases is the question discussed with reference to a situation, such as here, where the condemnor has taken possession but no deposit made as by the statute required. Our Constitution, section 21, art. I, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." To like effect is section 74-301, Comp. St. 1929. That generally the taking includes interest is well settled. As stated in Orgel, on Valuation under Eminent Domain, 18, sec. 5, note 20: "This minimum includes the allowance of interest on the amount of the award from the date of the taking to the date of the award of compensation"—and the numerous authorities therein cited. As stated in *Central Nebraska Public Power and Irrigation District v. Fairchild*, 126 Fed. 2d 302: "When it makes its payment into court the amount of such payment constitutes a fund which must be deemed a substitute to the owners for the land of which they have been deprived and for their damage. See *State ex rel. Katelman v. Fink*, 84 Neb. 185, 120 N. W. 938; *Omaha Bridge & Terminal Ry. Co. v. Reed*, 69 Neb. 514, 96 N. W. 276." Under our Constitution and these statutes, any one taking the property of another under the power of eminent domain is generally re-

quired to pay interest upon the amount of compensation from the taking. When the condemnor, as here, fails to bring himself within the statute, under which we have held that on appeal from the award of the appraisers he is not liable for interest unless the amount of the award is increased, by depositing with the county judge the amount of the award for the use of the owner before going into possession and occupying the premises, he is not entitled to the benefit of the rule. He is subject to the general rule that the owner is entitled to interest on the amount of the compensation from the taking no matter whether the verdict of the jury is larger or smaller than the award of the appraisers and no requirement rests upon the owner to make demand for such deposit or to take any action requiring such deposit to be made to entitle him to interest thereon.

The defendant further contends that the court failed to properly tax the costs. The court ordered that each party pay his own costs. The mandate of this court on the previous consideration of this litigation ordered the costs of that appeal taxed to the plaintiffs. The statute, section 74-307, Comp. St. 1929, provides: "Such railroad company shall in all cases pay the costs of the first assessment: * * * ." And further that: " * * * if on appeal the appellant shall not obtain a more favorable judgment and award than was given by said freeholders, then such appellant shall be adjudged to pay all the costs made on such appeal; * * * ." Under this later provision of the statute in *Burlington & M. R. R. Co. v. Spere*, 24 Neb. 125, 38 N. W. 35, we held: "Under section 97, chapter 16 of the Compiled Statutes, as amended in 1883, where on appeal from an award of damages for property taken for right of way of a railway, and the verdict is less than the amount of the award, neither the railway company nor the land owner will be liable for all the costs of the appeal; but ordinarily such costs should be divided between the parties." The order of the lower court was proper in so far as the costs in its court were concerned. But the costs of appeal in this

court in the former hearing were taxed to the plaintiffs as evidenced by the mandate issued. The directions of this mandate must be followed. Likewise, the costs of this appeal are taxed to the plaintiffs.

The defendant further contends that there was error by the court in the refusing of the giving of certain instructions. The purpose for which instructions are given is stated in *Zabinski v. Novak*, 211 Wis. 215, 248 N. W. 99: "The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired."

The court refused defendant's requested instruction No. 2 which is a definition of fair market value. We find no other definition thereof contained in the instructions given and we think it should have been included in the instructions. While we said in the previous opinion in this case that the failure to give this instruction was not error, we think, however, it should be included in the instructions in all condemnation cases.

The court refused to give defendant's requested instruction No. 3. With this we find no fault. This is merely a precautionary instruction and while it could have been properly given, it was not error to refuse it.

Defendant objects to the giving of instruction No. 3 which is the same as instruction No. 2 in the previous trial and there we held the giving of the instruction was not error.

Defendant objects to instruction No. 6 which refers to the testimony of certain witnesses who testified as experts, which includes this statement: " * * * and the conclusions of such persons are considered of great value * * * ." As stated in *Horst v. Lewis*, 71 Neb. 370, 103 N. W. 460: "Expert evidence is permitted where the facts under investigation are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the

subject of inquiry, which jurors generally do not possess." However, " * * * The weight to be given to such expert testimony is ordinarily a question for the jury. * * * Jurors are not bound by the testimony of experts; their evidence is to be weighed as that of all other witnesses." *McNaught v. New York Life Ins. Co.*, 143 Neb. 220, 12 N. W. 2d 108. While the balance of the instruction properly qualified the consideration thereof, we do not think the instruction should state that such testimony is of great value.

The defendant complains of the fact that at its request, to which no objection was made by the plaintiffs, the court refused to let the jury view the premises and claims this is prejudicial error. We have often announced the rule as stated in *Reams v. Clopine*, 121 Neb. 86, 236 N. W. 158: "Whether the jury shall be permitted to view the *locus in quo* is a question addressed to the sound discretion of the court." And as stated in *Robison v. Troy Laundry*, 105 Neb. 267, 180 N. W. 43: "The granting or refusal of an order directing a view by the jury of the locality of the accident rests within the sound discretion of the trial court, and the fact that one party consents to the request of the other that such view be directed will not control the discretion of the court in that regard." Although it would seem desirable for the jury to view the premises under the facts of this case, however, the record fully discloses the nature of the premises, the surrounding community and all facts necessary for their determination of the issues and we find no abuse of discretion on the part of the trial court.

The defendant complains because the court failed to instruct as to special benefits. The rule as to special benefits is stated in *Prudential Ins. Co. v. Central Nebraska Public Power and Irrigation District*, 139 Neb. 114, 296 N. W. 752: " 'In order that benefits may be set off against the * * * damage to that injured in making an improvement * * * they must be special or local or such as result directly and peculiarly to the particular tract of which a part is taken.' 20 C. J. 822. See, also, 2 Farnam, Water and Water Rights, 1068; 4 Sutherland, Damages (4th ed.)

4106; 3 Sedgwick, Damages (9th ed.) 2299; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721." The record discloses no evidence of any special benefits and therefore no instruction thereon was required nor should it have been given.

The question of the qualification of witnesses to testify as to the value of the premises in question is raised by the rulings on objections to the testimony of certain witnesses. In *Republican V. R. Co. v. Arnold*, 13 Neb. 485, 14 N. W. 478, we stated: "Where persons are shown to be familiar with the value of a particular piece of land, across which a railroad has been built, they may be permitted to testify as to the value of such tract immediately before the location of the road, and to the value thereof immediately afterwards." And in *Wahlgren v. Loup River Public Power District, supra*, we stated: " * * * where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. *Republican V. R. Co. v. Arnold*, 13 Neb. 485, 14 N. W. 478; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207, 40 N. W. 956; *Burlington & M. R. R. Co. v. White*, 28 Neb. 166, 44 N. W. 95; *Chicago, R. I. & P. Ry. Co. v. Buel*, 56 Neb. 205, 76 N. W. 571." And as stated in 20 Am. Jur. 754, sec. 897: "Ordinarily, property owners who have lived for some time in the vicinity and know the property are qualified to testify to its value." Either lay or expert witnesses may be used if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility being for the jury.

For the reasons herein given the judgment and verdict of the lower court are set aside and the case remanded to the lower court for a new trial in accordance herewith.

REVERSED.

GUARDIAN NATIONAL LIFE INSURANCE COMPANY, PLAINTIFF, V. LAURA EDDENS, APPELLEE: JAMES EDDENS, ADMINISTRATOR, APPELLANT.

13 N. W. 2d 418

FILED MARCH 3, 1944. No. 31680.

1. Insurance. A person may in good faith and without fraud, collusion, or an intent to enter into a wagering contract, lawfully take out a policy of insurance on his own life and make the benefit payable to whomsoever he pleases, either himself or his estate or a third person regardless of whether or not the latter has an insurable interest; insured has an unlimited insurable interest in his own life which is sufficient to support the policy.
2. ———. Where there is a named beneficiary followed by the term "wife," that term is held to be descriptive of the person and of assistance in determining the identity of the beneficiary.

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

Frank C. Yates, for appellant.

John C. Barrett and *Allen, Requartte & Wood, contra.*

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

SIMMONS, C. J.

This is an action to determine whether the named beneficiary in a life insurance policy or the administrator of the estate of the insured shall receive the benefits. The trial court held for the beneficiary. The administrator appeals. We affirm the judgment of the trial court.

In 1932, Laura Richey, wife of Ben Richey, began living with Alex Eddens and continued thereafter to live with him until Eddens' death in 1942. She was known as his wife and went by the name of Laura Eddens.

In February, 1934, Eddens applied for and was issued a life insurance policy on his own life with the beneficiary named "Laura Eddens" and the relationship "wife."

Eddens died in May, 1942. Both Laura Eddens and the administrator of the Eddens' estate demanded the proceeds of the policy. The insurance company brought an action to

determine the controversy and tendered the money into court. The defendants were ordered to interplead and present their claims. The money was paid into court.

The administrator contends that there is no such person as Laura Eddens; that the insured did not have a wife; and that Laura Richey did not have an insurable interest in the life of Eddens.

There is no question but that she, who, as Laura Eddens, claims the benefits of this policy, is and was in fact the wife of Richey, and that Eddens did not have a wife. There is also no question but that she is the party intended by the insured to receive the benefits of this policy. Section 44-102, Comp. St. 1929, defines insurable interest as used in the insurance code as follows: " 'Insurable interest' in the matter of life and health insurance exists when the beneficiary, because of relationship, either pecuniary or from ties of blood or marriage, has reason to expect some benefit from the continuance of the life of the insured." Having defined the term, it does not appear that the legislature thereafter used it in the insurance code.

The administrator's theory is that Laura Eddens does not come within the statutory definition of one having an insurable interest as defined in the code, and, therefore, she cannot take. The administrator overlooks the fact that Laura Eddens, or Richey, whichever he prefers, did not apply for or take out the insurance on the deceased's life. He took out that insurance on his own life, designated the beneficiary and paid the premiums. Under those circumstances the rule is: "A person may in good faith and without fraud, collusion, or an intent to enter into a wagering contract, lawfully take out a policy of insurance on his own life and *make the benefit payable to whomsoever he pleases*, either himself or his estate or a third person *regardless of whether or not the latter has an insurable interest*; insured has an unlimited insurable interest in his own life which is sufficient to support the policy; * * *." (Emphasis supplied.) 37 C. J. 389. See, also, 29 Am. Jur. 312; 1 Couch, Insurance, 780; 1 Cooley, Briefs on Insurance (2d ed.) 336.

Section 44-804, Comp. St. 1929, clearly provides for the issuance of a life insurance policy upon the application of the person insured and no limitation is made as to beneficiaries. The legislature, however, has limited the recipients of death benefits on certificates issued by fraternal societies. Comp. St. 1929, sec. 44-1207. That limitation has no application here and is referred to only in so far as it demonstrates the legislature's intent to limit the classes of beneficiaries only in fraternal society cases.

It is further urged that the beneficiary, being designated as "wife," and Laura Eddens not being the "wife," she is, therefore, not the beneficiary. We see no merit in this contention. Laura Eddens is the named "beneficiary." The term "wife" is used as descriptive of the "relationship of beneficiary to assured" (from the application) and is of use in assisting in determining the identity of the named beneficiary. 37 C. J. 567; 29 Am. Jur. 965; 2 Couch, Insurance, 1264. The use of the description "wife" does not change the fact that whether she is called Laura Eddens or Laura Richey, she is the one, the same, and the only designated beneficiary.

It is urged that because Laura Eddens lived with the insured in a state of adultery she should be denied the insurance benefits which the insured provided for her. This is a civil action. The law does not authorize the imposition of a penalty for the offense of adultery in this proceeding, nor does it fix the forfeiture of life insurance benefits as the penalty for that offense. This insurance money is payable by contract to Laura Eddens. To direct that it be paid to the administrator would be to violate the terms of the policy and the intent of the insured, and to award the money to one not designated by the insured to receive it.

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant administrator.

AFFIRMED.

LORENA BULMAN ET AL., APPELLANTS, V. LYMAN-RICHEY SAND & GRAVEL CORPORATION, APPELLEE.
13 N. W. 2d 403

FILED MARCH 3, 1944. No. 31754.

1. **Workmen's Compensation.** In a compensation case brought by a widow, where no justifiable cause is shown for living apart, the statutory presumption of dependency is inapplicable, and proof must be made that in fact she was dependent. The duration of the separation, the sums contributed, the intention of the parties, and all of the other facts and circumstances are to be considered in determining whether dependency existed.
2. ———. "The issue must be determined against the applicant where it appears that separation continued for a considerable period, and that during such time support was derived from other sources than the earnings of the deceased." 28 R. C. L. 777, sec. 70.
3. ———. Where the widow never recognized the husband's obligation to support her, and never made any demand on him for support, or attempted in any way to enforce her rights, the trifling gifts he may have made did not come within the term "in any way contributing to her support."

APPEAL from the district court for Morrill county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Morrow & Miller, for appellants.

Neighbors & Danielson, contra.

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

PAINE, J.

Action brought under workmen's compensation act to recover for accidental death was dismissed on the ground that plaintiffs were not dependents at the time of the death. Plaintiffs appealed.

John A. Bulman was in the employ of the Lyman-Richey Sand & Gravel Corporation, operating a pump on a boat near Bridgeport, Morrill county, pumping sand and gravel from a pit, or lake, in which the boat was floating. On the night of October 25, 1942, while walking from the boat to

the shore to get some lacing to repair a belt, he fell off the pipe line into the lake and drowned. The weather was unseasonably and extremely cold on this particular night, being near zero, and while one of the crew, who heard the splash when he fell in, threw a rope to him, he was not able to grab it, and his body was recovered about midnight. There is no question but that this fatal accident arose out of and in the course of the employment of the deceased with the defendant corporation.

A petition was filed in the Nebraska workmen's compensation court by the widow, Lorena Bulman, and their minor daughter, Thelma, and the cause was tried before Charles E. Jackman, one of the judges of said court, who dismissed the plaintiffs' petition on the ground that at the time of the accident the plaintiffs were not dependents of the deceased within the meaning of the Nebraska workmen's compensation law. The plaintiffs thereupon filed a waiver of rehearing before the full compensation court, and elected to appeal directly to the district court for Morrill county from said order of dismissal.

In the petition filed it was alleged that deceased was receiving in excess of $50 a week as wages from the defendant; that Lorena Bulman, plaintiff, was the wife of the deceased, and that Thelma Burton Bulman was a minor daughter of the deceased, and 17 years of age, and that deceased was living with his wife and minor children, who were wholly dependent upon him for support at the time of the accident.

In the answer filed in the district court, the defendant denies each and every allegation contained in the petition, and specifically denies that the plaintiffs, or either of them, were dependents of the deceased within the meaning of the Nebraska workmen's compensation law.

Section 48-122, Comp. St. 1929, provides that if death results from injuries, and the deceased leaves one or more dependents wholly dependent upon his earnings for support at the time of the accident causing the injury, compensation shall be paid as therein set out.

Our Nebraska statute also provides: "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she is living at the time of his death; * * * (d) * * * No compensation shall be payable under this section to a widow, unless she is living with her deceased husband at the time of his death: *Provided*, a wife or husband living in a state of abandonment for more than two years at the time of the injury, or subsequently, shall not be a beneficiary under this article. * * * (e) In all other cases, questions of dependency * * * shall be determined in accordance with the fact, as the fact may be at the time of the injury; * * *." Comp. St. 1929, sec. 48-124.

After trial in the district court, the court found generally against plaintiffs, and affirmed the finding and order of the workmen's compensation court dismissing plaintiffs' petition.

The plaintiffs set out in their assignment of errors that the judgment is not supported by the evidence and is contrary thereto, and also contrary to law. It is further alleged that the rulings of the court upon several objections to admission of oral answers and exhibits were prejudicial.

Under the law cited herein, if a wife is living with her husband at the time of his death it is conclusively presumed that she is wholly dependent upon him for support, and entitled to the award provided by law. It therefore becomes a question of fact to be decided by the court, and we will therefore briefly present the matters as tried out in the district court.

When trial began in the district court, counsel for plaintiff submitted the contract of employment between the plaintiffs and the firm of Morrow & Miller, of Scottsbluff, and the court thereupon approved the same in writing, as required by section 48-108, Comp. St. 1929.

The evidence discloses that the wife was notified of the death of her husband out at her home on the farm near McGrew, Scotts Bluff county, the morning after his body was found, and immediately went to Bridgeport with her son Albert to arrange the funeral.

The plaintiff widow told Bern Coulter, the county attorney and *ex officio* coroner, upon arriving at Bridgeport that they had been separated for about seven years and, while he had not contributed anything to her support, they were not divorced.

W. A. Canaday, the undertaker, testified: "She told me standing in the hotel lobby that she and her husband hadn't been living together, but she would claim the body and wanted to give John a good, Christian burial." He further testified that he took the plaintiff and her son out to the sand pit to get the car her husband left there, and they stayed out there quite a little while. She got some money that was taken off his body, and also his automobile, in which her son drove her back to Mr. Canaday's home. He testified that she had met a Mr. Wiles, representing the defendant's insurance carrier, out at the gravel pit, and he followed them to the funeral home to get from her a statement of all the facts.

Mr. Canaday testified that he offered Mr. Wiles the use of his typewriter, but Mr. Wiles thanked him and said that he had his own portable typewriter with him, and that he at once started to write out the facts in the room in his home which he uses as an office; that Mrs. Bulman was not hysterical at all, that she was very calm and collected, that she did not weep nor cry, and that she answered the questions and talked with Mr. Wiles in a perfectly rational way.

Mrs. Ruth M. Canaday, wife of the undertaker, said she sat in the next room in her home, and that the door was open and she could hear Mr. Wiles and Mrs. Bulman talking in the next room while he was writing down the statement, and she heard the conversation with Mr. Wiles, and gave one answer as follows: "I heard her make the statement that she and her husband had not lived together for about seven years and that she didn't even know his whereabouts until she was notified of his death."

This exhibit No. 17, written out at that time, was introduced by the defense, and reads as follows:

"Bridgeport, Nebraska
"October 26, 1942

"Statement of Mrs. Lorena Bulman, wife of John Arthur Bulman. I am 52 years of age. John Arthur Bulman and I have four children, John Arthur, Jr., age 35, last known address, somewhere in Idaho, Albert James Bulman, age 23 living with me, Thornton Burt Bulman, age 17, and Thelma Burton Bulman, age 17. These twins are also living with me.

"My husband has been separated from me for about the past seven years. We have not been divorced but have lived separately for that time. Practically all of this seven years my husband has stayed away from home and has had a separate residence. We just did not get along and we had separate homes.

"During all of this time that we have been separated none of our children nor myself have received any support from my husband John Arthur Bolman. He has not sent us any money, he did not own anything and has not left us anything for our support, nor has he sent us any part of his salary or anything to care for us or any of the children.

"I have bought a farm where we are now living, it is about two miles south and one mile west of McGrew, Nebraska. All of the time my husband has been away from us, we have lived on the farm and managed to get enough to keep us.

"We were married in 1906 at Alliance, Nebraska. During all of the time that I have known my husband, he has never had any serious illnesses and seemed to be perfectly healthy. He did not have any physical defects according to my knowledge. He had some rheumatism in his legs but it was never serious and did not bother him much.

"I have been taking care of the children for the past seven years and John Arthur Bulman has contributed nothing for their support during that time.

"As far as I know there never was any heart trouble with my husband or anything that might have caused his death on October 25, 1942. As far as I know he was drowned

while working at the Lyman Richey Gravel Company near Bridgeport Nebraska.

"I have read my statement and it is true and correct.

"(Signed) Mrs. Lorena Bulman

"(Signed) Albert Bulman
witness"

Upon a very lengthy cross-examination Mrs. Bulman denied that she had given any such statement as exhibit No. 17, or signed any such statement. Nearly every clause in it was read to her, and while she denied making most of the allegations she did admit that some of them were true, but said she did not remember making or signing any statement, and she did not recall talking to Mr. Wiles that morning at all. She finally admitted that it was her signature at the bottom of the statement, as well as that of her son.

Albert Bulman signed a written consent, permitting the draft board to disclose what the plaintiff claimed in her application for his deferment. F. F. Hamilton, chairman of the draft board, read this statement which plaintiff had filed January 31, 1942, which had been sworn to before the county judge, and it read as follows: "We rent our farm near McGrew and my son, the registrant herein, manages it entirely. He not only looks after me and operates the farm but has been sending his younger brother and sister to school. The brother and sister are twins of the age of 16. Under present conditions it is impossible for me to secure anyone else to look after us and we have no income excepting that on which to farm, consisting of 320 acres. My husband has been gone since 1935."

Exhibits Nos. 18 and 19 were applications of Mrs. Bulman, the plaintiff, to rent a farm from the Northwestern National Life Insurance Company of Minneapolis, one lease being for the year 1942, and in these applications it is represented that she is a "widow," and shows that she has borrowed $1,000 in one and $1,500 in the other from the F. S. A. for her live stock, consisting of cows, horses, sheep and hogs.

In the plaintiff's testimony she produced four money or-

der receipts, found among the deceased's papers, showing $20 sent to Albert from Lisco, Nebraska, September 7, 1935, $12 sent Albert July 16, 1935, $24 sent Mrs. J. A. Bulman from Lisco October 11, 1935, and $13 sent Albert from Lisco August 7, 1935. She also testified that after her husband got his car he came home more frequently, and left with the family small sums of money, and also occasionally brought groceries or wearing apparel; that he came home in July, 1935, and usually stayed over night, and in 1939 he was home a week. They occupied the same room, and some letters which passed between them were also received in evidence. This testimony was corroborated by the daughter, Thelma. Thornton, the son, said when the father came home he "always embraced my mother and kissed her, my mother and sister, always shook hands with my brother and I."

The plaintiff's contention is that this evidence indicates that the husband and wife were living together within the law at the time of the death, and that under the Nebraska statute it is therefore conclusively presumed that she is wholly dependent upon him for support.

The defendant quotes in its brief from the case of *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, 142 N. W. 271, Ann. Cas. 1915B, 877, L. R. A. 1916A, 366, to the effect that "The question does not turn on time or distance, but upon the nature and character of the absence and the intention of the parties respecting it. Intent is an important element in determining the nature of absence." In this case an award was made to the wife, who did not accompany her husband when he moved from Austria-Hungary to the United States some three years before, on the ground that he had sent money for the support of his wife and child, having sent her $21 just 17 days before his accidental death, following his declared intention of sending her money every three months.

In the case of *Smith v. Scheidegger Bros.*, 170 Wis. 162, 174 N. W. 462, a wife had nine children, five or six of them being feeble-minded, by her first marriage, and married the

deceased in May, 1912. In April, 1916, he left the farm because he did not like the children, and would not take care of them. He came back occasionally, but worked in a logging camp, where he was taken sick, and his wife visited him in the hospital a week before his death on January 20, 1918. Until this visit to the hospital, she had not seen her husband since November, 1916. These facts denoted an actual separation in the nature of an estrangement, and while the wife claims that just before his death they made plans to live together in the spring, the judgment denying an award was affirmed.

"Under the Workmen's Compensation Act * * * providing that a wife shall be conclusively presumed to be wholly dependent for support upon her husband with whom she lives at the time of his death, where a wife of her own volition left her husband to resume her old occupation of school teacher in another state, because of friction, as she testified, a 'lot of little things came up,' and she thought that her 'going away would bring us together,' she always having in mind the intention to return, and returning, in fact, upon notification by her husband's employer that he had been severely burned, staying with the husband in the hospital some hours before his death, such wife was not a 'dependent' of her deceased husband within the act, since she had severed the marital relation for an indefinite period with only the mere expectation in view that at some indefinite time in the future it would be resumed." *Finn v. Detroit, Mt. C. & M. City Ry.*, 155 N. W. 721 (190 Mich. 112).

Among the tests for the determination of the questions involved in such a case is the following: Were they living together? This is a question of fact, not of law. This contemplates that there had been no break of any serious nature in the marriage relations, although there may be a physical separation, and they may for some time have lived in different towns. If a wife is living apart from her husband for a sufficient and justifiable cause, she may be entitled to compensation if she was dependent upon him.

However, on the other hand, if the parties have been estranged and living apart for some years, and found it unhappy to live together, and were without any plans for again renewing their living together, this is an important consideration. Where the separation is merely for the mutual convenience of the parties, and the wife is dependent, and the obligation to support her is either recognized or performed, the mere fact that the husband, for any reason, fails to perform that duty for a short time, does not deprive the wife of her status as a dependent.

The court must always carefully consider the question whether the deceased husband contributed regularly to his wife's support, and whether they have kept in touch with each other by occasional visits or correspondence more or less regular.

"Where no justifiable cause is shown for living apart, the statutory presumption of dependency is inapplicable, and proof must be made that in fact the husband or wife was dependent. The duration of the separation, the sums contributed, the intention of the parties, and all of the other facts and circumstances are to be considered in determining whether dependency existed. The issue must be determined against the applicant where it appears that separation continued for a considerable period, and that during such time support was derived from other sources than the earnings of the deceased." 28 R. C. L. 777, sec. 70.

In the case at bar, the judge must have given great weight to the statements made by the plaintiff widow in exhibit No. 17, which statements were definite and positive that she had separated from the deceased, was not living with him as man and wife, and that she supported her family by her own unaided efforts. In exhibits Nos. 18 and 19 she had gone to the extent of holding herself out as a widow, perhaps for the greater ease in securing a lease for the farm she desired to rent and later to purchase. Her testimony after she realized that a possible compensation award might come to her because of his death is entirely different from these earlier statements of hers, and this later testimony was not convincing to the trial court, or to this court.

The plaintiff in the case at bar was a woman of great energy and unusual ability, and was perfectly able to bring up her children and support the entire family, and she deserved great credit for her fine record in this regard. However, she never recognized the husband's obligation to support her, and never made any demand on him for support, nor attempted in any way to enforce her rights, and the trifling gifts he may have made did not come within the term "in any way contributing to her support."

The deceased husband had been more or less regularly employed, and earning fair wages, and was rooming at a hotel and boarding at eating houses, keeping a car for his own pleasure, and contributing very little, if anything, to the support of his wife and children, and the wife has been able to support herself and children during the past seven years, without any assistance from him, she is not a dependent upon him in fact or in law, and neither is the minor daughter, who is also a plaintiff.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

HAZEL DEVORE, APPELLANT, V. BOARD OF EQUALIZATION ET AL., APPELLEES.

13 N. W. 2d 451

FILED MARCH 3, 1944. No. 31728.

1. **Evidence.** A witness is qualified to testify to the market value of land, if he has had an opportunity to form a correct opinion as to its value. He need not have bought or sold land in the vicinity.
2. ———. Witnesses familiar with the rental value or the value of the use of real estate are qualified to testify to market value for assessment purposes.
3. **Appeal and Error: EVIDENCE.** The competency of a witness to testify as an expert rests largely in the sound discretion of the trial court, whose rulings will not be reversed unless clearly erroneous.
4. ———: WITNESSES. The extent, course and scope of cross-ex-

amination rest in the discretion of the trial court, and its ruling thereon will not be reviewed unless there has been an abuse of such discretion.

5. ———. Under section 20-853, Comp. St. 1929, a violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.

6. Taxation. Section 77-1702, Comp. St. 1929, authorizes the board of equalization to correct evident errors of assessment or apparent gross injustice in overvaluation or undervaluation of real property at any of its annual meetings, whether such error be due to some act of the assessor or to that of the board itself; provides for the meetings of the board each second year, to equalize values of real property of the county. A decree of the court fixing the value of real estate on a previous assessment made is not competent evidence in a further suit affecting the assessment values of property.

7. ———. It is discretionary on the part of the trial judge to view property for assessment purposes, and, where objection is made to a request of such nature, the objecting party subsequently is not in a position to complain because the record fails to disclose that the trial judge did or did not view the property.

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

W. A. Ehlers, for appellant.

Walter G. Huber, contra.

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

MESSMORE, J.

This is an appeal from the district court for Washington county from an order fixing the assessment valuation of plaintiff's properties, praying for cancellation of the valuations fixed thereon for the year 1942, and that the district court determine and fix the fair and reasonable assessment valuations on such real estate.

On June 11, 1942, the plaintiff filed her complaint with the board of equalization of Washington county, Nebraska; in July, 1942, a hearing was had before the board. On August 10, 1942, plaintiff's claim for correction of assessment

for the year 1942 was denied. The complaint included lots 13, 14, 15 and 16, in block 1, village of Kennard. The lots were assessed at $50 each, a total of $200. The value of the improvements, consisting of a story and a half frame building, modern, about 20 years old, was fixed at $2,150, making a total assessment of $2,350. No objection was made to the assessment on the lots. Plaintiff asked that the assessment on the improvements be changed to $750, making a total assessment of $950.

Complaint was made with reference to lots 7, 8 and 9, in block 9, First Addition to the village of Kennard. The lots were assessed at $150, to which there was no objection. The improvements thereon were assessed at $450, making a total of $600. Plaintiff placed the value of the improvements at $150; a total valuation of $300. The improvements consisted of a one-story, reconstructed dwelling, with electric lights and an outside water hydrant. Complaint was made with reference to lot C in J. C. Neal's subdivision in the village of Kennard. The lot was assessed at $50, the improvements thereon at $1,100, a total of $1,150. No objection was made to the lot assessment. The value for assessment purposes claimed by plaintiff for the improvements was $400, a total of $450. This property was an old reconstructed frame dwelling on the lot, with five adjoining lots. Complaint is made with reference to lots E, F, G, H and I, in J. C. Neal's subdivision in the village of Kennard, assessed at $250. Plaintiff claimed the value for assessment purposes to be $150.

For convenience the properties above described will be referred to as Nos. 1, 2, 3 and 4, respectively.

The trial court assessed property No. 1, with lots and improvements, at $1,500; property No. 2, consisting of three lots at $150, and the value of the improvements at $300, or a total of $450; property No. 3, the lot at $50 and the improvements at $800, total $850, and property No. 4, consisting of five lots, at $40 each or a total of $200. From this decree the plaintiff appeals.

The plaintiff predicates error in that a request was made

by defendant's counsel to have the trial judge view the premises, to which plaintiff's counsel objected, on the ground that there was no showing that the court would be better informed as to property values in a small town, outside his own town; that the witnesses who have testified and will testify will give all the needed testimony, and that it is an unfair element being injected into the trial. There is nothing in the record to show that the trial judge ever viewed the premises. Plaintiff's contention is without merit. Obviously, the court abided by the objection made by her counsel, and she is in no position to predicate error on the court's not viewing the premises. It would be discretionary on the court's part, in any event.

