Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/09/2026 04:16 PM CST

EMIL HAHN, APPELLANT, V. VERLIN DOYLE ET AL., APPELLEES.

286 N. W. 389

FILED JUNE 16, 1939. No. 30604.

1. **Appeal.** The verdict of a jury based upon conflicting testimony will not be disturbed unless clearly wrong.
2. **Trial: INSTRUCTIONS.** It is not error for a trial court in a personal injury action to instruct the jury that verbal testimony in conflict with the undisputed physical facts, and which cannot be reconciled therewith, should be rejected by the jury.
3. **New Trial.** A motion for a new trial on the ground of surprise is properly overruled, where a request for a continuance for that reason was not made at the trial.
4. ———. A motion for a new trial on the ground of newly discovered evidence is properly overruled, when the new evidence is merely cumulative or impeaching in character.
5. ———. Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before the trial would have produced it.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Spillman & Ptak, for appellant.

Carl H. Peterson and *R. J. Shurtleff*, *contra.*

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

CARTER, J.

This action was commenced to recover damages suffered by plaintiff when struck by an automobile alleged to have been driven by the defendant Gerald Doyle. From a verdict and judgment for the defendant the plaintiff appeals.

Plaintiff testifies that on January 1, 1936, at or near the hour of 12:30 a. m., he was walking south across Norfolk avenue on the west side of First street in Norfolk, Nebraska. At the time he reached a point approximately seven feet from the south curb of Norfolk avenue he was struck by a car, operated by a negligent driver, which came from the south on First street and turned west on Norfolk avenue, causing the injuries for which damages are sought. Plain-

tiff did not recognize the driver of the car nor the car itself. To establish that the car was driven by the defendant Gerald Doyle, Paul Jones was called as a witness and testified that the defendant Verlin Doyle, the father of Gerald Doyle and the owner of the car which is alleged to have struck the plaintiff, stated to him and his wife that Gerald did cause his car to strike plaintiff and that he needed all the help he could get as he was unable to pay damages. This evidence was positively denied. Fred H. Schmeckpeper testified that he had a conversation with Paul Jones in which Jones stated that he knew the car which hit the plaintiff and that it was not defendant's car.

Plaintiff called Clarice Case, who testified that Gerald Doyle took her to her home in Battle Creek, accompanied by four other young people, shortly after 1 o'clock of the morning in question and that he stated he hit something on Norfolk avenue and he was afraid his father would find it out. Gerald Doyle and the other four passengers deny that any such statement was made.

Max Leonard and his wife testify that Gerald Doyle and two companions came into their place of business about 12:30 a. m., of the morning in question, and ordered some beer, which was refused because Gerald was in a drunken condition. Both witnesses say that they went to Verges Sanitarium at about that hour and that they followed Gerald Doyle's car on First street to within one block of the point where the accident occurred, at which time they saw him turn west on Norfolk avenue. The purpose of the trip to the sanitarium was to take one Bill Buss there for treatment for injuries he had suffered in a fall. There is evidence in the record that Buss arrived at the sanitarium after plaintiff had been taken there.

The chief of police and officer Rice of the Norfolk police department testified that they went to the scene of the accident where plaintiff told them he had been hit by a car coming from the west instead of from the east as plaintiff testified. Dr. Verges testified that plaintiff's right leg was broken and that it appeared to have been struck from the

outside, which would indicate that the moving force of the blow was from the west. Gerald Doyle denies that he was at the scene of the accident at any time that night. There is evidence by the young folks who were with him that Gerald Doyle was not at the scene of the accident.

This in substance is the evidence upon which the jury returned a verdict for the defendant. The evidence was very conflicting. We have many times held that, where the evidence was conflicting, a verdict of a jury based thereon will not be disturbed unless it was clearly wrong. We find no reason for interfering with the verdict of the jury in so far as the sufficiency of the evidence is concerned.

Plaintiff contends that the trial court, in instructing the jury, gave undue prominence to the physical facts by special reference thereto. The substance of the instruction complained of was that the physical facts surrounding the accident were very important and, if the jury found that the verbal testimony of any witness or witnesses was in conflict with the physical facts and could not be reconciled therewith, the physical facts should be accepted as reflecting the truth. This statement of the law seems to conform to previous holdings of this court. *Hessler v. Bellamy*, 128 Neb. 571, 259 N. W. 514; *Peterson v. Omaha & C. B. Street R. Co.*, 131 Neb. 676, 269 N. W. 510. The use of the words "very important" in the instruction is criticized and assigned as error because it gives undue prominence to the evidentiary value of the physical facts. This contention is answered by this court in *Stull v. Stull*, 1 Neb. (Unof.) 380, 96 N. W. 196, wherein the court said:

"It is claimed that this instruction was erroneous, because, by calling attention specifically to these letters, it gave them undue prominence as evidence and because by the use of the word 'important,' it indicated that the court regarded them as of peculiar or, at least, considerable weight as evidence bearing upon the issues of the case. We are unable to concur in either objection. The trial of causes would be rendered extremely difficult, if not impossible, if the presiding judge should be rigidly forbidden to remind the jury

of the propriety of considering certain items of evidence which had been introduced upon the trial, or to tell them upon what particular matters in controversy such items had a bearing. Indeed, it is often of the highest importance to the ends of justice that he should so do, lest evidence that is important and material as to certain matters in dispute only, should be mistakenly supposed by the jury to be entitled to consideration in the determination of other matters to which it had no relevancy."

We have examined the instructions complained of and, when considered with all the other instructions, we find no prejudicial error in this respect.

The plaintiff in his motion for a new trial asked that a new trial be granted on the ground of newly discovered evidence. The affidavits of several persons appear in the record in support thereof. We have examined them and find that the newly discovered evidence is either cumulative, impeaching, or that which would have been discovered before the trial in the exercise of reasonable diligence. If the newly discovered evidence is cumulative or impeaching in character it is not sufficient to obtain a new trial. *Miller v. Crosson*, 133 Neb. 892, 277 N. W. 796. Much of the newly discovered evidence set out in the affidavits would have been available had due diligence been exercised. This situation is governed by the cases of *Erwin v. Watson Bros. Transfer Co.*, 129 Neb. 64, 260 N. W. 565, and *Miller v. Olander*, 133 Neb. 762, 277 N. W. 72. Plaintiff also contends that he was surprised by the evidence produced by the defendants. There was no motion for a continuance made on the ground of surprise. Plaintiff's failure to move for an adjournment of the trial precludes a new trial on that ground. *Bonacorso v. Camden Fire Ins. Ass'n*, 130 Neb. 203, 264 N. W. 442. A party preparing a case for trial is bound to proceed on the assumption that his adversary will produce evidence to sustain the allegations of his own pleading and attempt to disprove the allegations made in opposition thereto. *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846; *Kielian v. Kent & Burke Co.*, 131 Neb. 308, 268 N. W. 79. The plaintiff is not

entitled to a new trial on the ground of newly discovered evidence and the trial court properly denied it.

There being no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, APPELLANT, V. JOE LAPIDUS ET AL., APPELLEES.

286 N. W. 386

FILED JUNE 16, 1939. No. 30592.

1. **Husband and Wife.** The common-law disability of a married woman is still in force in this state, except as it has been abrogated by statute.
2. ———: MARRIED WOMEN: CONTRACTS. Under our married women's act (Comp. St. 1929, ch. 42, art. 2), she is without capacity to contract, except in reference to her separate property, trade or business, or upon the faith and credit of her separate estate and with the intent to bind it.
3. ———: ———: ———. Where the contract does not have reference to her separate property, trade or business, proof of such intent on her part is necessary.
4. ———: ———: ———. The burden of establishing such intent rests on the party seeking to bind the separate estate.
5. **Evidence.** A valid provision in the contract, expressly and unequivocally binding her separate estate, is conclusive proof of such intention, and cannot be contradicted by parol evidence.
6. **Husband and Wife:** MARRIED WOMEN: CONTRACTS. Where the contract is not in reference to her separate property, trade or business, and does not in express terms bind her separate estate, the question of intention is one of fact to be determined from all the circumstances.
7. ———: ———: ———. In such a situation, her testimony that she did not intend to bind her separate estate is competent.
8. ———: ———: ———: ESTOPPEL. Where she joins in executing a contract with her husband, which does not have reference to her separate property, trade or business, the fact that part of her separate estate is listed in a financial statement, furnished in connection with the contract, does not estop her, as a matter of law, to deny the intent to bind her separate estate.
9. ———. Whether any situation can exist where, within the scope of the contractual power given her by statute, a married

woman may be estopped to assert that she did not intend to bind her separate estate is not necessary to be determined in this case.

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

D. O. Dwyer and *W. L. Dwyer*, for appellant.

W. A. Robertson and *Leon & White, contra.*

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

JOHNSEN, J.

Plaintiff has appealed from a judgment for defendant Erna Lapidus, on a contract which she executed with her husband, Joe Lapidus. The case was tried without a jury, and the court gave judgment against defendant Joe Lapidus, but denied recovery against Erna Lapidus on the ground that she had not bound her separate estate. The sole question necessary to be considered is whether the evidence sustains this finding.

Joe Lapidus had obtained a mortgage loan on some real estate owned by him, but because of some mechanics' liens, which he was disputing, the mortgagee withheld part of the loan proceeds. To obtain their release, he agreed to provide a surety company bond, saving the mortgagee harmless from the lien claims. Plaintiff executed this bond as surety.

An application form was required to be executed for the bond. This named Joe Lapidus and Erna Lapidus as the applicants; contained a financial statement listing real estate and other assets valued at $163,000, with $62,000 encumbrances thereon; recited that "the undersigned * * * represent that the statements made herein as an inducement * * * to execute the bond applied for herein are true;" agreed that the applicants would "indemnify * * * against all loss * * * and expenses whatever, which the company may sustain or incur by reason of executing said bond;" and provided that "the above agreements shall bind the undersigned and the heirs, executors, administrators, successors

and assigns of the undersigned, jointly and severally." Erna Lapidus signed the application with her husband.

Plaintiff claimed to have sustained a liability and loss of $1,425, by virtue of having executed the bond, and brought this action for reimbursement on the indemnity agreement in the application.

The evidence shows that, when Lapidus came to execute the application, the agent through whom the bond was being obtained requested that Erna Lapidus also sign as "a matter of form," because she had signed the note and mortgage and would have to join in the bond; that Lapidus took the application out and had it signed by her; that she had no interest in the mortgaged property, against which the mechanics' lien claims existed, and had received no part of the loan proceeds; that none of the property listed in the financial schedule in the application was owned by her, and that the only interest she had ever had therein was as the wife of Joe Lapidus. She was permitted to testify also, over objection, that, in executing the application, she had no intention to obligate herself personally or to bind any separate estate that she might have.

While the application contains no clause by which Erna Lapidus expressly binds her separate estate, plaintiff argues that the provision that "the above agreements shall bind the undersigned and the heirs, executors, administrators, successors and assigns of the undersigned, jointly and severally," must be accorded this meaning and significance. We cannot say, as a matter of law, that this language conclusively establishes an intention to bind her separate estate. It simply declares that such obligation as has been created against Joe Lapidus and Erna Lapidus under the preceding provisions of the application shall be binding on their heirs, executors, administrators and assigns. It does not purport to extend the scope of the previous obligation of either of them. The most, therefore, that plaintiff can claim from it is the right to argue that it shows, by inference, an intention on the part of Erna Lapidus to bind her separate estate. It would still leave the question of in-

tention to be determined from all the circumstances and would not preclude parol evidence on the issue.

The rules governing a married woman's liability in this state are now well settled. Except in so far as it has been abrogated by statute, her common-law disability is still in force. *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. 82. She is without capacity to contract, except in reference to her separate property, trade or business, or upon the faith and credit of her separate estate and with the intent to bind it. Comp. St. 1929, ch. 42, art. 2; *Godfrey v. Megahan*, 38 Neb. 748, 57 N. W. 284. Where the contract does not have reference to her separate property, trade or business, proof of such intent on her part is necessary. The burden of establishing such intent rests on the party seeking to bind the separate estate. *John Fletcher College v. Estate of Pailing*, 121 Neb. 847, 238 N. W. 750. If the contract contains a valid provision expressly and unequivocally binding her separate estate, this is conclusive proof of such intention, and it cannot be contradicted by parol evidence. *Sturm v. Lloyd*, 130 Neb. 89, 264 N. W. 150. Where the contract does not in express terms bind her separate estate, the question is one of fact to be determined from all the circumstances. In such a situation, her testimony that she did not intend to bind her separate estate is competent. *Falstaff Brewing Corporation v. Smith, ante*, p. 49, 284 N. W. 868.

Under these rules, it was proper for the trial court, in determining whether Erna Lapidus had bound her separate estate, to receive evidence that she had signed the application as a matter of form; that she had no interest in the mortgaged property, in connection with which the bond was executed; that she had received no part of the loan proceeds; that none of the property listed in the financial statement was hers; and that she never intended to create a personal liability or to bind any separate estate she might have. This evidence, in the state of the record, was sufficient to sustain the judgment of the trial court. Plaintiff offered no evidence to contradict it, except such as is argued to

inhere in the recitals and provisions in the application, which have already been discussed.

Plaintiff asserts that the request that Erna Lapidus sign the application was made by the First Trust Company of Omaha as agent of the mortgagee and not as agent of the bonding company, and that it therefore is not bound by any representation that her signature was a mere matter of form. Without considering whether, if this were true, the evidence would still be sufficient to sustain the judgment, it seems to us that the trial court was justified in taking the view that the First Trust Company of Omaha acted as plaintiff's agent in the transaction, even though it also was the agent of the mortgagee in making the loan. Lapidus testified that it sold him the bond. He knew no one else in the transaction. It took his application, had the bond issued pursuant thereto, and apparently collected the premium. In addition, the cover of the bond bore its endorsement: "First Trust Company of Omaha—Insurance." In the absence of any evidence denying or disproving its representative capacity, this was sufficient to justify the finding that it acted as plaintiff's agent, and that its request that Erna Lapidus sign the application as a matter of form was the request of plaintiff.

The recitations and provisions in the application are claimed to estop Erna Lapidus to deny that she intended to bind her separate estate. It is said that, since she signed the application jointly with her husband, its statements are binding jointly on them; that she ought not, therefore, to be permitted to prove that she had no interest in the property listed in the financial statement, but that it should be conclusively presumed that she had an interest and that she intended to bind it as her separate estate. Even if she had an interest in or owned part of the property listed in the financial statement, this would not be sufficient to estop her, as a matter of law, to deny that she intended to charge her separate estate, although it might be evidence against her on that issue. *Falstaff Brewing Corporation v. Smith, supra.* The case cited indicates that, since a

married woman has no power to contract without an intent to bind her separate estate, her want of legal capacity cannot be supplied by estoppel. Certainly, she cannot enlarge her contractual capacity by her own acts. 30 C. J. 875. Whether any situation can exist where, within the scope of the contractual power given her by statute, she may be estopped to assert that she did not intend to bind her separate estate need not be determined in this case. The facts do not require such a determination.

The evidence sufficiently sustains the trial court's findings and judgment.

AFFIRMED.

HENRY MUNDT, APPELLANT, V. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY ET AL., APPELLEES.
286 N. W. 691

FILED JUNE 27, 1939. No. 30511.

Railroads. This case involves a railroad crossing accident. The evidence has been examined, its substance stated in the opinion, settled rules of law have been applied thereto, and the judgment of the trial court affirmed.

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

Ziegler, Dunn & Becker, D. L. Manoli and *William R. Patrick*, for appellant.

Chambers, Holland & Locke and *Ralph J. Nickerson, contra.*

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

SIMMONS, C. J.

This is an action to recover damages for personal injuries caused by a collision of plaintiff's automobile and a train at a railroad crossing. The trial court sustained a motion of defendants for a directed verdict. Plaintiff appeals.

In reviewing this record, we have regarded as established

every issuable fact which the evidence in favor of the plaintiff proves or tends to prove. *Petersen v. Ohio Casualty Ins. Co.*, 131 Neb. 128, 267 N. W. 393.

The accident occurred in the late afternoon of July 23, 1936. On that date, the weather was clear; the sun was shining; and what wind there was, was blowing from the northwest.

Plaintiff was driving south on a north and south graveled highway. The railroad track at the point of the accident runs generally east and west, swinging from the southwest in a gradual course, and crosses the highway at slightly less than a right angle.

The highway at about 600 feet north comes over a hill, and about half way down, as it goes south, passes through a cut and slopes downhill. A few rods from the railroad track, it levels out and runs level from that point to the track. There was a corn-field to the west of the highway and down to the railroad 50 feet north of the tracks. The weeds had been cut along the highway. They were growing at considerable height on the right of way.

The plaintiff, who was a county commissioner, had lived in that neighborhood and had been familiar with that crossing practically since the railroad was built. He had crossed the track at that point for weeks before the accident, and knew the physical facts there existing. Plaintiff knew that freight and passenger trains, regular and extra, passed that crossing at various hours of the day, and knew that they might do so at any time. When at his home over a mile away, he often heard the whistle of the trains.

Plaintiff had driven cars for 25 years. His sight and hearing were good. On the day of the accident, he was driving a standard-make car, which was in good condition, making no unusual noises, and the car windows were open. He was driving 25 to 30 miles an hour as he came down the hill. As he approached the track, he reduced his speed to 20 miles an hour and could have stopped his car within 15 or 20 feet at that time. As he came through the cut, his vision of the track to the west was obstructed, but at

a point 75 to 100 feet north of the crossing, he could have seen a train 100 feet west of the crossing. Beginning at a point 75 feet north of the crossing, there was nothing "to amount to anything" to obscure his vision, and at 50 feet north of the track, he could have seen a train 1,000 feet west.