Plaintiff further predicates error in that the court failed to admit in evidence the decree of the district court in 1941, fixing the assessed values of the separate pieces of property, of which complaint was made. The defendant's counsel objected, for the reason that it was immaterial, so far as fixing the value of the property in question for 1942. This objection was sustained.

Section 77-1601, Comp. St. Supp. 1941, provides in part: "All real property in this state subject to taxation shall be assessed on the first day of April, 1933 and 1934 and every second year thereafter, which assessment shall be used as a basis of valuation for taxation until the next regular assessment."

In *Swanson v. Board of Equalization*, 142 Neb. 506, 6 N. W. 2d 777, this court held: "Section 77-1702, Comp. St. 1929, authorizes the board of equalization to correct evident errors of assessment or apparent gross injustice in overvaluation or undervaluation of real property, at any of its annual meetings, whether such errors or injustice be due to some act of the assessor or to that of the board itself. The act is remedial and intended to reach cases where, because of evident errors of assessment, or because of overvaluation or undervaluation, a taxpayer would pay more or less than his just share of taxes." Section 77-1702, *supra*, provides that the county board of equalization shall at its

meeting in 1912 and every second year thereafter "equalize the valuation of real property of the county by raising the valuation of such tracts and lots as are assessed too low, and lowering the valuation of such tracts and lots as are assessed too high."

From the foregoing statutes, it appears that the legislature provided that the valuation for property for assessment purposes for each year could be different, according to the circumstances arising within the purview of the statutes concerned. 1942 was a regular year for assessment under the Nebraska statutes; presumably, the 1941 assessment was based on the 1940 valuation. Plaintiff's contention is without merit.

A witness testifying for the plaintiff, a dealer in real estate, had listed the properties, heretofore described. He stated that he was unable to obtain buyers for any of them; that property No. 1 was listed at $1,200, and he was unable to sell it for $1,000; that the property consisted of an eight or nine-room house in fair condition, in need of a new roof, with fair guttering, a part of the stucco off and in bad condition; that there was a cess pool connecting with the property. The witness described property No. 2 as a small house in poor condition and empty, and property No. 3 as a two-story house in poor condition. He could not obtain a buyer for this property at $400 or $500; he had not sold property in Washington county. As finally summed up, his testimony on value fixed the No. 1 property at $1,000; No. 2 at $275; No. 3 at $500, and No. 4 at $100 to $250.

The renter of property No. 1, who testified for plaintiff, paid $15 a month and subleased a part of the premises. It had been offered to him for $800, but it was too large for his small family and not in good repair. He placed the value of this property at $800; the value of property No. 2 at $275; of No. 3 at $500, and No. 4 from $100 to $150. Plaintiff's attorney testified to the value of property No. 1, placing it at $800; of property No. 2 at $275, of No. 3 at $500, and No. 4 from $100 to $150.

For the defendant, the secretary and treasurer of a co-

operative credit association, an insurance man, with his place of business in the village for eight years past, testified he had knowledge of the rental values of residential properties and was acquainted with property No. 1; that the fair rental value thereof was $20 a month. He estimated the tax rate at $50 a year, the insurance rate with his company at 50 cents a hundred. He testified that the demand for such property was limited; he fixed its value at $1,500. Property No. 2 he designated as a good little home, with two out-buildings, an old barn and a shack. Based on a six-dollar rental a month, he fixed the value at $480; property No. 3 at a rental value of $9 a month. He stated the house on that property was in good condition and he placed the value at $850; the No. 4 property he valued at $200. He did not own property in the village, but his wife owned a piece of property and consulted with him about it.

Another witness for defendant, a resident of the village for 20 years, identified a photograph of the house on property No. 1 and placed its value at $2,000; of property No. 2 at $400; No. 3 at $900, and the vacant lots at $250. He testified that he placed a value of $2,000 on property No. 1 for the reason that it would be worth such an amount for salvage, and to build an ordinary house on the lots and utilize the material in the building to advantage; that it could be wrecked for $200 or $300; that the building was in fair condition; the stucco was off the house in places, and the cornice was down. He testified that property No. 2 was an old house, in a run-down condition. He was unable to fix rental value from his own personal knowledge, but was acquainted with the No. 1 property, lived close to it, and had seen it quite often.

The former owner of the No. 1 property testified that the house had an A-1 foundation, a full basement, stone pillars built up from the basement; the lower floor finished with oak, a beamed ceiling and built-in kitchen cupboards, and was modern throughout; that one room was 14 or 15 by 32 feet; another 16 by 14 feet, one room 14 by 14, and another 10 by 12, making four rooms on the lower floor, and four

rooms on the upper floor, with a bathroom; that there was a two-car garage with cement floor and double doors; that he built the house and had lived in it from 1918 until two years previous to the trial; that it was built when material was cheap at a cost of $7,000 or more; that when he left the house it was in good condition; that he lost it through tax-sale foreclosure; that it had not been kept up since he moved out, and the witness valued this house at between $2,500 and $3,000, together with the lots. He fixed the valuation of property No. 2 at $500 to $600; property No. 3 at $1,500, and the vacant lots at $500. He testified that there were two places on the big house on property No. 1 where the stucco was bad, consisting of a crack in the northwest corner and for a distance of two or three feet in the southeast corner. He based his present valuation upon the depreciation which he considered large. He testified that the lumber in the house on property No. 2 was worth $500 or $600 as salvage, and on property No. 3 the house was very well kept up on the outside and well painted; that it was "just a common-built house," and was worth $1,500 in his opinion. The size of the village is about 300 population.

A brother-in-law of the owner, a banker from Arlington, Nebraska, negotiated with plaintiff's counsel for purchase of the No. 1 property, or for an exchange of properties with him. He testified he was acquainted in Washington county and had lived there; that plaintiff's counsel, in a letter, placed the value of the No. 1 property at $1,250, stating that his client had $1,000 in it. They arrived at no basis for an exchange of properties.

A lumberman and coal dealer in the village testified that he had lived there all but seven of his 61 years; that he owned five rental properties, which he had owned for four or five years or longer, and was acquainted with the No. 1 property; that it was in reasonably good condition, needed some repair, had a rental value of $20 to $25 a month and a value of $3,000 to $3,500. He was familiar with property No. 2, stated that it had no rental value but was worth $250 to $300 for salvage; that he had made repairs at property

No. 3 by putting a roof on the house at a cost of $120, and that it had a rental value of $10 a month and a total valuation of $1,250. He valued property No. 4 at $200 to $250.

The plaintiff contends that the evidence offered by the defendant, as briefly outlined above, was incompetent for the purpose of fixing valuation for assessment purposes.

In *Beebe & Runyan Furniture Co. v. Board of Equalization,* 139 Neb. 158, 296 N. W. 764, this court said: "The test as to the qualifications of a witness to testify as to the market value of land, as disclosed by a multitude of cases, is that a witness is qualified to testify to such value if he has had an opportunity to form a correct opinion as to its value. It is not essential that the witness should have bought or sold land in the vicinity. See Jones, Evidence (2d ed.) 485, sec. 387." See, also, *Langdon v. Loup River Public Power District,* 142 Neb. 859, 8 N. W. 2d 201; *Langdon v. Loup River Public Power District, ante,* p. 325, 13 N. W. 2d 168.

"Whether the witness is properly qualified is a question addressed primarily to the sound discretion of the trial judge, and his action will not be reviewed in the absence of a showing that he has abused that discretion. There is no question that professional appraisers and dealers engaged in the business of buying and selling similar property are competent to testify as to value, but it is not necessary that a witness have the status of a professional appraiser or dealer in the class of property in question. Others who are familiar with the property in question and know the prices paid for like property are also competent to testify as to value. One who has bought and sold similar property or who knows the prices paid therefor, even though that knowledge is based on secondary evidence, is competent to give an opinion as to the value of the property in question, provided, of course, he is familiar with that property. The fact that the extent of dealing in the particular kind of property has been limited does not affect the admissibility of the opinion, but merely its weight." 20 Am. Jur. 748, sec. 891.

"It is well established that the value of the use, or the

rental value of property, may be proved by the opinion evidence of witnesses acquainted with the property and by the facts bearing upon its use. The question before the court usually has been the qualification of the witness to give the opinion. Thus, the courts have in many cases permitted witnesses who are acquainted with the property or familiar with the rental value of property of the kind in question to give opinion evidence as to the value of the use of chattels. The propriety of opinion evidence by qualified witnesses upon the question of the rental value or the value of the use of real property is affirmed in many cases." 20 Am. Jur. 755, sec. 899.

It is difficult to lay down an exact yardstick, fixing values of properties in villages with a degree of exactness. Real estate values generally through a period of years, due to many contingencies, fluctuate in accordance with the times and the progress of the community.

Defendant's witnesses consisted of the former owner of property No. 1; another witness acquainted with rental values of properties in the village, and, in addition, a property owner who had five rental properties which he compared with the properties involved. The knowledge which these witnesses possessed of the value of real estate in the village and their acquaintance with the properties, cost, condition and rental value, were sufficient, in our opinion, to qualify them to testify as to the value of such properties for assessment purposes.

In *Aurora Hotel v. Board of Equalization,* 140 Neb. 511, 300 N. W. 419, this court said: "As a general rule of law, the competency of a witness to testify as an expert rests largely in the sound discretion of the trial court whose rulings will not be reversed unless clearly erroneous." Citing *Schmuck v. Hill,* 2 Neb. (Unof.) 79, 96 N. W. 158; *Jensen v. Palatine Ins. Co.,* 81 Neb. 523, 116 N. W. 286; *Beebe & Runyan Furniture Co. v. Board of Equalization, supra.*

In *Chicago, B. & Q. R. Co. v. Shafer,* 49 Neb. 25, 68 N. W. 342, in the opinion at page 31 it was said: "It is sufficient that resident owners of land in a farming neighborhood

have generally been held competent witnesses to the value of real estate in such community. In a leading case upon the subject, *Robertson v. Knapp*, 35 N. Y. 91, the witnesses, all of whom were residents of the immediate neighborhood, some being engaged in farming and others retired farmers, were held competent without further showing. In the opinion it is said: 'There are no certain data which, if given, will fix the value of land. The same data will produce widely different results as to the value, depending, perhaps, on location and the use to which it can be applied, or upon the demand. The value of land in the vicinity is usually understood by all of the residents of a farming neighborhood, without respect to occupation.' The opinion of such a witness may not be the best or most satisfactory evidence attainable, and yet it is difficult to conceive of persons better qualified to testify upon the subject of the value of farming lands than resident owners of like property in the particular locality. It is, to say the least, competent evidence, its weight or probative force to be determined by the jury and depending upon the facts of the particular case." Likewise, the testimony of residents of a small village, acquainted with values of real estate, income therefrom and the condition of the improvements, as heretofore set out in the instant case, constitutes competent evidence, its weight and probative force in this instance to be determined by the court.

Plaintiff contends that the court erred in failing to permit counsel to pursue the cross-examination with reference to the witness Brock. It is true that the court limited this cross-examination to property No. 1. Plaintiff's counsel asked that he be permitted to examine the witness as to the other properties, and the court said: "That is enough."

In *Aurora Hotel v. Board of Equalization, supra*, we said: "The extent, course and scope of cross-examination rests within the discretion of the trial court, and it will not be reviewed unless there has been an abuse of such discretion. *Peterson v. State*, 63 Neb. 251, 88 N. W. 549. Also, under section 20-853, Comp. St. 1929, a violation of the strict rule

of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining." Citing *Brooks v. Thayer County*, 126 Neb. 610, 254 N. W. 413; *Manley State Bank v. Spangler*, 130 Neb. 196, 264 N. W. 459.

While there is no apparent reason why this cross-examination should have been limited, in view of all the evidence and the circumstances, we conclude that it was not an abuse of discretion on the part of the trial court, and its failure to permit further cross-examination of this witness did not prejudice the substantial rights of the plaintiff.

The plaintiff had no objection to the assessed valuation of the lots at $50 each, with the exception of property No. 4, but objected to the assessment of the improvements thereon. It is observed that the trial court determined the value of the real estate for assessment purposes at a much lower figure than the assessor's value by reducing the assessment value more than $1,200.

The decree of the trial court is affirmed.

AFFIRMED.

RAY CANTRELL AND MARION CANTRELL, A COPARTNERSHIP DOING BUSINESS UNDER THE STYLE AND NAME OF RAY CANTRELL AND SON, APPELLANTS, V. CLARIS A. OWEN, APPELLEE.

13 N. W. 2d 408

FILED MARCH 3, 1944. No. 31705.

1. **Fraud.** A party relying on allegations of false representations as ground for recovery is required to sustain the burden of proving that the representations were false and so known to be, or that they were made without knowledge but as a positive statement of known fact, that they were believed to be true, that they were relied and acted upon, and that the party believing and relying thereon was thereby injured and damaged.
2. **Trial.** In an action at law where minds may reasonably draw different conclusions from the evidence the question to be decided is for the jury.

3. ———. Error cannot be predicated on the refusal of the court to instruct on matters contained in the pleadings not supported by evidence.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Affirmed.*

R. E. Harris and *Edward E. Carr*, for appellants.

Johnson & Johnson and *Rosewater, Mecham, Shackelford & Stoehr, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This is an action by plaintiffs and appellants against Claris A. Owen, defendant and appellee, originally instituted in the district court for Custer county, Nebraska, to recover damages for claimed false and fraudulent representations made by the defendant prior to and as the inducement to the sale of 60 cows by defendant to plaintiffs which sale was consummated on the 24th day of February, 1940. The cause was tried to a jury. The verdict was in favor of defendant. Following the ruling on the motion for new trial duly filed, plaintiffs have appealed.

In substance and to the extent necessary to refer to it here the petition sets forth that plaintiffs were engaged in the business of cattle breeding and raising, and desiring to increase the size of their herd called upon defendant who had breeding cows for sale and informed him of their desires and informed him that they wanted to purchase some clean cows which were free from disease; that the defendant falsely, knowingly and fraudulently represented that he had 60 cows for sale which were free from disease; that relying upon the representations of defendant plaintiffs purchased the said 60 cows for the sum of $3,800 and caused them to be removed to their ranch where they were mingled with other cattle belonging to plaintiffs; that about two weeks after the purchase of the cows it was ascertained by plaintiffs that the cows purchased were infected with Bang's

disease which was known to defendant at the time the sale was made. As results plaintiffs claim 24 calves were lost, a number of cows had to be sold for slaughter, three bulls had to be sold for slaughter, they were unable to receive cattle from others for pasture, that extra expense was entailed and extra work was required in caring for the premises and veterinary services became necessary in the care of the cattle at considerable expense to plaintiffs, for all of which, damages were claimed. There are other allegations in the petition but their purport and effect will be discussed later on in this opinion.

In the answer the defendant denied generally the allegations of the petition, denied that he made the false and fraudulent representations charged to him and denied that he had any knowledge that the cows sold were infected with Bang's disease.

On the issues thus presented the burden devolved upon plaintiffs to sustain by a preponderance of the evidence the essential elements of their cause of action. Having alleged false representations, before becoming entitled to a recovery they were required to prove the representations; that they were false and so known to be, or else were made without knowledge but as a positive statement of known fact; that the plaintiffs believed the representations to be true; that they relied and acted upon them, and were thereby injured and damaged. *Scovel v. Isham,* 113 Neb. 238, 202 N. W. 869; *Platte Valley Bank v. Lemke,* 141 Neb. 218, 3 N. W. 2d 396; *Ralston Purina Co. v. Cox,* 141 Neb. 432, 3 N. W. 2d 748.

The evidence on the question of whether defendant made the false representations charged to him was in substantial conflict, therefore that issue was one for the jury. In an action at law where minds may reasonably draw different conclusions from the evidence the question to be decided is for the jury. *Craig v. Chicago, St. P., M. & O. R. Co.,* 97 Neb. 426, 150 N. W. 374; *Hickey v. Omaha & C. B. Street Ry. Co.,* 140 Neb. 665, 1 N. W. 2d 304; *Fulcher v. Ike,* 142 Neb. 418, 6 N. W. 2d 610.

On this issue the finding was in favor of the defendant, and for this court to vacate or set it aside would be an invasion of the province of the jury.

Other assignments of error deal with the refusal to give instructions tendered by plaintiffs and the giving of instructions by the court on its own motion.

In instruction No. 9 the plaintiffs requested that the jury be instructed, among other things, that if the defendant suspected that the cattle sold were infected with Bang's disease there was an implied warranty that they were free from the disease. In support of this proposition *Brown v. Blackwood,* 108 Neb. 288, 187 N. W. 911, is cited. The case fails to sustain the contention in this respect. In this connection it holds only that the seller of cattle for breeding purposes who knows that they are infected with a disease which is not discoverable by inspection and keeps silent is guilty of fraud and that under such circumstances the rule of *caveat emptor* does not apply.

The legislature of the state of Nebraska has enacted certain laws pertaining to Bang's disease in cattle the evident purposes of which are to eliminate the disease and to promote the production of healthy cattle in the state. By these laws regulations and restrictions are imposed upon the disposition and transportation of infected animals, and facilities calculated to aid in the eradication of the disease are provided for those desiring to avail themselves of such facilities in the eradication of the disease in their own herds. In their petition plaintiffs have alleged violations of certain of these regulations and restrictions by defendant and also of the rules imposed on him by the agreement whereby he was enabled to take advantage of these facilities, and have sought to predicate, in part, their action on violations thereof.

Assignments Nos. 3, 4 and 5 deal with failure to instruct with reference to this phase of the petition and proof, and No. 12 with failure to instruct properly in relation thereto. The regulations and rules in the light of the attitude taken need not be set forth, since the gist of the action is false

and fraudulent representation. Proof of violations of these regulations or rules would not sustain in any wise the issues made by the pleadings. It was not error to fail to instruct in relation thereto. The evidence in this connection was properly admissible, not however to prove violations as grounds of action, but because the jury had the right to consider it circumstantially in determining whether or not the defendant knew that the cattle sold were infected with Bang's disease which was an element of plaintiffs' cause of action. This disposes of assignments Nos. 3, 4 and 5.

Assignment No. 12 refers to instruction No. 16 given by the court. The instruction is merely definitive of the obligation which defendant assumed under the statute designed for the control and eradication of Bang's disease. It was unnecessary but we fail to see in it any prejudice.

Assignments Nos. 7, 8 and 9 are directed to the refusal of the court to give instructions Nos. 12, 14 and 15 tendered by plaintiffs. They are all requests for instruction on the burden devolving upon the defendant with regard to the affirmative allegations contained in the answer. The defendant charged in his answer that if the cattle purchased by plaintiffs had abortions such abortions were caused from other and different sources and causes which were chargeable to plaintiffs; that if Bang's disease existed it was caused by plaintiffs' own herd in which the disease was inherent; that if the disease spread among plaintiffs' cattle it was due to the negligent and careless manner in which plaintiffs looked after, cared for and handled said cattle.

These are affirmative allegations and assuming that they amount to the pleading of an affirmative defense the court did not err in refusing to instruct in relation to them. An examination of the bill of exceptions fails to disclose that the defendant offered or adduced any competent evidence in support thereof. The case was tried on the issues tendered by the petition and the denial thereof contained in the answer. Error cannot be predicated on the refusal of the court to instruct on matters contained in the pleadings not supported by evidence.

It is true that the court in defining the issues in the instructions set forth these affirmative allegations contained in the answer but of this plaintiffs do not complain.

Plaintiffs next complain of instruction No. 7 given by the court on its own motion. The instruction is the following:

"The first question which will claim your attention is: 'Did the defendant at or about the time he sold the 60 head of cattle to plaintiffs, for the purpose of procuring the sale, represent or warrant expressly or impliedly the said cattle to be sound and free from Bang's disease, and to be good breeding cattle.'

"The burden of proof on this proposition rests with the plaintiffs, and unless the evidence is such as to satisfy you by a preponderance of the evidence that the defendant did represent or warrant, either expressly or impliedly, said cattle to be sound, free from Bang's disease, and to be good breeding cattle, your verdict must be in favor of the defendant. It is not sufficient to warrant a verdict against the defendant that you find that said cattle were in fact diseased, but you must go further and find that the defendant represented or warranted either expressly or impliedly that the said cattle were free from disease, and were good breeding cattle."

The particular complaint is that the instruction places an undue burden on the plaintiffs. They insist that the burden was upon defendant to prove that the cattle sold were free from the disease. This contention is not supported by, but it is opposed to, legal precedent. *Scovel v. Isham, supra, Platte Valley Bank v. Lemke, supra*; *Ralston Purina Co. v. Cox, supra.* The contention is without merit.

Complaint is made of instruction No. 9 given by the court on its own motion. The instruction is the following:

"You are instructed that when a vendor or seller of property merely states an opinion, or merely gives his judgment on a matter on which he has no special knowledge, and upon which the buyer might also be reasonably expected to have an opinion and to exercise his own judgment, such transactions would not amount to a warranty.

"And in this case, if you believe from the evidence that defendant in selling the 60 cattle to plaintiffs merely stated his opinion or merely gave his judgment as to said cattle being free from Bang's disease, and that plaintiffs in buying the cattle exercised their own judgment as to the health of said cattle, then you are instructed that there was no warranty and plaintiffs cannot recover."

The complaint is not that the instruction is not a correct statement of law but was misleading to the jury in that it permitted the jury to believe that the defendant was only expressing an opinion when in fact the evidence showed conclusively that the plaintiffs relied upon statements made which were of fact. This contention of plaintiffs does not find support in the evidence. There was a substantial evidentiary dispute as to whether defendant made a positive representation as to the condition or simply expressed an opinion in the light of conditions known to him. No error is found in the instruction.

Without pointing specifically to it the plaintiffs assign as error overemphasis in the instructions of express warranty, and underemphasis of implied warranty. This contention, if instruction as to warranty is called for at all by the issues as presented by the pleadings, warranty or breach thereof not having been pleaded, is without foundation. The second paragraph of instruction No. 7 given by the court places equal emphasis on express and implied warranty. The paragraph is as follows: "The burden of proof on this proposition rests with the plaintiffs, and unless the evidence is such as to satisfy you by a preponderance of the evidence that the defendant did represent or warrant, either expressly or impliedly, said cattle to be sound, free from Bang's disease, and to be good breeding cattle, your verdict must be in favor of the defendant. It is not sufficient to warrant a verdict against the defendant that you find that said cattle were in fact diseased, but you must go further and find that the defendant represented or warranted either expressly or impliedly that the said cattle were free from disease, and were good breeding cattle."

Two assignments of error are predicated on the rejection and admission of evidence. In the light of the circumstances no prejudicial error was committed in these respects.

Having found that the verdict in this case is supported by sufficient evidence and that otherwise the record is without prejudicial error it is concluded that the judgment of the district court should be and is affirmed.

AFFIRMED.

PAINE, J., dissents.

MESSMORE, J., participating on briefs.

EVERETT H. EVANS, APPELLANT, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.
13 N. W. 2d 401

FILED MARCH 3, 1944. No. 31721.

Contracts. A contract, the fulfillment of which by express or implied agreement is made to depend upon the act or consent of a third person, over whom neither party has any control, cannot be enforced unless the act is performed or the consent given.

APPEAL from the district court for Lincoln county: ERNEST G. KROGER, JUDGE. *Affirmed.*

William C. Dorsey and *James T. Keefe,* for appellant.

Beeler, Crosby & Baskins, contra.

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

CHAPPELL, J.

Plaintiff brought this action against defendant, a public power and irrigation district organized and existing under the laws of Nebraska, to recover an alleged balance due upon a contract for legal services. When the issues were made complete by their respective pleadings the parties waived a jury and the case was tried to the court, resulting

in a judgment for defendant. Plaintiff appeals to this court assigning as error that the judgment is not supported by the evidence and is contrary to law.

The questions for decision are, whether the parties entered into a contract to increase plaintiff's salary, conditioned that it be approved by P. W. A. officials, and, whether it was thereafter so approved?

There is no dispute in the evidence which discloses that plaintiff was employed as chief counsel for defendant and as such rendered valuable services from the time of its organization in June, 1933, until December 31, 1937. On August 29, 1935, plaintiff sent a letter of resignation to defendant terminating his services as of September 1, 1935. Plaintiff then left the city of North Platte for a short period of time and upon his return was solicited by certain officials of defendant and members of the board of directors thereof to reconsider the action he had taken. Thereupon plaintiff met with the board of directors of defendant district at their regular meeting on September 21, 1935. At this meeting after much discussion of the matter and in plaintiff's presence a motion was made in proper manner and form and the board of directors adopted a resolution, which is reflected in the official minutes of defendant corporation, increasing plaintiff's salary from $500 to $850 a month effective September 23, 1935, *all subject to the approval of P. W. A.*

The only moneys that defendant district ever had with which to increase plaintiff's salary, or as a matter of fact for any other purpose, were funds loaned to it by P. W. A. under conditions specifically imposed by debenture loan agreements requiring that every prospective expenditure by the district for any purpose or amount must be first approved by P. W. A. officials of the state and nation. Plaintiff, as chief counsel for defendant, had full and complete notice and knowledge of all these facts and circumstances. It is evident also that he had knowledge of their legal significance. The resolution of the board of directors is pleaded verbatim in plaintiff's petition, together with the allega-

tion appearing thereafter, "that P. W. A. in substance and effect, approved and assented to plaintiff's said employment and agreed compensation."

The evidence further discloses that after adoption of the resolution defendant made every reasonable effort to obtain the approval and allowance of the increase, and this even after plaintiff's employment finally terminated. Nevertheless, P. W. A. officials continuously and steadfastly at all times refused to give their approval. As early as October 29, 1935, and again on April 22, 1936, the proposed increase was disapproved and disallowed by appropriate P. W. A. officials in letters sent to defendant, which plaintiff read at the times they were received. However, with this notice and knowledge plaintiff voluntarily continued as chief counsel for defendant and accepted, endorsed and cashed pay checks on the 1st and 15th of each month during the entire period from September 23, 1935, to and including December 31, 1937. These checks, each for the sum of $250 semi-monthly, had printed on their face, "In full for all wages or salary from ———— (date inserted) to ———— (date inserted)," and immediately above plaintiff's endorsement appeared these words, "Endorsement and cashing of this pay roll check receipts in full for all wages or salary claims for period shown on face of this check."

Applicable rules of law are: "A condition precedent in the law of contracts either may be a condition which must be performed before the agreement of the parties shall become a binding contract, or it may be a condition which must be fulfilled before the duty to perform an existing contract arises." 17 C. J. S. 792, sec. 338. See, also, 12 Am. Jur. 849, sec. 296. A contract, the fulfillment of which by express or implied agreement is made to depend upon the act or consent of a third person, over whom neither party has any control, cannot be enforced unless the act is performed or the consent given. See 17 C. J. S. 940, sec. 456f; 13 C. J. 634. And, except for fault of the promisor, reasons given for failure or refusal to act or give consent

are immaterial. See 17 C. J. S. 969, sec. 468b, 939, sec. 456d; 13 C. J. 648.

As usual, we find in the authorities a transposition of words but the same result. In *Federal Reserve Bank v. Neuse Mfg. Co.*, 213 N. Car. 489, 196 S. E. 848, the court said:

"That a contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contract relations is too well established to require the citation of authority. * * *

"In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement. A promise, or the making of a contract, may be conditioned on the act or will of a third person." See, also, *Gund v. Roulier*, 108 Neb. 589, 188 N. W. 185 (on rehearing, 108 Neb. 595, 190 N. W. 220); *Hanneman v. Olson*, 114 Neb. 88, 206 N. W. 155. In *Garner v. Grogan*, 136 Okla. 261, 277 Pac. 649, we find this statement: "When an obligation to pay money is, by agreement, made to depend upon the action of another party, over whom neither party has control, payment cannot be exacted unless the specific act is performed." See, also, *Beams v. Young*, 92 Okla. 294, 222 Pac. 952, and *Gordon v. Pollock*, 124 Okla. 64, 253 Pac. 1021. In both of these last cited cases the obligations of the parties were conditioned upon the approval of the Secretary of the Interior of the United States.

The evidence in the case at bar clearly establishes that the parties entered into a contract for an increase in plaintiff's salary as chief counsel for defendant, upon condition that it would be approved by P. W. A. officials, but the latter failed and refused to do so, and, under the law, we must find that plaintiff cannot recover.

We have not overlooked other propositions of law ably presented by counsel for the parties, but we do not consider it proper or necessary to discuss them in this opinion since the authorities heretofore cited and discussed entirely dispose of the case on its merits.

The judgment of the trial court is supported by the evidence, is in conformity with the law, and it is affirmed.

AFFIRMED.

IN RE ESTATE OF OLIVIA JOHNSON.
FLORENCE HOME FOR THE AGED, APPELLANT, V. BESSIE MUSGROVE, ADMINISTRATRIX WITH WILL ANNEXED, APPELLEE.
13 N. W. 2d 412

FILED MARCH 3, 1944. No. 31657.

1. **Executors and Administrators.** Where an administrator pleads that a claim against the estate was paid in full during the life of decedent, the burden is on him to prove that defense.
2. **Appeal and Error.** Where an action at law is tried in the district court without a jury, findings of fact have the same force as a verdict.
3. ———. The finding of a trial judge in a law action has the force of a verdict and will not be disturbed upon appeal unless clearly wrong.

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

Wells, Martin & Lane, for appellant.

Penelope H. Anderson, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

WENKE, J.

This action was commenced by the Florence Home for the Aged filing a claim in the estate of Olivia Johnson, deceased, in the county court of Douglas county. Bessie Musgrove, administratrix with the will annexed, filed objections thereto and upon hearing in the county court the claim was disallowed. From that order the claimant appealed to the district court for Douglas county where the findings and judgment of the county court were sustained

and the claim disallowed. From that order the claimant has appealed to this court.

For the purpose of this appeal the Florence Home for the Aged, a corporation, will be referred to as the claimant; Olivia Johnson, deceased, as the deceased; and Bessie Musgrove, administratrix of the estate of Olivia Johnson, deceased, as the administratrix.