Plaintiff had the obstructions to his vision in mind as he approached the crossing. He testified that he looked and listened all the way down the hill and saw and heard nothing. He testified, "I looked mostly towards the west until I got within about, I don't know, thirty or forty feet of the track and then I must of turned my head and looked to the east." At another place in the testimony, plaintiff says he looked east when he was 30 to 50 feet from the track.

The train was a freight train consisting of six cars, caboose, engine and tender. Its speed was about 30 miles an hour. The regular crossing whistle of two long and two short blasts was blown beginning a quarter of a mile west of the crossing. Plaintiff's witness says that he saw the steam from the last whistle about 500 feet west of the crossing. Plaintiff's witness says that at that time the plaintiff's car was about 500 feet north of the crossing, and if it was, then plaintiff had not yet entered the cut on the highway. While the record as to that is not definite, it may be properly inferred that plaintiff, had he been looking, could at that time have seen the train or at least could have seen the escaping steam from the whistle. Plaintiff's witness saw both the plaintiff's car and the train for several hundred feet before the accident, and testified that they were about the same distance from the crossing and were approaching at about the same rate of speed.

Defendants' witnesses testify that the fireman, who was sitting on the left side of the engine cab, first saw the plaintiff when he was about 70 feet from the crossing. The engineer was on the right side of the cab and could not see the plaintiff. The fireman called to the engineer to stop, and the air and emergency brakes were applied immediately. The engine hit the rear right side of plaintiff's car.

The train was stopped a few car-lengths beyond the crossing.

That plaintiff was seriously injured is not disputed. The question presented is that of the liability of the defendants. Defendants contend that plaintiff's negligence was gross and that it caused the accident. Plaintiff denies being negligent, and contends that, even if he were, the defendants were guilty of contributory negligence, and had the last clear chance to avoid the accident. This contention is based upon the proposition that there is evidence that the last whistle was sounded 500 feet west of the crossing; that plaintiff heard nothing; that therefore the jury could have found that the bell was not ringing and the whistle not being blown; that defendants saw the plaintiff's peril when he was 70 feet from the crossing, and had the whistle been sounded, or the bell rung, that plaintiff would likewise have discovered his peril in time to have avoided the accident.

Plaintiff testified that he was looking west until he was 30 to 40 feet from the track. Assuming the truth of that statement, then it is perfectly clear that the train was in his full view at that time and had been for some 25 or 30 feet back.

However, assuming plaintiff's speed at that time was 20 miles an hour, he was traveling at the rate of about 30 feet a second and was accordingly two to two and one-third seconds away from the crossing. The speed of the train is fixed at 30 miles an hour, and, accordingly, it was traveling at a rate of about 44 feet a second, and, on that basis, was about 100 feet west of the crossing when the brakeman first saw the plaintiff. On that assumption, at that time the car and the engine were about 123 feet apart on a direct line. When the plaintiff was 40 feet from the crossing, the engine was about 60 feet from the crossing, and on a direct line was about 72 feet from plaintiff's car. At that point the entire train was visible. Plaintiff says he could have stopped his car in 15 to 20 feet. At 25 feet from the crossing, the engine and car were, on a direct line, less than

48 feet apart, and the entire train was visible. One of two conclusions is unescapable. Either plaintiff, contrary to his testimony, looked, saw the train, thought he could cross ahead of it and tried to do so; or he did not look when the train was clearly visible and drove upon the track in utter disregard of known and anticipated dangers, and was not in the least exercising his sight or hearing, either of which would have given him full warning in time to have avoided the accident.

It is difficult to reconcile plaintiff's testimony that he listened and looked to the west when he was 30 to 50 feet from the crossing with the admitted physical facts and the undisputed testimony of himself and other witnesses. Plaintiff explains his looking to the east with the statement that there was a cut in the right of way there which shut off the view to the east, until he was near the track. The evidence does not fully support his statement with reference to the obstructed vision to the east. However, assuming that to be true, the fact remains that the train, coming from the west, must have been in plaintiff's full view when he turned to look to the east.

"It is the positive duty of an automobile driver approaching a railroad crossing where there is restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence." *McQuin v. Missouri P. R. Corporation*, 122 Neb. 423, 240 N. W. 515, and cases there cited.

Was there a reasonable excuse for plaintiff's failure to observe that rule? The only one suggested by the evidence is that his vision to the east was obstructed until he approached the track and that therefore he looked toward the east. However, plaintiff contends that his vision to the west was likewise obstructed as he approached the crossing. The same reason which prompted him to look to the east likewise existed to prompt him to look to the west. Nothing diverted his attention from his driving, nor from

the known hazards of the crossing and the highway at that point. A reasonable excuse is not shown.

Was there negligence on the part of the defendants? It is contended that defendants were negligent in not seeing the plaintiff and his position of peril more quickly. By the same reasoning, it is also true that the plaintiff was equally negligent in not seeing the train and in realizing his obvious position of peril.

Plaintiff cites section 74-562, Comp. St. 1929, which is as follows:

"A bell of at least thirty pounds weight, or a whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and be kept ringing or whistling until it shall have crossed such road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning or operating the railroad, and also be liable for all damages which shall be sustained by any person by reason of such neglect."

We have assumed from the testimony favorable to the plaintiff that beginning 500 feet west of the crossing and thereafter the whistle was not blown nor the bell rung. However, this accident took place in the open country, and there were no unusual noises. We must recognize that freight trains, pulled by steam engines, make noises that are loud and distinguishable from other noises.

"Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will defeat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given." *Moreland v. Chicago & N. W. R. Co.*, 117 Neb. 456, 220 N. W. 692. See, also, *Lewis v. Union P. R. Co.*, 118 Neb. 705, 226 N. W. 318, and *Belz v. Chicago & N. W. R. Co.*, 119 Neb. 312, 228 N. W. 617.

Section 20-1151, Comp. St. 1929, is as follows: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the

fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

This statute was before this court for construction in the case of *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N. W. 158. In that case, this court said: "The true rule is that, 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."

That holding has been repeatedly affirmed and is now the settled rule of construction of that statute. The negligence of the plaintiff in this case was certainly more than slight and any negligence of the defendant was not gross in comparison therewith, and as was said in *Troup v. Porter*, 126 Neb. 93, 252 N. W. 611, there can be no recovery.

Plaintiff, however, while not denying that he failed to look to the west when within 30 to 50 feet of the crossing, contends that the defendant, in the exercise of due care and the use of the instrumentalities at hand, had an opportunity to prevent the collision, and that the doctrine of the last clear chance applies.

In *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N. W. 537, this court said: "The last clear chance doctrine in this state, as applied to the situation here pre-

sented, is that, when a street car runs against a person causing his injury, liability arises, when the peril is discovered by the motorman, or by the exercise of ordinary or reasonable care and caution could have been discovered, in time to have avoided the injury."

In *Nyegomir v. Union P. R. Co.*, 130 Neb. 380, 264 N. W. 879, this court said: "In order for the plaintiff to prove liability under this doctrine, it is incumbent upon her to prove by competent evidence that just before the accident the deceased was in a position of peril; that the railroad company or its agents knew or by the exercise of ordinary care ought to have known of his peril; that defendant, after receiving such knowledge, had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; that defendant failed to exercise ordinary care to avoid the impending injury, and that deceased was injured as a result thereof."

After the discovery of plaintiff's peril, could the defendants have avoided the accident?

In order to sustain his contention that the defendants had the last clear chance to avoid the accident, plaintiff must accept the testimony of defendants (the brakeman and the fireman) that they did not see the plaintiff until he was 60 or 70 feet from the crossing, and that they could not have seen him before that time. Prior to that his immediate approach to the crossing was hidden by the cut in the highway and by the corn. At that point, the weeds growing on the defendants' right of way did not obstruct their view. It is also clear that when plaintiff was first seen it was impossible for the defendants to stop the train in time to avoid the accident.

We have assumed that the plaintiff was approaching the crossing at a rate of speed of 20 miles an hour. He was traveling about 30 feet a second, and his position was discovered when he was 60 to 70 feet from the crossing in distance and from two to two and one-third seconds away in time.

Assuming the truth of plaintiff's statement that he could

stop his car in 15 to 20 feet, and under the circumstances disclosed by this testimony, it follows that, where a car is traveling 20 miles an hour, it would take slightly over a second of time to stop it in 15 feet. Therefore, a warning during the last second before the collision would not have avoided the accident. It follows that there was not more than one and a third seconds after plaintiff's peril was discovered that a warning could possibly have been effective. During that time, it would have been necessary for the head brakeman to turn and shout to the engineer to stop the train. The engineer would have had to have heard the alarm, reach for and pull the whistle cord, and set the mechanical operations of the whistle in motion. Plaintiff would have had to have heard the whistle, and then apply his brakes, and the brake mechanism would have had to operate. Between each of these operations, there would have been the added time necessary for the human and mechanical reactions to put in operation the various acts. All of these movements would have had to have been concluded in not to exceed one and a third seconds.

The doctrine of the last clear chance has been before this court for application in many cases. The question of time involved to prevent an accident has been considered on several occasions. In *Barrett v. Alamito Dairy Co.*, 105 Neb. 658, 181 N. W. 550, this court said: "Under all of the circumstances it is quite apparent to us that the danger did not arise until almost the instant of the collision. It was so small a fraction of time that there was no reasonable opportunity of avoiding the collision after the occupants of the car were in a place of danger. In view of all of the circumstances we are convinced that reasonable minds could not say that the wagon-driver was negligent in not sooner anticipating the danger of a collision."

A comparable set of facts may be found in the case of *Tynon v. Missouri P. R. Co.*, 101 Neb. 810, 165 N. W. 148, wherein the court discusses the doctrine of the last clear chance. It was held not applicable where instantaneous action was necessary.

It must be considered also that the last act necessary to avoid the accident was that of stopping the automobile, an act which the plaintiff alone could perform. The defendants acting alone could not have avoided the accident. The plaintiff's position in and of itself, prior to and when discovered by defendants' brakeman and fireman, was not one of peril. The defendants cannot be charged with negligence for having failed to see him before that time. Had they seen him prior to that time, they had no reason to expect that he would not stop. It is the common practice of drivers to approach within a few feet of a crossing before stopping for a train to pass. It is not a common practice for drivers to stop at distances of more than 70 feet from a crossing. Had the defendants seen the plaintiff prior to the time they did, they had the right to expect him to do the ordinary act of stopping his automobile. Plaintiff's speed was not excessive at any time and was not such as would have caused alarm to defendants had he been discovered prior to the time he was seen. The peril was one that was caused by the negligent act of the plaintiff in continuing to approach the crossing without looking to the west, when to have done so would have disclosed his danger to him in time for him to have stopped his car.

From the time that plaintiff's peril was discovered there was not sufficient time to avoid the accident, and the defendant company and its agents did not have the ability at that time to avoid the impending collision. It necessarily follows that the doctrine of the last clear chance does not apply in this case.

The only question remaining is whether or not questions of fact should have been submitted to the jury. The answer is found in the case of *McDonald v. Omaha & C. B. Street R. Co.*, 128 Neb. 17, 257 N. W. 489: "It has been the settled rule in this state that, where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but on the other hand, 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." See cases there cited.

The judgment of the trial court is

AFFIRMED.

IDA A. REICHMAN, APPELLEE, V. E. H. REICHMAN ET AL., APPELLANTS.
286 N. W. 778

FILED JUNE 27, 1939. No. 30599.

Mortgages: FORECLOSURE: SALES: CONFIRMATION. "On appeal from an order confirming a judicial sale in a suit to foreclose a mortgage, confirmation will not be set aside for inadequacy of price, where it is not so low as to evidence fraud or as to otherwise invalidate the sale, and where the evidence does not prove that a resale would result in a better price." *Weir v. Smith*, 135 Neb. 447, 282 N. W. 260, and cases there cited.

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

E. E. Richards, for appellants.

R. L. Smith, contra.

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

SIMMONS, C. J.

This is an appeal from an order confirming a sale in a real estate mortgage foreclosure proceeding. The objection is the sale price was inadequate. A 320-acre farm is involved. The petition was filed June 4, 1934, and the decree entered October 1, 1934. The lien of the mortgage foreclosed is junior to a Land Bank mortgage. The regular nine months' stay was taken. Subsequent thereto, moratoriums were had. The property was sold June 20, 1938, to the plaintiff for $3,500. Objections to confirmation were filed, a hearing had thereon, and the matter taken under

advisement. The sale was confirmed on September 20, 1938. It was stipulated that at the date of the hearing on confirmation there was due on plaintiff's decree the sum of $3,534.76. The liens, including taxes, the first mortgage, and the decree, totaled, as of that date, $7,344.56. Plaintiff bid almost the total amount of her decree, and the sale price, adding thereto prior liens, was roughly $7,300.

At the hearing on confirmation, plaintiff's three witnesses fixed the value of the property at $6,400. The defendant, title owner of the premises, and other witnesses fixed it at $16,000. Two other witnesses for the defendant fixed the value at $22,000. The court heard the witnesses, considered the reasons given for their estimates of value, and confirmed the sale. Before confirming the sale, the court asked the defendant if he knew of any one who would pay more than $3,500, subject to prior liens, if the land were readvertised and sold. The defendant replied: "I don't know of any one who would bid any more." One of defendant's expert witnesses testified to the same effect.

There is no material difference between this case and the many cases to which this court has applied the following rule:

"On appeal from an order confirming a judicial sale in a suit to foreclose a mortgage, confirmation will not be set aside for inadequacy of price, where it is not so low as to evidence fraud or as to otherwise invalidate the sale, and where the evidence does not prove that a resale would result in a better price." *Weir v. Smith,* 135 Neb. 447, 282 N. W. 260, and cases there cited.

Under the situation here existing, we are required to sustain the action of the trial court, and its decree is

AFFIRMED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. FRED C. DAUGHERTY ET AL., DEFENDANTS.
286 N. W. 783

FILED JUNE 27, 1939. No. 30603.

1. **Attorney and Client.** The supreme court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the bar.
2. ———. The giving of advice and counsel in the manner disclosed by this record, for a consideration exacted and paid, constitutes the practice of law, inhibited to all save such as are duly admitted to practice law by this court.
3. ———. The practice of law in this state by one not duly licensed may be prosecuted as for a contempt of this court.

Original action for contempt by the state, on the relation of the attorney general, against Fred C. Daugherty et al. *Defendants held guilty of contempt.*

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

H. M. Baldridge, for defendants.

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and CHAPPELL, District Judge.

EBERLY, J.

This is an original action in this court instituted by the State of Nebraska, upon the relation of the attorney general, against the defendants, Fred C. Daugherty and Joseph F. Waszgis.

The gist of the charge, so far as sustained by the pleadings and the evidence, is that the defendants named, not having "been licensed * * * to engage in the practice of law in this state or elsewhere," did "advise and counsel as attorneys at law" and did "furnish and render legal services for compensation and hire as attorneys at law of this state, to Alvina K. Miller and Gerald Miller, in direct contempt" of this court, etc.

By their amended answer in writing the defendants admitted that neither of said defendants has ever been licensed by this court or any other court to engage in the practice

of law in this state or elsewhere, and that neither is an active or inactive member of the Nebraska state bar association. They further also admitted the truth "of all of the statements made by each of them in the testimony given in the case of Miller v. Daugherty & Waszgis, Doc. V8-pg. 249, in the municipal court of the city of Omaha, Douglas county, Nebraska, which statements are part of the transcript and part of the record of said case."

This record so expressly admitted discloses that, in a proceeding pertaining to a tax foreclosure suit then pending in the district court for Douglas county in which Miller was interested, the defendants were consulted by him from 20 to 25 times, and in which they furnished him guidance, counsel and advice as to the steps to be taken in order that his legal rights might be preserved and protected. Further, that as compensation for the legal guidance, counsel and advice, defendants charged Miller a contingent fee of 50 per cent. of an item of $344, in controversy therein, and that Miller thereupon paid to said defendants such sum of $172, which said defendants divided equally between themselves. These defendants, however, did not formally appear in a court as attorneys at law in the transaction of this business which had been entrusted to them, and as to which their advice and counsel were sought and obtained.

On these unquestioned facts, the conclusions are, viz.:

(1) The supreme court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the bar.

(2) The giving of advice and counsel to Miller in the manner disclosed by this record, for a consideration exacted and paid, constitutes the practice of law, inhibited to all save such as are duly admitted to practice law by this court.

(3) The practice of law in this state by one not duly licensed may be prosecuted as for a contempt of this court. *State v. Barlow,* 131 Neb. 294, 268 N. W. 95.

In consideration of which, this court determines that said defendants, and each of them, by reason thereof, were, and are, guilty of contempt of the authority of this court. It

is further ordered and adjudged that each of said defendants be fined in the sum of $50, and that they be assessed with the costs of this proceeding, and stand committed to the county jail of Douglas county, Nebraska, until such fines and costs are paid. And, further, that a certified copy of this opinion and order, under the seal of this court, be process and warrant for executing this judgment.

JUDGMENT ACCORDINGLY.

E. H. LUIKART, RECEIVER OF THE COMMERCIAL STATE BANK OF OMAHA, APPELLEE, V. J. J. HEELAN ET AL.: F. A. GUGGENMOS ET AL., APPELLANTS.

286 N. W. 780

FILED JUNE 27, 1939. No. 30468.

1. **Corporations.** A stockholder in a corporation enters into a contractual relation which arises out of the following things: His signing the subscription for stock, and the receipt given for the payment thereof; the terms of the stock certificate given him, together with the charter, or articles of incorporation, and by-laws; the effect of all being subject to, and controlled by, the provisions of the Constitution of the state and laws relating thereto which were in force at the time.
2. **Banks and Banking.** The repeal of section 7, art. XII of the Constitution, which fixed a double liability upon a stockholder in a state bank for all liabilities accruing while he remains such a stockholder, does not affect his obligation respecting judgments for debts to creditors of said bank which had been entered long prior to said repeal, for such repeal has no retroactive effect.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Hotz & Hotz and *C. J. Campbell,* for appellants.

F. C. Radke and *Young & Williams, contra.*

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and CHAPPELL, District Judge.

PAINE, J.

An equity action was brought by the receiver of the

Commercial State Bank, of Florence, Douglas county, against some eleven stockholders of said bank to require them to contribute and pay, by virtue of the Constitution and laws of Nebraska, the double liability upon the shares of stock owned by them in said bank. The district court found for the plaintiff, and entered judgment against Fred A. Guggenmos for $300, William J. Hotz, $500, and Fred Armbrust, $1,000, each with interest. Motion for new trial was overruled, and supersedeas bonds were duly filed by Fred Armbrust and William J. Hotz. Fred Armbrust having died, consent was given to revivor, and it is directed that an order of revivor be duly entered. Fred A. Guggenmos having failed to file either a cost bond or supersedeas bond, his appeal is hereby dismissed for such failure.

This action is brought to this court without a bill of exceptions, and therefore only questions of law may be considered. It may be noted that a few pages of a supplemental transcript are attached to the original transcript.

The petition alleges in proper form that the receiver was duly appointed, and took charge of said bank, that all corporate property of said bank was converted into money and applied to the payment of indebtedness, and that there still remained debts and liabilities in the sum of $77,664.66 due to the creditors of said bank; that each stockholder of said bank owes $100 upon each and every share of stock owned in said bank, as all of said indebtedness and liabilities accrued to the creditors of said bank while the defendants were stockholders in said bank, and under the Constitution and laws of Nebraska each stockholder must contribute an amount equal to the shares of stock held by him therein. Plaintiff asked for an accounting to determine the number of shares held by each defendant, and prayed for judgments thereupon to be entered and execution awarded.

To this petition a demurrer was filed on October 20, 1931, charging that the facts stated in the petition did not constitute a cause of action in favor of the plaintiff. The transcript shows no ruling on said demurrer. Said de-

murrer might have been argued, held under advisement for a long time, and then overruled, for the next filing in said case is nearly five years later. However, we cannot speculate as to what was done, but in any event the filing of the answer was a waiver of the general demurrer. This court has held that the filing of an answer to the merits is a waiver of all objection to the legal capacity of the plaintiff to sue where the defect, if any, appears in the petition. *Pine-Ule Medicine Co. v. Yoder & Eply,* 91 Neb. 78, 135 N. W. 383.

As stated above, we find an answer was filed August 10, 1936, the original of which is now missing from the files, but the rule copy served upon F. C. Radke, attorney for plaintiff, is set out in the transcript. The answer denied the appellee's capacity to sue; alleged that the constitutional amendment of 1930 amending section 7, art. XII of the Constitution, had no application because by the amendment receivers were given the right to sue, but the answer alleged the case was governed by the law as it existed prior to the filing of the petition on June 23, 1930, which provided that the secretary of the department of trade and commerce alone might sue; that the liability of stockholders was secondary; that the stockholders' liability was based upon both sections 4 and 7, art. XII of the Constitution, and not upon section 7, art. XII, as subsequently amended. The appellants denied in said answer that any cause of action existed against the three answering defendants.

An amendment of three pages to the answer was filed as paragraph 10, setting out certain legal services rendered by William J. Hotz after said bank was taken over by the guaranty fund commission, but no written contract of employment had ever been made in reference thereto.

On May 25, 1937, plaintiff demurred to said new paragraph 10, and the court sustained said demurrer, and struck out said proposed amendment from the answer. The second ground for reversal is this alleged error of the court in striking out said proposed tenth paragraph to the answer. We have carefully examined the same, and considered the

alleged prejudicial error in the court's ruling. Paragraph 10 did not plead a cause of action or a set-off on account of attorney's fees for service, but rather it alleged that, because of certain discussions between some representative of the former guaranty fund commission and Mr. Hotz, under certain conditions the receiver would be estopped from enforcing a stockholder's liability against W. J. Hotz. Such an understanding, if there was one, could not work an estoppel against the legal claims of the creditors of the bank, and the ruling by the trial court appears to have been the only ruling which could have been made.

The principal ground for a reversal of the judgment in this case is the defendants' first proposition of law, setting out that on May 13, 1937, the Nebraska legislature (Laws 1937, ch. 18) passed Legislative Bill No. 262, by which there was to be submitted to the voters of Nebraska at the general election on November 8, 1938, the proposition of whether or not "Section 7, Article XII, Constitution of Nebraska, fixing individual liability of stockholders in banking corporations or banking institutions," should be repealed. It is further stated that the court will take judicial notice that in the form provided in said session laws the repeal of the constitutional provision was so submitted, and the entire section repealed by the requisite number of voters, and officially proclaimed.

Therefore, defendants claim that the repeal of such constitutional provision by the people, without any reservation provided in the repeal, takes away all rights as well as remedies given by the repealed statute, and defeats all actions and proceedings pending under it at the time of its repeal, in the absence of vested rights where a consideration had already passed from a contracting party at the time of the repeal.

In support thereof, the defendants cite *State v. Citizens State Bank*, 118 Neb. 337, 224 N. W. 868, the first paragraph of the syllabus of which reads as follows: "Liability of Stockholders: Constitutional Provision. The provisions of section 7, art. XII, of the Constitution, are self-executing.

No legislative act is necessary for their enforcement. The stockholders' liability thereby created is free from legislative interference."

It is asked by defendants, if the liability had its origin under the constitutional provision just quoted, which is self-executing under the law, and if the same was repealed without a saving clause by the people of the state at an election held for that purpose, may the legislature provide a saving clause and otherwise vary the terms of the repeal decided by the people? The answer on that point, say the defendants, is positively against appellee's position, and it is argued that judgments already entered against the defendants must be set aside and vacated.

In general, the personal liability of bank stockholders is regarded primarily as a contractual one, on the theory that all valid and applicable constitutional or statutory provisions form a part of the contract which a person assumes in acquiring ownership of bank stock. 9 C. J. S. 151, sec. 78.

This is not a new question before this court, for we have held that bank stockholders' liability is a contractual obligation, and that by construction the constitutional provisions in effect when the shares of stock were purchased are material parts thereof. *Allen v. White,* 103 Neb. 256, 171 N. W. 52; *Luikart v. Paine,* 126 Neb. 251, 253 N. W. 86; *Luikart v. Higgins,* 130 Neb. 395, 264 N. W. 903.

To be more specific, one who subscribes for stock in a corporation enters into a contractual relation arising out of the signing of the stock book or the stock subscription, the receipt for money paid for the shares, the terms of the stock certificate issued to him, together with the charter, or articles of incorporation, and the by-laws. Finally, important considerations and guides in determining said contractual relations are the Constitution and the laws relating thereto which were in force at the time. *Kennedy v. Central Power Co.,* 129 Neb. 637, 262 N. W. 504.

The obligations had become fixed, and the repeal of the double liability provision of the Nebraska Constitution could not, and did not, abate or otherwise affect the obligation of

the stockholders entered into years ago. The debts due these creditors were already contracted and determined. The repeal of the double liability provision cannot divest the creditors of the banks from rights already established.

We must uphold the rights and obligations to just the same effect in the case at bar as though there had not been any repeal of the constitutional provision for a double liability. 13 Am. Jur. 584, sec. 573; 12 C. J. 1062; *Coombes v. Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866; *In re Westchester Title & Trust Co.*, 10 N. Y. Supp. (2d) 190; *Henry v. Alexander*, 186 S. Car. 17, 194 S. E. 649.

This court has recently had this same question before it, and on June 2, 1939, released the opinion in *Department of Banking v. Foe, ante*, p. 422, 286 N. W. 264, in which we held:

"The repeal of a constitutional provision, imposing double liability on corporate stockholders of an insolvent bank, not containing a saving clause, does not affect the obligation of such stockholders as to liabilities incurred by the banking institution prior to such repeal.

"Where private rights of parties have vested by judgment of a court, they cannot, by subsequent legislation, be taken away, but must be thereafter enforced by the court, regardless of such legislation."

We have carefully examined all assignments of error, and find no prejudicial error in the record, and the judgments of the trial court are hereby

AFFIRMED.

E. H. LUIKART, RECEIVER OF THE STATE BANK OF BLAIR, APPELLANT, V. CARL J. SCHMIDT ET AL.: T. E. STEVENS, APPELLEE.

286 N. W. 687

FILED JUNE 27, 1939. No. 30619.

1. **Banks and Banking: STOCKHOLDERS: LIABILITY.** One who was a stockholder in a bank at the time of the issuance of the original certificate of deposit, but who, in good faith, for a valuable

consideration, disposed of his bank stock prior to the renewal of said certificate, by the surrender and cancelation of the old certificate, cannot be held liable to the holder of such renewal certificate, under section 7, art. XII of the Constitution.

2. ———: ———. The liability under the original certificate of deposit is terminated and settled, and a new liability has been created, when the renewal certificate of deposit is issued.

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

F. C. Radke and *O'Hanlon & O'Hanlon,* for appellant.

Wells, Martin, Lane & Offutt, contra.

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

PAINE, J.

An action was instituted by E. H. Luikart, as receiver of the State Bank of Blair, to recover constitutional superadded liability from the stockholders of said bank, said action being brought under section 7, art. XII of the Constitution of Nebraska. T. E. Stevens, the appellee herein, filed an amended answer, pleading, first, a general denial, and, second, that the cause of action was barred by the statute of limitations. Upon trial it was found by the district judge that the petition was filed within four years from the accrual of the cause of action, and that the evidence did not establish any liabilities of the bank remaining unpaid which accrued while the defendant T. E. Stevens was a stockholder, and for which he would be liable under said section of the Constitution, and therefore the petition was dismissed as to the defendant T. E. Stevens. The receiver appeals, but from the finding of the court against him on the issue of limitation of action T. E. Stevens did not take a cross-appeal to this court, so that question is not before us.

The facts in the case may be briefly stated as follows: The State Bank of Blair was organized January 3, 1916, on which date T. E. Stevens became the owner of 20 shares out of the 500 shares issued by the bank. He held these

shares of stock until February 6, 1924, at which time he sold and transferred them to D. J. Hundahl, who held them until April 8, 1924, when he sold the same 20 shares of stock to Lyle Reeh, who owned them at the time the bank failed. On March 17, 1934, all corporate assets having been exhausted, a balance was found due from the debtors of the bank, including its stockholders, in the sum of $258,570.62, and on February 19, 1936, the petition was filed in this case against some 21 or more stockholders of said bank, including said T. E. Stevens, the appellee herein, as well as D. J. Hundahl and Lyle Reeh, each of whom had owned the same 20 shares of stock, and no more.

The evidence discloses that on June 20, 1924, the said State Bank of Blair was taken over by the department of trade and commerce of the state of Nebraska, and operated by said department as a going concern, subject to certain restrictions; that more than three years later, to wit, December 17, 1927, said bank was adjudged insolvent, and R. O. Brownell appointed its receiver.

When said bank was placed in receivership, there were 45 creditors who filed claims based on certificates of deposit, and some of these certificates had been issued as renewals of former certificates, and it was finally ascertained that six certificates, the smallest of them being for $1,000 and the largest in the sum of $9,000, had been issued and reissued repeatedly, as shown on exhibit No. 4, and that the originals of these six certificates in the same amounts had been issued prior to February 6, 1924, the date on which T. E. Stevens, appellee, sold his stock.

It is the contention of the receiver, appellant, that the mere renewal of a certificate of deposit does not have the legal effect of a new certificate of deposit, and that the debt accrues on a certificate of deposit on the date of the issuance of the original certificate of deposit.

We are cited to authorities by the receiver which indicate that some courts hold that a certificate of deposit is somewhat the same as a receipt for money or a promissory note. On the other hand, it is contended by the appellee that a

note is an evidence of a loan, and not a deposit, and that a certificate of deposit does not bear interest after the date of its maturity, so that the owner of such certificate must surrender his certificate and enter into a new contract by purchasing a new certificate if he desires to secure further interest earnings on such sum of money.

It is contended by the appellee, and supported by the evidence, that if the holders of any of the six certificates of deposit originally issued before the appellee ceased to be a stockholder in the bank on February 6, 1924, had demanded cash and interest upon the maturity of the first or each renewal of said certificates of deposit, the cash would have been paid upon demand. The evidence also discloses that, when each certificate of deposit was presented at the window for payment, it was canceled and filed away, and so noted on the records of the bank, whether it was paid in cash or a new certificate issued.

Agnes R. Martin is one of the six certificate holders who owned a certificate of deposit prior to the time appellee sold his stock in the bank, and an examination in her case might clarify the situation as to all of these. On December 1, 1923, she purchased a certificate of deposit for $2,500 in said bank. This was two months and five days prior to the date that the appellee sold his stock in the bank. This certificate was presented and renewed many times, the holder thereof taking out the interest due thereon and buying a new certificate of deposit for the same amount, and on June 10, 1927, she purchased certificate No. 21802 for $2,500, being exhibit No. 32. This exhibit is on the same form as all of the others issued by this bank. It states that it is not subject to check and is nonnegotiable. It is payable to herself or her assigns (but not to her order), only upon the return of the certificate properly indorsed, and the certificate states that on June 10, 1927, the date of the certificate, she has deposited with said bank $2,500 in current funds. This form of certificate, with these many restrictions, differs apparently from some of the certificates of deposit referred to in the opinions from other states. There

is nothing in the evidence to show that she did not receive $2,500 in cash for the prior certificate and pay the bank $2,500 in cash "in current funds," as stated on the face thereof, for the present certificate, which she has filed as a claim against the bank.

In the evidence in the case at bar, Carl J. Schmidt, who had been for many years an officer in the bank, testified, when called by the receiver, that when these time certificates were tendered they were stamped "Paid" and put away as canceled instruments, and if a new certificate was issued on that date it was given a new number, and the transaction of the issuance of the new certificate was complete in itself.

It is also noteworthy that the creditors, in filing their claims on certificates of deposit, made no reference to any antecedent liability, and each claim was based solely on the last certificate issued, which is attached to their claim.

In the assignment of errors the receiver contends that the judgment of the district court is contrary to the evidence and to law; that the renewal of such a certificate of deposit, after the appellee sold his bank stock, did not relieve him of liability therefor, as the renewals only changed the evidence of the original deposit. Therefore, the court erred in finding and adjudging that the renewal of the certificates of deposit constituted a discharge of the original liability on former certificates issued while the appellee Stevens was a stockholder in the bank. To support these alleged errors, the receiver relies, first, on the proposition that a certificate of deposit in a bank is, in legal effect, the same as a promissory note, and that the renewal of a promissory note is not a payment of the original note unless there is a specific agreement that it extinguishes the original indebtedness, and therefore that the renewal of a certificate of deposit does not constitute final payment thereof, and cites Nebraska cases in support of this contention.

The receiver has cited five Nebraska cases which have involved the adjudication of rights under certificates of deposit, and claims that in every case the court refused to consider the renewal certificate by itself, but followed the

transaction back to the first certificate in the series to determine the rights of the claimants.

We will examine these five cases. The first one is *State v. Farmers State Bank,* 111 Neb. 117, 196 N. W. 908, in which an officer of a bank presented a note of a third party, payable to the bank, and took a certificate of deposit to himself, which he sold at a discount, this being a trick or device on the part of the officer to obtain a loan to himself, and it was held not to be a deposit within the meaning of the law.

In *State v. Atlas Bank,* 114 Neb. 650, 209 N. W. 334, a stockholder took a certificate of deposit for Liberty bonds, knowing the bank was in an insolvent condition, and it was held that such a transaction did not constitute a deposit within the meaning of the bank guaranty law.

The next case is *State v. Farmers State Bank,* 115 Neb. 574, 214 N. W. 4, in which it was held that the law will look through all semblances and forms to ascertain whether or not there has been a *bona fide* deposit, and, if not, the depositors' guaranty fund will not afford protection.

The case of *State v. Security State Bank,* 116 Neb. 521, 218 N. W. 405, involved money which a stockholder had placed in a bank to replenish its reserve, and this court held that the certificate of deposit issued therefor did not constitute a deposit made in the usual and ordinary course of business.

The fifth of the Nebraska cases cited by the receiver in support of his proposition is *State v. Citizens State Bank,* 117 Neb. 358, 220 N. W. 593, and is quite similar, wherein it was held that a $3,600 certificate of deposit represented money obtained by a stockholder for the purpose of effecting a loan to the bank, and was not a *bona fide* deposit.

In the reply brief of the receiver we find the case of *Barsness v. Tiegen,* 184 Minn. 188, 238 N. W. 161, 76 A. L. R. 1317. It was an action brought to recover on three certificates of deposit, and it was held that a certificate of deposit is in legal effect a promissory note, and the taking of a renewal certificate does not constitute a deposit which

makes it an offense for officers and directors of a bank to receive deposits when the bank is insolvent, but the peculiar circumstances recited in this case do not in our opinion give any foundation for declaring that the certificate of deposit in the case at bar should be governed by the same rule as is applied to promissory notes.

The receiver also cites the case of *Dunn v. Bank of Union*, 74 W. Va. 594, 82 S. E. 758, L. R. A. 1915B, 168, which holds that the renewal of deposit certificates does not operate as a novation of the original indebtedness, but in the opinion it clearly appears that H. B. Dunn loaned the Bank of Union $5,000, for which it issued to him a certificate of deposit, which it renewed several times thereafter, and the opinion shows that the loans which he made to the bank remain unpaid, and says that the instant the loans were made the liability of the bank to the plaintiffs accrued, or became vested, and, therefore, when a stockholder transfers his stock when said bank is tending toward insolvency, as he reasonably suspects, he cannot relieve himself from liability. The stockholder seems to have been considered, in relation to such certificate of deposit, the same as a joint maker of the note. We cannot see how this case would uphold the contention of the receiver on *bona fide* certificates of deposit, such as appear in the case at bar, together with a *bona fide* sale of bank stock by the appellee.