The claim filed in the estate of Olivia Johnson, deceased, is for the sum of $1,000 with interest at five per cent from November 23, 1932, and is based upon a contract entered into between the claimant and the deceased on that date. To this claim the administratrix filed objections setting forth that the contract lacked consideration, was based on fraud, had been paid, and was barred by the statute of limitations. From an examination of the record we will only consider the defense of payment. As stated in *In re Estate of Peterson,* 104 Neb. 574, 178 N. W. 187: "Where an administrator pleads that a claim against the estate was paid in full during the life of decedent, the burden is on him to prove that defense." See, also, *Farmers Cooperative Mercantile Co. v. Shultz,* 113 Neb. 801, 205 N. W. 288; *Washington v. Beselin,* 141 Neb. 638, 4 N. W. 2d 753; 34 C. J. S. 279.

This is an action at law in which a jury was waived and as stated in *National Engraving Co. v. Queen City Laundry,* 92 Neb. 402, 138 N. W. 575: "Where an action at law is tried in the district court without a jury, findings of fact have the same force as a verdict." "The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury." *Moore v. Krejci,* 139 Neb. 562, 297 N. W. 913. "The finding of a trial judge in a law action has the force of a verdict and will not be disturbed upon appeal unless clearly wrong." *Quivey v. City of Mitchell,* 133 Neb. 727, 277 N. W. 50.

The undisputed evidence shows that the deceased, Olivia Johnson, a domestic, had in 1932 reached the age of 68 years, being born on February 4, 1864. She had saved some $11,000 which she had on deposit in building and loan

associations in Omaha. The previous year she had a hip injury which somewhat incapacitated her and on or about October 1, 1932, she entered the home of the claimant for aged people, paying at the rate of $50 a month.

On November 4, 1932, she made an application to the claimant for a life membership, which was based on a rate of $500 a year for the life expectancy of the applicant, stating she had on deposit with the Omaha Building and Loan Association $3,000. This application was approved by the claimant and on November 23, 1932, a life membership agreement was entered into in consideration of $4,250 of which $3,250 was paid and $1,000 remained unpaid. The deceased in said contract represented that she had no funds or property other than that paid and agreed that if she had other property or thereafter acquired other money or property she would pay the balance and that the claimant should have a claim against her estate for the amount thereof. In the forepart of 1936 the claimant constructed a wing to its home and the Finance Committee at their March 16, 1936, meeting fixed the rates for the rooms in this new addition at $180 per annum additional for rooms with connecting bath and $300 per annum additional for rooms with private bath and toilet. The deceased desired one of these rooms with private bath and toilet and in September of 1936 moved into such a room. On September 24, 1936, she caused to be paid to the claimant the sum of $2,000. She died on July 16, 1941, leaving an estate of over $6,000.

The dispute between the parties arises out of their disagreement as to the purpose for which the $2,000 was paid. The administratrix, who is a niece of the deceased and residuary legatee under her will, testifies that while she handled the bank books for the deceased, she did not sign withdrawal slips but that the deceased signed them and then she took them to the bank and got the money for her. That a few days before September 24, 1936, the date the $2,000 was paid, she had a discussion with the deceased and Mr. Poe with reference to the deceased occupying a room in the

new wing. This conversation took place in the room then occupied by deceased. That deceased expressed her desire to move into a room in the new wing, the cost of which Mr. Poe stated was $1,000 with private bath and $850 for regular bath. That Mr. Poe stated that the deceased owed $1,000 on the original contract and that they had better pay that because it was drawing interest and that the claimant would have a first claim if she passed away and there was anything left. Administratrix testified: "I said, 'Well, then, she will have to pay $2,000.00', and he said 'Yes', and she did pay the $2,000.00, and I said, 'Well, that makes her all paid up then', and he said 'Yes'." The deceased signed a withdrawal slip on the Omaha Building & Loan Association for $2,000 directing it to be made payable to the claimant. Administratrix then obtained a check from the Association on September 24, 1936, and took it out to the home and gave it to Mrs. Poe, Mr. Poe being absent. Mrs. Poe offered to give her a receipt for the check but she told her to give it to the deceased as it was her money. She had no knowledge of the supplemental agreement issued by the claimant on September 26, 1936, until after the death of deceased, nor of the receipt issued by the claimant on September 25, 1936, nor the contents thereof.

Mrs. Earl W. Gannett, who is neither related to nor a beneficiary under the will of the deceased, testified that she was a close friend and that she and her husband were her business advisers, she having worked in their home as a domestic for over 21 years. That after the deceased entered the home of claimant she frequently visited her there. That she discussed with Mr. Poe, before deceased moved into the new room, the advisability of her paying $1,000 for a room with private bath, which amount Mr. Poe had told her it would be, or taking a cheaper room with connecting bath at $850 or not moving into the new wing.

No demand was ever made on deceased after September 24, 1936, for the payment of this claim nor was any investigation made by claimant to ascertain if she had any additional assets with which to pay.

Lloyd E. Poe, who had been superintendent of the claimant's home for 11 years, testified that in 1936 the deceased's expectancy was 7.1 years. That based on the $300 per annum rate fixed by the finance committee as a charge for a room with private bath in the new wing, the regular charge to the deceased at the time of her moving, which he testifies was September 19, 1936, was $2,130. He testifies that shortly after August 27, 1936, he went to the home of Mr. and Mrs. Earl W. Gannett and discussed with them the cost of the new room. He stated to them it would be $2,130 based on her expectancy of 7.1 years at $300 a year and that he also discussed with them the balance owing on the contract. He denies that he ever quoted to Mrs. Gannett any other figures. He also testifies that he did not recall any such conversation as the administratrix testifies to and denies ever having told any one that the charge to the deceased for the new room would be less than $2,000. On the day following the delivery of the $2,000 check to Mrs. Poe, Mr. Poe issued a receipt found in the papers of the deceased at the home after her death as follows:

"Sept 25 1936

"Received of Mrs. Muskgrove Two Thousand—00/100 Dollars for Miss Johnsons new room

"$2000.00 B. L. Poe"

The next day the claimant issued the following supplemental agreement signed only by the claimant which he testifies he delivered to the deceased:

"Supplemental Agreement to be attached to Life Membership Contract for room with private bath in new addition.

"Omaha, Nebraska, September 26, 1936.

"In consideration of the payment of $2000.00 by Olivia Johnson, the receipt of which is hereby acknowledged, the Florence Home for the Aged agrees to provide Olivia Johnson a room with private bath in the new addition of the Florence Home during the balance of her life membership contract dated November 23, 1932, said room to be assigned by the Home. All other terms and conditions of said life membership contract to remain the same and in full force and effect.

"This supplemental agreement is attached to and made a part of the above referred to life membership contract.

"FLORENCE HOME FOR THE AGED
"By G. H. Payne
President
"Attest: L. E. Poe
Assistant Secretary."

The cash journal of the claimant as of September 26, 1936, has the following entry: "Surplus income, Olivia Johnson, new building, additional payment, room with bath, $2,000.00." And account No. 3-1 of life members in the new addition has the following entry: "Olivia Johnson, additional payment, room with bath, $2,000.00."

This evidence presents a conflict on the question of the purpose for which the $2,000 was paid on September 24, 1936. Both lower courts found it included payment of the balance owing on the original contract of November 23, 1932, and disallowed the claim, and under the rule, as often announced by this court, that a verdict or findings on conflicting evidence will not be disturbed on appeal, the action of the lower court is affirmed.

AFFIRMED.

CARTER, J., dissents.

PAINE, J., dissenting.

I respectfully dissent from the opinion which was adopted by a bare majority of the court.

The evidence discloses that the Florence Home for the Aged is a non-profit, charitable corporation, located at 7915 North Thirtieth street in the city of Omaha, and at the time of the trial was accommodating about 100 life members, and in addition some temporary boarders, who paid the Home $50 a month. It has 25 employees to conduct the Home.

The management of the Home prefers that a person seeking to become a member of the Home shall first become such a temporary boarder for a few months, for the purpose of seeing whether such person would like to become a permanent member of the Home, as well as to enable the

management to ascertain whether it desires to accept such person into the Home permanently. The terms upon which members were admitted to the Home required the payment of $500 a year for the remaining years of the applicant's life expectancy, as shown by the approved insurance tables of expectancy.

Miss Olivia Johnson had broken her hip in October, 1931, and it was very difficult for her to get around, and she desired to become a member of the Home, and on November 4, 1932, signed a printed application for membership. This application, exhibit No. 1, gave her birth as February 4, 1864, and set out that she had $3,000 in the Omaha Loan and Building Association.

On the 23d day of November, 1932, she signed exhibit No. 2, a typewritten contract for life membership with the Home, which was prepared in the Omaha National Bank building, in the office of G. H. Payne, then president of the Florence Home for the Aged, witnessed by L. E. Poe, superintendent. This exhibit No. 2 provided that at her age and expectancy the life membership fee would be $4,250, but as she was unable to pay that full amount, and has represented to the officers of the Home that she had no funds or property of any kind other than the sum of $3,250 which she would pay in cash, the same would be accepted upon the definite understanding and written agreement that, if the second party now has other property, or hereafter acquires other money or property, the second party will pay the balance of the regular membership fee, with interest thereon at 5 per cent per annum from date until paid, "and the party of the First part shall have a claim against her estate for the said amount if the party of the Second part dies leaving any property subject to administration."

In addition to this carefully prepared typewritten contract, exhibit No. 2, there was stapled to the back of it a printed stock contract for life membership, signed by the parties at the same time. This provided the rules and regulations between the "Home" and the "Member," and upon violation of rules member could be discharged.

Miss Olivia Johnson, upon signing this contract, exhibit No. 2, and the printed stock contract, became a member of the Home, and remained such until she died.

During the year 1936 the Home started to build a new addition. This would contain better rooms, for some of the rooms would have private baths and some would have a bath between two rooms, and Miss Johnson watched the building of this addition and had her heart set upon having one of the best rooms in the new addition, with a private bath and, against the advice of her friends, she insisted upon moving. The prices of the new rooms were higher, and figured on her expectancy would have fixed the cost of the new room at $2,100 in addition to the basic membership.

The official minute book of the finance committee shows, under date of March 16, 1936, among other things, that rates were fixed in the new addition at $180 additional a year for rooms with connecting bath and $300 a year additional for rooms with a private bath and toilet. The evidence shows that others who moved into the new part paid these prices.

Miss Johnson's expectancy in 1936 was 7.1 years, and at $300 a year, the amount necessary for her to pay to change from the small room she had in the old part to one of the very best rooms in the new part, with private bath and toilet, would be $2,130.

Exhibit No. 3 was prepared and signed, and reads as follows:

"Supplemental Agreement to be attached to Life Membership Contract for room with private bath in new addition.

"Omaha, Nebraska, September 26, 1936.

"In consideration of the payment of $2000.00 by Olivia Johnson, the receipt of which is hereby acknowledged, the Florence Home for the Aged agrees to provide Olivia Johnson a room with private bath in the new addition of the Florence Home during the balance of her life membership contract dated November 23, 1932, said room to be assigned by the Home. All other terms and conditions of said life

membership contract to remain the same and in full force and effect.

"This supplemental agreement is attached to and made a part of the above referred to life membership contract.

"FLORENCE HOME FOR THE AGED
"By G. H. Payne
President
"Attest: L. E. Poe
Assistant Secretary"

Exhibit No. 4, given Miss Johnson at the time, reads as follows:

"No.———— Sept 25 1936
"Received of Mrs. Muskgrove Two Thousand—00/100 Dollars for Miss Johnsons new room
"$2000.00 B. L. Poe"

Exhibits Nos. 13 and 14 show the ledger entries made at the time. Exhibit No. 14 is account No. 3-1, under date of September 26, 1936, on ledger sheet 1054 of the cash journal, and reads: "Olivia Johnson, additional payment, room with bath, $2,000.00." This entry shows the surplus amounts received from life members for rooms in the new addition.

Exhibit No. 13, shown in the ledger, reads: "Surplus income, Olivia Johnson, new building, additional payment, room with bath, $2,000.00."

Miss Olivia Johnson died July 16, 1941, and the inventory filed by her administratrix with will annexed disclosed that she owned $3,196.98 of stock in the Omaha Loan and Building Association and $3,060.42 of stock in the Conservative Savings & Loan Association, making a total amount of $6,257.40, and the Home filed a claim against her estate for the balance due of $1,000 with interest at 5 per cent from November 23, 1932, and attached to said claim the contract providing for the payment of said sum from her estate, as signed by her November 23, 1932, upon which contract she was admitted to the Home. In the answer filed by the administratrix, Bessie Musgrove, it is alleged that this original contract dated November 23, 1932, was secured by

fraud, deceit, and misrepresentation. She further alleges in her answer that "plaintiff knew that the said Olivia Johnson was incompetent on the 25th day of September, 1936, and that she had been so for some time prior thereto and that she continued incompetent thereafter."

It is alleged, and argued strenuously, that the Home committed a fraud upon Miss Johnson because it took advantage of her when she was an elderly, infirm old lady, who was only experienced in domestic service. The record does not support such a charge, but rather indicates that she was a keen, thrifty woman, who had not only accumulated a competence from her savings, but very carefully concealed the amount of her assets from every one.

The Home offered its original records in evidence in support of its claim. Exhibit No. 12 is the original record, as found in the minute book, of the meeting of the finance committee of November 14, 1932, and reads as follows:

"Application of Miss Olivia Johnson for membership in the Home was submitted. Miss Johnson is sixty-nine years old and should pay about $4250.00. She claims that $3,000.00 is all that she has deposited with the Omaha Loan & Building Association. On motion made and carried her application was accepted with a beneficiary clause, on the condition that the President and Treasurer were satisfied that she had enough money to pay her incidental expenses and burial, and with the request that any additional funds she has should be deposited with us for the above purpose. Secretary Poe was requested to investigate the case a little further."

In reference to the original contract, Mrs. Musgrove testified: "Then she made an agreement for a life membership, but she took care of that herself. * * * I had nothing to do with that, no."

Mrs. Earl W. Gannett was called by the administratrix, and testified on direct examination that Olivia Johnson had worked as their cook and housekeeper for 21 years; that "she had had a fractured hip and she had to go some place and we all discussed it and thought that was a very good

place to go." She testified that she knew Olivia Johnson had signed up a life membership, and it was her understanding that the price was $4,250; that she still owed $1,000, for which she gave a note, but had paid the remainder, as Mrs. Gannett understood it.

When the terms of $2,000 were agreed upon between Miss Johnson and the Home, then Miss Johnson signed a withdrawal slip, requesting that a check for $2,000 be made to the Home, and Mrs. Musgrove brought out the check and gave it to Mrs. Poe in the evening. She was asked to wait and get the receipt, and replied: "You give it to Aunt Olive. It belongs to her. It was her money." Mrs. Musgrove testified that she did not see this exhibit 4 until after Miss Johnson's death, when it was found in her box with her other papers.

Mr. Lloyd E. Poe in his testimony stated that he told Mr. and Mrs. Gannett that the price of the room which Miss Johnson wanted would be $300 additional a year for 7.1 years of her expectancy, or $2,130, and that the figure of $2,000 was definitely agreed upon with Miss Johnson. He testified that he did not recall any conversation with Mrs. Musgrove at all about the price of the new room. With the ledger sheets in his hand, Mr. Poe testified that the entries showed: "Olivia Johnson, additional payment, room with bath, $2,000.00" and that he never told any one that the cost of the new room was anything less than $2,000.

The officers of the Home and Mrs. Musgrove, her residuary legatee, were each trying to dissuade Miss Johnson from changing from her old room to the new room, the officers because the old room was next to the dining-room, and Miss Johnson was crippled, so walking was difficult, and she could not use the bath in the new room without help anyway. Under these circumstances, it does not ring true that the Home, with such a demand for these new rooms, would give her a new room at a rate of less than one-half of the price that others were paying for such a room. Mrs. Musgrove testified that Miss Johnson was given a $2,000 room for only $1,000, and that the other $1,000 was to pay off the

valid written obligation of the balance due under the contract of November 23, 1932. Such a plea of payment being an affirmative defense, the burden rests upon the one who alleges it. See *Washington v. Beselin,* 141 Neb. 638, 4 N. W. 2d 753; 34 C. J. S. 279.

"There is always a presumption arising from the instrument itself that it sets forth correctly the agreement of the parties." *Sweley v. Fox,* 135 Neb. 780, 284 N. W. 318. See, also, 23 R. C. L. 365, sec. 65.

"The best evidence of the terms of a contract in writing is the writing itself, and parol evidence is not admissible unless the instrument is lost or its absence is otherwise satisfactorily explained." 32 C. J. S. 717.

Does it stand to reason that a philanthropic institution of standing in the community would falsify its record in its minute books of transactions of its business? Or that it would be dishonest with a hundred other members by giving Miss Johnson a room at one-half the price the others were paying for that accommodation? Or that its entries in its books of account are untrue and false in reference to this one transaction?

As a general rule, original written accounts and books of account are the best evidence of the matters they contain. Books of account are competent to prove the performance of a contract, and to show that credit was given as agreed between the parties.

Where book entries were made by a corporation contemporaneous with the time the transaction took place, they are somewhat in the nature of *res gestæ,* and there has been no impeachment of these book entries by any competent evidence.

As stated in the majority opinion, the evidence in behalf of allowing the claim for the balance due under the written contract with the Florence Home presents a conflict on the question of the purpose for which the $2,000 was paid on September 24, 1936.

On one side, we have the written contracts, receipts, and minute book entries of the meetings of directors, and reso-

lutions adopted in reference thereto, together with book entries made at the time of the financial transactions, as well as the positive oral evidence of the manager of this Home.

On the other side, we have the evidence of the lady for whom Olivia Johnson had worked as cook and housekeeper for 21 years, and after leaving her employ "she had had a fractured hip and she had to go some place and we all discussed it and thought that was a very good place to go." But the principal oral evidence against the claim is by Mrs. Bessie Musgrove, who did not want her aunt, Miss Johnson, to take the better room with a private bath, nor to pay the Home any more on this written contract. Why? The answer is not far to seek. May it not be found in the fact that she is the residuary legatee under her aunt's will, and will personally receive the $1,000 if she can prevail upon the court to reject this claim?

"The decisions are numerous that logical inferences which may be drawn from existing proved facts possess a very strong evidentiary value, and oftentimes are allowed to overcome positive testimony." *Smith v. Bankers Nat. Life Ins. Co.*, 130 Neb. 552, 265 N. W. 546.

I am authorized to state that Nuss, District Judge, concurs in this dissent.

MYRON O. JOHNSON, APPELLANT, V. HAZEL A. BATTEEN, APPELLEE.

13 N. W. 2d 625

FILED MARCH 10, 1944. No. 31671.

1. **Appeal and Error.** Where on appeal an instruction is assailed as erroneous, the question is: Is the instruction so erroneous as to be prejudicial and to require a reversal?
2. **Negligence.** Slight negligence actually means small or little negligence.
3. ———. Gross negligence means just what it indicates, gross or great negligence, that is, negligence in a very high degree.

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

C. M. Skiles and *Albert S. Johnston,* for appellant.

Baylor, Tou Velle & Healey, contra.

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

SIMMONS, C. J.

This is an action to recover for personal injuries and damages to a car, arising as a result of an intersection collision. There were presented the questions of defendant's negligence and plaintiff's contributory negligence. The trial court submitted the case to the jury. Defendant prevailed. Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff's principal assignment of error is directed at the following instructions: "Slight negligence means the want of great care and diligence, or, in other words, the absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use.

"Gross negligence is defined as the want of slight care and diligence and includes a failure to exercise any care to avoid injury to person or property."

In the instruction on comparative negligence, the court instructed the jury in part as follows: "If, in comparing the negligence of the plaintiff and defendant you find from the evidence that the contributory negligence of the plaintiff exceeded in any degree that which under the circumstances in this case amounted to slight negligence, or if the negligence of the defendant was in any degree short of gross negligence under the circumstances, then the contributory negligence of the plaintiff, however slight, will defeat a recovery by the plaintiff in this case."

Plaintiff's objection goes to the definition of slight negligence when read in connection with the comparative negligence instruction, and contends that it places a burden upon the plaintiff of proving that he exercised a higher degree of care than the law requires.

In addition to these instructions, the court instructed the jury that: "Negligence is the omission to do something which a reasonable person, guided by those considerations which ordinarily govern the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do; in other words it is the absence of care according to the circumstances;" and "By ordinary care is meant that amount or degree of care which common prudence and a proper regard for one's own safety and the safety of others would require under the circumstances shown in the evidence."

The criticized definition of slight negligence is one approved by the authorities. See 45 C. J. 666; 39 Words and Phrases (Perm. ed.) 381; Black's Law Dictionary (3d ed.) 1233; Ballentine's Law Dictionary, 1209; 38 Am. Jur. 690.

It is difficult, if not impossible, to write instructions that are criticism-proof. The question on appeal is: Is the instruction so erroneous as to be prejudicial and to require a reversal? This court has said: "The words 'slight' and 'gross' are words of common use which are understood by every one of ordinary intelligence. An attempt to define these words would have been superfluous. Any one of common sense knows that slight negligence actually means small or little negligence, and that gross negligence means just what it indicates, gross or great negligence." *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N. W. 623. Also, "Gross negligence means great or excessive negligence; that is, negligence in a very high degree." *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96. If, in instructing a jury it becomes necessary to define slight and gross negligence, it is suggested that either of the above definitions is clear and acceptable. However, that does not mean that the instructions here given are prejudicially erroneous. Jurors are accepted because they are men and women of common sense and have a common understanding of words ordinarily used in our language. When read in their entirety, we are of the opinion that the instructions enabled the jury to understand the language used in the comparative negligence

instruction, to apply the proper measure to the conduct of the parties, and properly to weigh the evidence by it.

Plaintiff next argues that the motion for a new trial should have been sustained for the reason that the verdict of the jury was clearly against the weight and reasonableness of the evidence. Plaintiff approached the intersection from the west and was proceeding east. The defendant approached from the south and was proceeding north. There were some obstructions to visibility at the southwest corner of the intersection. There is a dispute in the evidence as to the speed of plaintiff's car and of defendant's car when they entered the intersection, as to which car reached the intersection first, and which car had the right of way; there is dispute as to where each party was when the other entered the intersection; there is unanimity as to the point of impact of the two cars within the intersection. We do not consider that the case calls for an application of the rule which plaintiff invokes.

Plaintiff next argues briefly and generally that the court erred in refusing to give certain instructions to which we refer. Requested instruction No. 2 was given by the court in instruction No. 11½ with the exception of one clause which obviously had no application to the facts of the instant case. Requested instruction No. 6 was given in substance by the court in instruction No. 14 with one exception. This instruction had to do with the various items that the jury could consider in arriving at the amount of damages if they found for the plaintiff. The plaintiff asked in the instruction that he could recover for the value of time lost. The court instructed the jury that they could not allow anything for loss of earnings, as there was no competent evidence to sustain such a recovery. In view of the jury's verdict for the defendant, we do not deem it necessary to review the evidence on that point. At best, if error, it was without prejudice. Requested instruction No. 9 was to the effect that if the jury believed certain facts to be true, the plaintiff "would not be negligent in proceeding across said intersection." Without considering other problems

presented by the instruction, it is obvious that the instruction did not include all of the elements which would have to be considered and determined before the jury could make any such a finding. Requested instruction No. 10 was that "As to the speed of the defendant's car, you are instructed that you can take into consideration" certain facts. Again, without considering other problems presented by the instruction, it is obvious that, if otherwise proper, the same rule should apply to a determination of the speed of the plaintiff's car as they would have applied to the speed of the defendant's car.

We find no error in the court's refusal to give the tendered instructions.

The judgment of the trial court is affirmed.

AFFIRMED.

ELVEN A. BUTTERFIELD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
13 N. W. 2d 572

FILED MARCH 10, 1944. No. 31637.

1. **Contempt.** A prosecution for criminal contempt is governed by the strict rules which govern a criminal proceeding.
2. ———. The abstraction of a page of a pleading and the substitution of another therefor with intent to deceive and mislead the court constitute a criminal contempt.
3. ———. An attorney at law, who makes a false statement to the court which was known to the maker to be false and which was made for the purpose of deceiving and defrauding the court and obstructing and hindering the administration of justice, is guilty of criminal contempt.
4. ———. An attorney at law, who produces a carbon copy of a pleading and asserts that it is a true copy of the original when in fact it is a carbon copy of an altered pleading as it appeared after he had changed it, is guilty of criminal contempt when it is done with the intent to deceive and mislead the court.
5. ———. Evidence examined and *held* to sustain a conviction of criminal contempt on each of three counts.

ERROR to the district court for Antelope county: SIDNEY T. FRUM, JUDGE. *Affirmed as modified.*

Jesse L. Dougherty, August Wagner and *Webb Rice,* for plaintiff in error.

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

Heard before SIMMONS, C. J., PAINE, CARTER and CHAPPELL, JJ., and POLK and NUSS, District Judges.

CARTER, J.

Defendant was proceeded against for a constructive criminal contempt. The trial court found him guilty and assessed a fine of $300 and costs. Defendant seeks a review in this court by petition in error.

Defendant is a practicing lawyer at Neligh, Nebraska. He is charged by the first count of the information with removing a page of an amended petition which he had filed in the office of the clerk of the district court and substituting another without leave of court, which substituted page contained statements materially different from the original in that the words "the southwest quarter of the southwest quarter of section 6, township 25 north, range 6 west of the 6th P. M., Antelope county, Nebraska," were substituted for the words "the southwest quarter of the southwest quarter of section 7, township 25 north, range 7 west of the 6th P. M., Antelope county, Nebraska." The second count charges defendant with disorderly, contemptuous and insolent behavior toward the district court for Antelope county in that at a subsequent hearing, upon being asked by the court if he committed the acts recited in count one, he made a false answer to said court when he well knew it to be false for the purpose of defrauding and deceiving the court. The third count charges that the defendant at a subsequent hearing, after committing the acts recited in counts one and two of the information, produced a carbon copy of the amended petition and asserted that it was a correct copy of the original, when in fact it was not a true copy of the orig-

inal amended petition in that it did contain the substituted page referred to in count one of the information.

The evidence shows that on February 16, 1942, defendant filed a partition suit in the district court for Antelope county entitled Lester West et al. v. Ruth E. Greeley et al. to secure the partition of certain lands. It appears that another attorney, Harold Rice, discovered that one tract of forty acres was erroneously described in the petition and on February 24, 1942, filed an answer and cross-petition praying for the partition of the same lands correctly described in his cross-petition. Defendant thereupon filed an amended petition in which was contained the erroneous description recited in the first count of the information. The evidence shows that defendant filed a plea in abatement to the cross-petition filed by Rice and when it came up for hearing it was discovered that page two of the amended petition had been removed and a new one substituted which contained a proper description of all the real estate involved in the partition action. There is evidence in the record that Rice and Elmer C. Rakow, another attorney at Neligh, examined the amended petition and observed the erroneous description therein shortly after the amended petition was filed. A handwriting expert identified a page number on the substituted copy as the handwriting of the defendant. The defendant, when questioned by the trial judge, as well as by his plea to the information filed against him, denied that he had committed the acts charged. He contends that the page was substituted before he ever filed the amended petition and that no change was thereafter made by him. After an examination of all the evidence we must necessarily conclude that the evidence is sufficient to sustain the finding by the trial court.

A prosecution for criminal contempt is *sui generis*, neither civil nor criminal, but in the nature of a criminal proceeding. To sustain a conviction the guilt of the defendant must be shown beyond a reasonable doubt. Also, the strict rules which govern criminal prosecutions apply to a prosecution for criminal contempt. *State v. Barlow*, 132 Neb. 166, 271 N. W. 282.

The defendant contends that count one of the information did not charge a criminal contempt and that his demurrer thereto was improperly overruled. Our statute provides in part that any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceeding, or process pending before the courts, constitutes a criminal contempt. Comp. St. 1929, sec. 20-2121. The abstraction of a page of a pleading and the substitution of another therefor, with intent to deceive and mislead the court, constitute a criminal contempt. In *United States v. Ford,* 9 Fed. 2d 990, a case where the defendant was charged with making unauthorized changes in a bill of exceptions, the court said: "Little need be said to emphasize that the administration of justice depends upon the integrity of judicial proceedings and records. Falsification of either obstructs and defeats justice. In consequence, if falsification be done or attempted intentionally in fact or equivalent as aforesaid, it is contempt of the authority of the court, and usually also a crime. Done by an attorney of the court, it is more reprehensible than by others; for it is an abuse of his office, a betrayal of his trust, a violation of his oath, infidelity to the court to which, and not to his client, is counsel's first duty always, and a profanation of the temple of justice. All this is conceded here as everywhere."

In a case where an attorney, after obtaining an order from a court, sought to vacate it by destroying the petition and order before it had been filed, the court said: "That the destruction of a petition preferred to a court, and an order made thereon, is at least a contempt of that court goes without saying, and needs not the citation of authorities to support the proposition. Lack of bad motive mitigates, but cannot wholly excuse, the transgression." *In re S.,* 83 N. J. Eq. 607, 91 Atl. 801. See, also, *Baldwin v. State,* 11 Ohio St. 681; *In re P.,* 83 N. J. Eq. 390, 91 Atl. 326; *O'Conner v. Fields,* 79 Neb. 840, 113 N. W. 528.

It is urged, however, that defendant had a right to amend the amended petition under the provisions of section 20-849, Comp. St. 1929, which provides: "The plaintiff may

amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant, or his attorney, and the defendant shall have the same time to answer or demur thereto as to the original petition." This statute, assuming that it has application to the case before us, contemplates an amendment openly made and that the date thereof be made known to the opposite party so that he may thereby be apprised of the time within which he must plead. The charge here is that he not only tampered with and changed the amended petition, but that he did so with an intent to defraud and deceive the court and for the purpose of hindering the due administration of justice. We are of the opinion that count one of the information is sufficient to charge a criminal contempt.

The defendant urges, also, that count two fails to charge a criminal contempt. In this count defendant is charged with falsifying to the court in answer to the court's inquiry with respect to the substitution of a page in the amended petition described in count one, and that such statement was known to be false and was made for the purpose of deceiving and defrauding the court and obstructing and hindering the due administration of justice. False statements made by an attorney to a court for the purpose of deceiving the court constitute a criminal contempt. This is so whether or not it is specifically defined as such by section 20-2121, Comp. St. 1929, because that statute is declaratory of the common law as far as its provisions go and does not have the effect of limiting the common law or the inherent powers of the court to punish for contempt. *In re Dunn*, 85 Neb. 606, 124 N. W. 120; *Goodhart v. State*, 84 Conn. 60, 78 Atl. 853.