The receiver claims that this court in *Peterson v. Strayer*, 121 Neb. 587, 237 N. W. 667, has decided the issue involved in the instant case, as he claims that case involved exactly the same facts and law, and the parties made the same contentions as in the instant case.

The receiver admits that the decision itself does not fully set forth the evidence on the issue involved, and has furnished the court with the bill of exceptions from Hitchcock county, and we have made an examination of the 182 pages of briefs. Of the 16 propositions of law in the brief of the defendants and appellants, No. 2 alleged that liability on a certificate of deposit attaches at the date of renewal, and not at the date of the original issue of the same, citing

Dempster v. Atwood, 118 Neb. 579, 225 N. W. 683, *State v. South Fork State Bank,* 112 Neb. 623, 200 N. W. 349, and several other cases.

In the brief of the receiver as appellee, in discussing this second proposition, he cites *State v. Farmers State Bank,* 118 Neb. 743, 226 N. W. 332, in which it was held that a renewal of a certificate of deposit by the special agent of the department of trade and commerce will not charge the depositors' guaranty fund with a deposit if it was not a proper charge thereon at the time the department took possession, and discusses numerous other cases cited in the brief. But, in stating the facts in the opinion, Judge Redick says: "The bank issued to claimant certain certificates of deposit for full consideration, but under circumstances contravening the bankers' guaranty fund law."

We have reached the conclusion from an examination of the transcript, bill of exceptions, and briefs in the case of *Peterson v. Strayer, supra,* that the cases cited therein are all based upon illegal or irregular certificates of deposit, not issued upon a *bona fide* deposit, or in the due course of regular banking business. The proposition which we have examined in this *Strayer* case was not supported by the cases cited, and was not discussed in the opinion, and certainly nothing in the briefs nor the opinion determined or passed upon the question when a liability accrues under a *bona fide* certificate of deposit or a renewal thereof. Therefore, they do not support the proposition of the receiver that the trial court in the case at bar erred in holding that renewal of a legal certificate of deposit, after a stockholder had sold his stock in the ordinary course of business, relieved him of any liability therefor.

On the other hand, the appellee herein cites many cases, such as *Harrison v. Ault,* 359 Ill. 75, 194 N. E. 235, 97 A. L. R. 626, which is a case very much in point with the case at bar. James G. Cramer deposited in the State Bank of Yale $1,000 on July 19, 1926, receiving a certificate of deposit, payable six months after date, with 4 per cent. interest. In six months he surrendered the certificate and

took a new certificate in the amount of $900. The cash book showed the proper entry, the date the old certificate was canceled with a "Paid" stamp. The question to be decided was whether the surrender and cancelation of a certificate and the issuance of a new one were merely a continuation of a contractual liability of the bank, created when the first certificate of deposit was issued, or whether in each instance the surrender, cancelation, and issuance of a new certificate created a new contractual relation. It was held that one who was a stockholder in the bank at the time of the issuance of the original certificate of deposit, but who disposed of his bank stock prior to the renewal of the certificate by the surrender of the old certificate, cannot be held liable to such depositor as a stockholder under a statute making every stockholder individually responsible for all liabilities accruing while he remains a stockholder to the amount of his shares.

In *Fremont State Bank v. Vincent,* 112 Wash. 493, 192 Pac. 975, the second paragraph of the syllabus in 192 Pac. 975, reads: "When original certificates of deposit were taken up by the issuing bank, interest paid thereon, and new certificates issued, a new loan from the depositor to the bank was created, and a new obligation, which could not go on insolvency of the bank to increase the superadded liability, under Const. art. 12, sec. 2, of a stockholder who, before such issuance of the new certificates, had sold his stock, which had been duly evidenced by record of the transfer on the books of the bank." See, also, *Heine v. Degen,* 362 Ill. 357, 199 N. E. 832.

These and other cases support the proposition that each certificate of deposit constitutes a separate and complete transaction, and the stockholder's liability under section 7, art. XII of the Constitution, accrues thereon at the date of issuance. Any other view would be unnecessarily burdensome to bank stockholders.

"Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transac-

tions which would conclude the bank, if solvent." *State v. South Fork State Bank,* 112 Neb. 623, 200 N. W. 349. See, also, *State v. American Exchange Bank,* 112 Neb. 834, 201 N. W. 895; *State v. Farmers State Bank,* 112 Neb. 788, 201 N. W. 899.

It seems to the court that, if a certificate of deposit is taken up, marked "Paid," and canceled, it is perfectly immaterial whether the holder thereof takes cash, which he could have demanded and been paid, or reinvests the proceeds thereof by taking a new certificate of deposit. In either event the liability under the old certificate of deposit is terminated and settled, and a new liability has been created. Finding no prejudicial error in the record, the judgment is

AFFIRMED.

JOSEPH SIC ET AL., APPELLEES, V. LOUP RIVER POWER DISTRICT, APPELLANT.
286 N. W. 700

FILED JUNE 27, 1939. No. 30560.

1. **Fraud.** Fraud, in equity, includes all acts, omissions and concealments which involve a breach of either legal or equitable duty, trust or confidence.
2. ———. A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth.
3. **Contracts.** "Equity will not refuse to set aside a contract when it plainly appears that one party overreached the other, and gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, although the victim owes his predicament largely to his own stupidity and carelessness." *Stone v. Moody,* 5 L. R. A. n. s. 799 (41 Wash. 680, 84 Pac. 617).
4. ———. When the simplicity and credulity of people are taken advantage of by shrewdness, overreaching and misrepresentation of persons with whom they are dealing, and they are thereby induced unwittingly to do something, the effect of which they do not intend, foresee or comprehend, which if per-

mitted to culminate would be shocking to equity and good conscience, a court of equity will with propriety interpose.

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

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

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

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

MESSMORE, J.

Plaintiffs brought this action in the district court for Dodge county, to set aside two separate options and easements for a transmission line across their land in Dodge county, and to enjoin defendants from going upon the premises for any purpose. The trial court found that the right of way options, granted by plaintiffs to defendant to convey perpetual easements for a transmission line across plaintiff's land, should be canceled and vacated, and that the two grants of easement should be vacated and canceled, and the court refused to grant the injunction, without prejudice to the rights of defendant to institute condemnation proceedings. Defendant appeals, contending that the findings and decree of the court are not sustained by the evidence and are contrary to law. The alleged representations, hereinafter referred to, were made to plaintiff Joseph Sic. His wife Bozny signed the instruments in question, but did not testify, and therefore, for convenience, we will refer to Joseph Sic as the plaintiff.

Plaintiff's cause of action is based upon false and fraudulent representations, alleged to have been made to him by agents of defendant, upon which he relied to his damage, in procuring from him the options and grant of easements for the construction of a transmission line across his land. The petition sets out in detail facts constituting the alleged fraudulent representations, which will appear later in the opinion. The defendant's answer is a general denial, and alleges full payment of the purchase price and estoppel.

The plaintiff, a farmer, of Bohemian extraction, 57 years of age, and with limited schooling, resided with his wife and family on the west half of section 35, township 18 north, range 6, east of the 6th P. M., in Dodge county, Nebraska, which land he has owned since 1918. He also owns the southwest quarter of section 31, township 13 north, range 7, east of the 6th P. M., in Dodge county. The west half of section 35 runs north and south. There is a fence six or eight feet south of the half-section line of section 35, extending for about 60 rods from the west side towards the east. The land is bottom land and tillable, and is planted generally to wheat. Section 31 is about three miles east of section 35. One Floyd Snover owns the quarter-section north of plaintiff's quarter in section 31. There is a fence on the half-section line between plaintiff's and Snover's land, and immediately south of this fence there is a private drainage ditch, occupying a strip about 30 feet wide. One hundred acres of the quarter-section in thirty-one is tiled.

The evidence discloses that one Clark, an agent of defendant, called on the plaintiff at his home on section 35 in January, 1937, introducing himself as representing the government, for the purpose of securing an option for an easement for the construction of a transmission line across part of the plaintiff's land. This meeting took place in the plaintiff's barn. There was some talk as to where the transmission line would be constructed. The plaintiff pointed out from the barn where the fence line was located, and said the fence line was approximately on the half-section line, and Clark said: "That is where they are building the line is along the half-section line." The plaintiff stated that there was some discussion as to his land in section 31. He described the lay of the land, and Clark said the line "would go on the north side along the fence line" on plaintiff's property in section 31, which would be along a private drainage ditch, south of the fence line on section 31, but which would not be on the cultivated land. The option was procured, signed and acknowledged on the 28th of January, 1937. It provided for the grant of a perpetual easement to the de-

fendant of plaintiff's land in section 31 for four two-pole structures, on cultivated land, for the sum of $15 per structure. While the testimony of Clark is not clear as to just what he did tell the plaintiff, we conclude from a reading thereof that it is substantially a denial of plaintiff's testimony. Clark, from his statement, was not on section 31, the land upon which he claims to have obtained the option. He denies the discussion as to the approximate location of the transmission line, and that the fence with reference to the half-section line was pointed out to him. He states that he knew nothing of the private ditch, as mentioned by plaintiff, and testifies that a blueprint was attached to the option which he showed to the plaintiff.

A week or so after this meeting, the plaintiff had a conversation with Roy Cusick, an agent of the defendant, whom the plaintiff had known for 25 years, and with whom he had transacted banking business for a number of years. Cusick stated, in substance, that the government was putting through a line, and plaintiff discussed with him the option on section 31 in regard to the location of the line. Cusick said it would be right next to the ditch. This option was signed and acknowledged in the forepart of February. Both options are identical in the language used and the price to be paid. The written options disclose that Clark obtained the option with reference to section 31 and Cusick the option with reference to section 35. Cusick testifies that he had known and had transacted business with the plaintiff for a period of years, when Cusick was in the banking business; that he told plaintiff the approximate location of the transmission line, as shown on the map, a blueprint attached to the option; that the line could not be on the half-section line where parties might own land on either side, as the crossarms on the poles are eight feet long and would extend over onto the other party's land; that in any analysis the transmission line would have to be eight feet south of the half-section line; that the option was either read to the plaintiff and his wife, read by them or explained to them. The point is made that if the plaintiff had been talking with

reference to section 35 the conversation about the crossarms extending over onto another person's land would not have occurred, for the reason that the plaintiff owns the entire half-section in thirty-five, and the crossarms on the poles, if located along the half-section line, would not extend onto another person's land. It is true that Clark is the first man whom plaintiff met with reference to the transactions.

The testimony of the plaintiff as to the procurement of the options by Clark and Cusick is directly in conflict with the written options. The options are, ordinarily, in triplicate and attached to each of them is a plat, drawn to scale 1/10 inch to 1,000 feet, showing the approximate location of the transmission line to be constructed across the land, with a blueprint of the land, and yellow perpendicular lines appear, indicating the number of structures. These yellow lines on the exhibits are in practically the same relative position, with the exception that at section 31 one exhibit shows the yellow line closer to the section line than do the others. No copies of the options were left with the plaintiff, and plaintiff testifies that no blueprint was ever seen by him, or attached to the options. The original preliminary survey of the premises was made in the forepart of February. Laths and small rags were used to designate the course of the construction. Much dispute arises as to the visibility of such markers or tokens. The plaintiff states that he was unaware of the preliminary survey made in February, and that he had no direct knowledge of the course of construction of the transmission line until December, when he saw men digging the holes for the placing of the poles. The actual position of the structures was located by the field men in August, September or October of 1937, and from the early part of February, according to plaintiff's testimony, considerable snow remained on the ground until March, and he was sick for a period of time; he did notice some surveyors in September who told him that the survey was preliminary. As soon as he discovered where the line was to be located he tendered back the amount paid for the options and grants of easement which were obtained by Cusick on the 22d of

July, 1937, in the total amount of $120. The transmission line is now completed.

The evidence with reference to the survey discloses a disputed question of location of the corner of the section line in section 35 and the location of the transmission line on said section, with reference to the section line. Defendant's testimony is to the effect that the center of the transmission line is 27 feet south of the half-section line. The plaintiff states that his fence is eight feet south of the section line, and he contends that the transmission line was located 74 feet south of the half-section line on section 35, 80 feet south of the half-section line on the west side of section 31, and 90 feet south at the east side of section 31. Some of the tile in the drainage ditch was destroyed.

If the power line had been placed along the half-section line and along the ditch bank in section 31, it would not in any manner have interfered with farming operations, for the reason that it would have been between the half-section line fence and the private ditch. As the line is now constructed, according to plaintiff's view of the testimony, it is approximately 80 feet south of the fence line. In section 35 the line fails to follow the fence line, which extends 60 rods across the half-section. The inconvenience occurs in the southwest quarter, where the transmission line is some 70 feet south of the north line of the quarter.

The representation as to the location of the transmission line across the plaintiff's land is a material representation upon which plaintiff had a right to rely as reflecting the truth. By the use of the term "approximate," it is true, some variation in the construction of the line across the plaintiff's premises might be expected, but from the testimony it is obvious that the transmission line extends out from the half-section line a distance which is more than an approximate location. It is apparent from the evidence that the plaintiff, Clark and Cusick and defendant's engineers did not know definitely the location of the transmission line at the time the options were procured, and in July, when Mr. Dever, an engineer for the defendant, and Mr.

Cusick met the plaintiff in the field, some four miles from his home, to procure his signature for the grants of perpetual easements, they did not, if they knew the location of the line, so inform the plaintiff. From all of the facts and circumstances in reference to the representation made as to the location of the transmission line, we conclude that the trial judge was right in his findings.

The plaintiff's testimony is to the effect that both Clark and Cusick represented themselves as procuring options for the building of a transmission line for the government. In a measure, it is true that a government project was involved, and it is true that a government official does have jurisdiction over the amount of damages to be paid. Clark and Cusick further represented, according to plaintiff's testimony, that the maximum the government allowed was $15 per structure; that in the event this figure was not accepted the land would be condemned and the matter would probably be carried to the district court and the supreme court. Both Clark and Cusick deny that such representations or statements were made. The plaintiff claims further that Cusick and Clark told him that all of the farmers along the line had signed up on such a basis. It is true that most of the farmers did sign, but not all of them.

As to the effect of representations of this character, a great deal depends upon to whom the representation is made and the circumstances under which it is made. In this instance, it was made to a farmer of foreign extraction, one who had no other occupation or business than that of farming. He is a man of limited education, his schooling not having extended beyond the fifth grade. He was unacquainted with the true facts, and if a representation should be made to him that certain requirements of the government must be met by him, he would be more prone to believe that not to accept might involve him in extensive litigation. Under such circumstances, the representation, if made, is material, and, if relied upon as being true, its effect as an inducement to sign the options is apparent. The trial judge so found.

The plaintiff further testifies that Clark told him there was no danger in the poles; that they would be high enough so there would be no danger at all, and plaintiff could farm around them; that Cusick told him there was no more danger in the transmission line than in the line that passes in front of his place. Most of the testimony with reference to this representation is reflected in the following answer given by Cusick: "A. As far as exact words, I would say that it wasn't any more dangerous than a 3600-volt line that passes down in front of your place because of the construction of this line it would stand up longer in a storm, wouldn't be so apt to fall down and coming in contact with a 3600-volt line would kill him then anyway and I don't believe there is any more danger in this line than there is in a 3600-volt line going past his land on a one pole line." The line in question is 115,000 volts.

In the instant case, the defendant's agents were engaged in procuring options and easements for the purpose of building a transmission line across certain lands, and unquestionably they would be asked about the danger, if any, from the line as being constructed. Such inquiry did develop. The defendant's agents were in a position to know something about the line; they made a representation as to the danger, or lack thereof, and the knowledge, intelligence and relationship of the respective parties are obvious in so far as the effect of the representation is made as an inducement to procure the options and easements. We will not here review the testimony as to the danger, or lack thereof, as disclosed by the record, but in conclusion will state that, from the record, the trial court's finding with reference thereto will not be disturbed.

When the evidence on material issues so conflicts that it cannot be reconciled, "this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317, 156 N. W. 632.

"Fraud in equity includes all acts, omissions, and con-

cealments which involve a breach of either legal or equitable duty, trust or confidence justly reposed. Thus in some transactions equity may impose a higher measure of duty than is required at law with regard to the disclosure of matters of which one party is ignorant." 21 C. J. 114.

The court stated that the price of $15 per structure was grossly inadequate. There is no doubt that the defendant has a right to drive a bargain, and it is true that mere inadequacy of consideration is not sufficient, even in equity, to warrant the setting aside of a contract. The consideration, be it more or less, is held at law to support the contract. But, under the circumstances as disclosed by the evidence in this case, where the inadequacy of the consideration is so connected with the circumstances or the misrepresentation as to afford strong, if not conclusive, evidence of fraud, it may furnish the ground for relief. This principle of law the trial court evidently had in mind. See 13 C. J. 612.

"A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth. *Foley v. Holtry*, 43 Neb. 133, followed." *Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063.

"While it is not the function of the courts to make contracts for parties, or to relieve them from the effects of bad bargains, nevertheless where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching, and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, a court of equity may with propriety interpose." 4 R. C. L. 502, sec. 16.

"Equity will not refuse to set aside a contract when it plainly appears that one party overreached the other, and gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce,

although the victim owes his predicament largely to his own stupidity and carelessness." *Stone v. Moody*, 5 L. R. A. n. s. 799 (41 Wash. 680, 84 Pac. 617).

The foregoing principles of law are applicable to the case at bar.

For the reasons given herein, the judgment of the district court is

AFFIRMED.