In *Goodhart v. State, supra*, the court aptly stated the rule as follows: "The due administration of justice requires that statements to the court by attorneys and its other officers shall be such that the court may rely upon their truthfulness with absolute confidence. The law demands this; and attorneys, when they are admitted to the bar, are re-

quired to take an oath, not only that they will do no falsehood, nor consent to any to be done in court, but that, if they shall know of any to be done, they will inform the court thereof, to the end that it may be reformed. To deceive the court by untruthful statements for the purpose of securing the admission of testimony is unlawful and disorderly conduct, and a contempt in the face of the court." We submit that an attorney at law, as an officer of the court, is guilty of a criminal contempt if he falsifies to the court with intent to deceive and thereby hinders, obstructs or defeats the administration of justice. Any other rule would degrade the dignity of the court and lower the confidence of the public in the judicial system.

The defendant likewise urges that count three is insufficient to charge a contempt. Defendant was therein charged with having produced a carbon copy of the amended petition and having asserted to the court that it was a true copy of the original when it in fact was a carbon copy of the altered amended petition as it appeared after defendant had changed it. We think such acts when done with intent to hinder the administration of justice constitute a criminal contempt. The cases cited with reference to counts one and two are sufficient to sustain this holding.

While we do not condone the gravity of the offense committed by the defendant, there are certain mitigating circumstances apparent from the record which warrant a reduction in the amount of the fine. It is quite evident to us that the answer and cross-petition filed by Harold Rice in the partition suit had for one of its purposes the obtaining of control of the case in order that the fee payable from the proceeds of the sale would go to him instead of the defendant. It also appears that the trial judge was formerly a law partner of Rice. It seems clear from the circumstances recited in the record that defendant obtained the notion that the trial court would lend his assistance to Rice in carrying out his ill-conceived plan. Both attorneys appeared to be operating upon the theory that the first petition on file which properly described the property to be partitioned

would carry with it the attorney's fee ordinarily paid from the proceeds of the partitioned property. If, as the record indicates, the defendant was obsessed with the idea that the case was being unethically taken from his control, we can see why he impulsively undertook to correct the legal description to the lands by rewriting and substituting the page for the one containing the erroneous description without any purpose of committing an offense of the gravity which we have herein expressed. The unseemly plan instigated by Rice set in motion the events which led to this unfortunate offense. The animosity of these two attorneys, testified to in the record and which was permitted to affect the conduct of this litigation, reflects no credit to the legal profession. The whole transaction is indicative of the sordid results that can be generated when personal enmities are permitted to come into play in the trial of a lawsuit. A proper professional attitude ordinarily places more restraints upon the primitive instincts than is shown to have been exercised by the attorneys in the litigation out of which this prosecution arose.

We feel that under the circumstances shown by this record the fine imposed should be reduced to $25. As thus modified, the judgment of the trial court will be affirmed.

AFFIRMED AS MODIFIED.

RICHARD CRECELIUS, A MINOR, BY R. ALLEN CRECELIUS, HIS FATHER AND NEXT FRIEND, APPELLEE, V. GAMBLE-SKOGMO, INCORPORATED, ET AL., APPELLANTS.

13 N. W. 2d 627

FILED MARCH 10, 1944. No. 31662.

1. **Appeal and Error.** For the purpose of decision upon a motion for a directed verdict the motion must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can be deduced from the facts in evidence.

2. **Trial.** Where different minds may reasonably draw different conclusions from the evidence in a law action the question to be decided is for the jury.
3. **Evidence.** Where it appears that a witness had a reasonable time, means, distance and opportunity to formulate a basis for an opinion as to speed of a car, such witness may express his opinion as to speed. The credibility and weight to be given such testimony is for determination by the jury.
4. ———. As a foundation for the admissibility of experiments to illustrate a given subject it must be shown that the person who makes the experiment is competent to do so, that the apparatus used was of a kind and in the condition suitable for the experiment and that the experiment was honestly and fairly made.
5. **Appeal and Error: EVIDENCE.** A discretion is conferred upon the trial court in the reception of evidence of experiments and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion.
6. **Damages.** In an action for damages for personal injuries which are permanent and have impaired the earning capacity, damages for pecuniary loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition.
7. **Trial.** Communications between the trial judge and jury after retirement of the jury should be controlled by a high degree of circumspection.
8. **Damages.** The only future pain and suffering which a jury is entitled to consider in the assessment of damages is such as the evidence shows with reasonable certainty will be experienced.

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

Morrow & Miller, Floyd E. Wright and *Cline, Williams & Wright,* for appellants.

Bertrand V. Tibbels, contra.

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

YEAGER, J.

This is an action by Richard Crecelius, a minor, by R. Al-

len Crecelius, his father and next friend, plaintiff and appellee, against Gamble-Skogmo, Incorporated, a corporation, and Robert R. Robertson, defendants and appellants. The action is for damages for personal injuries claimed to have been sustained by plaintiff on the 24th day of July, 1940, in the city of Scottsbluff, Scotts Bluff county, Nebraska, on account of alleged negligence of the defendant, Robertson, who was at the time employed by, and engaged in the operation of a truck owned by, the defendant Gamble-Skogmo, Incorporated.

The case was tried to a jury and on February 22, 1943, a verdict was returned in favor of plaintiff and against the defendants for $20,000. Judgment was rendered on the verdict. From this judgment the defendants have appealed to this court.

Many of the pertinent facts in the case are not disputed. Among them are these: West Twentieth street is a street extending east and west in the city of Scottsbluff, Nebraska, and in the vicinity involved here it has a width of approximately 42 feet. Intersecting Twentieth street are avenues "C" and "D." Avenue "D" is one block west of avenue "C." On July 24, 1940, the defendant, Robertson, in due course of his employment, was operating a Chevrolet pick-up truck in the business of the defendant, Gamble-Skogmo, Incorporated. Shortly after 5:00 p. m. while Robertson was operating the truck in an easterly direction on Twentieth street between avenues "C" and "D" he ran into the plaintiff, a minor of the age of four years. The plaintiff, at the time, was crossing Twentieth street. From the south side he was running across the street in a northeasterly direction. The right front fender struck plaintiff and as a result he came to rest some distance eastward from the point of collision and near the center of Twentieth street. That he was injured is not questioned. The character and extent of his injuries are in dispute.

Plaintiff by his petition contends that the collision came about because of negligence in substantially the following particulars: The truck was equipped and operated with de-

ficient, faulty and improper brakes; the truck was operated at an excessive rate of speed in violation of the ordinances of the city of Scottsbluff; the truck was operated without proper control; Robertson failed to steer the truck to right or left so as to avoid striking plaintiff although he had sufficient opportunity so to do.

In the answer the allegations of negligence are generally denied and the defendants further allege substantially that Robertson was confronted with an emergency for which he was in nowise responsible, whereby he was unable, in the exercise of ordinary care under the circumstances, to avoid striking the plaintiff.

The first question raised by the appeal is the sufficiency of the evidence to justify the submission of negligence of the defendants to a jury. The determination of this question must be agreeable to two rules.

The first is that in considering a motion for a directed verdict this court must, for the purpose of a decision thereon, treat it as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Fairman v. Cook*, 142 Neb. 893, 8 N. W. 2d 315.

The second is that where different minds may reasonably draw different conclusions from the evidence in a law action the question to be decided is for the jury. *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426, 150 N. W. 374; *Hickey v. Omaha & C. B. Street Ry. Co.*, 140 Neb. 665, 1 N. W. 2d 304; *Fulcher v. Ike*, 142 Neb. 418, 6 N. W. 2d 610.

In the light of these rules it becomes necessary to examine the evidence. The helpful evidence in this connection is found for the most part, if not entirely, in the testimony of plaintiff's witness, Dan Goodro, as aided by distances shown by the plat of the area of Twentieth street between avenues "C" and "D." Goodro and the defendant, Robertson, were the only eyewitnesses to the accident. The pertinent part

of Goodro's testimony is the following: "Q. (163) Just tell us what happened as you drove along there? A. * * * I turned around and I seen Dickie, and there was another boy there with the bunch. I seen him start running across the street and I seen a pick-up coming. * * * Q. (166) Mr. Goodro, just tell us what you saw there? A. Well, I saw the pick-up coming and I saw the boy start from the curb. Q. (167) Then what happened? A. Well, then the boy got hit. * * * Q. (170) Where was the pick-up truck? Where was the pick-up truck when Dickie left the curb? A. It looked to me like it was entered D at the intersection. Q. (171) Did you watch it then from the time it entered D until the time it hit Dickie? A. Yes. * * * Q. (191) Now, which did you see first, Dickie leave the curb or the pick-up? A. Well, I seen them both about the same time. Dickie started to run. * * * Q. (358) When the Crecelius boy started across the street, in which direction did he run? A. Northeast. Q. (359) He was going in a northeasterly direction? A. Across towards the alley. * * * Q. (375) Can you tell this jury about exactly where that truck was at the time the boy left the curb? A. He was coming into the intersection at D when this boy left the curb. * * * Q. (411) Now, about how far west of the extended line of the north alley was it that Dickie left the curb? A. How far west of the north alley? Q. (412) Yes. How far west of the extended line of the north alley? If you extended that line across the street, how far west of the alley would it be? A. Of the north alley? Q. (413) Yes, of the north alley? A. I would say it would be about thirty-five feet." On the matter of speed of the truck this witness testified that it was traveling at a rate of about 45 miles per hour.

If this testimony is true then by reference to the plat which is in evidence plaintiff started across the street from a point about 35 feet west of the alley which alley is 140 feet east of avenue "D." At the time plaintiff started across Robertson was at least 105 feet to the west. The witness also testified that there was no traffic and no parked automobiles to obstruct Robertson's full view of the street.

At the time of the accident the brakes on the truck were greatly out of adjustment. The left front had no braking pressure, the right front had 75 pounds, the right rear 300 pounds and the left rear 600 pounds.

On these facts there was clearly a question of negligence to be submitted to the jury. The jury had a right to consider whether or not Robertson was negligent in not, under the circumstances, having the truck under such control as to be able to avoid striking the plaintiff by stopping, turning to the left or to the right, or in not seeing plaintiff in time to avoid striking him. It is true that Robertson's version of the incidents varies greatly from that of Goodro. He says that plaintiff ran out from behind an automobile which was parked on the south side of the street so closely in front of him that he did not even have time to apply his brakes before striking plaintiff and that there was no possibility of avoiding him although he was traveling only between 20 and 25 miles per hour.

This does not present a question for the court but is a disputed question of fact for the jury, since as to it, we are unable to say that different minds could not reasonably draw different conclusions from this evidence.

Appellants contend that it was error to permit Goodro to give his opinion as to the rate of speed Robertson was driving at the time of the accident on the ground that he did not have reasonable time, means, distance or opportunity to formulate a basis for an opinion. They contend that the admission of this opinion is violative of the rule announced in the second syllabus point in *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673, and followed in *Knoche v. Pease Grain & Seed Co.,* 134 Neb. 130, 277 N. W. 798; *Mierendorf v. Saalfeld,* 138 Neb. 876, 295 N. W. 901; *Fairman v. Cook, supra,* as follows: "Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject."

The rule is a sound one but in the negative sense in which it is stated it can have no application here. The testimony of the witness discloses that he did have a basis for his opinion. He first saw the truck a distance of about a half block away, observed it from that time until it came to a stop. It was coming toward him and at least in part his estimate was based on the time taken to close the gap between. The accuracy of such estimates or opinions is open to question but being admissible as evidence the determination is one for the jury and not the court.

On February 6, 1943, more than two and one-half years after the accident, the brakes of a Chevrolet pick-up truck similar to the one involved in the accident were adjusted so that the pressure on the wheels was the same as that on the defendant's truck at the time of the accident and driven to the scene of the accident where a police officer made some experiments. Apparently the purpose was to show in what distance the truck could be stopped by the use of brakes going at different speeds, although this is not quite clear. The testimony adduced was as to length of skid marks rather than stoppage distances.

Over objection of the defendants the court permitted witnesses to give the results of the experiments, and photographs of skid marks produced on the pavement as a result of the experiments were admitted in evidence.

With regard to the matter of admission of evidence of experiments this court has said: "While experiments are sometimes admitted to illustrate a given subject, we are not aware of any rule that permits onlookers to testify as to the result, without laying the foundation and showing that the result of the experiment can be relied on as a substantive fact. This means that, as a foundation for this testimony, it must be shown that the person who makes the experiment is competent to do so; that the apparatus used was of the kind and in the condition suitable for the experiment, and that the experiment was honestly and fairly made. Without these facts established, 'the result' is without probative force." *Omaha Street Ry. Co. v. Larson*, 70 Neb. 591,

97 N. W. 824. See, also, *Clarence v. State*, 86 Neb. 210, 125 N. W. 540; *Amsbary v. Grays Harbor Ry. & L. Co.*, 78 Wash. 379, 139 Pac. 46, 8 A. L. R. 1; *Kohlhagen v. Cardwell*, 93 Or. 610, 184 Pac. 261, 8 A. L. R. 11; *Ragan v. MacGill*, 134 Or. 408, 292 Pac. 1094, 72 A. L. R. 860; 9 Blashfield, Cyclopedia of Automobile Law and Practice (Part 2) (Perm. ed.) 619-620; 20 Am. Jur. 627-632; 32 C. J. S. 440-443.

This court recognizing the difficulties attending an offer of evidence of illustrative experiments has adopted the rule that in such cases a discretion is conferred upon the trial court and that unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such evidence. In *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964, it was said: "Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating other witnesses, and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion." Other cases adhering to this principle are: *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Lillie v. State*, 72 Neb. 228, 100 N. W. 316; *Falkinburg v. Prudential Ins. Co.*, 132 Neb. 831, 273 N. W. 478.

From an examination of this record we are unable to say that this evidence with its foundation was or was not of value to the jury in a determination of the question to which it related. Certainly the jury were entitled to the benefit of every probative fact available and under our system of jurisprudence, moreover of government, the determination of issue of fact in jury cases is within the exclusive province of the jury. Thus conclusively under our system of government we presume that juries are capable of weighing the facts and rendering just decisions.

We are unable to say on the record that the court abused its discretion in the admission of the evidence of these experiments.

Three doctors were called by plaintiff to testify as ex-

perts with regard to his condition. Each of these doctors had previously examined him, had obtained a history from the father and had examined the hospital records made while the plaintiff was in the hospital, which records were in evidence. Each doctor testified to his findings and the history given. Hypothetical questions were propounded to each of the doctors. With this background each doctor was permitted to express his opinion as to the condition of plaintiff, past, present and future. The qualifications of these witnesses were sufficient, the matters inquired about were pertinent to the issues being tried, the histories were admissible, the hypotheses embraced the essential features of the evidence and the answers responded to the proper subject matter of inquiry.

Assignments of error Nos. 13, 14, 15, 16, 17, 18, 20 and 21 challenge the propriety of certain of the testimony of the three doctors mentioned in this connection and with this foundation. We find no error in the admission of this testimony.

We next direct our attention to assignment of error No. 19. Under this assignment one doctor was allowed to give it as his opinion that the accident would have the effect of shortening plaintiff's normal life expectancy by 25 years. This evidence was doubtless admissible. 32 C. J. S. 238, sec. 534; 22 C. J. 661; 20 Am. Jur. 722, sec. 862, and 735, sec. 872. Assuming however that there was no sufficient foundation for its admission this evidence could not have been prejudicial to defendant.

The reason why this is true is obvious. If it had any effect at all it would have been to reduce rather than increase the amount of plaintiff's recovery since while plaintiff was entitled to his pecuniary loss based on his life expectancy before the injury, the recovery for future mental and physical suffering would depend upon expectancy in his injured condition. The rule of law in this connection has been announced in *Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596, 164 N. W. 564, as follows: "In an action to recover damages for personal injuries which are permanent and have impaired

the earning capacity of the plaintiff, damages awarded for pecuniary loss by reason of his decreased earning power should be based on the probable expectancy of plaintiff's life immediately before the injury, but damages awarded for future mental and physical suffering should be considered in connection with the probable expectancy of plaintiff's life in his injured condition at the time of the trial."

Complaint is made that in violation of statute (Comp. St. 1929, secs. 20-1111 - 20-1115) the court erroneously permitted the bailiff to answer a question propounded by the jury, the point being that this was in violation of the statutory requirement that juries shall be instructed in writing.

In this connection the record discloses that on February 22, 1943, while the jury were deliberating they requested that the bailiff inquire of the judge in substance whether or not a recovery by plaintiff would be subject to income tax. He made the inquiry of the judge. The judge advised the bailiff that he would give no instruction on that subject. This reply was communicated to the jury by the bailiff.

We observe nothing in this which could have prejudiced either one of the parties. However, communications between the trial judge and jury after retirement of the jury should be controlled by a high degree of circumspection. We commend the practice approved in *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766, 244 N. W. 298.

Appellant contends that there was error in certain instructions given by the court. The first one discussed in the brief is instruction No. 7. This instruction related to the fixation of damages by the jury. In the instruction the following language is found: "In fixing the amount of such damages you should consider the character and extent of plaintiff's injuries and of their probable duration; * * * ." It is the contention that a jury in assessing future damages may consider only reasonable certainty and not probability.

As authority for its position attention is directed to *Burkamp v. Roberts Sanitary Dairy*, 117 Neb. 60, 219 N. W. 805; *Fisher v. Trester*, 119 Neb. 529, 229 N. W. 901; *Schwarting v. Ogram*, 123 Neb. 76, 242 N. W. 273; *Jensen*

v. Omaha & C. B. Street Ry. Co., 128 Neb. 21, 257 N. W. 257.

In *Burkamp v. Roberts Sanitary Dairy, supra*, it is stated: "By instruction No. 16 upon the measure of damages, the jury were told that they might consider 'any physical or mental pain or anguish which the plaintiff has suffered because of his injuries, or any pain that he still suffers, or will probably suffer in the future.' This was error in so far as it permitted the jury to allow damages for pain which the plaintiff will 'probably suffer in the future.' This language is too indefinite and conjectural. The only future pain and suffering which the jury is entitled to consider is such as the evidence shows with reasonable certainty he will experience."

From a careful examination of this instruction and others accompanying it we conclude that the contention of appellant is without merit. This instruction requires that the jury shall "consider the character and extent of plaintiff's injuries and of their probable duration." This is directive and properly so. Instruction No. 10, which must be read with instruction No. 7, informs the jury as to the weight of evidence required under the directive of No. 7. It is as follows: "You are instructed that to warrant a recovery for a permanent injury the future extent of the injury must be shown with reasonable certainty, a mere conjecture or even a probability of the future disability which may never exist is not sufficient." Considering the instructions together we are of the opinion that the jury were not improperly instructed in this regard and that the manner of instructing could not be calculated to mislead.

We find no error in the giving of instructions Nos. 15, 18 and 23, the other instructions discussed in the brief. There was ample evidence upon which to submit the matters therein involved for determination by the jury. No complaint is made that these instructions do not embody correct principles of law.

The remaining error complained of is that the verdict is excessive. It is contended that the verdict is so clearly ex-

cessive as to indicate that it was the result of passion and prejudice on the part of the jury. If this is apparent from the record then it is the duty of the court to set it aside and grant a new trial for that reason.

This court, however, can properly do this only when from the record it appears that there is either no evidence to support the verdict or that reasonable minds cannot come to any other conclusion than that the verdict is the result of passion and prejudice. Any other attitude would amount to an invasion of the province of the jury.

The record having been examined in this light we are unable to say that the verdict was the result of passion and prejudice, and is excessive.

Three doctors testified on behalf of the plaintiff and gave their findings and opinions as to his condition, past, present and future, and, without detailing it, if this testimony is to be believed, plaintiff received severe and painful injuries, the end results of which have been and will be disabling and progressively so during the life of plaintiff. In just what degree is none too clear. On the other hand the defendants called three doctors whose testimony indicated that there had been a complete recovery and that there are and will be no after effects. The jury, whose prerogative it was to consider the credibility of the witnesses, could accept either viewpoint and, as is apparent, having accepted that of plaintiff's witnesses, this court is unable to say that they are wrong. Reversal cannot be granted on this ground.

The judgment of the district court is affirmed.

AFFIRMED.

HOMER H. JOHNSON, APPELLANT, V. RADIO STATION WOW, INC., ET AL., APPELLEES.

13 N. W. 2d 556

FILED MARCH 10, 1944. No. 31685.

1. **Corporations.** The directors of a corporation have no authority to make or authorize contracts or do other acts which are beyond the powers conferred upon the corporation by its charter.
2. ———. The wisdom and expediency of corporate business policies and the methods of executing them are left to the discretion and decision of the board of directors. In the absence of usurpation, fraud, gross negligence or transgression of statutory limitations, courts of equity will not interfere, at the suit of dissatisfied stockholders, merely to overrule the discretion of directors on questions of corporate management, policy or business.
3. **Fraud.** Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.
4. ———. The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction.
5. **Contracts.** Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself a convincing evidence of fraud.
6. **Equity.** In the determination of the interests of parties, equity looks through the form and regards the substance of the transaction.

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

Stewart, Stewart & Whitworth and *Ralph W. Slocum*, for appellant.

Brown, Crossman, West, Barton & Fitch, Rainey T. Wells,

Paul P. Massey, Peterson & Devoe, Cline, Williams & Wright and *William P. Kelley, contra.*

Heard before PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ., and ELLIS, District Judge.

WENKE. J.

This action was commenced in the district court for Douglas county by Homer H. Johnson, as plaintiff, on behalf of himself and all other members of the Woodmen of the World Life Insurance Society, against Radio Station WOW, Inc., the Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston, and John J. Gillin, Jr., as defendants, to have the lease and assignment of license by the society of its radio station to Radio Station WOW, Inc., be declared illegal and void and that they be canceled and terminated and that the society be enjoined from transferring by lease, assignment or otherwise radio station WOW or its license thereto and that the officers of the society be required to pay to the society all expenses incurred in connection therewith. From a finding for the defendants and against the plaintiff and dismissing the plaintiff's action and the overruling of plaintiff's motion for a new trial, the plaintiff has appealed.

For the purpose of this appeal the appellant will be referred to as the plaintiff; the defendant Radio Station WOW, Inc., as the lessee; the Woodmen of the World Life Insurance Society, a corporation, as the society; De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, and Sterling C. Holston collectively as the officers and directors of the society; and John J. Gillin, Jr., as Gillin.

The first question presented by this appeal is whether the board of directors of the society had the power to authorize the execution of the lease to the radio station. Section 44-1201, Comp. St. 1929, provides in part as follows: "Any such society shall be deemed to have a representative form

of government when it shall provide in its constitution and laws for supreme legislative or governing body composed of representatives elected either by the members, or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: * * * ." Section 1, art. V of the Amended and Substituted Articles of Incorporation, provides: "The Sovereign Camp shall be the supreme representative governing body and shall be composed of its elective officers, members of elective committees, who are ex officio delegates thereto, and such other delegates as are now elected or as shall hereafter be provided for and elected pursuant to the provisions of its Constitution, Laws and By-Laws." Article VI thereof provides in part as follows: "The Board of Directors shall have the general control and management of the business affairs of this corporation and all matters, except during the sessions of the Sovereign Camp." Section 2 of the Constitution, Laws and By-Laws as amended in 1941 provides: "The Sovereign Camp shall have original and appellate jurisdiction in all matters pertaining to the general welfare of this Society. * * * and shall have generally such powers and may perform such duties as it may deem wise for the welfare of the Society, * * * ." It further provides in section 26 (a): "All power and authority of the Sovereign Camp, when not in session, shall be vested in the Board of Directors, except as herein provided." And in section 26 (c): "It shall examine the transactions and reports of its officers and transact any business that cannot be delayed until a meeting of the Sovereign Camp." Article IV of the Amended and Substituted Articles of Incorporation provides: "It may also purchase, erect, equip, furnish, maintain and operate radio stations; * * * ." Section 3 of the Constitution, Laws and By-Laws as amended in 1941 provides: "The objects of this Society shall be * * * own, maintain and operate radio broadcasting stations, * * * ." While it is true, as stated in 2 Fletcher, Cyclopedia Corporations (Perm. ed.) 399, sec. 511: "* * * the directors of a corporation have no authority to make or

authorize contracts or do other acts which are beyond the powers conferred upon the corporation by its charter." However, tested by the provisions of the statute, the Articles of Incorporation and the Constitution, Laws and By-Laws of the society, we determine that the board of directors had the power and authority to enter into and authorize the execution of the 15-year lease of its radio station.

The next question is, should a court of equity modify the lease? After the conclusion of the trial the plaintiff moved to amend the prayer of his petition by including therein conditions for modification of the lease. It is contended by the society, its officers and directors, lessee, and Gillin that this motion was never ruled on and therefore not properly here for consideration. In *Davey v. Aevermann,* 110 Neb. 62, 192 N. W. 956, we held: "This court will not review an alleged ruling of the district court where the record brought to this court fails to disclose that such ruling was, in fact, made by the trial court." The prayer of plaintiff's petition includes the following: " * * * and for such other, further and different relief as equity and justice may require." If we were inclined to consider the question of modification this part of the prayer would be broad enough to permit us to do so. However, as stated in 19 C. J. S. 83, sec. 743: "Within the limits of their authority directors or trustees possess full discretionary power, and in the honest and reasonable exercise of such power they are not subject to control by the stockholders or by the courts at the instance of a stockholder, * * * in the absence of usurpation, of fraud, or of gross negligence, courts of equity will not interfere at the suit of a dissatisfied minority of stockholders, merely to overrule and control the discretion of directors on questions of corporate management, policy, or business." And as stated in *Royal Highlanders v. Wiseman,* 140 Neb. 28, 299 N. W. 459: "The accepted principle is that the wisdom and expediency of corporate business policies and the methods of executing them are left to the discretion and decision of the board of directors. In the absence of usurpation, or fraud, or gross negligence, or transgression of statutory

limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule the discretion of directors on questions of corporate management, policy or business." To like effect are *McQuillen v. National Cash Register Co.*, 112 Fed. 2d 877; *Wight v. Heublein*, 238 Fed. 321; *City Bank Farmers Trust Co. v. Hewitt Realty Co.*, 257 N. Y. 62, 177 N. E. 309. Therefore, in the absence of usurpation, fraud, gross negligence or transgression of statutory limitations this court will not interfere with the discretionary powers of directors on questions of corporate management, policy or business.

The next question is, did the officers and directors of the society in making the lease so violate their duties to the society that the lease will have to be canceled? The nature of their relationship is well summarized in *Beaumont v. Folsom*, 136 Neb. 235, 285 N. W. 547: "Directors occupy, of course, a fiduciary relation to the corporation and its stockholders. *Howell v. Poff*, 122 Neb. 793, 241 N. W. 548. They must exercise the utmost good faith in any transaction touching their duties to the corporation and its property. 3 Fletcher, Cyclopedia Corporations (Perm. ed.) sec. 850. Conduct tinged with any breach of faith or inconsistent with any duty will be readily condemned. *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N. W. 839. Dealings with respect to corporate property will be given most careful scrutiny. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548, 54 N. W. 830." And as stated in *Whaley v. Matthews*, 134 Neb. 875, 280 N. W. 159: " 'Every violation by a trustee of a duty required of it by law, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.' *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333."

In considering the facts in this case we will, of course, follow the rule as stated in *Ericson v. Nebraska-Iowa Farm Investment Co.*, 134 Neb. 391, 278 N. W. 841: "In the determination of appeals in equity, this court will '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."

The Woodmen of the World Life Insurance Society is a fraternal insurance society organized in 1891 with its headquarters located in Omaha, Nebraska. At about the time of the lease here involved it had approximately $136,000,000 of assets, $370,000,000 of insurance in force, 335,000 members, and its gross annual income was in the neighborhood of $16,000,000 a year. The members of its board of directors and its officers, who are also members of the board, at the time were De E. Bradshaw, president; T. E. Patterson, vice-president; Farrar Newberry, secretary; William Ruess, chairman of auditors; W. C. Braden, auditor; R. E. Miller, treasurer; Sterling C. Holston, escort; all of Omaha, who are the resident officers and directors named as defendants. Also, H. E. Klugh of Harrisburg, Pa., Robert G. Plunkett of Macon, Ga., William E. Mooney of Chicago, Ill., Charles A. Hines of Greensboro, N. C., Rev. W. M. Crawford of Birmingham, Ala., T. A. Heise of Columbia, S. C., and John J. Wahl of San Antonio, Tex., who are the nonresident members. In 1923 the society obtained a license to operate radio station WOAW which subsequently became station WOW. During the years of 1923 to 1928, inclusive, the station operated at a loss. While a profit is shown for the years of 1929 to 1935, this is discounted by the fact that all charges were not made to the station that properly should have been such as space occupied, salary for time of officers required, wages for time of employees of the society, etc., so that it can be said that up until 1936, when the society changed its location and new equipment was added and a better wave length was obtained with more power, the station operated at a loss. During the years of 1936 to 1942, inclusive, the station made a substantial return to the company. During this time there was charged to it salary for the officers' time used, which in 1942 amounted to $35,000, also for the space occupied which was at the same rate as provided in the lease to lessee. After deducting all

expenses from gross income, including that charged for the officers' time and rent for space occupied, the following net was left from the operation of the station:

1936	$131,337.34
1937	204,631.31
1938	174,169.14
1939	170,653.57
1940	182,032.52
1941	212,807.38
1942	287,437.74

or a yearly average of $194,724.14. The record further discloses that the gross income for January and February of 1943 was in excess of that for the same months in 1942.

While the first evidence of any action with reference to a disposition of the station appears in the minutes of the meeting of the board of directors on October 30, 1937, nothing further appears until the action of March 5, 1942; however, the record does disclose that it was often discussed among the officers and directors. Members of the board gave as some of their reasons for wanting to dispose of the station the following: That the station interfered with the officers in the discharge of their duties to the society which was organized for the purpose of fraternal insurance; the possibility of its (the radio station) income being made subject to income tax; the possibility of its operation causing a tax to be levied on the gross income of the society; the possibility of legislation preventing a fraternal insurance society from owning and operating a radio station; that the society was drawn into controversial subjects discussed over the station; that it caused difficulties in the relationship between employees of the society and the station due to the differences in wage scale; fear of regulatory measures of the Federal Communications Commission destroying the value of the station; because the area covered by the station had been so materially reduced it no longer was of any great value as an advertising medium for the society; because of the additional cost that new developments such as television and frequency modulation would entail; the pos-

sibility of government ownership; and that it had reached the peak of its earning powers and there probably would be a decline in its earning capacity.