GEORGE L. CARTER, APPELLANT, V. LOYAL PARSONS ET AL., APPELLEES.
286 N. W. 696

FILED JUNE 27, 1939. No. 30551.

1. **Trial.** A trial judge has the same power to view the premises, on a trial without a jury, as exists in him to permit inspection on a jury trial, and such view or inspection is entitled to the same effect in both cases.
2. ———. On a trial without a jury, the judge, in the exercise of his discretion, may view the premises without the consent of the parties.
3. **Appeal.** Such action, like all judicial discretion, may be reviewed on appeal for prejudicial abuse.
4. **Trial.** As a matter of judicial propriety, a trial judge should, ordinarily and so far as practical, make his inspection in the presence of the parties or with an opportunity to them to be present, but his failure to do so does not necessarily constitute an abuse of discretion.
5. ———. A view of the premises by a judge, on a trial without a jury, is evidence and may be made a factor in his determination of the case.
6. **Appeal.** Such fact is entitled to consideration and weight on an appeal, although the record itself must contain competent evidence to support the trial court's findings.
7. ———. In a law action tried to the court, its findings of fact have the same effect as the findings of a jury, and cannot be set aside unless clearly wrong.

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

Frank A. Peterson, for appellant.

Chambers, Holland & Locke, contra.

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

JOHNSEN, J.

Plaintiff has appealed from a judgment for defendants, in an action for damages arising out of an automobile collision. At the close of the evidence both parties moved for a directed verdict, and the court thereupon discharged the jury, made a personal inspection of the scene of the accident, and dismissed plaintiff's petition.

It is contended (1) that the trial court erred in viewing the premises without the consent of the parties, and (2) that the evidence does not sustain the judgment.

The first contention is predicated on the following journal entry: "On June 9, 1938, after submission of this case, the court inspected the place of the accident taking Exhibit Number 3 with him, and this case now coming on for final decision, the court finds generally against the plaintiff on his cause of action." The exhibit referred to was a photograph of the intersection involved, which purported to show the skid marks of plaintiff's car.

Whether the court, on a trial without a jury, may view the premises without the consent of the parties is a question on which the authorities are divided. In 26 R. C. L. 1085, sec. 90, it is declared that the weight of authority is to the effect that it is error to do so. An examination of the decisions generally, however, does not sustain this statement. The doubt contained in the cases is not so much of the right to view, as of the use which the trial judge is permitted to make of the information thus acquired.

The extent of a trial court's right to view the premises, on a trial without a jury, has never been clearly defined in this state. There are a number of equity cases in which such a view has been made, but where the right of the court to do so does not appear to have been directly challenged.

Shavlik v. Walla, 86 Neb. 768, 126 N. W. 376; *Chapin v. Village of College View*, 88 Neb. 229, 129 N. W. 297; *Keim v. Village of Bloomington*, 119 Neb. 474, 229 N. W. 769; *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647; *Higgins v. Adelson*, 131 Neb. 820, 270 N. W. 502.

Logically, however, a trial judge must be held to have the same power to view the premises, on a trial without a jury, as exists in him to permit inspection on a jury trial, and such view or inspection necessarily is entitled to the same effect in both instances. Any other position would stamp a trial judge as meriting less confidence than, and as lacking the wisdom and restraint of, an ordinary jury. It would also create an absurd procedural distinction between court and jury trials.

The right of the trial court to permit inspection in jury cases is expressly recognized in section 20-1108, Comp. St. 1929, "whenever, in the opinion of the court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place in which any material fact occurred." This section is merely confirmatory of the power generally recognized as existing in a trial court even apart from any statute. 26 R. C. L. 1016, sec. 13; 64 C. J. 1200. Whether a view shall be permitted does not depend upon the consent of the parties, but is a matter solely for the discretion of the trial court. *Alberts v. Husenetter*, 77 Neb. 699, 110 N. W. 657.

A view of the premises is held in this state to be evidence and not merely a means of enabling the jury better to construe and apply the evidence adduced in court. *Chicago, R. I. & P. R. Co. v. Farwell*, 59 Neb. 544, 81 N. W. 440. On rehearing, in 60 Neb. 322, 83 N. W. 71, an opinion was written by Judge Sullivan, where it was said: "We have again carefully examined the grounds of our decision, without being able to reach a conclusion different from the one already announced. Upon the question in controversy judicial opinion is divided, the greater number of adjudged cases supporting the theory that the impressions gathered by the jury in making an inspection are not evidence. This

court is, we think, committed by *Carroll v. State,* 5 Neb. 31, and *Omaha & R. V. R. Co. v. Walker,* 17 Neb. 432, to the doctrine that the jury may take into account the result of their observations at the *locus in quo* and make it, in connection with the other evidence, the basis of their verdict. This is the rational rule; by its adoption a fact is recognized and a fiction abolished. In whatever capacity men act they will not reject the evidence of their own senses; and it is futile and almost foolish to direct them to do so."

The rule which was thus adopted has been reaffirmed in *Drollinger v. Hastings & N. W. R. Co.,* 98 Neb. 520, 153 N. W. 619, *Stull v. Department of Roads and Irrigation,* 129 Neb. 822, 263 N. W. 148, and *Rundall v. Grace,* 132 Neb. 490, 272 N. W. 398.

In *Stull v. Department of Roads and Irrigation, supra,* it was said: "This court is committed to the rule that the viewing of the premises involved in litigation by the jury is evidence, and not merely a means of enabling the jury better to construe and apply the evidence adduced in court. * * * However, we take the view that such evidence by itself, and in the absence of other evidence tending to sustain the issue, is not sufficient to sustain a finding or an award of damages."

In the light of what has been previously said, it must be held, as a matter of consistency and logic, that, on a trial without a jury, the judge, in the exercise of his discretion, may view the premises without the consent of the parties. "But it is the wise policy of the law that, in receiving evidence of any kind in judicial proceedings, it should, so far as practical, be done in the presence of the parties, or with opportunity to be present. We commend this as a rule of judicial propriety in making inspections." *Adalex Construction Co. v. Atkins,* 214 Ala. 53, 106 So. 338.

As in the case of an inspection by a jury, any restrictions attempted to be imposed by an appellate court upon the effect which a trial court may give to such a view are purely artificial. Actually, it constitutes evidence, because the relevant and competent facts revealed thereby necessarily

affect the mind of the trial judge and tend to produce belief or disbelief on an issue. Any other rule is psychological fiction. For this reason it may as well squarely be declared that the trial judge is entitled to make such a view a factor in his determination of the case. It follows also that this fact is entitled to consideration and weight in examining the evidence on appeal, although, of course, the record itself must contain competent evidence to support the findings of the trial court. In technical matters, wholly within the field of expert testimony and on which the witnesses differ, the trial judge's inspection necessarily cannot be accorded the same weight and significance as in other matters. *Wall v. United States Mining Co.*, 232 Fed. 613. And, while it is rather inconceivable that an abuse of discretion by a trial judge in viewing premises will arise, his action is, of course, in any case, as is all judicial discretion, reviewable on appeal for prejudicial abuse.

In this case there was no abuse of discretion, and plaintiff is not entitled to a reversal on that ground. The remaining question is whether the evidence is sufficient to sustain the judgment.

The accident occurred at the intersection of Twenty Seventh street and Sheridan boulevard, in the city of Lincoln, about 11:30 a. m., on a clear day. Twenty Seventh street runs north and south, and Sheridan boulevard runs somewhat diagonally, in a northwesterly and southeasterly direction. Sheridan boulevard is an arterial highway, and there are stop signs as one approaches it on Twenty Seventh street. Both streets are paved. Plaintiff's sedan was proceeding south on Twenty Seventh street, and defendant's bus, which had come from Falls City, was going westerly on Sheridan boulevard.

Plaintiff's testimony showed that he was driving approximately 15 miles an hour at the time of the collision; that he had stopped at the stop sign 33 feet north of the intersection, looked in both directions, started his car in low gear, and shifted into intermediate as he proceeded into the intersection; that it was possible to see a distance of

350 feet east of the intersection up Sheridan boulevard, but he did not see defendant's bus; that he first became aware of the bus as he started into the intersection and heard it sound its horn; that he looked up and saw it 100 feet away, bearing down on him at a speed of 35-40 miles an hour; and that he immediately set his brakes and skidded his car until the impact occurred.

The driver of defendant's bus testified that he was traveling 15 miles an hour before the collision occurred; that, when he was approximately 50 feet east of the intersection, he saw plaintiff's car approach the stop sign and fail to stop; that he sounded his horn in warning, but plaintiff apparently was unable to stop; that he applied his brakes as he went into the intersection and swung to avoid a collision, but that the cars came together in an angular crash. He claimed further that the skid marks of plaintiff's car extended from a point north of the intersection to the place of collision, 13 feet south of the north curb line. A photograph was introduced in evidence which it is contended corroborates this testimony.

A police officer, who was a witness for plaintiff, testified that the skid marks were only 9 feet in length and were all within the intersection. Another witness said that the marks were 12 feet long. A passenger in the bus testified that his attention was attracted to plaintiff's car when he heard the bus driver sound his horn and felt him apply his brakes, throwing him forward in his seat. He stated that plaintiff was at that time about even with, or just beyond, the stop sign and was proceeding toward the intersection. Both vehicles, in his opinion, were traveling at about the same speed.

We shall not attempt to detail the testimony further. Enough has been set out to indicate its irreconcilable conflict. The situation is not controlled by undisputed physical facts. If the fact that the trial court viewed the premises were to be ignored, there is still sufficient competent evidence in the record to support a judgment for either party, depending upon the testimony that the court chose to believe.

The question would accordingly be one of credibility and weight. No doubt the view which the trial court made of the premises was helpful to it in settling that question. But, in any event, in a law action this is a matter solely for the trial court. Plaintiff points out discrepancies in the testimony of defendant's driver, argues that he is unworthy of belief, and contends that the accident must therefore have happened as plaintiff claimed it did. We are unable to say, as a matter of law, even if no view of the premises had been made, that the testimony of defendant's driver was incredible, and that the trial court would be clearly wrong in accepting any part of it. Plaintiff argues also that the evidence shows a liability under the last clear chance doctrine, but, here again, the situation was, at most, one for the trial court's determination. Under the testimony, a verdict could not have been directed for plaintiff on that ground. In the situation presented by the record, we have no right to set aside the judgment of the trial court. In a law action tried to the court, it is conclusively settled that its findings of fact have the same effect as the findings of a jury and cannot be set aside unless clearly wrong. *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *In re Estate of Wotke,* 133 Neb. 739, 277 N. W. 45.

For convenience in this opinion, we have referred to the owner of the bus as the defendant, although the driver was sued jointly with him.

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, APPELLEE, V. AIREDALE RANCH & CATTLE COMPANY ET AL., APPELLANTS.
286 N. W. 766

FILED JULY 3, 1939. No. 30555.

1. Guaranty. The mortgage bonds, a real estate mortgage securing them, and an "agreement against ultimate loss," relating thereto, being executed substantially contemporaneously as one transaction, are to be construed together.

2. ———. In this case, under the facts disclosed by the record, the assignment of the first mortgage real estate bonds evidencing the debt secured, by necessary implication, carried with it to the assignee thereof the mortgage by which such bonds were secured, and also the "agreement against ultimate loss" insuring the payment in full of the indebtedness evidenced thereby.
3. **Trusts.** Under the proceedings had in this case, when the legal capacity of the Lincoln Trust Company to discharge the duties imposed by this trust had terminated through its bankruptcy and proceedings incidental thereto, the First Trust Company of Lincoln legally succeeded to and possessed all and identical powers originally vested in and possessed by the Lincoln Trust Company, and thus was a proper plaintiff to maintain this action.
4. **Guaranty.** In view of the facts in this case, the contemporaneous contracts between the parties pertaining to the same subject-matter, the nature of the transactions between them, and the attendant circumstances, including the result sought to be attained, by necessary implication evidencing what the parties intended the language of the "agreement against ultimate loss" should provide for, may be properly taken into consideration in interpreting that document.
5. ———. The "agreement against ultimate loss" construed, and interpreted as being strictly one of indemnity.
6. **Indemnity.** "The general rules which govern the construction and interpretation of other contracts apply in construing a contract of indemnity and in determining the rights and liabilities of the parties thereunder. In accordance with such rules the important question for determination is the intention of the parties, and the contract should be so construed, if it can be done consistently with legal principles, as to ascertain and give effect to such intention; and in making such construction the terms used and the language employed in the contract must be given a fair and reasonable interpretation, the contract must be read in its entirety, and consideration must be given not only to the language of the contract but also to the situation of the parties and the circumstances surrounding them at the time the contract was made." 31 C. J. 426.
7. ———. Ordinarily, a covenant of indemnity cannot, when clear in its terms, be restricted by a recital. "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

Ex parte Dawes, 17 Q. B. D. (Eng.) 275, 286, quoted with approval in *Williams v. Barkley*, 165 N. Y. 48, 58 N. E. 765.

8. **Bonds.** "Courts incline strongly to construe bonds as contracts of indemnity only, and will attach more importance to the general purpose of a bond, as shown by its provisions as a whole and the interests of the parties in the subject-matter, than to the precise form of words employed." *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226.

9. **Guaranty.** "The promise in an indemnity contract is an original and not a collateral undertaking, and in this particular differs from a contract of guaranty. If the contract of indemnity refers to, and is founded upon, another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability, arising upon such other contract; it is not a contract to answer for the contractual debt, default, or miscarriage of another than the promisee, but a contract to indemnify the promisee from loss owing to his contractual liability." 31 C. J. 419.

10. **Contracts:** ALTERATION. "If an instrument is changed in respect of the consideration, which appears only as a recital to show the basis of the instrument, it would seem to be immaterial. Where words are added which are merely descriptive of the consideration and so fail to alter the legal effect of the instrument, they are, of course, immaterial." 3 C. J. S. 947, sec. 32.

11. ———: ———. "An alteration of a written instrument after its execution by one party thereto, without the knowledge or consent of the other, which neither varies its meaning nor changes its legal effect, is an immaterial alteration, and will not invalidate the instrument." *Fisherdick v. Hutton*, 44 Neb. 122, 62 N. W. 488.

12. **Appeal.** Appeals in equity are for trial *de novo* in this court, and it is the duty of this court to reach an independent conclusion without reference to the findings of the district court. But, when the evidence on material issues so conflicts that it cannot be reconciled, the court considers the fact that the trial court observed the witnesses and their testimony, and must have accepted one version of the facts rather than the opposite.

13. **Guaranty.** Under the facts in this case, the makers of the contract against ultimate loss are not released from the obligation evidenced thereby because of the extension of the time of payment of the indebtedness to which it relates.

14. **Action.** "Differing from the rule in actions on the law side of the court, which limits the judgment to the facts as they existed at the commencement of the action, when the action is in equity, relief will be administered as the nature of the case and the

facts, as they exist at the close of the litigation, demand." *Russell Hardware & Implement Mfg. Co. v. Utica Drop Forge & Tool Co.*, 195 N. Y. 54, 87 N. E. 788.

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

Neighbors & Coulter, Fred A. Wright and *Woods, Aitken & Aitken,* for appellants.

Harry R. Ankeny and *Clinton J. Campbell, contra.*

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

EBERLY, J.

This is an appeal from a judgment entered in behalf of plaintiff in a suit in equity for the collection of certain bonds, the foreclosure of the real estate mortgage securing the same, and the enforcement of a certain "agreement against ultimate loss" pertaining to the indebtedness evidenced thereby. From the adverse action of the trial court in adjudging them liable under the "terms" of the guaranty against ultimate loss, and overruling their respective motions for new trial, defendants appeal.

This is a continuation of *First Trust Co. v. Airedale Ranch & Cattle Co.*, 131 Neb. 475, 268 N. W. 362. It was therein stipulated by the parties, and ordered by the trial court, that the issues now for consideration be continued until after sale of the property was made and confirmation thereof had. These facts having occurred, the cause was tried with results as above indicated.

The original "agreement against ultimate loss" has been lost. There is no question as to the fact that such an instrument was originally executed and delivered by the defendants Robert L. Ferguson, W. H. Ferguson, T. L. Green, and C. N. Wright to the Lincoln Trust Company of Lincoln, Nebraska, in December, 1924. All parties agree that the following is a correct copy of the contractual parts of that agreement, land description, signatures, and one word only omitted, viz.:

"Agreement against ultimate loss.

"Know all men by these presents: That, whereas, the Airedale Ranch and Cattle Company has made application to the Lincoln Trust Company of Lincoln, Nebraska, for a loan of Seventy-five Thousand Dollars for five (5) years at six (6) per cent. per annum interest, payable semiannually, from * * * 1st, 1925, to be secured by a mortgage on Nine Thousand Two Hundred Eighty (9280) acres of land situated in Scotts Bluff county and Banner county, Nebraska, more particularly described as follows: * * * and whereas, the Lincoln Trust Company has agreed to make said loan, provided title is found satisfactory.

"Now, therefore, it is understood and agreed that, in consideration of the Lincoln Trust Company making said loan, the undersigned, C. N. Wright, T. L. Green, Robert L. Ferguson and W. H. Ferguson agree with the said trust company that in case it becomes necessary to foreclose said mortgage that the undersigned will pay all court costs and reasonable attorneys' fees incident to said foreclosure, and when the property secured by said mortgage is sold and a sheriff's deed issues, if it does not sell for a sufficient amount to pay said loan in full together with all interest according to the terms of the note and mortgage, then and in that case the undersigned will make up such deficiency, the intention being that the Lincoln Trust Company, its successors or assigns is to be held safe and harmless in the principal sum of Seventy-five Thousand Dollars ($75,000) with interest according to the terms of said note and mortgage by reason of the making of said loan, hereby binding our heirs and assigns for the faithful performance of the conditions herein set out. Dated this December 22d, 1924."