On March 5, 1942, the board of directors passed a resolution authorizing the president to negotiate and make a sale of the property for the best price obtainable. Thereafter, on August 25, 1942, President Bradshaw made his report to the board. A committee, consisting of directors Charles A. Hines, William E. Mooney, Robert G. Plunkett, and W. C. Braden, was appointed, who, with all the facts before them which were subsequently put in the lease, made their report to the board favorable to a sale or lease or both and tendered a resolution to that effect. This resolution, after all the facts with reference to the lease were presented to the board, was unanimously adopted and President Bradshaw was authorized to negotiate a sale or lease, or lease and sale subject to the lease, of the radio station, property, and assets other than cash and accounts above $25,000, and he and the secretary were authorized to execute all instruments necessary to carry it into effect. Pursuant thereto the lease on the station and also a lease on the space it occupies were entered into, the terms of which are in accordance with those presented to the special committee and the board. The question of making the lease or sale, or both, was left with President Bradshaw and he handled all the negotiations in reference thereto, William Ruess being the only one present at any of the negotiations.

The lessee is a corporation organized for the purpose of operating the station. Its officers, stockholders, and directors are John J. Gillin, Jr., of Omaha, president and general manager of the station, who owns 100 shares of preferred A, 250 preferred B, and 350 common; Guy C. Myers of Seattle and New York, vice-president, who owns 250 shares of preferred A and 250 common; M. M. Meyers, Omaha, secretary, who owns 50 shares of preferred A and 50 common; Harvey E. Milliken, Omaha, treasurer, who owns 50 shares of preferred A and 50 common; Francis P. Matthews, Omaha, who owns 100 shares of preferred A and

100 common; J. J. Isaacson, Omaha, who owns 50 shares of preferred A and 50 common; Thomas J. Wallace, Chicago, Ill., who owns 100 shares of preferred A and 100 common; Robert P. Samardick, Omaha, who owns 50 shares of preferred A and 50 common. All stock is valued at $1 per share, but preferred A and B has a $7 cumulative dividend right, all preferred being subject to retirement by payment of $100 per share and cumulated dividends. Common was sold at $1 per share, preferred A at $99 per share and 250 shares of preferred B was sold to Gillin at $1 per share. It was authorized to do business when $1,000 was subscribed and paid in. There is no personal liability on the part of the stockholders. The board of directors has the power to determine the working capital and fix or abolish reserves.

The plaintiff charges that lessee is dominated and controlled by men who have been and now are directly or indirectly connected with the Consumers Public Power District of Nebraska, or are personally interested in its acquisition of the power facilities serving Omaha and vicinity, which facilities are now owned and operated by the Nebraska Power Company, and that the obvious purpose of the leasing is to make the radio station available to Consumers and those interested in its acquisition of these facilities. The evidence discloses that Guy C. Myers, vice-president and stockholder of lessee, is a fiscal agent in the field of financing utilities and had handled the acquisition of all utilities purchased by the Consumers Public Power District of some $47,000,000 in value and was negotiating for Consumers in its endeavor to purchase the properties of Nebraska Power Company for which an offer of $40,600,000 had been made; M. M. Meyers, secretary and a director and stockholder of lessee, is a representative of a banking syndicate which had handled all of Consumers' bonds and which hoped to handle the bonds of Consumers if it purchased the property of Nebraska Power Company; Francis P. Matthews, director and stockholder of lessee, is counsel for Consumers in its effort to purchase the properties of Nebraska Power Company; and that John B. Dawson, son-in-law of President Brad-

shaw, is a member of a New York firm of attorneys who are counsel for the banking syndicate that handles all of Consumers' bonds. That these men have an interest in trying to secure the purchase for Consumers is beyond question but there is no evidence that Consumers has any interest in lessee nor have any of the officers and directors of the society any interest in Consumers or lessee nor can Consumers use any of its funds for this purpose. If any of these parties desired time on this station to explain their plan to the public they could purchase it no matter who owns the station and the same amount of time would have to be made available for the other side. It also appears that there is a divergence of opinion among the stockholders of lessee as to the desirability of Consumers acquiring these properties. The record does not sustain this contention of the plaintiff.

The plaintiff further charges that the individual defendants, who are officers of the society, violated their duties as such officers and the trust imposed in them as such by devising a plan to unlawfully procure for the benefit and profit of themselves, their friends and associates the possession and control of radio station WOW for a grossly inadequate consideration. The record discloses that none of the officers and directors of the society have any interest in lessee nor any agreement with any one by which they have now or may in the future claim any interest therein. None of them have any interest in the purchase of the Nebraska Power Company property by Consumers, either directly or indirectly. In their action to dispose of the operation of the station the several directors gave various reasons as controlling their judgment for so doing. All of these reasons are not supported by evidence in the record but the action of leasing the station being within the scope of their authority the reasons therefor and the desirability thereof are matters for their concern and with which the court will not interfere unless their acts are shown to be fraudulent or the terms thereof so inadequate as to create a situation when it must be said that it would be a legal fraud to permit it to stand. Fraud is never presumed but must be es-

tablished by whoever alleges it and in examining the record we fail to find any evidence of actual fraud on the part of the officers and directors of the society.

The next question presented by the record is, do the facts create a legal or constructive fraud? "Constructive or legal fraud may be found from the relation of the parties to a transaction, or from circumstances and surroundings under which it takes place. The conscience is not necessarily affected by it, and it may exist without any fraudulent intent. * * * 'Legal fraud' is synonymous with 'constructive fraud,' and is such as is implied by law from the nature of the transaction itself. The question of the existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question, but the law regards the transaction as fraudulent *per se*." *Lake Hiawatha Park Assn. v. Knox County Agricultural Society*, 28 Ohio App. 289, 162 N. E. 653. In *Taxpayers' League v. Wightman*, 139 Neb. 212, 296 N. W. 886, we held: " 'Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.' 26 C. J. 1061." Fraud may be established by circumstantial evidence. "The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. In fact, many of the elements of fraud are such as not to be susceptible of proof by direct testimony. Fraud in its nature is not a thing susceptible of ocular observation or readily demonstrable physically; it must, of necessity, be proved in many cases by inferences from the circumstances shown to have been involved in the

transaction in question." 24 Am. Jur. 89, sec. 257. "Equity courts are said to be more liberal than the law courts in respect of the circumstances from which an inference of fraud may be drawn, and will grant relief upon the ground of fraud established by circumstantial evidence which would not always be deemed sufficient evidence to justify a verdict at law." 24 Am. Jur. 128, sec. 282.

During the past seven years the station has netted the society an average annual income of approximately $194,000 in addition to being charged the same rental for the space occupied in the society's building as provided in the lease with lessee and also being charged with part of the salary of the officers of the society, which in 1942 was $35,000. The net for 1942 was approximately $287,000. The average of the 15-year lease will be approximately $74,000 a year. While the rental income for the space occupied in the building that the society will receive remains the same and it will be assumed that the time given by the officers to the station and now available to other functions of the society will be of sufficient value to compensate for the amount of their salary formerly charged to the station, yet, it is difficult to understand why an agreement would be entered into that would so seriously cut down the income of the society. As an explanation of the difference in the value of the income of the station to the society and the same income to a purchaser or lessee is cited the application of federal income taxes thereto. The income while the station is being operated by the society is tax exempt while generally the income to most any purchaser or lessee would be subject to tax in an amount depending upon the various factors as they would affect such purchaser or lessee. The radio station is a business different from that of the society generally and the matter of the desirability of the society disposing of it being for the board of directors, since it had the power and authority to do so, we will generally not interfere, unless, we come to the conclusion that to permit the action to stand would work a fraud upon the society. The rule as to inadequacy of consideration, taken from 9 C. J. 1174, and

as approved in *Price v. Fraser,* 119 Neb. 806, 231 N. W. 18, is: "Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself a convincing evidence of fraud." If the question of inadequacy of income alone were to be the sole guide to our determination in this matter it would be a serious question, whether or not the lease should be set aside, but in determining this question we must carefully analyze the facts leading up to its disposition together with the terms and conditions thereof, for as stated in *McGuire v. Stimbert,* 129 Neb. 383, 261 N. W. 685: "In the determination of the interests of parties, equity looks through the form and regards the substance of the transaction."

The record discloses that President Bradshaw, who was then general counsel for the society, was instrumental in getting the station for the society in 1923. At first the station was financially unsuccessful. President Bradshaw employed Gillin in 1929 and he seemed to have the ability to operate the station successfully and President Bradshaw felt Gillin was largely responsible for the station's remarkable success. Gillin, however, did not at any time become an officer or director of the society. No particular effort was made to dispose of the station by either lease or sale until 1942 although the officers and directors testified that they often discussed it. In 1937 there was some action taken by the board but nothing in particular was done in regard thereto. It is also significant to note that President Bradshaw in his reports to the Sovereign Camp of the Society in 1937, 1939, and 1941 reported favorably upon the radio station and that it was a valuable adjunct to the society and to like effect in his semi-annual reports to the board of directors up until 1942, while in his testimony he stated that it had ceased to be such for the past five or six years. There is evidence that Cowles of Des Moines, Ia., made an offer in 1935 and that the World Herald attempted negotiations in 1936 and 1937 but nothing came of these negotiations.

However, in March of 1942 the board of directors authorized President Bradshaw to negotiate and make a sale of the property for the best price obtainable. The reasons of the various officers and directors for the desired disposition have already been set forth in this opinion.

President Bradshaw first began his negotiations by contacting Trammell of N. B. C. and trying to interest him in having his company carry a second mortgage on the station of $350,000 subject to a first mortgage of $350,000 to the society. This was at first favorably considered and President Bradshaw then contacted Carl A. Swanson and his two sons, Clarke and Gilbert, all of Omaha, endeavoring to sell them the station for $850,000, $150,000 to be a cash payment and the balance to consist of two mortgages as above described. The society was to get the proceeds of the second mortgage. When these negotiations fell through because N. B. C. refused to make the loan a lease was discussed, which was to include an option to purchase. This failed to materialize because of the manner in which federal income tax regulations would affect the income if a lease included an option to purchase. Negotiations then continued with A. Horace Erickson and Clarke Swanson discussing a sale for $850,000. Erickson and Swanson refused to consider this amount but wanted to offer around $600,000-$650,000 but President Bradshaw would not consider anything under $850,000. A lease was then discussed but when Erickson and Swanson wanted the society to pay for new equipment needed for television and also wanted to move the station, this fell through. It is significant that in all these negotiations President Bradshaw wanted the parties to give Gillin a place in the business. Gillin and President Bradshaw had become very close personal friends and as President Bradshaw testified, Johnny (Gillin) had stayed with him and made the station and he did not want to sell it without Johnny being included and have a share in the business and he was willing to do the best he could to see that he got it. There is also evidence that the purchase of the station was considered by the Securities Acceptance

Corporation but dropped, and that the World Herald again made efforts to acquire the station but were turned down until the negotiations hereinafter discussed were completed.

When these negotiations with Swanson and his two sons and then with Erickson and Swanson fell through, President Bradshaw suggested to Gillin that he organize a group of his friends for this purpose and out of these contacts was created Radio Station WOW, Inc., lessee. Among those contacted by President Bradshaw who became officers and stockholders of lessee are Guy C. Myers, Harvey E. Milliken, M. M. Meyers, and J. J. Isaacson. This corporation, the personnel and stock ownership of which has been set out in this opinion, was formed on October 3, 1942, the same day the lease was entered into. Until the very day lessee was incorporated on October 3, 1942, Gillin was only to invest a nominal sum to acquire a one-fourth interest therein of 250 shares of common and 250 shares of preferred B and only when Erickson and Swanson on that date backed down on their agreement to put up $25,000 did Gillin agree to put up $10,000 for which he received 100 shares of common and 100 shares of preferred A. Matthews then put up $5,000 more and Isaacson and Samardick each came in for $5,000, making the $25,000 which Erickson and Swanson were to have put up.

Let us now examine the lease and the provisions thereof. The cash rentals are $8,166 a month for three years and $5,680 a month for 12 years. It is significant to note that the lease requires no down payment, whereas in all previous negotiations President Bradshaw had made a substantial down payment a requirement in addition to the lessee having adequate additional financial stability for the future performance thereof. Not only that, but $25,000 of accounts receivable were transferred by the society to lessee so it would have $100,000 with which to do business which President Bradshaw considered a minimum. Bradshaw explains this by saying he felt Gillin was so essential to the station that if he were left in charge the society would be secure. It is also significant that the amount of accounts

receivable transferred to lessee is equal to the 250 shares of preferred B stock issued to Gillin for $1 per share whereas all the other incorporators of lessee paid $99 per share for their preferred A stock.

One of the principal provisions of the lease for the benefit of the society is that the lessee is to install all new equipment necessary to keep the station in first-class condition and which at the end of the term of the lease is to be turned over to the society. This is considered very important in view of the probability of television and frequency modulation sometime after the war and the probable high cost of such equipment. However, no provision is made in the lease to secure the performance of this part of the lease in the way of reserves by money being kept out of the earnings. The only security is the corporation itself. This expressly provides that none of the stockholders thereof are to be personally liable for its obligations; it also provides that the preferred stock can be redeemed; it can do business on $1,000 capital; its capital structure and reserves are under the control of the board of directors. According to the testimony this new equipment will be very expensive and with the limited funds now available to carry on a business of this kind and with a corporation that can redeem its preferred stock at any time, including Gillin's, there is little security back of this provision except the good intentions of the officers and stockholders of the lessee.

The lease further provides that if the station is taken over by the government then the lessee can turn it back and cancel the lease or pay the rent provided in the lease and keep it in force. This provision only protects the lessee in this very important feature for it can either take a profit or turn the station back to the society without incurring any liability in so doing.

Many of the reasons considered by members of the board as making it desirable to dispose of the station contemplated that the society should completely dispose thereof. This lease does not accomplish this for the society remains the owner. It does not protect the society against legislation

which prevents fraternal societies from owning radio stations. It in no way protects the society if the license to operate is canceled, except for default of lessee, for the lease is then canceled and the society will own the station without a license to operate it. Under the provisions of this lease the society continues to assume the risk of government ownership and the risk of cancellation of the license, which were considered by the directors as important reasons for desiring to dispose of the station.

We have considered the testimony of those witnesses who are experienced in radio and those who are experienced in business matters generally giving their opinion that it was a good deal for the society and that the provisions are adequate, but from our consideration of the entire record we do not agree with their opinions. We find that President Bradshaw, as president of the society and because of his close friendship for Gillin and his desire to secure his future welfare, prompted the organization of lessee by his friends and those of Gillin in order to take over the station. As a result of these negotiations Gillin obtained a one-fourth interest in this 15-year lease on this valuable radio station for a nominal investment and in addition thereto, in effect, a $25,000 bonus from the society. The society in return obtained an extremely excessive reduction in its income therefrom, without a complete disposition thereof, and a lease the terms of which are grossly inadequate to protect it. It is evident, from the record as a whole, that President Bradshaw in his zeal to secure the welfare of his close personal friend Johnny Gillin entered into a lease for the society, which the board of directors authorized, the terms of which are grossly inadequate to protect the society and to permit it to remain in force and effect would be a fraud upon the society and the members thereof. It is therefore ordered that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside.

It is further ordered that the $25,000 of accounts turned over by the society to lessee be returned; that an account-

ing be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society; that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the leases; that the costs of these proceedings be taxed to the defendants, except the Woodmen of the World Life Insurance Society; that all expenses had by the society in connection with the transfer of the station and license to the lessee and that will be had in connection with returning the same to the society pursuant hereto are to be paid by the lessee.

REVERSED, WITH DIRECTIONS.

YEAGER and CHAPPELL, JJ., and ELLIS, District Judge, dissenting.

The majority opinion confirms the power and authority of the directors of the Society to make the lease in question and finds no fault with the decision of the directors that it was to the best interests of the Society and its members for it to get out of the radio broadcasting business.

The opinion finds that there was no actual fraud and otherwise disposes of all the contentions of the plaintiff favorably to the defendants with the exception of the contention that "legal" or constructive fraud is established by the record.

With reference to constructive fraud, this contention, along with all the others made by the plaintiff, involved and placed upon him the burden of proving the same by a preponderance of the evidence.

At the plaintiff's rest there was utterly no proof to sustain *any* of plaintiff's allegations. If a motion for judgment had been made at that point, it seems wholly improbable that any trial judge would have hesitated to have sustained such motion and entered judgment of dismissal. However, the defendants expressly refrained from entering such a motion, expressly indicated a desire to completely

refute the charges that had been made against them, and then proceeded voluntarily to put in all of the facts and details surrounding the transaction in question.

This attitude on the part of the defendants certainly justifies the inference that they were not conscious of any wrongdoing but rather had a confidence that their action was entirely open and aboveboard and justified by the circumstances.

With reference to the record itself, there is no direct evidence whatsoever that supports any of the plaintiff's charges. On the other hand, the overwhelming weight of the evidence (in nearly all instances uncontradicted) shows the following:

1. The long-held judgment of several members of the board of directors of the Society that the radio station was foreign to and not beneficial to the Society. This judgment was unanimous after 1937.

2. The unquestionable threat of taxation proximately caused by and contributed to by the untaxed profits from the station. This was not a threat based on speculation or conjecture alone but was real in form of legislative proposals and bills and actual suits involving more than $1,000,000. (This threat of tax legislation proximately caused by or contributed to by the profits from the radio station and prejudice to the primary interest and business of the Society was sufficiently real that if the officers and directors had not been prompted to an effort to eliminate this cause they would have been subject to severe criticism on the ground that they had failed in the discharge of their duties as trustees to the members of the Society.)

3. The peculiar uncertainties, threats and hazards of the broadcasting business.

4. Completely overcomes any inference based on the difference between the income from the Society's operation of the station and the rental under the lease.

5. The return to the Society under the lease appears to be greater than could be realized from outright sale.

6. *Uncontradicted* and overwhelming expert opinion that the rental is adequately compensatory.

7. Completely disproves and overcomes every allegation and insinuation that the officers and directors of the Society had any personal interest in the lessee corporation or stood to profit personally in any way whatsoever from its lease and operation of the station.

In this state of the record the majority opinion is left to rest on just two things—(a) Bradshaw's interest in John Gillin and (b) dissatisfaction with the terms of the lease. With reference to the first, the evidence is overwhelming in establishing Gillin's ability, capacity and standing in the radio field.

When Bradshaw's statements are considered with the context of his testimony, they do not support an inference of ulterior purpose but rather disclose a perfectly normal and proper reason for wanting Gillin to be in any organization taking over the station. There is no evidence that the personal relationship between Bradshaw and Gillin was any other or different than that which would exist between any appreciative employer and a valued, competent and loyal employee. Bradshaw's statements about Gillin should be considered not only in the light of his success in operating the station but also in the light of other facts as, for instance, Cowles's testimony that at one time he attempted to persuade Gillin to leave WOW and enter his employ.

It should also be noted that Carl A. Swanson testified he had known Gillin for a long time and wanted to help him if he could. Also, that Gillin was to have a one-fourth interest in the organization if the Swansons made a deal for the station and that the Swansons were to put up the money.

With reference to the dissatisfaction of the majority with some of the terms of the lease, it is interesting to note that Erickson would have insisted, under a lease arrangement, that the Society pay for the installation of television equipment. And also that the Swansons would not have entered into a lease without an option to buy at the termination of the lease for a nominal sum. This evidence serves to illustrate that no lease is likely to contain only those provisions which are to the advantage of one of the parties.

The advantages of the lease under attack over a lease containing either one or both of the provisions which other prospective lessees would have insisted on is apparent. Under the lease in question the Society continues to own the reversion unincumbered by any option and with assurance that the physical equipment will be maintained and modernized apace with technical developments in the industry, all of which would seem to enhance the opportunity of the Society to sell the reversion and thus entirely remove the Society from the radio business.

In the final analysis it seems apparent that the finding of constructive fraud by the majority must be and is ultimately based upon an inference of inadequacy of the rental consideration reserved in the lease and this inference must rest *solely* on the difference between the amount of net income received by the Society from its operation of the station and the rent it will receive under the lease. This must necessarily be true because all other phases of the matter such as the decision to lease and terms and conditions of the lease are conceded by the majority to fall within the discretion and wisdom of the directors and are not subject to judicial interference in the absence of fraud. It will be noted that the majority opinion holds with reference to the belated motion of plaintiff for alternative relief requiring modification of the terms of the lease that these matters are within the discretion of the directors and that the court will not interfere.

In any comparison of these income figures it must be borne in mind that had it not been for the rare and peculiar exemption of the Society from federal income taxes, the net income of the Society from its operation of the station would have been *very substantially* reduced. It was the advantage of this very exemption over others engaged in the same type of commercial business which aroused prejudice against the general exemption in favor of the Society and other similar institutions and created the threat of legislation to remove the exemption—a threat which at least involved the possibility of injury to the best interests of the

members of this Society far beyond the loss of income represented by the difference between the income from the station operated by the Society and the rental.

The record, as well as common knowledge, overwhelmingly indicates the improbability, if not the utter impossibility, of finding either a buyer or a lessee of the station not subject to the burden of federal taxation. Therefore, in comparing the value of the station to the Society on an income basis with the value that might be realized on a sale or rental under a lease, it seems elementary that consideration must be given to the fact that the station could not be comparably profitable to any available buyer or a lessee and that this inescapable fact would be reflected in any bid or rental offer that might be made.

In this situation the plaintiff, having the burden of proof, *offered no direct evidence whatever* that the rental reserved under the lease attacked was inadequate. Neither did the plaintiff offer any evidence as to the fair market value of this station for whatever help such evidence might be in reasoning from such value to any adequate or fair rental. As before stated, there is nothing in the plaintiff's case to support the inference of inadequate rental consideration and in turn the constructive fraud inferred therefrom except the difference in income.

Against this, the evidence presented by defendants discloses the following: The matter of this lease was referred to a committee of the board of directors of the Society, the members of which met by themselves, considered the matter for two days with all the facts before it and reported to the whole board recommending the lease. Following this, the whole board unanimously approved the lease. The board is composed of 14 members, several of them from scattered points in the United States, and there is nothing in the record that would justify any other assumption than that all members of the board are conscientious, representative and capable men. In addition to the 14 judgments thus represented, three business men of Omaha who are members of the Society expressed their opinion approving the lease.

Messrs. Carl A. Swanson and Gilbert Swanson, who do not appear to have been interested in the Society and who do not appear to have been engaged in the radio business, but who appear to be successful business men and who made some investigation of the business and the federal tax angle as a result of some negotiations looking either to the purchase or lease of the station, testified that in their opinion the rental under the lease was adequate.

In addition to this evidence, the defendants introduced the testimony of six men, all experienced in the ownership, management and operation of radio stations in widely separated parts of the country. Among these witnesses were Niles Trammell, president of the National Broadcasting Company, and Joseph H. Ream, vice-president of Columbia Broadcasting System. All of these witnesses with broad background of experience in a highly specialized and limited field testified that the rental value was adequate. Several expressed the opinion that the rental was not only adequate "but high" and "more than could be secured by rental to other people in the radio industry."

None of the opinions of 25 men thus reflected by the record was impeached in any way and this evidence stands uncontradicted.

In this state of the record we are unable to agree with the conclusion of the majority that the court is justified in inferring constructive fraud.

Recognizing the importance and value of inferences in the determination of disputed facts and that there are many instances in trials where inferences are permitted to overcome positive and direct testimony, we think the latter is only justified where the strength of the inferences clearly overcomes the opposing evidence or where the force of the inference is irresistible and destroys the very credibility of the direct evidence.

Inferences ought to spring directly, naturally and irresistibly from proved facts. In view of the undisputed impact of federal taxes upon the profits of any operator of the station in question other than one enjoying the exemption

of the Society, and the resulting absence of any basis for a rental comparable to the Society's income, it is seriously doubted whether any inference whatever from this difference is justified. The proved fact basis is entirely lacking.

In any event, as stated in 32 C. J. S. 1129, 1133, sec. 1044: "An inference is unjustified and without probative force if it is inconsistent with undisputed or clearly established facts, or is contrary to direct, positive, and uncontradicted testimony. Evidence which is consistent with direct, positive, and otherwise uncontradicted testimony that a fact does not exist will not support an inference that it does, and an inference should not be adopted from a few of the facts proved when it is absolutely inconsistent with, and repelled by, other equally well proved facts."

The result of the majority opinion is to place the problem of disposing of the radio station back in the hands of the directors of the Society with their power to sell or lease confirmed and their judgment that it is to the best interests of the Society to get out of the broadcasting business unquestioned.

This will neither enlarge the field of prospects nor change the character of possible buyers or lessees. Neither will it overcome the inexorable economic fact that any purchase price or rental will be reduced in amount to compensate for the effect upon possible profits of federal taxes. If, to escape judicial condemnation, the purchase price or rental must be directly comparable to the basis of profits to the Society, the directors are faced with great difficulty in executing their judgment if not an absolute bar.

No one can say with positive assurance that this Society will sustain benefit or suffer detriment from the condemnation of the lease in question. Absolute assurance of the wisdom of any major business decision, whether made by an individual or corporate agents, is seldom afforded at the time. Hindsight is all too frequently the unpleasant reminder of mistakes in judgment. The result of the judgment following the majority opinion is essentially a decision of a problem of business or economic character and not

of legal character. It is a venture into a field in which the courts are obviously without adequate experience or equipment. Such decision is easily rendered and will have the virtue of arbitrary finality. This, however, will not exempt it from the inexorable review of time and future developments. It will not be immune from that same hindsight to which all such decisions are subject. Its inherent unsoundness lies in the fact that if time indicates error the maker of the decision is without opportunity or power to move to avoid the consequences. These things are the basis of the rules quoted in the majority opinion from *Royal Highlanders v. Wiseman,* 140 Neb. 28, 299 N. W. 459, and *Price v. Fraser,* 119 Neb. 806, 231 N. W. 18.

The risk that the affirmance of this lease would deprive the members of the Society of a chance of better disposition of this property, if present, is insignificant when compared to the danger to them and all other citizens of the precedent of judicial determination which ignores the overwhelming weight of competent evidence.

We find confirmation of our opinion that the plaintiff wholly failed in sustaining the burden of proof to justify any inference of constructive fraud in the other contention of plaintiff mentioned at the outset. At the close of the case and after the announcement by the trial court that his findings would be against the plaintiff, the latter filed a motion for leave to amend the prayer of his petition. With reference to this the plaintiff says in his brief: "The substance of his proposed amendment was that in the event only that the court determined that the officers and directors of the Society had the right to enter into a lease of the station, the court then require as a condition of its approval, that such lease be modified to protect and safeguard the interests of the Society and its members in certain respects then mentioned." The suggested modifications included a substantial increase in the rental.

This motion seems to clearly disclose recognition by the plaintiff that he had wholly failed to sustain the burden of proof of either actual or constructive fraud and that the di-

rect proof to the contrary was overwhelming. Otherwise the plaintiff has suggested no tenable, legal basis upon which this court could rewrite the lease and bind the lessee thereto.

With reference to Mr. Gillin, his interest in the lessee, and the consideration therefor, he was not an officer of the lessor and what interest he has in the lessee, as well as what he paid for it, seems to be a matter between him and his associates and wholly immaterial to the issues involved. He had been a valuable employee of the Society and the lease of the station left no place for him in the Society. We are reluctant on the record to infer an ulterior purpose from what with equal force appears to have been no more than a decent desire to see him satisfactorily placed. The record gives full credit to him for the successful financial operation of the station by the Society during the later years. The evidence of his ability and valuable contacts in the radio field is overwhelming and undisputed. In view of these facts it seems that Bradshaw's apparent interest in having Gillin in the lessee organization was entirely proper since it directly tended to provide assurance of the success of the lessee and therefore the best possible security for performance of the covenants of the lease.

The escape clauses in the lease in case of the station being taken over by the government or cancellation of the license seem to be no more than sound business provisions which any prudent and experienced business person would insist on with the firm support of his own counsel. It must be borne in mind that the lessee under penalty of forfeiture must keep the station equipment in first class and modern operating condition so that upon its return to the Society in any event the station will be unimpaired from an operating standpoint.

The other provisions of the lease, reflecting in this case as they do in every such instrument the composition of efforts of each party to have as many favorable and as few burdensome ones as possible, cannot, we think, be said to be either so unusual or improvident as to justify any inference of fraud.

It is our opinion that this record wholly fails to disclose any basis justifying the court in disregarding the rule that in the absence of fraud, " * * * the wisdom and expediency of corporate business policies and the methods of executing them are left to the discretion and decision of the board of directors." *Royal Highlanders v. Wiseman*, 140 Neb. 28, 299 N. W. 459.

On motion for rehearing, the following supplemental opinion was filed May 26, 1944. *Former opinion adhered to and motion for rehearing denied.*

1. **Judgment.** A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the facts pleaded and the evidence adduced in support thereof.
2. **Licenses.** The power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission by virtue of subchapter I to subchapter VI, inclusive, of chapter 5, Title 47, U. S. C. A.
3. ———. A judgment of this court, vacating a lease of a radio station on the ground of constructive fraud and ordering a return of the property to its former owner in a representative suit, in no way affects or encroaches upon the granted powers of the Federal Communications Commission to license, or to transfer, assign or annul such a license.
4. **Appeal and Error.** A constitutional question not presented to the district court cannot be raised for the first time on an appeal to the supreme court.

Heard before PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CARTER, J.

Our first opinion in this case will be found, *ante*, p. 406, 13 N. W. 2d 556. In that opinion we determined that the lease of the radio station, which was the subject matter of the action, was made and procured as the result of constructive fraud. The facts upon which this holding was based are set out in the former opinion and will not be repeated here. The lease was thereupon set aside and directions given ordering the restoration of the property to the Wood-

men of the World Life Insurance Society, the owner and lessor. Motions for a rehearing have been filed which raise certain questions not heretofore presented that are deserving of consideration.