The defendants contend that at the time they executed the original agreement against ultimate loss, the first omission in the foregoing quotation was occupied by the word "March;" that after delivery the trust company without authority changed the word "March" to "Jany;" that such change was a material alteration and avoided the agree-

ment; and that under the agreement as executed by them they were under no obligation to satisfy the amount remaining unpaid in the present foreclosure proceeding, for the reason that they never executed the second guaranty, and even if liable on the original guaranty they were completely discharged from all liability thereon because of the extension of the maturity of the mortgage indebtedness to which such guaranty related, made, without their consent as individual guarantors, by the Lincoln Trust Company to the Airedale Ranch & Cattle Company.

The defendants challenge the legal capacity of plaintiff to maintain this action for the reason that the First Trust Company of Lincoln, Nebraska, has no interest under the guaranty agreement executed in December, 1924, and therefore is not the proper party plaintiff and has no right to maintain this action.

The original indebtedness engagement in suit in this action was evidenced by, viz.: (1) An agreement against ultimate loss; (2) ninety-one real estate first mortgage bonds bearing even date with and secured by the real estate mortgage foreclosed in this suit in equity. These bonds each provided for the payment of interest from January 1, 1925, "at six per cent. per annum, payable semiannually," and that upon default made in the performance of terms therein stipulated, at the option of the Lincoln Trust Company, the maturity thereof was accelerated; that all payments to be made on these bonds, whether principal or interest, shall be made to said Lincoln Trust Company; and also provides that, "If any default occurs in this bond, or in any of said bonds or in said mortgage, then the Lincoln Trust Company may, as trustee for the holder of this bond and of all of said bonds, without notice to, or hindrance from any one, declare this bond and all of said bonds matured, due and payable;" (3) also, the real estate mortgage of even date with such bonds executed by the Airedale Ranch & Cattle Company to the Lincoln Trust Company of Lincoln, Nebraska, and securing the payment of the same, which in addition contained the following agreement, viz.: "In case of any of the

bonds or coupons secured hereby are held by other parties than the mortgagee, the parties hereto constitute and authorize the Lincoln Trust Company of Lincoln, Nebraska, as trustee under this mortgage, for the use and benefit of the holders of the debts secured hereby, with full power and authority upon maturity of this mortgage or the debts secured thereby, either by the lapse of time or by failure to perform any of the terms or conditions hereof, to foreclose or enforce collection or payment of this mortgage and the debts secured thereby, * * * to satisfy and release of record or otherwise this mortgage or said debts; to make distribution of the proceeds thereof to the holders or owners of said bonds or coupons after payment of the costs and expenses thereof, and to do all things necessary or suitable to the performance of said duties and the exercise of said powers." These three separate parts made and together as an entirety constituted a single contract. In the instant case neither the Lincoln Trust Company nor the First Trust Company, its successor-trustee, are owners or holders of any of the bonds secured by this mortgage.

The substance of the issue now before us was presented to this court in *First Trust Co. v. Eastridge Club*, 134 Neb. 785, 279 N. W. 720. The language of that opinion is quite applicable to the situation in the instant case, viz.:

"In cases such as here presented, sound policy would appear to require the highest effort to discover and effectuate the intention of the parties involved at the time of the execution of the instrument in suit. For this purpose this court has said: 'It is proper to look into other papers constituting parts of the same transaction and to consider the nature and course of the business between the parties.' *Rice v. McCague*, 61 Neb. 861, 867, 86 N. W. 486. See, also *Tootle v. Elgutter*, 14 Neb. 158, 15 N. W. 228.

"So, also, where the contract of guaranty is executed contemporaneously with, and as a part of, the consideration of the contract guaranteed, the law imputes notice to all parties immediately related to the transaction of its character and extent. This principle is certainly applicable here

in view of the identity of interest between the guarantors and the Eastridge Club. *Wright v. Griffith,* 121 Ind. 478, 23 N. E. 281.

"The view above set forth is quite in harmony with the general rule that a note, a mortgage securing the same, and a guaranty relating thereto, being executed substantially contemporaneously as one transaction, are to be construed together. 28 C. J. 918; *Charlestown Five Cents Savings Bank v. Zeff,* 275 Mass. 408, 176 N. E. 191; *Baker v. James,* 280 Mass. 43, 181 N. E. 861; *Skilton v. R. H. Long Cadillac LaSalle Co.,* 265 Mass. 595, 164 N. E. 652; *Luikart v. Massachusetts Bonding and Ins. Co.,* 129 Neb. 771, 263 N. W. 124.

"In the instant case, the assignment of the 'first mortgage real estate bonds,' evidencing the debt secured, by necessary implication, carried with it to the assignee the real estate mortgage by which they were secured, and also the guaranty assuring the payment thereof.

"Nor do we find the guaranty in suit 'special' in the sense contended for by appellants. Considered as an entirety, in connection with the bonds and mortgage evidencing the indebtedness referred to therein, and the purpose to be accomplished thereby as established by the surrounding circumstances, the guaranty is unrestricted as to right of transfer, and though running to the Lincoln Safe Deposit Company it is equally available to the assignee of the principal contracts and enforceable by him, or by the trustee who is his legal representative in the present suit. See, *Stillman v. Northrup,* 109 N. Y. 473, 17 N. E. 379; *Abraham Lincoln Life Ins. Co. v. Reynolds Mortgage Co.,* 30 Fed. (2d) 790; *Everson v. Gere,* 122 N. Y. 290, 25 N. E. 492; *First Nat. Bank v. Taylor,* 38 Utah, 516, 114 Pac. 529; *McGowan v. Wells' Trustee,* 184 Ky. 772, 213 S. W. 573."

It is axiomatic that equity will not allow a trust to fail for want of a trustee. The transaction as established by the three instruments referred to clearly evidenced the creation of a trust. The Lincoln Trust Company, the original trustee, and the First Trust Company of Lincoln, Nebraska, plaintiff

in this case, as successor-trustee, were corporations organized and doing business under the provisions of sections 8-201 to 8-221, inclusive, Comp. St. 1929, and were thereby specifically endowed with power "To accept and execute all such trusts as may be committed to them by any corporation, person, or persons, and to act as * * * trustee * * * and to accept and execute all such trusts as may be committed or referred to them by order, judgment or decree of any court of record;" and in addition were each vested with ample legal capacity "To perform all acts and exercise all powers connected with, belonging to or incident to, or necessary for the full and complete exercise and discharge of the rights, powers and responsibilities * * * (thus) granted, and all provisions of this article shall be liberally construed." Comp. St. 1929, sec. 8-206.

It follows that under the proceedings had in this case, when the legal capacity of the Lincoln Trust Company to discharge the duties imposed by this trust had terminated through its bankruptcy and proceedings incidental thereto, the First Trust Company of Lincoln legally succeeded to and possessed all and identical powers originally vested in and possessed by the Lincoln Trust Company, and thus was a proper party plaintiff with ample right to maintain this action.

Preliminary to a consideration of the remaining defenses tendered in behalf of C. N. Wright, T. L. Green, Robert L. Ferguson and W. H. Ferguson, who executed the first "agreement against ultimate loss" in suit, it will be noted that they were business associates in the operation of the ranch which is referred to in the record as the Airedale Ranch. This ranch embraced 9,280 acres of land situated in Scotts Bluff and Banner counties, Nebraska. Wright lived in Scottsbluff and occupied himself more with the outside affairs looking after the stock and welfare of the ranch. T. L. Green was in the ranch office at Scottsbluff. Mr. W. H. Ferguson attended to the financing. Robert L. Ferguson is the son of W. H. Ferguson, and was the principal representative of all interests concerned in the nego-

tiating of the original $75,000 loan in 1924, and of the renewal thereof in 1930. This ranch business was carried on under corporate forms. It was incorporated on May 11, 1916, as the Airedale Ranch & Cattle Company. In December, 1924, Green, Wright, and W. H. Ferguson owned the controlling stock. Robert L. Ferguson became a stockholder therein July 31, 1925. Green, Wright and W. H. Ferguson were directors in 1924. Robert L. Ferguson became a director in June, 1925. Wright, Green, W. H. Ferguson and Robert L. Ferguson were continued as directors and executive officers of this corporation until after the date of the extension of the maturity of the mortgage on the company's real estate December 20, 1929. W. H. Ferguson was president of, and appears to have had executive control over, Ferguson & Company, a corporation which is mentioned in the evidence in this case, and was at all times, until the bankruptcy of the Lincoln Trust Company in 1932, a stockholder and director therein. Robert L. Ferguson was likewise a director of the Lincoln Trust Company, the exact time of his continuance in that position is not disclosed, but he served on the executive committee from January, 1928, to the date of its bankruptcy in 1932. However, in corporate action pertaining to the matters here in suit, the two Fergusons did not in any manner participate as directors of and for the Lincoln Trust Company or in its behalf, though subject to the presumption as to knowledge which their office implied. *Merchants Bank v. Rudolf*, 5 Neb. 527; *Kienke v. Hudson*, 126 Neb. 551, 253 N. W. 687.

We are now to determine the liability of the defendants in view of the nature of the remedy sought, their relation to each other and to the subject of the action, and the inherent nature of the contractual obligation they have assumed by the terms of the "agreement against ultimate loss."

First, it may be said that because of the facts hereinbefore set forth the signers of this "agreement against ultimate loss" have such a beneficial interest therein, and in the corporation sought to be benefited thereby, as to deprive

them of the status of "favorites of the law" in the ordinary sense of guaranty or surety. They were real beneficiaries of the loan to which this contract relates. The corporation was their own artificial creation, organized for their own profit. *Valley Nat. Bank v. Cownie,* 164 Ia. 421, 145 N. W. 904.

In the interpretation of this contractual agreement by these defendants, it being strictly one of indemnity, the following principles of construction are applicable, viz.:

"The general rules which govern the construction and interpretation of other contracts apply in construing a contract of indemnity and in determining the rights and liabilities of the parties thereunder. In accordance with such rules the important question for determination is the intention of the parties, and the contract should be so construed, if it can be done consistently with legal principles, as to ascertain and give effect to such intention; and in making such construction the terms used and the language employed in the contract must be given a fair and reasonable interpretation, the contract must be read in its entirety, and consideration must be given not only to the language of the contract but also to the situation of the parties and the circumstances surrounding them at the time the contract was made. Other general rules of construction which apply are: That the contemporaneous understanding and the construction which the parties have put upon the contract, as shown by their correspondence or otherwise, should be considered; that the interpretation must be made with reference to the known customs of trade, which constitute a part of the contract." 31 C. J. 426.

See, also, *Title Guaranty & Surety Co. v. Roehm,* 215 Mich. 586, 184 N. W. 414; *Moriarty v. Tomlinson,* 58 S. Dak. 431, 235 N. W. 363; Restatement, Contracts, secs. 243, 244.

In this connection it has been held that a covenant of indemnity cannot, when clear in its terms, be restricted by a recital. *Parker v. Read,* 9 N. H. 121; *In re Baker,* 20 Ch. D. (Eng.) 230.

So, also, the rule has been announced, viz.: "If the re-

citals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." *Ex parte Dawes*, 17 Q. B. D. (Eng.) 275, 286, quoted with approval in *Williams v. Barkley*, 165 N. Y. 48, 58 N. E. 765.

A careful consideration of the terms of the "agreement against ultimate loss" leads to the conclusion that it is a direct and original undertaking of the makers thereof to and with the Lincoln Trust Company as trustee, and is wholly one of indemnity, in which the signatories thereto undertake to save the indemnitee against loss arising from the contingent event therein stated. We are confirmed in this view by the principle of construction announced by Pound, C., in *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226, viz.: "Courts incline strongly to construe bonds as contracts of indemnity only, and will attach more importance to the general purpose of a bond, as shown by its provisions as a whole and the interests of the parties in the subject-matter, than to the precise form of words employed."

In *Moore v. Capital Nat. Bank of Lansing*, 274 Mich. 56, 264 N. W. 288, in the discussion of a situation analogous to the one presented in the instant case, the following language is employed, viz.:

"While the indemnitors were referred to as 'guarantors' in the agreement and did 'guarantee' the Capital National Bank against loss, the purport of the agreement was wholly one of indemnity, notwithstanding the fact that appellants are referred to as 'guarantors' in the agreements. The contract was an original and not a collateral agreement, and differs from a contract of guaranty or suretyship. The contract of guaranty or suretyship requires three parties, the principal, the obligee, and the guarantor or surety. One of indemnity requires two parties, the indemnitor and the indemnitee. The indemnitor undertakes to save the indemnitee

against loss arising from an unknown or contingent event. The contract of indemnity is one of insurance. A contract of guaranty is a form of suretyship. See Stearns, Law of Surety (4th ed.) footnote, p. 37; *Hall v. Woodin,* 35 Mich. 67. In the instant case the 'guarantors' were not to answer for the payment of a debt of another, but were to indemnify the Capital National Bank for any loss in connection with the performance of the contract."

In 31 C. J. 419, it is stated, viz.:

"The promise in an indemnity contract is an original and not a collateral undertaking, and in this particular differs from a contract of guaranty. If the contract of indemnity refers to, and is founded upon, another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability, arising upon such other contract; it is not a contract to answer for the contractual debt, default, or miscarriage of another than the promisee, but a contract to indemnify the promisee from loss owing to his contractual liability. It is given to a person against his sustaining loss or damage, and cannot properly be called one that insures the thing."

See, also, *Eckhart v. Heier,* 37 S. Dak. 382, 158 N. W. 403; *In re Prunty's Estate,* 201 Ia. 670, 207 N. W. 785; *Westville Land Co. v. Handle,* 112 N. J. Law, 447, 171 Atl. 520.

In the determination of the proper application of the foregoing principles of law, we must include a consideration of the situation of the parties and the circumstances surrounding them when the contract was made. The lands embraced in the Airedale Ranch had been mortgaged to secure an indebtedness of $75,000 which matured January 1, 1925. To provide for this situation, in the fall of 1924, Robert L. Ferguson, representing the interests involved, carried on negotiations with the Lincoln Trust Company. The control of the business of this corporation was vested in the board of directors thereof. Comp. St. 1929, sec. 8-204. Throughout their negotiations, as a prerequisite to accepting the application thus made, was the requirement that the loan, if made, should be covered by the stock form of "agreement

against ultimate loss" which was then employed by the trust company. Finally, on this basis, the application for the loan was approved by the trust company. Its clerical help then prepared an "agreement against ultimate loss," ninety-one bonds with interest coupons attached evidencing the interest to accrue thereon "from January 1, 1925," and the real estate mortgage securing the same. These instruments were forwarded to Scottsbluff where, pursuant to authority of a resolution adopted by the stockholders of the Airedale Ranch & Cattle Company, C. N. Wright and T. L. Green, as president and secretary, respectively, on December 24, 1924, executed the real estate mortgage, together with the bonds and interest coupons secured thereby. This real estate mortgage was duly filed for record in Banner county, Nebraska, on December 26, 1924. C. N. Wright and T. L. Green, at Scottsbluff, also executed the "agreement against ultimate loss." The writing so signed was forwarded to Robert L. Ferguson, who, after the same had been signed by his father and himself, delivered the same to the trust company. There is also in the record an original letter, bearing date of December 29, 1924, directed to the president of the Lincoln Trust Company, signed by the secretary of the Airedale Ranch & Cattle Company, from which we quote, viz.:

"Enclosed I hand you copy of resolution authorizing procuring of new real estate loan by officers of Airedale Ranch & Cattle Company.

"Yesterday I forwarded to Robert L. Ferguson supplemental abstract covering all of the Airedale lands in Banner county, and have today sent him the abstract to the 40 acres in Scotts Bluff county, and asked that he deliver same to you. We also sent him the guarantee of the loan which was signed by us."

These instruments, so delivered, were accepted by the corporate authorities of the Lincoln Trust Company as in complete compliance with their requirements, and on December 31, 1924, the sum of $77,250 was remitted to the holder of the old mortgage thus retired.

Twelve or thirteen years after this transaction the makers of the "agreement against ultimate loss" testify that now for the first time they have discovered that the recital of this instrument in reference to the obligation to which it related, as originally executed by them, was "for a loan of seventy-five thousand dollars for five years with interest at six per cent. per annum from March 1, 1925." The correctness of the bonds and mortgage they executed in 1924 is unchallenged. The only matter possibly involved is the interest accruing on the loan for the months of January and February, 1925, which was fully paid and discharged more than twelve years ago, and after which the principal of the original obligation had been renewed for the period of five additional years by the same persons who executed the instrument now in suit. The original requirement of the ultimate loss contract, as made by the Lincoln Trust Company, is now not denied by them. Nevertheless, the claim at this time is that the mortgage and notes referred to therein were not properly described in their "guaranty" and therefore no liability followed the execution thereof by the "guarantors." In addition, it is claimed that the trust company, without authority, altered the original agreement by substituting January for the word "March," and such alteration operated to annul the agreement. However, it is not charged that the alteration, if made, was fraudulently done; and the evidence amply sustains the conclusions that, if the alteration was made, it was done in good faith to conform the "agreement against ultimate loss" to the actual contract of the parties, and made by an executive assistant of whose act it is not claimed that the board of directors had any knowledge whatever.