It is urged by the defendants that the issue of constructive fraud was not pleaded and that the holding of the court that the lease should be set aside because of constructive fraud constitutes a fatal variance from the pleadings. The petition meticulously recites the facts and prays for a decree declaring the lease to be illegal and void because of fraud and ordering cancellation and termination of the same, and for such other, further and different relief as equity and justice may require. Neither the words "actual" or "constructive" were used in connection with the charging of fraud in plaintiff's petition. Under our system of Code pleading, a petition is required to contain a statement of the facts constituting the cause of action in ordinary and concise language. Comp. St. 1929, sec. 20-804. Legal conclusions as to the nature of the action are not required and are not considered good pleading. *State ex rel. Johnson v. Wagner,* 139 Neb. 471, 297 N. W. 906. The character of a cause of action is determined by the allegations of fact contained in the petition, unaffected by the conclusions of the pleader. An authoritative text states the rule as follows: "Generally, however, it may be said, that the essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is at law or in equity, unaffected by the conclusions of the pleader or by what the pleader calls it, or the prayer for relief, or the nature of the defense interposed, or new matter stated in the reply, or whether the action is statutory or otherwise." 1 C. J. S. 1152, sec. 54. The prayer of the petition asks for general equitable relief and is not, therefore, so restrictive as to preclude the holding that constructive fraud exists. In *School District No. 70 v. Wood, ante,* p. 241, 13 N. W. 2d 153, we said: "A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court." In

the same case we also said: "A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence, even though he may have misconstrued his remedy and prayed specially for lesser relief." A constructive fraud is usually defined as "a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence, or to injure public interests." 37 C. J. S. 211, sec. 2c. Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship. An examination of the pleadings and the evidence reveals the correctness of the holding in our former opinion that a constructive fraud was sufficiently pleaded and proved by the evidence. Consequently, the claim of defendants that such a holding constitutes a fatal variance from the pleadings and the evidence is without merit.

Defendants urge that the subject matter of this action is solely within the jurisdiction of the Federal Communications Commission Act, subchapter I to subchapter VI, inclusive, of chapter 5, Title 47, U. S. C. A., and that this court is therefore without jurisdiction to pass upon the issues raised herein. This contention is in part based upon the interpretation placed by them upon that part of our former opinion as follows: "It is therefore ordered that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside. * * * that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the leases; * * *."

We conclude at the outset that the power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission. Such a license is a permissive grant of a privilege and creates no vested property right in the licensee. *Federal Communications Commission v. Sanders*

Bros. Radio Station, 309 U. S. 470, 60 S. Ct. 693; *American Bond & Mtg. Co. v. United States*, 52 Fed. 2d 318. But the right of the Federal Communications Commission to license and to require compliance with the regulations of the commission does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto. It is true that the Federal Communications Commission may refuse to approve the reissuance of a license to the Woodmen of the World Life Insurance Society. That is a hazard that every radio station operator must take. It is a matter that does not concern this court and is not involved in the decision of the case now before us. In any event, it leaves the Woodmen of the World Life Insurance Society in no different position than if it were obliged to take the station back under the express terms of the lease. The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal license being a question solely for the Federal Communications Commission. Our former opinion should be so construed.

The claim of defendants that the court has no jurisdiction of the subject matter of the action is contrary to the pleadings filed by the defendants in the trial court. In their answers the defendants say: "Defendants further allege that the Federal Communications Commission by virtue of the laws of the United States of America and its rules and regulations made pursuant thereto, has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said radio station * * * ." We think this allegation correctly recites the jurisdiction of the state courts in relation to the jurisdiction of the Federal Communications Commission. Our former opinion, correctly interpreted, we think, states the same conclusion. In any event, the trial court and consequently this court, has no power to set aside or vacate the license of the Federal Communications Commission to operate the radio station, that being a matter ex-

clusively within the granted powers of the commission. *Southern Broadcasting Corporation v. Carlson*, 187 La. 823, 175 So. 587. It was not our understanding that there was any contention to the contrary. Any statements in our former opinion on this subject are therefore to be construed in accordance with this opinion.

The claim that this was an action essentially to annul or set aside an order of the Federal Communications Commission is wholly without merit. It is a representative suit brought by one member of the society on behalf of all to protect the interests of all from loss resulting from a lease of valuable property of the society alleged to have been fraudulently made. The fact that the property involved was used in a licensed business was an incident to the suit only. The answer of the defendants, heretofore quoted, squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf.

Defendants also contend that the former opinion and judgment of this court are void because they contravene section 1 of the Fourteenth Amendment to the Constitution of the United States in that they deprive these defendants of their liberty and property without due process of law and that they deny them the equal protection of the laws. It is also asserted that such opinion and judgment contravene section 3, article I of the Constitution of the State of Nebraska in that they deprive defendants of their liberty and property without due process of law.

These questions were not raised in the lower court. They appear nowhere in the pleadings and are for the first time asserted in the motions for a rehearing after an opinion and judgment were entered. This court has repeatedly held that constitutional questions will not be considered unless raised in the trial court. *Bell v. Niemann*, 127 Neb. 762, 257 N. W. 69; *Howarth v. Becker*, 128 Neb. 580, 259 N. W. 505. It is a fundamental rule that the appellate jurisdiction of this court is limited to a review of the rulings of in-

ferior tribunals duly excepted to at the time and to a correction of those which are found to be erroneous; not the consideration of questions first raised after the case is brought here, except they be those involving jurisdiction. This has been the law since this court was first established and we see no reason for departing from it now. See *Courtnay v. Price*, 12 Neb. 188, 10 N. W. 698.

All other questions raised are properly and adequately disposed of in our former opinion. The former opinion is adhered to and the motion for a rehearing is denied.

YEAGER and CHAPPELL, JJ., dissent.

JAMES H. HANLEY, APPELLEE, V. HERMAN STRATBUCKER, APPELLANT.
13 N. W. 2d 665

FILED MARCH 17, 1944. No. 31696.

Contracts. The practical interpretation given a contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed, with directions.*

Fischer, Fischer & Fischer, for appellant.

Smith & Schall, Edward G. Garvey and *Charles S. Lobingier, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

This is a suit upon two notes given for rent. The defense was that the notes were canceled as the result of defendant's exercising an option of purchase of the property. Judgment was for the plaintiff. Defendant appeals. We

reverse the judgment of the trial court and direct judgment for the defendant.

The plaintiff and Ella B. Lobingier were the owners of a tract of land along the river in Washington county. They leased the land to the defendant for the year, March 1, 1940, to February 28, 1941, at a rental of $150, evidenced by promissory notes of the defendant for $75 payable to each of the owners and due September 1, 1940. There was a provision for an extension of the term under certain conditions.

The lease further provided: "Lessors hereby give lessee during the first year term of this lease the option of purchasing said premises for the sum of $2550.00, lessors to furnish a merchantable abstract for said premises. In the event lessee exercises the option to purchase said premises on or before August 1, 1940, and pays to said lessors on or before August 1, 1940, the sum of $2550.00, then and in that event the promissory note mentioned herein, payable to Ella B. Lobingier in the sum of $75.00 and the promissory note mentioned herein payable to James H. Hanley, in the sum of $75.00 will be cancelled and returned to lessee."

Plaintiff handled this matter for himself and his co-owner. He sues here for himself as payee of one of the notes and as endorsee of the other. We will, accordingly, refer to the plaintiff throughout as representing both of the owners of the land and the notes.

By letter dated July 3, 1940, plaintiff referred to the "option in the lease" and inquired of the defendant if he intended to purchase the land. Under date of July 8, 1940, defendant replied that he expected "to go thru with the purchase," had "arranged to have the money by August first"and gave directions as to the grantee of the deed. July 10, 1940, plaintiff advised defendant that he would have the abstract and deed prepared and be ready for final settlement "when I get out there the first part of August." Defendant had the money to make full payment on August first and thereafter held it available for that purpose.

The abstract certificate was dated August 6, 1940, and

was delivered by plaintiff to defendant's attorney on August 8, 1940.

Thereafter certain objections were made to the title, which are not fully disclosed by the record. There was a tax sale for taxes unpaid on an undivided half interest in the property. There is reference in the correspondence also to a required correction in the description of the property in the deed. A third party, under some claim of ownership, seems to have been in possession of an island, which was a part of the tract. Defendant's attorney advised plaintiff of this latter fact and plaintiff gave instructions as to what to do to correct the situation. There was a proposal by the defendant to place all the money in escrow or pay part and withhold part pending the settlement of this third party's claim. It was not accepted. Plaintiff made a counter proposal which was not accepted. Later plaintiff employed defendant's attorney to bring what appears to have been contempt proceedings to secure possession and ouster of the third party.

April 4, 1941, the proceedings with reference to the third party had been successfully completed and plaintiff submitted deed and abstract of title to an Omaha bank to be delivered to defendant upon the payment of the purchase price. Plaintiff added to the contract purchase price the sum of $24.58 representing 1940 taxes which the plaintiff had paid. A claim of apparent interest by still another party appears to have delayed settlement for a few days. Defendant made the payments and took up the deeds.

Thereafter in May, 1941, plaintiff demanded payment on the notes. There is evidence that plaintiff notified defendant in August, 1940, that payment of the notes would be required. This the defendant denies. That fact has been resolved by the court's decision in favor of the plaintiff. No reference was made to the notes at the time settlement was made for the property.

Plaintiff sued on the notes. Defendant answered alleging that under the terms of the contract the notes were to be canceled and returned to him and denying liability. At

the close of the evidence in the district court both parties moved for a directed verdict. The trial court discharged the jury, found for the plaintiff and rendered judgment accordingly.

With the exception above noted, there is no dispute of material facts in the evidence. Is the defendant liable to the plaintiff on the notes? The answer depends upon a construction of the contract in the light of the construction the parties themselves placed upon it. "This court on a number of occasions has stated: 'The practical interpretation given a contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction.' *Jensen v. Romigh*, 133 Neb. 71, 274 N. W. 199." *Dakota County v. Central Bridge & Construction Co.*, 136 Neb. 118, 285 N. W. 309.

That the sale and purchase of the land were completed under the provisions of the contract is not questioned and is not an issue here. The issue is as to defendant's liability on the notes given for rent. Plaintiff contends that only on the condition that defendant exercised the option and paid the purchase price on or before August 1, 1940, was plaintiff to cancel and return the notes and that, otherwise, the notes were to be paid. That plaintiff did not receive payment by August first is certain.

Plaintiff overlooks the fact that, as a condition precedent to the right to demand the payment of the purchase price, he was obligated by the contract to furnish an abstract showing merchantable title. If defendant exercised the option to purchase, plaintiff agreed to furnish the abstract. Obviously that was to be done and a reasonable time given to examine the title and objections made thereto before the defendant was called upon to pay the purchase price. The parties themselves so construed the contract. This condition applied whether the option was exercised before or after August 1. Plaintiff furnished no abstract of any kind until eight days after August 1. The abstract was exam-

ined; objections were made; they were treated as having merit; steps were taken by plaintiff to remedy the matters to which objections were made; and as soon as the objectionable matters were corrected, payment was made. It was not until after the transaction was completed, plaintiff had his money, and defendant the land, that plaintiff contended the objections to the title were without merit and the court proceedings against the third party wholly unnecessary.

The fault here lies with the plaintiff. He failed to deliver the abstract within the time set in the contract and when it was delivered, it did not show a merchantable title, as demonstrated by the action of the plaintiff in perfecting it. Defendant was, on or before August 1, ready, willing and able to perform. Plaintiff could not alter the contract by advising defendant that he would be required to pay the notes. Defendant's rights and liabilities were fixed when the contract option was exercised, and were not subject to change by the plaintiff.

Not to be overlooked is the fact that the plaintiff treated this sale as though completed in 1940 for he required the defendant to pay the purchase price, plus a reimbursement for 1940 taxes which were paid by plaintiff in 1941 before the transaction was completed. These taxes were not chargeable to the defendant except on the theory that they were considering the settlement on the basis of the sale having been made in 1940.

Under the construction which the parties themselves placed on their contract while they were performing it, it must be held that defendant has no liability to the plaintiff on the notes in question.

The judgment of the trial court is reversed and remanded with directions to enter a judgment for the defendant.

REVERSED, WITH DIRECTIONS.

IN RE ESTATE OF HENRY G. HEINEMAN. GORDON C. HEINEMAN ET AL., APPELLEES, V. LENA ARGABRIGHT ET AL., APPELLANTS.

13 N. W. 2d 569

FILED MARCH 17, 1944. No. 31718.

1. **Wills.** In order to invalidate a will, undue influence must be of such a character as to destroy the free agency of the testator and substitute another person's will for his own.
2. ———. Where it is shown that all requirements for a valid will have been met, the burden of proof is on the contestant to establish by competent proof that the will was procured by undue influence.
3. ———. Evidence of events occurring long after the will was executed, in order to be admissible or to have any weight or significance, must be connected with direct or circumstantial evidence tending to prove that undue influence existed and that it was exercised at or near the time the will was made.
4. **Evidence.** Admissions and declarations of a party to an action against his own interest on a material matter may be proved as original evidence. The fact that they are contained in a deposition is no bar to their reception in evidence.
5. **Wills.** Where there is no evidence of undue influence at the time the will was executed, evidence tending to establish undue influence at a time subsequent to the date the will was made is not material to the issue.
6. ———. Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed.
7. ———. An abuse of discretion by the trial court in denying a continuance to obtain additional witnesses cannot be successfully asserted where there was no showing made as to the nature of their testimony.

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

Merril R. Reller and *John McArthur*, for appellants.

Frank A. Hebenstreit, contra.

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

CARTER, J.

This is an appeal by the contestants of the will of Henry G. Heineman, deceased, from an order directing a verdict in favor of the proponents of the will and ordering the will admitted to probate.

Contestants allege that Henry G. Heineman did not have testamentary capacity to make a will on March 15, 1939, the date of the purported will. They further allege that the purported will was the result of the undue influence of proponents upon Henry G. Heineman at the time of its execution and that, for this reason, the purported will is not that of Henry G. Heineman.

The record shows that Henry G. Heineman, the testator, lived his entire life in Richardson county and died on November 10, 1942, at the age of 83 years. He had never married and his heirs at law consisted of a brother, two sisters, the children of a deceased brother and the children of a deceased sister. The proponents of the will were three brothers, Roy, Gorman and Keith Heineman, nephews of the deceased. All of the real estate owned by Henry G. Heineman was conveyed by deeds to the proponents of the will and their wives prior to his death. The will has the effect of giving the residue of the personal property to the proponents of the will.

The evidence shows that at the time the will was executed on March 15, 1939, Henry G. Heineman was living with a brother, the father of the proponents. It appears that on March 15, 1939, the proponents and Henry G. Heineman went to the office of a lawyer in Falls City where Henry G. Heineman executed the will in question. Proponents were not present during the ceremonies necessary to the execution of the will. The evidence is that they were in the hall outside the lawyer's office at the time. The witnesses to the will, two disinterested persons having only a casual acquaintance with Henry G. Heineman, testified to all acts necessary to the execution of a valid will and to the further fact that testator appeared to be mentally competent and to understand the import of what he was then doing. There

is no evidence in the record of a want of testamentary capacity at or prior to the time the will was made. The question of undue influence appears to constitute the real issue.

It is evident from the evidence that Henry G. Heineman was very friendly with proponents, and especially Gorman Heineman, for many years. All of the real estate of the testator was conveyed by outright gift or escrow deed prior to the making of the will. It is true, however, that an escrow deed to a Missouri farm in favor of Kenneth Heineman, a nephew of testator and a cousin of proponents, was withdrawn from escrow by mutual agreement and the property conveyed to the wives of Gorman and Roy Heineman after the will was executed. There is some claim of misrepresentation and fraud in connection with this transaction, but in view of the fact that it occurred long after the will was made we do not deem it material to the issue before us.

The evidence chiefly relied upon by contestants is: That in his declining years Henry G. Heineman was unable to personally handle his business and called upon the proponents to assist him. In September, 1940, after the will was executed, Henry G. Heineman was operated upon for cancer. Upon his return from the hospital he was cared for in the homes of proponents, principally in that of Gorman Heineman. For more than two years they attended to his needs and performed many very odious personal services required because of his affliction. There is evidence that Gorman and Roy Heineman, and their wives, obtained valuable gifts from him during this time. But the record is clear that all of such evidence relates to events which occurred long after the will in question was executed. We are convinced that such evidence is insufficient to sustain a verdict that the will was procured by undue influence. Giving the evidence of contestants its most favorable import, as we are required to do where the trial court has directed a verdict against them, it fails to show any undue influence at the time the will was made.

"An unequal distribution of property among the children

of testator, of itself, raises no presumption of the exercise of undue influence. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own." *In re Estate of Stuckey*, 105 Neb. 641, 181 N. W. 564.

"When it is shown that a will has been signed and attested by the statutory number of witnesses, and it is conceded that the testator was of sound mind, the will is presumed to be valid. In order to set it aside on the ground that it has been procured by undue influence, competent proof is required, and the burden of proof is ordinarily upon the contestant." *In re Estate of Dovey*, 101 Neb. 11, 162 N. W. 134.

"Where a will is contested because it is alleged that it was procured by undue influence, the burden is upon the contestants to establish by proof, or by fair inference to be drawn from facts proved, that there was undue influence, which induced the testator to dispose of his property contrary to his intention. In such a case, suspicion or supposition of undue influence is not sufficient either to require the submission of the question to the jury, or to sustain a verdict." *In re Estate of Bayer*, 119 Neb. 191, 227 N. W. 928. See, also, *In re Estate of Hagan*, 143 Neb. 459, 9 N. W. 2d 794; *In re Estate of Bowman*, 143 Neb. 440, 9 N. W. 2d 801.

"While it is unwise to lay down any hard and fast rule respecting the time to which this class of testimony must relate, we are of opinion that, under the facts of this case, these circumstances were entirely too remote to be brought within the category of evidence tending to establish undue influence * * *.

"But, aside from this objection, the testimony was clearly inadmissible because not only was there no offer to show by competent evidence a continuance of any general influence, supposed to be established by this class of testimony, down to, or near, the time of the execution of the will, but there was no testimony whatever showing that any undue influence was exercised by proponent over the testator con-

cerning the making of the will at or near the date of its execution, or at any other time. Testimony like that rejected, in order to be admissible, or to have any weight or significance, must be connected with direct or circumstantial evidence tending to prove that undue influence existed and that it was exercised at or near the time the will was made. Indeed, none of the proposed evidence tended to show that any influence was exercised at the time the will was executed, and it was properly rejected. Its admission could not be other than prejudicial to the proponent." *In re Shell's Estate,* 28 Colo. 167, 63 Pac. 413. It seems to us that the necessity of connecting up evidence of undue influence, occurring after the execution of the will, with the execution of the will itself is just as necessary, if not more so, than that which occurred some time prior to its execution. The evidence is material only to the extent that it indicates that the pressure of undue influence was exercised at the very time the will was executed. Consequently, unless there be competent evidence of the exercise of undue influence at the very time the will was made, evidence of it subsequent to the execution of the will can serve no useful purpose.

The testamentary capacity of Henry G. Heineman is not questioned. The evidence of undue influence is insufficient to sustain a verdict. The trial court was therefore right in directing a verdict.

It is contended, however, that the trial court erred in making certain rulings with reference to the admission of evidence. In this respect the record shows that contestants, after complying with the requirements of the applicable statute, took the deposition of Gorman Heineman, one of the proponents. Each question and answer were separately offered in evidence by the contestants as a part of their case in chief on the theory that they were admissions against interest. The court sustained the objections of proponents to this evidence on the ground that it was incompetent, irrelevant and immaterial and for the further reason that Gorman Heineman was present in court and willing to testify. Did the court err in refusing this testimony?

The statement alleged to be an admission against interest "must be disserving or of such a character that from it some inference may be fairly drawn to the party's prejudice. * * * If testimony is of such a character as to constitute an admission of the party, it is not necessary to lay a foundation for its reception by first asking the party if he has made such a statement. Nor need the statement, at the time when it was made, appear to have been against the interest of the party. The statement is admissible if at the time of the trial it is inconsistent with the contention of the party who made it. It is admitted as substantive, and not merely as impeaching, testimony." Jones, Evidence (4th ed.) sec. 236. Such admissions and declarations of a party to an action against his own interest on a material matter may be proved as original evidence. *Prince v. Petersen, ante,* p. 134, 12 N. W. 2d 704. We have also held that such admissions and declarations contained in a deposition may be proved as original evidence. *Prince v. Petersen, supra.*

An examination of the deposition reveals that the evidence contained therein pertains to incidents and events which took place long after the will had been executed and have no tendency to establish the exercise of duress upon Henry G. Heineman at or before he made his will. Neither does such evidence contain any declarations or admissions against interest which tend to prove the existence of duress at the time the will was made. When a will is contested on the ground of undue influence the primary question is whether or not the maker of the will was unduly influenced at the particular time it was executed. Evidence of undue influence subsequent to the execution of the will is not properly admissible until there be competent evidence of undue influence at the time the will was executed, unless it follows so closely as to have evidentiary value. Such evidence may corroborate the existence of undue influence when the will was made, but it is insufficient, standing alone, to sustain such issue. We think the trial court correctly rejected the proffered admissions against interest.

Contestant also urges that the trial court erred in refus-

ing a continuance in the course of the trial. It appears from the record that contestant subpœnaed some witnesses at 1:30 p. m. on the day the trial terminated. The condition of the roads and highways prevented the sheriff from serving the subpœnas on that day. Contestant moved for a continuance but failed to disclose the nature of the testimony, or the materiality thereof, to which the absent witnesses would testify. We have repeatedly held this to be an essential prerequisite to the obtaining of a continuance. An abuse of discretion by the trial court cannot be successfully asserted where such a showing is not made. *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481, 73 N. W. 942.

We think the trial court properly applied the law to the facts of this case and that a directed verdict for the proponents was required by the evidence.

AFFIRMED.

DUNDEE REALTY COMPANY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

13 N. W. 2d 634

FILED MARCH 17, 1944. No. 31578.

1. **Municipal Corporations.** Cities of the metropolitan class, for the purpose of promoting the health, safety, morals, or the general welfare of the community, are empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. Comp. St. 1929, sec. 14-404.
2. **Constitutional Law.** The police power is inherent in the effective conduct and maintenance of government and is to be upheld even though the regulation affects adversely property rights of some firm, business or individual.
3. **Municipal Corporations.** What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is com-

mitted, and unless an abuse of this discretion has been clearly shown it is not the province of the court to interfere.

4. ———. In determining the validity of a city ordinance, regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
5. **Constitutional Law.** Police regulations promoting public safety and welfare may be valid, though restricting the liberty of citizens in regard to occupations and the ownership and use of property.
6. **Appeal and Error.** In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions.
7. ———. In appeals from the district court to the supreme court in suits in equity, on trial *de novo* this court will retry the issue or issues of fact involved and reach an independent conclusion as to what findings are required under the pleadings and the evidence, without reference to the conclusion reached in the district court.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Ellick, Fitzgerald & Smith, for appellant.

Harold C. Linahan, W. W. Wenstrand, G. H. Seig and *Edward Sklenicka, contra.*

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

MESSMORE, J.

Plaintiff owned real estate in Omaha which was included by ordinance within a restricted zone for high-type residential use. Plaintiff contends that such inclusion was unreasonable, arbitrary and amounted to the taking of its real estate, or a part thereof, unlawfully. The trial court sustained the ordinance.

In this case there is a stipulation that the trial court, who heard and determined the first action, try the issues involved in this, the second, action. The transcript sets forth a history of the ordinances involved, their relationship to each other and their effect. Inasmuch as the two actions

are consolidated and the issue to be determined is whether ordinance No. 15068 is unconstitutional and void for the reason that it is arbitrary and unreasonable, that it destroys the plaintiff's property, and that it does not promote the public health and morals or general welfare, we deem it unnecessary to set forth the pleadings involving the prior ordinances, their relationship to each other and their effect, but rather to confine the decision in this case to the ordinance here involved and the pleadings relative thereto, having considered the previous litigation and the factors upon which the trial court determined it. A summary of the pleadings directly involving the issue here presented is as follows:

The petition alleges that plaintiff is the owner of the following described real estate:

"A tract of land in the City of Omaha, Douglas county, Nebraska, and located within the N. W. ¼ of the N. W. ¼ of Section 19, Township 15, North, Range 13 East of the 6th Principal Meridian, particularly described as:

"Beginning at a point on the present north line of Dodge Street 33 feet north and 213 feet east of the southwest corner of the N. W. ¼ of the N. W. ¼ of said Section 19; thence east along said north line of Dodge Street 718.3 feet; thence north 8 degrees 25 minutes east 72.2 feet; thence on a curve to the right with a radius of 1102.2 feet, 536.5 feet, more or less, to its intersection with a line 560 feet north of, and parallel to, the present north line of Dodge Street; thence west along said parallel line a distance of 1,000 feet; thence south 7 degrees 52 minutes east to the place of beginning."

The petition alleges that on July 21, 1942, the city council of defendant city passed a purported ordinance No. 15068, made a part of the petition; that more than 15 days have elapsed since the passage of said ordinance, and no protest has been lodged against the same, as provided by section 14-211, Comp. St. 1929; that plaintiff's land, hereinbefore described, is wholly within the area covered by section 1 of the ordinance; that by the terms thereof plain-

tiff's property is classified for building purposes as AA residence and AB height and area.

For brevity we summarize the uses provided under section 61-1.3, AA residence district: (1) One-family dwellings; (2) churches; (3) only such gardening as is exclusively for the use of occupants of the dwelling located on the premises; (4) certain accessory buildings; (5) uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of a business; (6) no signs except those appertaining to the lease, hire or sale of building on premises and then not exceeding eight square feet in area. With reference to the AB height and area ordinance, attached to the petition, it requires a lot area of not less than 5,000 square feet per dwelling, a main building more than one story in height, to have a ground area of not less than 1,200 square feet, and, if one story in height, a ground area, exclusive of garage, of not less than 1,000 square feet, as provided in section 61-1.15 AB height and area district, and providing for the set-backs, which we need not set out. With reference to the lot area per dwelling and building area, the effect of ordinance No. 15070, repealing certain parts thereof, is contained in the opinion.

The petition further alleges that the tract of land involved has a frontage of 718.3 feet on Dodge street and extends back from Dodge to the north a distance of 560 feet; that Dodge street, abutting this land, is a transcontinental highway, used by 9,000 motor vehicles, including trucks and transport vehicles, each 24-hour period; that, as a result of such heavy traffic on Dodge street, the street is dangerous and difficult for pedestrians to cross, and there is almost continual noise from the passage over Dodge street of so many vehicles, caused by the sounding of horns, application of brakes, and noise incident to the movement of such a volume of traffic; that, consequently, said tract of land is wholly unsuited and unfit for high-class residence purposes, such as provided for by paragraph 4 of the ordinance, referred to above; alleges that the passage of ordinance No.

15068 does not promote the public health, morals or general welfare, and that the zoning, as contemplated by the ordinance, is an unlawful, arbitrary and unreasonable exercise of the power of zoning, as vested in the city authorities by law, and that such ordinance is null and void and of no effect; that the existence of the ordinance, absent any attempt to enforce it, operates to and does reduce the value of plaintiff's property, destroys the marketability thereof for its actually lawful uses, and constitutes an invasion of plaintiff's property rights, deprives the plaintiff of its property without due process of law and equal protection of the laws, in violation of the Fifth Amendment and of section 1 of the Fourteenth Amendment to the Constitution of the United States, and of section 3, art. I of the Constitution of Nebraska, amounts to a taking and damaging of plaintiff's property without just compensation, in violation of the Fifth Amendment to the Constitution of the United States, and of section 21, art. I of the Constitution of Nebraska.

The petition alleges that plaintiff intends to and will erect upon said tract of land certain buildings and structures that do not comply with the requirements of the AA and AB classifications, respectively, and that the defendants intend to and will seek to prevent plaintiff from so using that part of its property, and the plaintiff will be denied building permits except for residences conforming to the provisions of the ordinance, and, unless restrained by this court, will harass, embarrass and impede plaintiff in the lawful use of its property. Plaintiff prays that the court adjudge ordinance No. 15068 unconstitutional, null and void, as applied to plaintiff's land, and that defendants be permanently enjoined from attempting to enforce the ordinance.

The answer, for the purposes of this opinion, may be considered as a general denial of the petition, and all of the admissions of fact therein have been noted. Its prayer is for a dismissal of plaintiff's petition. The court adjudged ordinance No. 15068 valid and constitutional, and not arbitrary or unreasonable. Plaintiff appeals.

In the record is an agreement made on the 23d day of January, 1939, between the plaintiff as seller and one George D. Fraser as purchaser, describing the real estate to be sold: A frontage on Dodge street of 718 feet, fanning out to a width of 750 feet at a point 560 feet north of Dodge street. The tract is 700 by 560 feet in dimension. On the date of the agreement there was to be a deposit made of $10,000; the balance of the purchase price of $30,500 to be paid by the purchaser upon the happening of certain events, which we need not set out. The seller agreed, in the proposed development of the real estate, that certain portions thereof, as well as other portions of real estate owned by the seller, were to be conveyed to the city of Omaha for park and boulevard purposes, pursuant to plans adopted, on the condition that defendant city agree to grade the boulevard, give it permanent care, install storm sewers, lay suitable black-top pavement and concrete gutters, at the expense of the city; the south 300 feet of the purchaser's tract to be classified as "Class C Commercial District" under the zoning ordinance of the city, and that the city is endeavoring to obtain a grant from the government for the purpose of defraying part of the cost of the public improvement. The purchaser was under no obligation to purchase property located immediately north of the property mentioned in the contract. It is unnecessary to set out other provisions of the contract.

The plaintiff's land is near a high-type residential district in the city of Omaha. The proposed boulevards, referred to in the contract, had not belonged to the city and were a part of the proposed plan set up by the plaintiff. To the north and east, a short distance away, is a girls' school, Brownell Hall. Across Dodge street from the zoned tract, a short distance, is Elmwood Park, a public park. South and west is the University of Omaha, a coeducational institution, and almost directly west are a beautiful Catholic church, recently constructed, and the residence of the bishop, the head of the church of that faith. The plaintiff proposed to build on the strip of land in question high-class

commercial shops with private road and parking area, buffeted by landscaping, so that those patronizing the shops would not park on Dodge street, but space would be provided, and the traffic area through Dodge street would be clear. Plaintiff proposed to erect north of the shops garden apartments of modern design and construction. Exhibits appearing in the record disclose the proposed buildings on plaintiff's real estate as examples of high-type commercial structures to accomplish the necessary needs of the population to be served. This is developed by similar construction of well known city planners and contractors, and, obviously, to show the necessity for such an enterprise.

An expert testifying for the city, in determining hazards arising from fire, testified that no fire hazard would result from the proposed development of the 300-foot strip north of Dodge street with shops, and likewise no fire hazard would result from building north of the 300-foot strip, and that the type of construction proposed by the plaintiff on the 260-foot strip north of the 300-foot strip constituted no fire hazard other or different from that which is ordinarily present.

The traffic engineer of the police department described in detail the travel on Dodge street adjacent to the plaintiff's tract, indicating that 9,660 vehicles traversed Dodge street at that point in a 24-hour period. He testified to the noise, its volume east and west of the plaintiff's tract, due to two hills; to the shifting of gears, the approach of cars at what is known as the Happy Hollow intersection from the east, taken at a point 88 feet back of the intersection, and placed the average speed of vehicles approaching such boulevard and Dodge street from the west at 42½ miles an hour. It was further explained that Dodge street at that point carries four U. S. highways and has the heaviest traffic at 42½ miles an hour of any point in Omaha.

The plaintiff states that the ordinance requires a lot area of not less than 5,000 square feet per dwelling and requires a main building, more than one story in height, to have a ground area of not less than 1,200 square feet, and, if one

story in height, a ground area, exclusive of garage, of not less than 1,000 square feet. It appears that ordinance No. 15070 absolutely repealed the building area part of AB height and area requirements of ordinance No. 14924, in keeping with this court's decision in *Baker v. Somerville,* 138 Neb. 466, 293 N. W. 326.

The case before us in no manner conflicts with the *Somerville* case. The facts are not analogous. In that case, the engineer testifying to parts of the ordinance now repealed stated that the section in question was zoned purely for aesthetic reasons, while in the instant case the facts deal decisively with the welfare, morals and safety of the people of the city of Omaha.

The plaintiff seeks, by the foregoing evidence, to show that the result of the ordinance is the taking of plaintiff's property and reducing its value, and that it has been appropriated for public use without just compensation. The AA use ordinance permits one-family dwellings, churches, only such garden space as is for the exclusive use of the occupants of the dwellings; certain accessory buildings, uses customarily incident to the uses named in the ordinance, when located on the same lot and not involving the conduct of a business, and permits no signs except those appertaining to the lease, hire or sale of buildings on premises, and the signs not to exceed eight square feet in area.

The plaintiff offered the testimony of experts in city planning, landscape architects and engineers, whose firms had done city planning, land architecture and subdivision work in a great many cities. These witnesses detailed how they took into consideration the topography of the land, the population of the city, its growth, its building apartment needs, the direction of growth, the surrounding development, the type of structure prevailing, the number of vacant lots available, their size, and how to make a thorough, complete analysis for the purpose of adequate and proper city planning. These witnesses stated that the zoning complained of was unreasonable, as applied to plaintiff's tract, and unanimously agreed that the proposed construction for

shops and garden apartments was a logical development of this tract of land and a reasonable use thereof.

The witness Riley, an expert, in substance testified that an additional community shopping center was needed; that the nearest one was about 3,000 feet eastward on Dodge street, in the vicinity of Fiftieth street; that rural community centers should be approximately a half-mile apart, and this particular section was that distance from any other shopping center; that the shopping district would be compact, would serve a neighborhood that could use it to advantage, due to the type of residents. He detailed other facts to the effect that if the 560-foot tract were devoted to residential use exclusively only homes of the value of $3,500 to $4,500 could be built on plaintiff's tract, which would cheapen the development and not be in keeping with the surrounding property; that the tax element on such type of homes would not be beneficial to the public. Other experts corroborated this testimony and detailed the construction of the type contemplated as reasonable and proper, stating that single-family residences on such a tract were not desirable and would decrease the valuation of the plaintiff's tract. One witness commented on the convenience of an orthodontist, beauty shop, grocery, drug store, children's shops, plumbing and shoe-repair shops,—to show some of the business enterprises that might be of value; testified that this tract of land was definitely situated for such purposes, and the single-family residence, as proposed by the ordinance, was unreasonable and impracticable; that properties adjacent to highways, with such heavy traffic, are not desirable for single-family residences; that the factors to be taken into consideration in zoning commercial areas are: Proper set-backs and entrances to the business properties, designed not to impede traffic on thoroughfares, ample parking space, grounds around the business for beautification, and that the proposed construction contemplated all of these factors.

At this point it may be well to explain that the city of Omaha has not enacted an ordinance that would contem-

plate high-type commercial building, such as proposed by the plaintiff. The ordinance in effect is a commercial ordinance for almost any type of business, without restriction. Any complaint that plaintiff has to offer, so far as this case is concerned, affecting the type of building of this nature, as against the type classified as "Class C Commercial District," where no other ordinance is enacted covering such matters, cannot be taken into consideration.

The evidence discloses the different values attached to the plaintiff's tract for the proposed use thereof by it, and the value of the tract under the use provided by the ordinance. In this connection, in the first instance, the value of the land designated in the contract is from $50,000 to $91,800, and, with no development of this nature, from no valuation to a value of $1,500 to $2,000, to $13,000, and in developing the value as contemplated by the ordinance there is much evidence concerning the frontage, the necessary set-back for residential purposes, the cost of promotion and sales, and all matters that pertain to the requirements for dwellings. In addition, there is testimony of nonexpert witnesses for the defendants, showing the distance from their respective properties to the edge of the plaintiff's tract of land and to the shops proposed to be erected thereon. This varies, to the edge of plaintiff's tract, from 240 to 1,700 feet, and to the proposed shops from 440 to a distance of 2,100 feet. The distances vary with the proximity of each of the witnesses' dwellings accordingly.

The expert witnesses for the defendants, who are real estate dealers and brokers of long standing in the city of Omaha, testified to the high value of the plaintiff's tract of land for residential purposes, when compared with buildings for commercial purposes, and the benefit of the whole tract involved; that the proposed development would lower the values of the balance of the tract, zoned for residential purposes, and that, as a general rule, commercial zoning in the defendant city is too extensive and beyond the need. The witnesses drew their conclusions that it would not be for the public welfare to place commercial property on any

part of the tract, one witness testifying that the city of Omaha has enough commercial zoning for a city of 686,600 population, and that the best residential area in Omaha is from Fifty-second street to Seventieth street on both sides of Dodge. It is true, from a review of the record, that in this location, where the plaintiff's tract of land is situated, are many of the most substantial and best residences in the city, with a more regulated value from $20,000 to $25,000.

Without detailing the testimony of the nonexpert witnesses or setting forth their qualifications, suffice it to say that they built their homes in that vicinity, recognizing all of the elements that constitute a high-type residential district, and long before the use, to which plaintiff proposed to put this tract, was contemplated, and have been served by a business community close enough for their purposes. They have concluded that the proposed building of shops and garden apartments, as contemplated, would lessen the value of their properties to a considerable extent. All of these witnesses are substantial business citizens of the city.

Due to the confusion with reference to the required setback of property, such as dwellings, ranging from 100 feet to approximately 300 feet, and the value of such dwellings proportionately to the business enterprise proposed by the plaintiff, we consider the record in its entirety, the general effect of the ordinance on the units as a whole, and the benefits which it seeks to develop for the citizens, to determine its validity. A large portion of the evidence is not relevant to the subject matter. We have summarized that deemed pertinent to the issue involved.

Plaintiff cites *Nectow v. City of Cambridge*, 277 U. S. 183, 48 S. Ct. 447; *Standard Oil Co. v. City of Kearney*, 106 Neb. 558, 184 N. W. 109; *Webber v. City of Scottsbluff*, 141 Neb. 363, 3 N. W. 2d 635; *Matter of Monument Garage Corporation v. Levy*, 266 N. Y. 339, 194 N. E. 848; *Baker v. Somerville, supra*; *Ehrlich v. Village of Wilmette*, 361 Ill. 213, 197 N. E. 567; on the premise that the ordinance here involved results in taking the owner's property, and is unlawful, arbitrary, confiscatory and void.

The authority of the city for zoning purposes is reflected by sections 14-368, 14-401, 14-404, Comp. St. 1929. Section 14-404 reads as follows: "For the purpose of promoting the health, safety, morals or the general welfare of the community, the city council in cities of the metropolitan class is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained."

Section 14-368, Comp. St. 1929, provides in part: "Each regulation shall be designed to secure the safety from fire and other dangers, and to promote the public health and welfare." Other provisions of the statute, affecting the zoning act and city planning, need not be summarized or set out.

We have no quarrel with the cases cited under the facts and circumstances therein stated and the law applicable thereto. The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts in each particular case presented. On this proposition the law is well settled.

There is ground for legitimate differences of opinion concerning the reasonableness of an ordinance. In the development of our civil life, the definition of public welfare has also developed until it has been held to bring within its purview regulations for the public welfare and public convenience.

In *Pettis v. Alpha Alpha Chapter of Phi Beta Pi,* 115 Neb. 525, 213 N. W. 835, we find the following holdings:

"The police power is inherent in the effective conduct and maintenance of government and is to be upheld, even though the regulation affects adversely property rights of some individual. *City of Aurora v. Burns,* 319 Ill. 84.

" 'If considerations of public health, safety, comfort, or general welfare could have justified zoning ordinance, the court must assume that they did justify it, and cannot take issue with the city council.' *State v. City of New Orleans*, 154 La. 271.

"The police power extends to all the great public needs. 'It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' *Noble State Bank v. Haskell*, 219 U. S. 104."

In *Lombardo v. City of Dallas*, 47 S. W. 2d (Tex. Civ. App.) 495, it was held: "That zoning ordinance, otherwise valid, limits use and depreciates value of property, is no reason for holding void ordinance passed in interest of public welfare. * * *

"Effective 'zoning' necessarily comprehends prohibitions against certain uses in named districts and restrictions as to area of lots to be built upon, size and height of structures, and similar matters." The court said:

"It is not an effective argument against a zoning ordinance, otherwise valid, that it limits the use and depreciates the value of property, as the public health, safety, morals, and the general welfare are superior in importance to the pecuniary profits of the individual owner."

"Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 387, 47 S. Ct. 114.

The court will not substitute its judgment for that of the city council if the classification for zoning purposes be fairly dependable.

"What is the public good as it relates to zoning ordinances affecting the use of property, is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere." *Zadworny v. City of Chicago,* 380 Ill. 470, 44 N. E. 2d 426.

In the case of *Hawkins v. City of Red Cloud,* 123 Neb. 487, 243 N. W. 431 (appeal dismissed 1933, certiorari denied, 289 U. S. 704, 53 S. Ct. 660), the court held:

" 'In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.' *State v. Withnell,* 91 Neb. 101.

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

"The ownership and use of private property in a city is subject to proper police regulations required by public safety and welfare.

"Police regulations promoting public safety and welfare may be valid, though restricting the liberty of citizens in regard to occupations and the ownership and use of property.

"Private property used in a business prohibited by a valid police regulation may be depreciated in value by such legislation without any provision to compensate the owner for his loss.

"If a city ordinance is valid as an exercise of police power, courts will not inquire into the motives of the city council in enacting it." See, also, *State v. Edgecomb,* 108 Neb. 859, 189 N. W. 617, 27 A. L. R. 437; *City of Lincoln v. Foss,* 119 Neb. 666, 230 N. W. 592; *State v. Anderson,* 122 Neb.

738, 241 N. W. 545; *Village of Euclid v. Ambler Realty Co., supra; Pettis v. Alpha Alpha Chapter of Phi Beta Pi, supra.*

In *Marblehead Land Co. v. City of Los Angeles*, 47 Fed. 2d 528, it was held: "Appellate court, in passing on validity of zoning ordinance, should give great weight to determination of local authorities and local courts especially familiar with local conditions."

Objection is made to the conduct and remarks of the trial court throughout the trial. It is contended that such remarks demonstrated the court had prejudged the issue involved, and, therefore, the decree was not based upon the evidence. This case comes here for trial *de novo*, as contemplated by section 20-1925, Comp. St. 1929, and is determined accordingly.

Our conclusion is reached from an analysis of the record and considering these factors: The new and beautiful Catholic church, which lies to the west of this zoned tract; Elmwood Park, used by the population of Omaha, men, women, boys and girls; the University of Omaha, a coeducational institution, beautifully landscaped and used by many students; the fact that Omaha, by the vote of its people, has legalized the sale of intoxicating liquor by the drink; the heavy traffic which would, of necessity, be increased by the erection of the store buildings and garden apartments, as contemplated; the commercial ordinance of the city of Omaha as it now exists, without restrictions as to the businesses that might occupy the proposed store buildings, the close proximity of the girls' school, and the substantial character of the residences in the immediate vicinity, of the very best and highest type in the city. We can arrive at no other conclusion than that the city of Omaha did not act unreasonably, in effect, by the adoption of the zoning ordinance, holding that the public welfare and morals would be essentially and vitally affected by the proposed structures, and that only by the exercise of the police power, which we deem properly vested in the city, can the city zone the plaintiff's tract of land and adequately co-ordinate it in keeping with the best interests of the people as a whole.

We hold that ordinance No. 15068 is valid and constitutional, as applied to the plaintiff's land, and that such ordinance is not arbitrary or unreasonable, as applied to plaintiff's land, but is to the best interests of the city of Omaha, for the reasons given in this opinion; that the plaintiff's land is subject to the AA use and AB height and area provisions of defendant city's zoning ordinance, being sections 61-1.3 and 61-1.15 of the Municipal Code, as modified by ordinance No. 15070; that plaintiff's petition is dismissed and that ordinance No. 15068 be adjudged a valid exercise by the city council of its police power and is constitutional and valid.

AFFIRMED.

WILLIAM MAHER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

13 N. W. 2d 641

FILED MARCH 17, 1944. No. 31647.

1. **Appeal and Error.** An assignment in a petition in error "that the court erred in overruling the motion for a new trial" is not required. If the particular errors complained of are properly set forth in the motion for new trial as by statute provided and the assignments in the petition in error are based thereon, then this court has jurisdiction to review the errors complained of. *James v. Higginbotham*, 60 Neb. 203, 82 N. W. 625, is overruled.
2. **Statutes.** The provisions of the Constitution relating to titles are to be liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the titles, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title. *Held*, that all offenses included in section 4 of Senate File 236 as passed by the 1935 legislature, now being section 28-5,101, Comp. St. Supp. 1941, are within the objects and purposes of the act as expressed in the title and germane thereto and that the same are defined with sufficient certainty and clearness.
3. **Jury.** On a challenge to the array or motion to quash the veni-

re, it will be presumed, in the absence of evidence to the contrary, that the officers charged with the duty of selecting, drawing, and summoning the jury have acted faithfully and according to law, and the burden of showing the contrary is upon the challenging party.

4. **Criminal Law.** When the accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he shall be deemed to have waived arraignment and a plea of not guilty to have been pleaded.
5. ———. The transcript imports absolute verity, and cannot be impeached. If incorrect, or if it fails to speak the truth, the correction must be made in the district court and not here.
6. ———. An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.
7. ———. The legislature of our state has interpreted the Constitution on the matter of a speedy trial by fixing what, in certain cases and under certain conditions, is to be regarded as a maximum time within which a defendant must be tried. The interpretation of this constitutional provision is for the court, but since the time fixed by the legislature is not unreasonable, we adopt it as our own. But the legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court.
8. **Arson.** The *corpus delicti* and the guilt of the defendant in an arson case may be established by circumstantial evidence. *Held*, evidence sufficient to establish the *corpus delicti* and guilt of the defendant under the circumstantial evidence rule.
9. **Trial.** It is the duty of the court, with or without request, to instruct the jury as to the law of the case.
10. **Judgment.** The approved journal entry of a judgment is indisputable evidence of what the judgment was.
11. ———. A judgment of a court is valid and effective when it is declared and announced by the judge, although it may not be reduced to writing until afterwards.
12. **Trial.** It is the duty of the court to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill-will.

ERROR to the district court for Douglas county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Grenville P. North, for plaintiff in error.

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

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

WENKE, J.

Information was filed in the district court for Douglas county charging William Maher and Tony Scavio with arson in the fourth degree. Upon application of William Maher, the plaintiff in error, he was granted a separate trial. Trial being had he was convicted thereof. In his petition in error, by which he brings his conviction to this court for review, he assigns a very large number of errors as grounds for reversal. For the purpose of this opinion, we will follow the rule as announced in *Mason v. State,* 132 Neb. 7, 270 N. W. 661: "Errors assigned but not argued will be considered as waived."

For the purpose of this opinion the plaintiff in error will be referred to as the defendant and the defendant in error as the state.

The first question presented by this appeal is whether or not the errors relied upon by the defendant are properly here for consideration. The defendant failed to assign in his petition in error that the lower court erred in overruling his motion for new trial. In *Achenbach v. Pollock,* 64 Neb. 436, 90 N. W. 304, we held: "A judgment will not be reversed for errors which are required to be assigned on a motion for a new trial, unless it is alleged in the petition in error and shown by the record that the court erred in overruling such motion." See, also, *Gandy v. Cummins,* 64 Neb. 312, 89 N. W. 777; *James v. Higginbotham,* 60 Neb. 203, 82 N. W. 625. In *Waxham v. Fink,* 86 Neb. 180, 125 N. W. 145, we stated: "Under the former practice it was held, perhaps not necessarily, that the petition in error in this court must contain the assignment that 'the court erred in overruling the motion for a new trial.' " In many of the decisions the reason for this rule is based upon the theory of waiver. This would seem to have little merit for by the ap-

peal itself the appellant shows his dissatisfaction with the ruling on the motion and his attempt to be relieved thereof. As stated in *Reese v. Fife*, 279 S. W. (Mo.) 415: "The appellant has preserved in his motion for new trial the errors of which he complains. To hold that, by failing to also assign error in overruling the motion, appellant has waived the errors preserved for review, would seem to be highly technical. Such an assignment would be superfluous." See, also, *Armour v. Pennsylvania R. Co.*, 353 Ill. 575, 187 N. E. 532. We think the better rule to be that, where the motion for new trial sets forth the errors of which the appellant complains in the manner prescribed by our statute and the assignments in the petition in error are based thereon, then the case is before this court for review and it is not necessary to assign in the petition in error that the trial court erred in overruling the motion for new trial. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955. Therefore, *James v. Higginbotham, supra,* and all other cases in so far as they conflict with the rule herein announced are overruled.

The defendant further contends that section 28-5,101, Comp. St. Supp. 1941, is unconstitutional and therefore void. The basis of this contention is that the act contains more than one subject, that the subject is not clearly expressed in the title, and that it lacks certainty and clearness. Section 14, art. III of our Constitution provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The information under which the defendant was convicted of fourth degree arson is in the language of section 28-5,101, *supra,* which statute is as follows: "Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to the Penitentiary for not less than one nor more than two years or fined not

to exceed One Thousand Dollars. The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purpose of this act constitute an attempt to burn such building or property." This is section 4 of Senate File No. 236 as passed by the 1935 session of the legislature appearing as chapter 60 of the 1935 Session Laws. The title to this act is as follows: "An Act relating to crimes and punishments; to define the crime of arson in its various degrees; to provide penalties therefor; and to repeal Sections 28-501, 28-502, 28-503, 28-504 and 28-505, Compiled Statutes of Nebraska, 1929." This act of the legislature includes the various degrees of arson and attempts thereat together with those who aid, counsel or procure the same to be done, including when the same is done to injure or defraud an insurer.

In the construction of this constitutional provision, we stated in *Lennox v. Housing Authority of the City of Omaha*, 137 Neb. 582, 290 N. W. 451: "The constitutional provision does not require that the title be a synopsis of the law. The purpose of the constitutional inhibition was to prevent surreptitious legislation by advising legislators of the nature of the measures they are called upon to support or oppose. If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title." And as stated in *Pandolfo v. State*, 120 Neb. 616, 234 N. W. 483: "The provisions of the Constitution relating to titles are to be 'liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the titles, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title.' *Affolder v. State*, 51 Neb. 91." And as further stat-

ed in *Birdhead v. State,* 105 Neb. 296, 180 N. W. 583: "A statute which relates to the stealing, buying or concealing of an article is sufficiently broad in its title to cover any act connected with or incidental to the crime, such as attempts to commit it, aiding or abetting the criminal, the protection and concealment of the thief, or the stolen property."

We therefore come to the conclusion that a statute which relates to the various degrees of arson and attempts thereat, together with those who aid, counsel or procure the same to be done, including when the same is done to injure or defraud an insurer, is within the objects and purpose of the act and germane thereto which is described in the title as "to define the crime of arson in its various degrees."

The defendant further contends that the section under which he was convicted was unconstitutional for want of certainty and clearness. Citing from the act hereinbefore set forth the following: "or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree," the defendant contends the act spreads an all inclusive net for the feet of everybody, upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoer may also be caught. In a criminal statute what is lawful and what is unlawful should not be left to conjecture. The crime, and its elements, must be clearly expressed so that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.

In applying the foregoing rule in construing that part of the act of which the defendant complains as lacking certainty and clarity, we must construe it in relation to the entire section of which it is a part. The words "wilfully and maliciously" apply to those "who commit any acts preliminary thereto or in furtherance thereof." The words "thereto" and "thereof" apply to "attempts to set fire to or attempts to burn." When the sentence of which defendant complains is read in relation to the entire act its meaning is certain and clear and we hold it to be constitutional.

The defendant complains of the court overruling his chal-

lenge to the array or motion to quash the jury panel. A defendant in a criminal case is entitled to be tried by a jury summoned and impaneled according to the provisions of the law in force relating thereto. *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007. The legislature has provided by sections 20-1625 to 20-1640, inclusive, being chapter 20, art. 16, subdiv. (c), Comp. St. 1929, and the amendments thereto as shown by the 1941 supplement, a statutory procedure for the selection and impaneling of juries for a county the size of Douglas. "On a challenge to the array or motion to quash the venire, it will be presumed, in the absence of evidence to the contrary, that the officers charged with the duty of selecting, drawing, and summoning the jury have acted faithfully and according to law, and the burden of showing the contrary is upon the challenging party." 35 C. J. 379, sec. 422. The appellant complains that there was no order of the court directing the original making of the ten key numbers as provided by section 20-1627, Comp. St. 1929. This act provides in part as follows: "The jury commissioner of all counties to which this act may apply, shall in the presence of three judges of the district court of the county, if there be three, if not, then in the presence of such number as there may be, within ten (10) days after the taking effect of this act, and at such times thereafter as may be necessary, or as he may be ordered to do so by the district judges, number ten (10) small cards in numerical order from one to ten, both inclusive; shall place not more than one number on each card, and shall use each number but once, in the manner hereafter provided." It will be observed from the foregoing that the cards can be made and numbered without an order of the court and in the absence of any showing to the contrary it will be presumed that this procedure was followed. There was no written order of the court directing the key number to be drawn which was drawn on June 3, 1941, at 11:00 a. m. Section 20-1627, Comp. St. 1929, provides in part as follows: "He shall then place said cards in a small box or wheel provided for that purpose, close the box or wheel and thoroughly shake the

same, and then draw therefrom by chance, one of the cards in the presence of the judge or judges. The number thus drawn shall be known as the key number. The jury commissioner shall immediately after drawing the key number deliver it to the officer having charge of the election records, who shall thereafter be the custodian thereof, and shall make a record of his acts at once, in connection therewith, that is, the placing of the cards in the box or wheel, the drawing of the key number therefrom, the presence of the judges, naming them, the date and hour of such drawing, the same to be certified by the officer having charge of the election records and such records shall become a part of the public records of the county." The record shows this provision was complied with and no written order is necessary.

Complaint is made because no jury list was made from the poll books and registrations after the 1942 elections. Section 20-1629, Comp. St. Supp. 1941, provides in part: "The list as thus revised shall constitute the list from which petit jurors shall be selected, until such list shall have been exhausted in the manner hereinafter set forth." There is no showing that the jury list created by the drawing of a key number on June 3, 1941, at 11:00 a. m., was exhausted and until that happens or the list is quashed, no new jury list could be made by the drawing of a new number which would affect the poll books and registration of the 1942 election.

We have carefully examined all of the acts done by the officers in pursuance of their duties under these statutes as disclosed by the record and find them to be in proper order and, as we have previously stated, in the absence of showing to the contrary, we will presume that the officers charged with the duty of selecting and impaneling the jury have faithfully performed their duty according to law.

The defendant further complains that he was not properly arraigned as by statute provided under the rule as announced in *Barker v. State*, 54 Neb. 53, 74 N. W. 427; *Browning v. State*, 54 Neb. 203, 74 N. W. 631; and *Bur-*

roughs v. State, 94 Neb. 519, 143 N. W. 450, to the effect that, "Under section 448 of the criminal code, a conviction of a felony will not be sustained where the defendant enters his objection after the verdict, unless the record affirmatively discloses that the accused was arraigned, and that he pleaded to the information or indictment before the trial." The code then provided by section 448 as follows: "The accused shall be arraigned by reading to him the indictment, unless, in cases of indictments for misdemeanors, the reading shall be waived by the accused by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged." However, since these decisions this act has been amended by the 1925 session of the legislature, now being section 29-1815, Comp. St. 1929, and reads as follows: "The accused shall be arraigned by reading to him the indictment, unless, the reading shall be waived by the accused, by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged. If the accused appear in person and by counsel and goes to trial before a jury regularly impaneled and sworn he shall be deemed to have waived arraignment, and plea of not guilty deemed to have been pleaded." The most that can be said of the defendant's contention is that the proceedings had were void. Assuming, but not deciding, this to be true, the effect would be that the defendant was not arraigned. In view of this amendment we hold that, when the accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he shall be deemed to have waived arraignment and a plea of not guilty to have been pleaded. *Hill v. State,* 116 Neb. 73, 215 N. W. 789.

There is a further reason why this contention is without merit. Journal 416 on page 117 of the court's journal shows the following to have happened in open court as of March 9, 1943: "Thereupon defendant William Maher is duly arraigned and stands mute and refuses to plead and the court enters a plea of not guilty as to Count 1 and a plea

of not guilty as to Count 2 of the information." "The transcript imports absolute verity, and cannot be impeached. If incorrect, or if it fails to speak the truth, the correction must be made in the district court and not here." *Ford v. State*, 46 Neb. 390, 64 N. W. 1082. And as stated in *Brown v. Ritner*, 41 Neb. 52, 59 N. W. 360: "The approved journal entry of a judgment is indisputable evidence of what the judgment was."

The defendant complains because of the court's refusal to grant him a continuance. As stated in *Cornell v. State*, 138 Neb. 708, 294 N. W. 851: " 'An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.' *Kerr v. State*, 63 Neb. 115, 88 N. W. 240." And in *Flannigan v. State*, 127 Neb. 640, 256 N. W. 321: "It is no abuse of discretion for the trial court to refuse defendant a continuance unless it clearly appears that defendant suffered prejudice."

Defendant's counsel complained of the state of his health and urged a continuance because thereof. The record discloses that the court did not abuse its discretion in denying a continuance in this respect. While the court was at all times solicitous of counsel's welfare, it appears from the record that counsel was at all times vigorously active in behalf of his client and that during the entire trial fully protected his interests.

The defendant further complains of the fact that certain witnesses which he desired to be present were in the armed forces of their country and therefore not available. He offered evidence establishing this fact. An analysis discloses that these witnesses are friends and associates of the defendant. He spent the evening of February 24, 1942, with several of them prior to his going to the Red Rooster Cafe at 3011 St. Mary's avenue at about 12:30 a. m. of February 25. No question is raised as to his whereabouts prior to his going to the cafe nor is it material for by his own testimony he admitted staying there until the time of his being taken into custody.

With reference to Lawrence and Mike Scavio, who are brothers of Mrs. Raymond C. Agosta, the defendant testified he talked to them a couple of days before February 25, 1942, and made arrangements with Lawrence to buy him a couple of five-gallon cans. That he was to take them to the Red Rooster Cafe in order that Lawrence might have them filled with gasoline so he could pick them up when driving a car from Chicago to the west coast. This being in explanation of the reason why he bought the cans and took them to the Red Rooster Cafe. Their evidence would only corroborate his own testimony on this subject.

Raymond C. Agosta, who operated the Red Rooster Cafe and to whom the defendant testifies he delivered the cans on the evening of February 24, 1942, at about 8:30 p. m. at the cafe, died on the morning of the first day of the trial. Defendant further testified Agosta, at the time he delivered the cans, asked him to come out and help Tony Scavio take care of the place and that is the reason he went to the cafe later in the evening. This testimony is likewise only corroborative, but it is also testimony that cannot be produced at any subsequent date.

The testimony of these witnesses is not to material matters in the case and only corroborative. It can hardly be conceived that every witness a defendant may desire will be available at any one time. We have given this matter careful consideration and while the court should endeavor to fix a time for trial when the witnesses of both the defendant and state can be present, we do not find that any of the testimony was as to such a material matter that the defendant was thereby prevented from having a fair trial and we find that the trial court in no way abused its discretion in denying a continuance.

The defendant complains that he was not given a speedy trial as by our state and federal Constitutions guaranteed to every person charged with the commission of a crime. In support of this contention he cites the fact that many witnesses that would have been available if a speedy trial had been granted are now in the armed services or dead

and therefore not available. These witnesses and the nature of their testimony has been discussed under the matter of the denial of a continuance. The record discloses that after the information was filed in district court on March 17, 1942, the defendant never applied to the court to have his case set down for trial and only after it had been set for trial on February 8, 1943, did he appear to object to a continuance, which was granted to the state until March 8, 1943. The defendant did testify that on several occasions he went to the office of the county attorney and talked to someone about the trial of his case, but he does not know with whom he talked. Our state Constitution provides in section 11, art. I, in part as follows: "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." This provision of our Constitution is self-executing and in accordance with Amendment VI of the Constitution of the United States, which provides in part as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * ." The defendant was admitted to bail and in such cases our legislature has provided by section 29-1203, Comp. St. 1929, as follows: "If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen on his application, or be occasioned by the want of time to try such cause at such third term." "The statute supplements the constitutional provision and secures or provides a method for securing the right thereby declared. It is to be regarded as enacted for the purpose of rendering the constitutional guaranty effective, and as a legislative declaration of what is and what is not, under the circumstances named, a reasonable and proper delay in bringing an accused to trial in respect of his constitutional right aforesaid." *State v. Keefe*, 17 Wyo. 227, 243, 98 Pac. 122.