Obviously, when the three instruments, the "agreement against ultimate loss," the real estate mortgage, and the coupon bonds evidencing the loan secured, were substantially at the same time presented to and laid upon the table of the trust company in December, 1924, such instruments must be deemed by the parties to the transaction to effect a definite and legal purpose and to evidence a certain valid

obligation assumed. Delivery of these instruments substantially contemporaneously was an essential element in their completion and marks the date of their effectiveness. 13 C. J. 307. We would certainly hesitate to imply that any one concerned in the transaction then intended the delivery of an invalid instrument. True, if the "agreement against ultimate loss" had been carefully compared, the discrepancy in the recital as to the commencement of the interest would have been noted, but the covenant against ultimate loss, the "operative part," is clear, definite and certain, and as the three instruments lay on that table, construed as one contract, the real intent of all parties is certain beyond reasonable doubt, and the "operative part" must prevail. This discrepancy, wholly due to a recital at variance with the unquestioned facts fully disclosed by the terms of the contract considered as an entirety, must be deemed immaterial. Not having the original agreement against ultimate loss at hand, in view of the evidence as an entirety, we find it unnecessary to determine whether the original instrument was as a matter of fact actually altered to conform to the clear intent of the parties. An immaterial defect, by correction made in good faith, could hardly become a material alteration.

"If an instrument is changed in respect of the consideration, which appears only as a recital to show the basis of the instrument, it would seem to be immaterial. Where words are added which are merely descriptive of the consideration and so fail to alter the legal effect of the instrument, they are, of course, immaterial." 3 C. J. S. 947, sec. 32.

"An alteration of a written instrument after its execution by one party thereto, without the knowledge or consent of the other, which neither varies its meaning nor changes its legal effect, is an immaterial alteration, and will not invalidate the instrument." *Fisherdick v. Hutton,* 44 Neb. 122, 62 N. W. 488.

See, also, *Quinn v. Moss,* 45 Neb. 614, 63 N. W. 931; *Blenkiron Bros. v. Rogers,* 87 Neb. 716, 127 N. W. 1062.

But there is no evidence in the record that this alteration was fraudulently made, and no evidence that it was done by direction or authority, or with the knowledge, of the board of directors of the Lincoln Trust Company. The only affirmative evidence on the subject is not direct, but tends to show that the word "Jany," if in fact written in the original agreement against ultimate loss, was written therein by an employee occupying an executive position only.

In this country the more equitable rule prevails that alteration by strangers, or spoilation as it is frequently called, will not discharge an obligation, and for this purpose the obligor's agent who makes an unauthorized alteration is a stranger. Alteration by the obligee's agent or attorney also does not discharge the obligation if the obligee himself did not authorize it, and the same is true if the alteration was by a trustee. Restatement, Contracts, sec. 434, Illus. 3 and 4; *Clyde S. S. Co. v. Whaley,* 231 Fed. 76, 79, 145 C. C. A. 264; *Burgess & Co. v. Blake,* 128 Ala. 105, 28 So. 963; *Forbes v. Taylor,* 139 Ala. 286, 35 So. 855; *Langenberger v. Kroeger,* 48 Cal. 147; *Central California Creditors Ass'n v. Seeley,* 91 Cal. App. 327, 267 Pac. 138; *Brooks v. Allen,* 62 Ind. 401; *Shenkberg Co. v. Porter,* 137 Ia. 245, 114 N. W. 890; *Vanderford v. Farmers & Mechanics Nat. Bank,* 105 Md. 164, 66 Atl. 47; *Broadway Nat. Bank v. Heffernan,* 220 Mass. 247, 107 N. E. 921; *White Sewing Machine Co. v. Dakin,* 86 Mich. 581, 49 N. W. 583; *Owosso Sugar Co. v. Arntz,* 244 Mich. 351, 221 N. W. 179; *Hunt v. Gray,* 35 N. J. Law, 227; *Martin v. Tradesmen's Ins. Co.,* 101 N. Y. 498, 5 N. E. 338, n.4; *Gleason v. Hamilton,* 64 Hun, 96, 19 N. Y. Supp. 103; *Waldorf v. Simpson,* 15 App. Div. 297, 44 N. Y. Supp. 921; *Fullerton v. Sturges,* 4 Ohio St. 529; *Acme Harvester Co. v. Butterfield,* 12 S. Dak. 91, 80 N. W. 170; *Port Huron Engine & Thresher Co. v. Sherman,* 14 S. Dak. 461, 85 N. W. 1008; *Deering Harvester Co. v. White,* 110 Tenn. 132, 72 S. W. 962; *Griffin v. Shamburger,* 262 S. W. (Tex. Civ. App.) 144; *Flinn v. Brown,* 6 S. Car. 209.

It is stated in *Barton Savings Bank & Trust Co. v.*

Stephenson, 87 Vt. 433, 89 Atl. 639, viz.: "There is a class of cases where a note is procured by an agent, delivery to whom is delivery to the payee, but whose subsequent authority is limited to the custody and transmission of the writing; and alterations made by these persons are treated as the acts of a stranger. In this class are *Bigelow v. Stilphen*, 35 Vt. 521; *Equitable Mfg. Co. v. Allen*, 76 Vt. 22, 56 Atl. 87."

It will be noted that in the instant case recovery against the guarantors is sustainable on the instrument as they originally made it, and is in no manner affected by the alteration which it is claimed was made. The conclusion is that the legal rights and obligations evidenced by the "agreement against ultimate loss" are in no substantial manner varied or impaired, when tested in an action where the beneficiaries of the trust, the bond holders, are the ultimate parties in interest.

It is to be noted that the plaintiff has alleged and introduced evidence tending to establish that, when this loan was, by agreement of the parties, extended at its maturity for a period of five years, a second "agreement against ultimate loss," in the same standardized form in which the first agreement of that nature was cast, was executed and given by Robert L. Ferguson, W. H. Ferguson, T. L. Green, and C. N. Wright, in December, 1929, and delivered to the Lincoln Trust Company as part of the contract of extension. Both oral and record proof is tendered in support of plaintiff's pleading. Evidence on the part of the defendants necessarily contradicts that upon which plaintiff relies to sustain its contention. Upon this state of proof, the trial court that heard defendants' evidence found "that as a part of the transaction and consideration for extending the maturity date of the original loan so made by Lincoln Trust Company to Airedale Ranch & Cattle Company from January 1, 1930, to January 1, 1935, there was delivered to Lincoln Trust Company on or about December 30, 1929, a second agreement against ultimate loss which had been executed by the defendants, C. N. Wright, T. L. Green,

Robert L. Ferguson and said W. H. Ferguson, deceased, and that the conditions thereof were the same as the conditions of said original agreement against loss, a copy of which was admitted in evidence, except as to the date said bond indebtedness became due."

This is an appeal in equity, and is here for trial *de novo*, and it is the duty of this court to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929 sec. 20-1925. But when the evidence on material issues so conflicts that it cannot be reconciled, the court considers the fact that the trial court observed the witnesses and their testimony, and must have accepted one version of the facts rather than the opposite.

Of the four alleged signers of the second "agreement against ultimate loss," defendant Green, though present in court, did not testify on this subject. Defendant William H. Ferguson was ill, but testified by deposition, and had no recollection of the transaction involving the extension of the loan in 1929. Mr. Wright, when questioned about the extension of this mortgage in December, 1929, testified that he did not recall the signing of the extension of the mortgage, and that he took no part in negotiating the extension. Robert L. Ferguson denied that any such second agreement against ultimate loss was ever entered into or given in connection with the extension of the real estate mortgage in December, 1929. So, it will be seen that but one of the alleged makers of this second agreement against ultimate loss expressly and positively denied its execution and delivery. It must be conceded that he is strictly a party in interest. Under similar circumstances, Redick, District Judge, in the opinion adopted by this court in *Dvorak v. Kucera*, 130 Neb. 341, 264 N. W. 737, made the following observations, viz.:

"It is extremely difficult for a reviewing court to arrive at a satisfactory conclusion when the testimony is in conflict and the principal fact to be determined rests upon the evidence of interested witnesses. In such case the judgment of the trial court who had the benefit of seeing the

witnesses and observing their deportment while testifying is of considerable weight, notwithstanding the requirement of the statute that the reviewing court shall try the case *de novo.*"

In the instant case we have to consider the testimony of one uncorroborated witness as to a transaction occurring some six or seven years prior to his examination before the trial court. Under the circumstances delineated in this record, on trial *de novo* we do not feel justified in departing from the conclusions of the trial court on the subject now under consideration.

But the testimony of defendants as to the negotiations that took place in 1929 is silent as to any reference therein to the admittedly then existing "agreement against ultimate loss" which had been executed by the four defendants in 1924. Under the circumstances outlined, the new "agreement against ultimate loss," in identical terms with the existing one and executed by the same parties, was not a superseding or replacement of the former obligation, but merely cumulative thereto. *Headley v. Post,* 120 Kan. 504, 243 Pac. 1042; *First Nat. Bank v. Story,* 131 App. Div. 472, 115 N. Y. Supp. 421. Had no new contract against ultimate loss been entered into, under the circumstances in this case the extension of the mortgage debt for a period of five years, in which each one of the makers participated, would not have operated to effect their release. This is strictly an indemnity contract and not a collateral obligation. The four original "guarantors" then constituted the principal stockholders and the control of the debtor corporation. As stockholders their votes adopted a resolution authorizing the making of the extension of the mortgage indebtedness by the corporation. They, as officers and directors, sought for this extension, and it was granted to them. It was for the benefit of their private interests that it was secured. They all, in their respective spheres, stockholders, directors and officers, cooperated in securing the extension. The extension affected their own property. Such as were officers joined as officers of the debtor corporation in executing the

necessary papers securing the renewal or extension of the real estate mortgage, and they at least made no stipulations or requests for release of the then original indemnifying agreement. They thereafter, through the corporate agency, paid interest on the extended obligation thus obtained. The effect of their acts was not thereby to secure their release from an obligation as to which they made no stipulations in the extension contract. 21 R. C. L. 1024, sec. 70. Thus, "Where the surety on a note of a corporation was the acting officer of the corporation, and executed and delivered the note originally, and paid interest in advance at the various times when the note was extended, he in legal effect, requested such extension, so that he was estopped to assert his discharge as surety because of lack of consent thereto." *Hallock v. Yankey,* 78 N. W. 156 (102 Wis. 41).

Finally, the defendants insist that the action on the "agreement against ultimate loss" was prematurely brought, and combining these causes of action with the foreclosure of the mortgage created a misjoinder. This, of course, was in turn based upon the proposition that, until the mortgaged premises had been sold and the amount of the deficiency determined, no present demands existed within the contemplation of the indemnity contract and the action must fail. *People's State Bank v. Smith,* 120 Neb. 29, 231 N. W. 141, and section 20-2143, Comp. St. 1929, are cited to sustain this contention. We cannot accept defendants' construction of the statutory provision. The weight of authority appears opposed to it. 19 Standard Ency. of Procedure, 942; *United States Trust Co. v. Miller,* 116 Neb. 25, 215 N. W. 462. *People's State Bank v. Smith, supra,* was an action at law. The present proceeding is clearly a suit in equity. The effect of this difference was well expressed by the New York court in *Russell Hardware & Implement Mfg. Co. v. Utica Drop Forge & Tool Co.,* 195 N. Y. 54, 87 N. E. 788, as follows: "Differing from the rule in actions on the law side of the court, which limits the judgment to the facts as they existed at the commencement of the action, when the action is in equity, relief will be

administered as the nature of the case and the facts, as they exist at the close of litigation, demand."

And it was said in the opinion in *Madison Avenue Baptist Church v. Baptist Church in Oliver Street,* 73 N. Y. 82, 95: "It is the practice of courts of equity, when they have once obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties." See *Lynch v. Metropolitan Elevated Ry.,* 129 N. Y. 274, 29 N. E. 315; *Pond v. Harwood,* 139 N. Y. 111, 34 N. E. 768; *Sherman v. Foster,* 158 N. Y. 587, 53 N. E. 504.

To accede to the contention of the defendants in this matter would, in effect, abrogate the equitable maxim that " 'Equity delights to do justice, and that not by halves.' The significance of this maxim lies in its last words. It means that it is the aim of equity to have all interested parties in court and to render a complete decree adjusting all rights and protecting the parties against future litigation. The principle of the maxim embraces the well-established doctrine that when equity once acquires jurisdiction it will retain it so as to afford complete relief." 21 C. J. 198. See, also, *Rakow v. Tate,* 93 Neb. 198, 140 N. W. 162; *Shevalier v. Stephenson,* 92 Neb. 675, 139 N. W. 233; *Bell v. Dingwell,* 91 Neb. 699, 136 N. W. 1128; *Bank of Stockham v. Alter,* 61 Neb. 359, 85 N. W. 300.

"The provisions of codes and practice acts with reference to joinder of causes of action and counterclaims have not changed the rule with regard to retention of jurisdiction in equitable actions. * * * The court is not restricted to an adjustment of the rights of the parties as they existed when suit was brought, but will give relief appropriate to events occurring pending the suit." 21 C. J. 137. See, also, *Loosing v. Loosing,* 85 Neb. 66, 76, 122 N. W. 707.

It thus appears that the indemnitors in this case were proper, though not necessary, parties to the original foreclosure proceeding; that no misjoinder was created by making them such; and that the decree of the trial court in

adjusting and determining matters as of the date of the trial was not erroneous, and the same is, in all respects,

AFFIRMED.

HAZEL T. GRAFF, APPELLANT, V. AUGUSTA K. GRAFF, APPELLEE.

286 N. W. 788

FILED JULY 3, 1939. No. 30584.

1. Wills: CONSTRUCTION. Where there is a devise to one in general terms only, expressing neither fee nor life estate, and a subsequent limitation over of what remains at the taker's marriage, and if there is also given to the taker an express power of disposition, which is not absolute, but is limited and restricted as to its exercise, the devise is construed to pass a life estate only.
2. ———. A power given in a will to sell real estate, and invest the proceeds for the best interests of testator's children, does not authorize a gift of such property, and such a transfer is void.

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

Harry R. Ankeny and *Clinton J. Campbell,* for appellant.

Jack, Vette & Lovewell, contra.

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

PAINE, J.

The plaintiff, Hazel T. Graff, filed suit to quiet title to a quarter-section of land in Gage county as against a judgment lien claimed by her sister-in-law, Augusta K. Graff, defendant. The trial court found in favor of the defendant and her judgment lien. Plaintiff appealed.

The facts may be briefly stated as follows: Henry Graff made a will April 11, 1905, and the issues must be determined in this case from a construction of the terms of such will. The testator died March 27, 1908, and on April 1, 1908, the will was filed for probate, the petition setting out that his only heirs were his widow, Susie Graff, his son,

Clarence W. Graff, then 19 years of age, and a daughter, Hazel T. Graff, then 16 years of age, who is the plaintiff herein.

On April 25, 1917, Clarence W. Graff married the defendant, Augusta K. Graff, and on August 28, 1921, their son, Joseph, was born. On March 1, 1923, a divorce was granted to Augusta from Clarence, the decree providing for payments of $50 a month for the support of the son, Joseph, said payments to begin April 1, 1923, and continue until the son, Joseph, was 14 years of age.

On January 8, 1930, a warranty deed for the quarter-section of land in Gage county was made by the widow, Susie Graff, and her son, Clarence, to her daughter, Hazel T. Graff, the consideration in said deed being one dollar and love and affection, and the deed was filed for record the same day.

The last payment made by Clarence W. Graff for the support of his son, Joseph, was for the month of September, 1930, after which no payments were made. An execution was issued on the judgment in the divorce case against Clarence W. Graff, and returned unsatisfied August 24, 1935. The widow, Susie Graff, died October 11, 1937, without having remarried.

On October 1, 1938, the petition to quiet title was filed in the case at bar, and exhibit A, attached thereto, is the will of Henry Graff. This will was drawn by Edwin N. Kauffman, an attorney of Wymore, and the second paragraph reads as follows:

"Second: I give and bequeath to my beloved wife Susie Graff the use income rents and profits of all the residue of my estate both real and personal after paying the charges mentioned in paragraph one of this instrument; so long as she remains unmarried; in case she should marry again after my death I direct that she shall then have one-third of my estate both real and personal, with absolute title thereto and the other two-thirds of my estate shall then be given in equal shares to my children then living in absolute title. I further direct that my said wife shall have the right and she is hereby empowered and authorized at any time

she desires to sell and convey by deed or bill of sale any or all real estate or personal property and invest the proceeds of such sales in such property and in such manner as she in her discretion shall deem for her best interests and the best interests of our children."

The appellant sets out several errors relied upon for reversal, which may be briefly stated as follows: That the trial court erred in holding that under the will the widow took a life estate, and not the fee title to the real estate; that the court further erred in holding that Henry Graff died intestate except as to the life estate of the widow, and that by reason of such intestacy Clarence W. Graff took an undivided one-half remainder interest in said estate; that the court further erred in holding that the deed from the widow and her son to her daughter was not within her power to give, and was of no effect; that the court erred in holding that the judgment of Augusta K. Graff attached to and was a lien against an undivided one-half interest in the real estate involved.

The plaintiff contends that a gift by will of the use, income, rents, and profits constitutes a gift of the real estate, and says this was first announced by Lord Coke, who asked the question, "For what is the land but the profits thereof?" and cites a multitude of cases which have followed the common-law rule.

In direct opposition to this claim, the defendant maintains that a gift to one during widowhood, or until her marriage, creates simply a life estate determinable on marriage, and this is true whether expressly limited for life or not, and that a power to sell added to the life estate does not include authority to make a gift of the property, or to convey it without consideration, and that such a transfer is fraudulent and void. This presents to this court a clear-cut issue, upon the determination of which the decree entered by the trial court stands or falls.

The court must not give undue weight to a single clause, for it is an accepted rule of construction of wills that they must be construed as a whole, giving to each word and

sentence such significance as will carry into effect the true intent of the testator, which intent will control over any arbitrary rule.

It has often been said that a court must, with care and patience, obtain first a full view of everything within the four corners of the instrument itself. We are assisted in this by two statutory rules of construction: First, section 76-109, Comp. St. 1929, setting out the duty of the court to carry out the testator's true intent; second, section 30-202, Comp. St. 1929, that a will shall convey all the estate the testator had unless it shall clearly appear by the will that he intended to convey a less estate. This provision renders ineffective the old common-law rule that, where a fee is given in one clause of a will, subsequent clauses attempting to cut down the estate would be void.