See, also, 22 C. J. S. 713, 716, sec. 467; *In re Schechtel,* 103 Colo. 77, 82 Pac. 2d 762.

"No general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial. The right to a speedy trial is necessarily relative; * * * ." 22 C. J. S. 713, 715, sec. 467. As stated in *Critser v. State,* 87 Neb. 727, 127 N. W. 1073: "There is room for the exercise of sound discretion on the part of the trial court, always bearing in mind that the right to a speedy trial is the constitutional right of any citizen who is accused of crime." The legislature of our state has interpreted the Constitution on the matter of a speedy trial by fixing what, in certain cases and under certain conditions, is to be regarded as a maximum time within which a defendant must be tried. The interpretation of this constitutional provision is for the court, but since the time fixed by the legislature is not unreasonable, we adopt it as our own. The defendant, having failed to bring himself within the provisions thereof, is not entitled to be discharged under its terms. But the legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases. Under the facts in this case we find that the defendant had a speedy trial within the constitutional provision.

The record shows that the defendant was arrested on February 25, 1942; that complaint was filed in the municipal court on February 27, 1942; that preliminary hearing was commenced on March 5, 1942, and continued until March 13, 1942, when defendant was bound over to the district court where information was filed on March 17, 1942. The statute with reference to the time within which a preliminary hearing must be had in cases of extra jurisdictional offenses is set forth in section 29-504, Comp. St. 1929, which in part provides as follows: "That when the complaint if (is) for a felony, * * * upon the accused being brought before the magistrate he shall proceed as soon as may be, in presence of the accused, to inquire into the com-

plaint." As stated in *Critser v. State, supra*: "There is room for the exercise of sound discretion on the part of the trial court, always bearing in mind that the right to a speedy trial is the constitutional right of any citizen who is accused of crime." The question as to the time in which the defendant should be given a preliminary hearing is a question for the court. There can be no precise length of time, after the arrest of a person, in which he must be given a hearing. The theory of the law is that he must be given a hearing as soon as possible. A person charged should be given a preliminary hearing just as soon as the nature and circumstances of the case will permit. Under the facts here we find that the preliminary hearing held was such as to give the defendant a speedy trial under the Constitution.

The defendant further complains that the court erred in refusing to give certain instructions which had the effect of submitting to the jury the question of whether or not the defendant had a speedy trial as by the Constitution provided. In this we think the trial court was right. The question of whether or not a defendant has had a speedy trial under the provisions of our state and federal Constitutions is always a matter of judicial determination by the court and not one of fact for the jury. 22 C. J. S. 713, 715, sec. 467; *Critser v. State, supra*; *State v. Simpson,* 125 Wash. 665, 216 Pac. 874; *Reed v. State,* 94 Fla. 32, 113 So. 630; *People v. Romero,* 13 Cal. App. 2d 667, 57 Pac. 2d 557; *Shafer v. State,* 43 Ohio App. 493, 183 N. E. 774.

With reference to the defendant's contention that the trial judge, not being a judge of the Fourth Judicial District in which Douglas county is located, was without jurisdiction since no written request or order had ever been given by any judge of the Fourth Judicial District or by order of the supreme court, we find it to be without merit. The record discloses that one of the judges of the Fourth Judicial District had asked the trial judge, who is a district judge of this state, to try this case. Our statute, section 27-303, Comp. St. Supp. 1941, does not require that such request be in writing.

The defendant contends that the evidence is insufficient to establish the *corpus delicti* of the crime charged and that under the rule as to circumstantial evidence it is insufficient to sustain defendant's conviction.

Evidence offered by the state shows that Raymond C. Agosta owned the fixtures and operated a restaurant and beer business at 3011 St. Mary's avenue, Omaha, Douglas county, Nebraska, known as the Red Rooster Cafe. His wife, Rosie, was a sister of Tony, Lawrence, and Mike Scavio who will be referred to herein. Agosta had been trying to sell the business but had been unsuccessful in doing so. He had removed or changed some of the equipment in the restaurant. On January 15, 1942, he purchased fire insurance on the contents in the sum of $1,300. There was very little stock in the place on February 24, 1942.

On the afternoon of February 24, 1942, the defendant, William Maher, rented a car from the Capitol Drive It Yourself Co. in Omaha, and went to the Continental Can Co. where he purchased two square five-gallon cans similar to the ones found at the cafe. Later that evening, or rather in the early morning of February 25 at about 2:30 a. m., Lickert and Elias, officers of the Omaha police force, stopped their cruiser car on St. Mary's avenue just east of the cafe to assist a resident of the city who was asleep in his car. At that time the cafe was closed. They awakened him and finding his condition such that he was not able to drive took him to his home. It might be mentioned that a heavy snow had fallen and generally the sides of the streets were blocked with snow and only the lanes for traffic were open. The car in which the resident was asleep was in the traffic lane on St. Mary's avenue just east of the cafe.

After taking this party home the officers, some time between 3:30 and 4:00 a. m., while driving down St. Mary's avenue, noticed that all of the lights in the cafe were out and the door was slightly open. They stopped their car and officer Lickert immediately went to the front door and officer Elias flashed the spot light on the cafe and started to go to the back door but changed his mind and likewise came

to the front door. When the car stopped someone closed the door of the cafe, dropped down and went to the back of the room. When officer Lickert came to the door the defendant was crouched in the back of the front room. Upon being asked what he was doing, he told officer Lickert that everything was all right. However, officer Lickert, who had previously drawn his gun, insisted on the door being opened. Upon entering they turned on a beer sign.

It might be well to mention here that the cafe fronts north on St. Mary's avenue and is not exactly rectangular because of the diagonal direction of the avenue. The inside of the building is partitioned into two rooms, the front room being larger than the back with two doors in the partition. The one door is on the east and just back of the bar and restaurant counter located in the east part of the front room. The other is in the west part of the partition just back of the booths located in the west part of the front room. The transom above the street door was open.

When officers Lickert and Elias entered the room, Tony Scavio, who was also in the building, had on his overcoat and hat and the defendant had on his hat and his overcoat and was near the door lying over a cigarette machine. Just to the left of the door and between the counter and juke box, which was just to the left as you entered, was a five-gallon can, similar to the ones the defendant had purchased the previous afternoon, with the lid off and containing a small amount of gasoline. Gasoline was generally distributed over the bar and lunch counter, the floor, on top of and under the seats of the booths, and on the equipment back of the counter. Such things about the place as napkins, napkin holders, newspapers, rags and other miscellaneous items were soaked with gasoline. Standing in the open doorway of the west partition door was another can, similar to the ones the defendant had purchased the previous afternoon, full of gasoline and with the lid removed. Neither lid of these two cans was found at the cafe. While the officers were there the defendant said he thought the gas was on and went back of the counter and apparently closed the jets

on the gas stove. When the officers entered the room it was filled with gasoline fumes. Being asked how the gasoline got there, Scavio said he did not know and the defendant kept still.

Without being searched, the defendant and Scavio were both taken to police headquarters in the car of officers Lickert and Elias. The defendant rode in the front seat on the right-hand side and Scavio in the back seat on the right-hand side and they both got out on that side at the police station. Some five or ten minutes thereafter one of the officers discovered, near the right front fender of this car, two caps, similar to those used on cans such as they found at the cafe, also, a pair of gloves soaked with gasoline. Upon being searched they found the key of the cafe in the defendant's shoe. The car the defendant had rented was found parked on 30th street just south of St. Mary's avenue. On the floor mat in front of the back seat were found heavy square indentation marks, the same as would be made by the cans found in the cafe, and some oily substance was on the mat around the marks.

Evidence was offered by the defendant to show that the removal and exchange of fixtures were done prior to the purchase of the insurance. Defendant admits that he purchased the two cans but states that he purchased the same for Lawrence Scavio who had asked him to do so several days prior to February 24, 1942. That Lawrence wanted him to leave them at the cafe in order that he might have them filled with gasoline as he was going to drive a car from Chicago to the west coast and wanted to pick up some extra gasoline. Defendant testified he took the empty cans out to the cafe around 8:30 p. m. of the evening of the 24th and gave them to Raymond C. Agosta. While there Agosta told him that Tony Scavio was going to take care of the cafe that evening and he would like to have him come out and help him. He told Agosta that he was busy the early part of the evening but if he could he would come out later. That he returned later that evening sometime between 12:30 and 1:00 a. m. of the 25th. Upon arriving at the cafe

he was immediately called to the back room by Tony Scavio and remained there during the entire time he was at the cafe. When he entered the cafe he did not observe either of the cans which were later found there. That Tony Scavio waited on business whenever anybody came in but always returned to the back room where they played pitch while he drank beer and Scavio drank whisky. Customers came in and out until late in the night when two men came in who seemed to be considerably under the influence of liquor. Scavio waited on them and then they left, but shortly thereafter, between 2:00 and 2:30 a. m., one returned and he and Scavio got into an argument. He heard some confusion in the front room but did not go out. Scavio finally put the man out and came back to the room and told him that he had spilled something and got a rag to wipe it up. When he came back he told the defendant that some officers had just picked up the drunk. They then remained in the back room for some time but at no time, while he was in the back room, did he smell any gasoline fumes. As they went to leave he walked through the west partition door into the front room where he noticed gasoline fumes for the first time. Scavio then told him that in the scuffle the customer had knocked over a can of gasoline and some had spilled out onto the counter and floor. Scavio had just turned out the back light and there was still a light burning in the front and that they had just opened the door and were about to leave when the officers drove up. He also testified they had just opened the transom and door to clean up the place.

This is necessarily an abbreviated statement of the facts contained in a lengthy bill of exceptions but fairly presents the events that transpired during the course of February 24 and the early morning of February 25, 1942, as disclosed by the evidence.

The evidence offered by the defendant conflicts with the state's testimony and the testimony of the defendant himself on many material matters is contradictory, but, of course, the weight of conflicting and contradictory evidence

was a matter for the jury and as they found the defendant guilty, they have found such conflict in favor of the state.

As stated in 6 C. J. S. 759, sec. 38: "It is recognized by the courts that, because of their very nature, arson or related crimes of illegal burning can seldom be established by direct and positive testimony of witnesses who actually saw the fire set, and, accordingly, a conviction may be had on circumstantial evidence, but the circumstances relied upon must be clearly and unequivocally proved, and be consistent with each other and with the hypothesis that accused is guilty, and inconsistent with the hypothesis that he is innocent and with every other rational hypothesis except that of guilt."

"To sustain a conviction for a crime the *corpus delicti* must be proven beyond a reasonable doubt." *Chezem v. State,* 56 Neb. 496, 76 N. W. 1056. See, also, *McCue v. State,* 112 Neb. 9, 198 N. W. 163; *Andersen v. State,* 141 Neb. 306, 3 N. W. 2d 447. The *corpus delicti* may be proved by circumstantial evidence. *Andersen v. State, supra.* This is true in arson cases. *Salistean v. State,* 115 Neb. 838, 215 N. W. 107; *Robino v. State,* 133 Neb. 391, 275 N. W. 463; *State v. Goldman,* 166 Minn. 292, 207 N. W. 627. Circumstantial evidence alone may sufficiently establish the *corpus delicti* and the guilt of the accused. As stated in *Morgan v. State,* 51 Neb. 672, 71 N. W. 788: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt." See, also, *Dreessen v. State,* 38 Neb. 375, 56 N. W. 1024; *Robino v. State, supra.* An instruction was given submitting the question of the sufficiency of the evidence under the circumstantial evidence rule and the jury found the defendant guilty of the crime as charged in count one of the information and from an examination of the evidence as a whole we cannot say that the jury were wrong. The evidence is sufficient to sustain the conviction.

The defendant assigns as error the instructions given by the court and the refusal to give certain instructions which he tendered. With reference to the general assignment as to the instructions given by the court, the following rule announced in *Hiatt v. Kinkaid,* 40 Neb. 178, 58 N. W. 700, is applicable: "An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given." However, in view of the defendant's separate assignment of error as to 16 of the 23 instructions, which he tendered, but all of which the court refused, it will be necessary to examine and consider all of the instructions given by the court for as stated in *Bourne v. State,* 116 Neb. 141, 216 N. W. 173: "It is the duty of the court, with or without request, to instruct the jury as to the law of the case." And as stated in *Goldman v. State,* 128 Neb. 684, 260 N. W. 373: "It is error to refuse an offered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles of law involved are covered by other instructions given." We have examined the instructions given and they completely and correctly submitted the questions at issue to the jury. As to the instructions tendered by the defendant and refused, they are either covered by the instructions given, not proper in form, or not warranted under the evidence. We find no error in the instructions given nor in the refusal to give those submitted by the defendant.

The defendant complains that the sentence of two years is excessive. With this we cannot agree. The statute under which defendant was convicted provides for a penalty of a fine up to $1,000 or a sentence of not less than one nor more than two years in the penitentiary. Comp. St. Supp. 1941, sec. 28-5,101. After the defendant was convicted, the trial judge sought information as to his character and reputation in the community where he lived for the purpose of assisting him to determine the proper sentence to impose. This is criticized by the defendant and assigned as reversible error. The sentence to be imposed is largely a

matter in the discretion of the trial court and for the purpose of exercising this discretion he is entitled to inform himself as to the character and reputation of the defendant in the community in which he lives. From what is contained in the record, it is clearly evident why the trial court imposed the maximum sentence. Very serious consequences would undoubtedly have developed had the plans of the defendant been fully completed. We do not find the sentence to be excessive.

The defendant contends the court erred by imposing sentence upon defendant without making a written entry of the order overruling his motion for new trial. The record discloses that the trial judge, prior to sentencing the defendant, overruled his motion for new trial. This is set out in the journal signed by him. As stated in *Brown v. Ritner*, 41 Neb. 52, 59 N. W. 360: "The approved journal entry of a judgment is indisputable evidence of what the judgment was." "A judgment of a court is valid and effective when it is declared and announced by the judge, although it may not be reduced to writing until afterwards." *State v. Warrick*, 106 Neb. 750, 184 N. W. 896. See, also, *Luikart v. Bredthauer*, 132 Neb. 62, 271 N. W. 165. This contention of the defendant is without merit.

The defendant refers to the duty of the trial judge, as announced in *Bourne v. State, supra*, that it is the duty of the court to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill-will, and with this we fully agree. An examination of the record discloses that the trial judge did endeavor to do just that and we think very successfully. It appears from the entire record that the defendant had a fair trial and that no errors occurred that entitle him to have his conviction vacated or set aside and it is therefore affirmed.

AFFIRMED.

IN RE APPLICATION OF WILLIAM MAHER FOR WRIT OF HABEAS CORPUS.
GRENVILLE P. NORTH, PETITIONER, APPELLANT, V. WILLIAM H. DORRANCE ET AL., APPELLEES.
13 N. W. 2d 653

FILED MARCH 17, 1944. No. 31659.

1. **Habeas Corpus.** Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error.
2. ———. The writ of habeas corpus is a proper remedy where one is deprived of his liberty by reason of a void judgment.

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

Grenville P. North, pro se.

Kelso Morgan and *Clinton Brome, contra.*

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

WENKE, J.

William Maher, as applicant, brought this action in the district court for Douglas county by Grenville P. North, as petitioner, and against William H. Dorrance, sheriff of Douglas county, and Emil Stahmer, keeper of the county jail of Douglas county, as respondents, to obtain his discharge by habeas corpus. From an order denying the application and overruling of the motions for new trial of the applicant and petitioner, the applicant, William Maher, has appealed. Maher will be referred to as the applicant.

The action was heard in the district court upon the applicant's amended petition. The matters therein set forth, by which the applicant claims he is being unlawfully restrained and imprisoned, arise out of the defendant's conviction and sentence for arson in the fourth degree in the case of State v. Maher. That case has been brought to this court by the applicant by error proceedings and is No. 31647. A careful study of the allegations of the amended petition and the errors assigned in applicant's brief show that all of the ques-

tions therein raised were also raised by the applicant's petition in error and brief in case No. 31647, *Maher v. State*, and therein determined.

" 'Habeas corpus is a collateral, not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant.' *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104." *Davis v. O'Grady*, 137 Neb. 708, 291 N. W. 82. It cannot be used as a substitute for a writ of error. *Hulbert v. Fenton, supra.* It cannot be resorted to for the purpose of correcting errors of the trial court rendering the judgment which is challenged in such proceedings. *In re Application of Walker*, 61 Neb. 803, 86 N. W. 510. "The judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void. *Hulbert v. Fenton, supra*; *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007; *In re Carbino*, 117 Neb. 107, 219 N. W. 846." *Davis v. O'Grady, supra.*

However, as stated in *In re Resler*, 115 Neb. 335, 212 N. W. 765: "It is firmly established that if a court or a judge thereof which renders a judgment, or who enters an order, has not jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged. *In re Havlik*, 45 Neb. 747; *In re Application of McMonies*, 75 Neb. 702; *In re Vogland*, 48 Neb. 37."

Under these holdings some of the questions raised by applicant's amended petition were not proper in this proceeding, while others, such as the constitutionality of the act, under which he was convicted, could be properly raised. However, it will not be necessary to separate and distinguish them for they have all been considered and determined adversely to the applicant in the case of *Maher v. State, ante*, p. 463, 13 N. W. 2d 641.

Therefore, the judgment of the lower court is affirmed.

AFFIRMED.

ENA F. LIPPINCOTT, APPELLEE, V. HARVEY R. LIPPINCOTT APPELLANT.
13 N. W. 2d 721

FILED MARCH 17, 1944. No. 31729

1. Judges: VENUE. A party to an action may, in good faith, make a motion together with a showing in support thereof for a change of venue or the disqualification of the trial judge.
2. Trial. A judge, in the exercise of his discretion, may view the premises, or a part thereof, without the consent of the parties. In doing so it is better practice to inform the parties and their counsel that he intends to do so and, in so far as it is practical, make such inspection in their presence or with an opportunity for them to be present.
3. Appeal and Error. The transcript imports absolute verity, and cannot be impeached. If incorrect, or if it fails to speak the truth, the correction must be made in the district court and not here.
4. Divorce. In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.
5. ———. In fixing the amount of permanent alimony the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties.

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

Dryden & Jensen and *J. L. Grimm,* for appellant.

James G. Mothersead, contra.

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

WENKE, J.

This divorce action was commenced in the district court

for Scotts Bluff county by Ena F. Lippincott, as plaintiff, against Harvey R. Lippincott, as defendant. From a decree in favor of the plaintiff, the defendant appealed to this court where the decree of divorce was affirmed but the case was returned to the district court with directions to determine the amount of permanent alimony. *Lippincott v. Lippincott*, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901.

The mandate of this court directed the "district court to take additional evidence as to the fair value of all of the property owned by the parties as of the date of the decree (March 11, 1941), the sources from which it came, the assistance plaintiff rendered in the accumulation thereof, and to determine the legal claims of other relatives upon the property of the defendant Harvey R. Lippincott, and to award such permanent alimony as the law and the evidence warrant."

Further hearing was had in the lower court pursuant thereto and from the award of permanent alimony and the allowance of attorneys' fees, the defendant has again appealed to this court. For the purpose of this opinion the appellee will be referred to as the plaintiff and the appellant as the defendant.

While the case was returned to the trial court for the purpose of taking additional evidence to determine and award such permanent alimony as the law and the evidence warrant, however, the defendant has raised certain legal questions which must necessarily be disposed of before a discussion of the facts.

Upon return of the case to the district court the defendant made a motion for change of judge or venue together with a showing in support thereof and claims the trial court abused its discretion in failing to sustain this motion. That the defendant may, in good faith, make such a motion is without question. *Le Hane v. State*, 48 Neb. 105, 66 N. W. 1017. However, the showing made fails to come within the provisions of section 27-315, Comp. St. 1929, as to the disqualifications of judges, nor is it sufficient to entitle the defendant to a change of venue under section 20-410, Comp.

St. 1929. There is also a reason why the matter is immaterial here. This is an action in equity and under our statutes is tried *de novo* in this court.

It appears from the decree of August 14, 1943, that the court inspected the lands located in Scotts Bluff county. The defendant claims this to be an abuse of discretion on the part of the trial court in view of the fact that it was done without the knowledge or consent of the parties or their counsel, and because the court examined only a part of the premises involved. A judge, in the exercise of his discretion, may view the premises, or a part thereof, without the consent of the parties. In doing so it is better practice to inform the parties and their counsel that he intends to do so and, in so far as it is practical, make such inspection in their presence or with an opportunity for them to be present. However, a failure to do so will not necessarily constitute an abuse of discretion. *Carter v. Parsons,* 136 Neb. 515, 286 N. W. 696; *Taxpayers' League v. Wightman,* 139 Neb. 212, 296 N. W. 886. Under the facts of this case we do not find that the court would have abused its discretion even though it had made such inspection without notice to the parties or their counsel. However, the record shows the defendant to be in error as to this contention. The journal of the court's order in overruling defendant's motion for new trial states that the judge had, in open court, announced his intentions to view the premises. "The transcript imports absolute verity, and cannot be impeached. If incorrect, or if it fails to speak the truth, the correction must be made in the district court and not here." *Ford v. State,* 46 Neb. 390, 64 N. W. 1082.

The defendant further contends the court was without jurisdiction to transfer real estate. Under the provisions of section 42-321, Comp. St. 1929, it is in the discretion of the court to award to the innocent party a share or interest in the real estate of the guilty party. *Gaster v. Estate of Gaster,* 92 Neb. 6, 137 N. W. 900. As stated in *Maxwell v. Maxwell,* 106 Neb. 689, 700, 184 N. W. 227: "It is too firmly established in the jurisprudence of this state to be ques-

tioned that in a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests." See, also, *Bigelow v. Bigelow*, 131 Neb. 201, 267 N. W. 409; *Resnick v. Resnick*, 137 Neb. 256, 288 N. W. 816.

The principle contention of the defendant is that the amount of alimony awarded and the attorneys' fees allowed are excessive. The history of the marriage relationship of the parties and the nature of the causes of their marital troubles are sufficiently set forth in *Lippincott v. Lippincott, supra,* and will not be repeated in this opinion. They have necessarily been reviewed in this proceeding in a study of the whole record in order to determine the rights of the parties. The matter of fixing the amount of alimony in a divorce action is always to be determined by the facts of each case. As stated in *Phillips v. Phillips*, 135 Neb. 313, 281 N. W. 22: " * * * the court will take into consideration the estate of each party at the time of the marriage, and their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce, and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties." See, also, *Swolec v. Swolec*, 122 Neb. 837, 241 N. W. 771. And in considering the matter of alimony we will take into consideration all properties acquired by the parties during their marriage. *DeVore v. DeVore*, 104 Neb. 702, 178 N. W. 621; *Nathan v. Nathan*, 102 Neb. 59, 165 N. W. 955.

The record discloses that the defendant came to Lyman, Nebraska, with his parents in 1916. The father had purchased an improved 80 acres, being the north half of the northeast quarter of section 1, township 22, range 58, in Scotts Bluff county, Nebraska, in 1915. In 1916 he pur-

chased the south half of the northwest quarter of section 6, township 22, range 57. This farm became the family homestead. On October 30, 1921, the defendant, then having arrived at the age of 21 years, was married to the plaintiff, who was then 18 years of age. They made their home with the defendant's family which then consisted of his father, mother, who at the time was ill, and a younger brother and sister. The mother died on June 2 of the following year. The plaintiff, from the time of the marriage, took charge of the household and did the household work necessary in the operation of the farm and helped carry on other work of the defendant. She was, during the entire period that they lived together, a capable and industrious wife who helped in every way possible in acquiring the property which they accumulated.

In the fall of 1922 the defendant, having acquired some $2,000 to $2,500 of personal property, entered into a partnership with his father. The father put in all the property he then owned and the son whatever property he had. The son was to take charge of and operate the farm and they were to share the earnings on a fifty-fifty basis. Commencing with 1923, when they began irrigating this land, it appears that the partnership of father and son was very successful financially. They proceeded to acquire additional real estate holdings in Scotts Bluff county. In 1925 they purchased the north half of the southwest quarter of section 6, township 22, range 57; in 1929 they purchased the north half of the northwest quarter of this same section; and in 1930 they purchased the school-land lease on the southeast quarter of the southeast quarter of section 36, township 23, range 58. All of the lands acquired up to this point are referred to as the home place. They also acquired the southwest quarter of section 11, township 22, range 57, in 1930; in 1931 or 1932 they purchased the west half of the northwest quarter, the northeast quarter of the northwest quarter, and part of the southeast quarter of the northwest quarter of section 23, township 22, range 57; and in January of 1933 they purchased the northwest quar-

ter of section 17, township 22, range 57. During the existence of the partnership the father sold some other lands he owned and also inherited some money, the proceeds of which he deposited in the partnership account and it was used as part thereof. During this same period the buildings on the home place were remodeled and repaired and new buildings constructed.

On February 11, 1933, the defendant and his father dissolved their partnership. In consideration of the defendant agreeing to make certain payments to him of $250 semiannually as long as he lived, and in case of his death to his then wife Phillipina the sum of $150 semiannually during her life if she should survive him and as long as she remained his widow; to pay the premium of $243.10 per annum, less dividends, on a certain insurance policy; to convey certain real estate in Wyoming to his brother Harold, which he did, the father deeded and assigned all his interests in and to the real estate hereinbefore described and transferred all personal property owned by the partnership to the defendant.

After the partnership was dissolved the defendant purchased the southwest quarter of section 12, township 22, range 58, in Scotts Bluff county, and the southwest quarter of section 16, township 9, range 13, in Buffalo county, Nebraska, in 1936. In 1937 he purchased the northeast quarter of section 21, township 9, range 13, in Buffalo county and in 1938 the northwest quarter of said section 16, township 9, range 13, all of which real estate the parties owned on March 11, 1941. In addition to this real estate the defendant owned personal property located on the lands in Scotts Bluff county and likewise personal property located on the lands in Buffalo county, all of which were used in the operation of these farms. Also, certain insurance policies that had a cash surrender value of $4,235 and claims against the Great Western Sugar Company, government benefit payments, and other rents and crops.

Pursuant to a certain purported property settlement entered into on February 8, 1937, the plaintiff obtained a

Pontiac sedan, a residence property in the city of Scottsbluff, Nebraska, described as lot 5, block 2, Sixth Addition, the household furniture and furnishings in the home place and $900 in cash. Pursuant thereto additional cash payments were made to the plaintiff. These cash payments were necessary for the maintenance and support of the plaintiff and the children for the period during which they were made.

It appears from the record that the defendant owes $7,000 in the form of a mortgage on some of the Scotts Bluff county land, $23,970.28 on the Buffalo county land, taxes on all of the lands in the sum of $3,935.33, $5,186.46 as a result of irrigation pumps and wells installed on the Buffalo county land, a balance of $350 on the school-land lease and the present value of the remaining insurance premium payments and the semiannual payments due either his father or stepmother, as the case may be, as provided in the agreement entered into with his father upon the dissolution of their partnership. These have a present value of approximately $5,700.

We find the evidence of the defendant as to the indebtedness claimed to be owing to his present wife's mother entirely insufficient to establish such a debt. With reference to the indebtedness of $9,165 as evidenced by the chattel mortgage of June 7, 1940, to the Scottsbluff Production Credit Association of Scottsbluff, which was used to raise the 1940 crop, the evidence is not clear as to what part, if any, of this remains unpaid. It is apparent that the defendant deliberately made evasive answers or denied knowledge of matters affecting his indebtedness, crops, rents, etc., which are entirely within his own knowledge and thereby prevented the court from receiving all of the information it needed with reference thereto. The record as to the amount still owing defendant on his claims against the Great Western Sugar Company and for government benefit payments arising out of the 1940 crop is not very satisfactory. In view of what evidence is in the record and since they all arise out of the 1940 crop, we will consider them as offsetting each other.

Under the decree entered by the trial court on August 14, 1943, the plaintiff was awarded the northwest quarter and the north half of the southwest quarter of section 6, township 22, range 57; the north half of the northeast quarter of section 1, township 22, range 58, and the school-land lease to the southeast quarter of the southeast quarter of section 36, township 23, range 58, all in Scotts Bluff county and referred to as the home place, same to be clear and free of all encumbrances and taxes, including the taxes for the year 1942. This is in addition to the property received under the purported settlement which includes the residence in the city of Scottsbluff described as lot 5, block 2, Sixth Addition. That the defendant be required to clear the title to said property of any claim by reason of a purported deed given to his present wife, Virginia. That defendant be further required to secure a release from his father and stepmother of any claim they may have in or to said premises. That in case of his failure to do so it makes provision to secure the plaintiff for any payments she may be required to make by reason thereof. That the plaintiff have the rents from real estate awarded to her for the year of 1943 and all years subsequent thereto and allow plaintiff's attorneys a fee of $3,000.

As to the value of this property there is a very wide discrepancy between the witnesses for the plaintiff and those for the defendant, especially the values of the defendant himself. Considering the evidence offered by the plaintiff, the court allowed her, including the house and car she received in 1937, approximately 50 per cent of their property as of March 11, 1941. In considering the evidence offered by the defendant, the court allowed the plaintiff somewhat over 60 per cent. The decree permits the defendant to have all of the income from the premises awarded plaintiff during the years 1941 and 1942. That this was a very substantial amount is indicated by the fact that the gross income from the home place and the Brown land in Scotts Bluff county during the year 1941 was in excess of $35,000. We conclude that the award is somewhat too high and that it is

also in error in seeking to require the father and stepmother to release whatever rights they have in and to the premises by reason of the agreement with the defendant entered into at the time the partnership was dissolved. The decree is vacated in so far as it requires the defendant to obtain a release from his father and stepmother as to any rights they may have by virtue of this agreement. It is modified to the effect that commencing with and including 1943 the plaintiff be required to make the semiannual payments to either the father or stepmother, as the case may be. The defendant is required to make payment of all insurance premiums provided for in the declaration and acknowledgment of trust. In case either party is required to make any of these payments that are charged to the other, the party making such payment shall be subrogated to all the rights provided under the agreement as against the property charged therewith and awarded to the other, and in addition the party charged therewith shall be personally liable therefor.

Considering the legal questions involved, the amount of work necessary in preparing the case for trial due to its nature, the duration of the trial at both hearings and matters preliminary thereto and the amount involved, we do not think the amount of the attorneys' fee allowed is excessive. In addition thereto plaintiff is allowed an attorneys' fee in this court of $500, same to be taxed as costs. That all costs on this appeal are to be taxed to the defendant.

As modified, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.