An examination of paragraph 2 of the will, set out herein, shows that the testator gives to his widow the use, income, rents, and profits of this quarter-section of land, such words indicating clearly that the interest given to the wife was less than the fee in said property. It is just as certain that the intention of the testator was to give her an absolute fee title to only one-third of the real estate in case she remarried, and the language chosen by the attorney who drafted the will indicates this definitely by the words, "with absolute title thereto."

The briefs are replete with citations of authority from many courts, but these questions are not new in Nebraska, and many cases can be cited from the decisions of this court on practically every phase of the construction of wills.

In *Worley v. Wimberly*, 99 Neb. 20, 154 N. W. 849, the testator gave his wife the use of all lands "so long as she lives or remains my widow," and it was argued by appellant that the widow took the estate in fee simple, for the reason that it did not appear that the testator intended to convey to her a lesser estate, and that the district court erred in construing it to devise to her only a life estate, but Judge Barnes said, in affirming the trial court: "This seems to be clearly a limitation upon the extent of her estate in the

real and personal property, and is a valid and effective limitation defining the extent of her estate."

In *Heyer v. Heyer,* 110 Neb. 784, 195 N. W. 109, the will was drawn by a person who was inexperienced in drafting wills, and bluntly provided as follows:

"After my death the farm shall go to my wife, Pauline Heyer.

"After her death the farm shall go to my son, August John Heyer. * * *

"In case my wife cannot keep up the place (farm), I give her the right to sell it, provided she is single.

"Should she marry again she shall not sell it."

In writing the opinion in this case, Judge Blackledge said: "The language of the will is simple. The rules of construction to be applied are elementary. The first two sentences hereinbefore quoted are not subject to construction, when both are considered, they so clearly give a life estate to the wife and remainder to the son."

Other cases might be cited, such as *Grant v. Hoover,* 103 Neb. 730, 174 N. W. 317; *Schimpf v. Rhodewald,* 62 Neb. 105, 86 N. W. 908.

In *Horak v. Stanley,* 249 N. W. 166 (216 Ia. 318), it is said: "Devise of life estate will not be interpreted as devise of fee simply because otherwise testator would die intestate as to remainder."

In *Krause v. Krause,* 113 Neb. 22, 201 N. W. 670, the third paragraph of a will gave all of the real estate owned by the testator to the wife, intending and making her the owner in fee, with full title thereof, but in the fifth paragraph he gives to his two sons all of his real estate which his wife has not sold or disposed of during her lifetime, and it was held that the husband did not vest his wife with a fee simple title in the property.

In *Bretschneider v. Farmers Nat. Bank,* 131 Neb. 495, 268 N. W. 278, the will provided that all of the estate, real and personal, should go to the widow, but if she should die, or marry again, then the property should descend to testator's two sons in equal shares. In this opinion this court

said: "Plaintiff insists that the will set out above is governed by the finding of this court in *Little v. Giles,* 25 Neb. 313, 41 N. W. 186; *Giles v. Little,* 104 U. S. 291. But that will provided that, if the widow should remarry, then all of his estate, *or whatever may remain,* should go to the surviving children. Again, in *Anderson v. Anderson,* 119 Neb. 381, 229 N. W. 124, relied upon by the plaintiff: In this opinion we find a quotation from Thompson, Construction of Wills, 515, sec. 382: 'Where the devise is to the wife "so long as she remains my widow," with a limitation over of the remainder "after the remarriage" and also "after the death" of the wife, she takes a life estate only.' "

In *Carman v. Davis,* 193 Ia. 1076, 188 N. W. 892, the will provided as follows: "I give, devise, bequeath, my estate and property, real and personal, as follows that is to say: to my beloved wife Elizabeth C. McGuire, one-third (1/3) of all my property, both real and personal, and the remaining two-thirds (2/3) to my beloved grandchildren, and shall be divided equal, share and share alike. * * * It is my request and will that after the death of my beloved wife Elizabeth C. McGuire, and after all her just debts are paid, then the remaining part of the estate shall be divided equal, share and share alike between my beloved grandchildren." The court in construing the will said: "If the testator intended to give the wife a fee he did not say so, and in the last paragraph of his will he manifested his intent that his grandchildren upon her death should take her interest, if it became vested. It is an expression of intent on the part of the testator to limit the estate vested in his wife to a life estate."

We will consider only one more decision of our court, which is *Merrill v. Pardun,* 125 Neb. 701, 251 N. W. 834, in which the will gave the property to testator's wife, "to be hers absolutely," but if any property remain at her death it "shall go to my daughter, * * * to be hers absolutely." The decree of the trial court found that the fee title went to the wife. This court, in reversing such holding, said: "The two clauses are to be construed and considered together

to ascertain the true character of the estate in fact granted by the first clause; and * * * the second clause is effective and operative to define and limit the estate granted by the first to and as a life estate with power of disposition." See, also, *Schminke v. Sinclair,* 100 Neb. 101, 158 N. W. 458; 9 Neb. Law Bulletin, 218; *Abbott v. Wagner,* 108 Neb. 359, 188 N. W. 113.

Where there is a devise to one in general terms only, expressing neither fee nor life estate, and a subsequent limitation over of what remains at the taker's marriage, and if there is also given to the taker an express power of disposition, which is not absolute, but is limited or restricted as to its exercise, the devise is construed to pass a life estate only. See 75 A. L. R. 93, Ann.

In the second paragraph of the will, quoted herein, the widow had the right to sell the real estate and invest the proceeds of such sales in such manner as she "shall deem for * * * the best interests of our children." Her right to sell was strictly limited, and in our opinion did not contemplate the right to give all the real estate to testator's daughter for one dollar, love and affection, when one possible effect of such a gift might be to assist the son to avoid making the last portion of the payments due on a judgment awarded in a divorce case by the district court, which monthly sums were to continue until testator's grandson had reached the age of 14 years.

This attempted gift of the property does not comply with the plain instructions of the testator in his will giving her the right to sell and invest the proceeds. A power to sell and invest proceeds does not authorize a gift of the property without consideration, and such a transfer is void. *Abbott v. Wagner,* 108 Neb. 359, 188 N. W. 113; *Garland v. Smith,* 164 Mo. 1, 64 S. W. 188; 49 C. J. 1271.

Without further discussion of the many authorities cited in the excellent briefs submitted, we are convinced that the trial court reached the proper disposition of matters at issue in this case, and its decree is hereby

AFFIRMED.

VILLAGE OF HAMPTON, APPELLEE, V. A. L. GAUSMAN ET AL., APPELLANTS.

286 N. W. 757

FILED JULY 3, 1939. No. 30425.

1. **Appeal.** Where a defendant, who has perfected an appeal to this court, attempts in the præcipe to designate, as appellant also, another defendant, who has not filed a motion for a new trial at law, or an appeal undertaking, it will be treated as an error in designation, which will be disregarded, and the correct status of such party as an appellee will be duly recognized.
2. **Municipal Corporations:** OFFICIAL BONDS. The bond of a public officer, joint and several in form, is not rendered void in favor of the surety because of the failure of the principal to sign it, especially in view of section 12-113, Comp. St. 1929, providing that no official bond shall be rendered void by reason of any informality or irregularity in its execution.
3. ———: ———. Section 12-112, Comp. St. 1929, providing that all official bonds shall be obligatory upon the principal and sureties for the faithful discharge of all duties required by law of such principal, constitutes part of the provisions of such a bond, by construction, and no other provision in the instrument can validly be made to limit the scope of the statutory obligation.
4. **Officers.** A treasurer of public funds is not relieved of all responsibility for funds placed in a legal depository, where the statute does not expressly exonerate him from liability. His status in such a situation is that of a bailee, and he must still exercise reasonable prudence and good faith in protecting the funds and is liable on his official bond for any loss resulting from his failure to do so.
5. ———. Where he has knowledge or acquires information indicating that the depository bank is unsafe, he may be responsible for a consequent loss, if he fails to communicate the facts to the authority charged with designating the depository, or to take other steps to protect the funds.
6. ———. If he is the managing officer of the depository bank, he is chargeable with knowledge of the bank's insolvency, and if he fails in this situation to protect the funds, in order to avoid injuring the bank, he is guilty of a breach of duty equivalent to a fraud.
7. **Municipal Corporations:** OFFICIAL BONDS. In the situations mentioned in the three preceding paragraphs, the surety upon a treasurer's official bond is not relieved of responsibility by a provision in the bond that no liability shall exist against him for any loss of funds occasioned by a bank failure.

8. ———. Where the statute does not expressly relieve a treasurer from all responsibility for public funds placed in a legal depository, the fact that it requires the bank to furnish a depository bond does not operate to release the treasurer from the duty of exercising reasonable prudence and good faith to protect the funds. A depository bond requirement, as such, is not intended to lessen the duties or obligations of the treasurer, but to provide additional security and protection for the funds.
9. ———. A mere audit of the receipts and disbursements of a treasurer of public funds and the approval of his records does not exonerate his bond.
10. **Estoppel.** The fact that a village board has certified to the surety on the treasurer's official bond that the treasurer has duly accounted for all village funds will not, alone, estop the village to show that no accounting was in fact made.
11. **Municipal Corporations:** OFFICIAL BONDS. A village treasurer, who is the managing officer of its depository bank, cannot relieve himself and his surety from liability to the village, on his official bond, by accepting and taking over, as his own successor, a deposit of village funds, where, on the expiration of his term, the bank's financial condition was such that the village funds were needed to keep it open, and that it could not or would not have permitted their withdrawal as an entirety for delivery to a successor, and where, as a result of its continued condition, the bank closed its doors three months later.
12. ———: ———. Where, on the expiration of the term of a village treasurer, the assets of its depository bank, of which he was the managing officer and which closed its doors three months later, are such that a reasonably prudent depositor, familiar with the conditions, would have withdrawn the deposit, a liability may be created on the official bond of such treasurer for his failure to communicate the facts to the village board or to take other steps to protect the funds, if they could at that time have been withdrawn from the bank.
13. ———. The effect or scope of the amendatory provision in chapter 31, Laws 1937 (Comp. St. Supp. 1937, sec. 17-515), that village treasurers shall not be liable for loss of moneys sustained by reason of the failure of a depository bank duly designated and approved, is not involved in this case or determined.

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

Craft, Edgerton & Fraizer, for appellants.

Ira D. Beynon, contra.

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

JOHNSEN, J.

This is an action upon the official bond of a village treasurer, for funds on deposit in a closed bank of which he had been the managing officer. On a trial without a jury, the court entered judgment against the treasurer and his surety for $2,500, the amount of the bond, together with interest at 6 per cent. from May 5, 1932. The surety, Hartford Accident and Indemnity Company, has appealed.

In the præcipe filed by the surety in this court, Gausman, the principal, also is designated as an appellant, but this designation is improper in view of the fact that he filed no motion for a new trial in the district court and furnished no appeal undertaking. He can therefore only be treated as an appellee, and, as against him individually, no question can be considered with respect to the correctness of the judgment. We will not, however, dismiss the surety's appeal, as plaintiff urges us to do, for this error in designation, but will disregard the error and recognize Gausman's correct status.

The surety contends that the trial court erred in rendering judgment against it on the bond, for the following reasons: (1) The bond was not signed by the principal. (2) It expressly provided that the surety should not be liable for any loss of funds occasioned by a bank failure. (3) The depository bank did not fail until after expiration of the bond, after approval of the treasurer's accounts, and after Gausman's reelection for a new term. (4) The evidence did not establish that the bank was insolvent during the term of the bond.

Under the pleadings, the first contention of the surety might perhaps be ignored, but we shall dispose of it on its merits. The bond of a public officer, joint and several in form, as all official bonds are required to be (Comp. St. 1929, sec. 12-102 *et seq.*), is not rendered void in favor of the surety because of the failure of the principal to sign it, especially in view of section 12-113, Comp. St. 1929, pro-

viding that no official bond shall be rendered void by reason of any informality or irregularity in its execution. *Pima County v. Snyder,* 5 Ariz. 45, 44 Pac. 297; 22 R. C. L. 499, sec. 180; 110 A. L. R. 959, annotation.

The surety's second contention is based on the following provision in the bond: "The 'Surety' shall not be liable hereunder for the loss of any public moneys or funds occurring through or resulting from the failure of, or default in payment by, any banks or depositories in which any public moneys or funds have been deposited, or may be deposited by, or placed to the credit, or under the control, of the 'Principal.'" Under section 12-112, Comp. St. 1929, Gausman's bond was obligatory upon him and his surety for the faithful discharge of all legal duties resting on him as village treasurer. The statute, by construction, constituted part of the bond, and the scope of the statutory obligation could not validly be limited by any provision in the instrument. *Curnyn v. Kinney,* 119 Neb. 478, 229 N. W. 894; *United States Fidelity & Guaranty Co. v. McLaughlin,* 76 Neb. 307, 107 N. W. 577; *Holt County v. Scott,* 53 Neb. 176, 73 N. W. 681. Whatever the measure of Gausman's duty was to account for the funds of the village under the law, it could not be restricted, nor could the surety's liability, by the bond provision on which the surety seeks to rely.

The liability of a public officer in this state for funds entrusted to his care by virtue of his office is that of an insurer, except as it has been modified by statute. *Ward v. School District No. 15,* 10 Neb. 293, 4 N. W. 1001; *Thomssen v. Hall County,* 63 Neb. 777, 89 N. W. 389. He must account absolutely for all funds lost in an insolvent bank, where the bank is not a validly designated depository or where the deposit is otherwise unauthorized by law. *Knox County v. Cook,* 126 Neb. 477, 253 N. W. 649. And even where the funds have been regularly placed in a designated depository, this is not a complete defense to the officer, unless the statute expressly relieves him of all responsibility for the deposit. His status in such a situation is that of a bailee; he must still exercise reasonable prudence and

good faith in protecting the funds and is liable on his official bond for any loss resulting from his failure to do so. *United States v. Howard,* 302 U. S. 445, 82 L. Ed. 352, 58 S. Ct. 309. Where he acquires knowledge of facts showing the bank to be unsafe, he may be responsible if he fails to communicate the information to the authority charged with designating the depository, or to have the funds removed. *City of Cozad v. Thompson,* 126 Neb. 79, 252 N. W. 606. If he is the managing officer of the bank, he is chargeable with knowledge of the bank's insolvency, and, if he fails in this situation to protect the funds, in order to avoid injuring the bank, he is guilty of a breach of duty amounting to fraud. *Independent School District v. Flittie,* 54 S. Dak. 526, 223 N. W. 728. For a breach of any of the foregoing duties, or of any other duty, resulting in a loss, his surety is liable, in spite of any attempted limitation in the provisions of the official bond.

Gausman was elected village treasurer on May 5, 1931. Under section 17-514, Comp. St. 1929, he became the custodian of all funds belonging to the village. Under section 17-515, then also in force, he was required to deposit the funds for safe-keeping "in the state or national bank doing business in the city or village, and of approved and responsible standing." The village board was empowered to designate a depository, and it was provided that "the city or village treasurer shall not deposit such moneys or any part thereof in any bank or banks other than such as may have been so selected by the city council or board of trustees for such purposes, if any bank or banks have been so selected." There was no provision in the statute expressly relieving the treasurer of all responsibility as custodian for deposits so made. In this situation, as the authorities cited indicate, while the designation of a depository would remove the treasurer's liability as insurer, his obligation as bailee still remained.

In this case, on Gausman's election as treasurer, the village board, on his application, designated the Farmers State Bank of Hampton, of which he was managing officer,

vice-president, director and stockholder, as official depository in place of its competitor. The bank gave the village a depository bond, signed by some of its directors as sureties, and it is argued that this fact should be considered in connection with the provision of the treasurer's bond purporting to exonerate the surety on losses occasioned by a bank failure. The requirement that state banks designated as depositories of village funds furnish a depository bond was first made by the legislature in 1931. Laws 1931, ch. 33. Up to that time, state banks, presumably because of the guaranty fund provisions of the statute, had been exempt from giving depository bonds, although national banks had not. Chapter 33, Laws 1931, had been enacted and approved at the time Gausman was elected village treasurer, but it contained no emergency clause and therefore did not go into effect until several months later. The bank, however, furnished a depository bond in compliance with its provisions. This statutory requirement was not intended to lessen the duties or obligations of a village treasurer, but merely to provide additional security and protection for village funds. In a parallel situation, where it was desired to lessen the liability of a treasurer of public funds, because of the furnishing of a depository bond, express language to this effect was used in the statute. Section 77-2513, Comp. St. 1929 (Laws 1891, ch. 50, sec. 11), provides that "No treasurer (of state or county funds) shall be liable on his bond for money on deposit in a bank under and by direction of the proper legal authority if the bank has given bond." This statute, by its title, is limited to state and county funds and, of course, has no application to a city or village treasurer, although this fact appears to have been overlooked in the opinion in *City of Cozad v. Thompson,* 126 Neb. 79, 252 N. W. 606.

Legislative intent not to release a treasurer of public funds from all liability by the mere designation of a depository and the giving of a depository bond, but to require an express declaration in the statute to that effect in order to accomplish it, is further evidenced by the enactment of

chapter 31, Laws 1937. This statute was intended apparently to give treasurers of cities of the second class and villages the same exemption from liability as was accorded state and county treasurers under section 77-2513, Comp. St. 1929. It provided that such treasurers shall not be liable for any loss of moneys sustained by reason of the failure of any depository duly designated and approved. It is confirmatory of the fact that, without such an express exemption in the statute, it cannot be held to exist. The statute referred to was enacted subsequent to the accrual of the rights sought to be enforced in this case and so has no application here. Whether it would in any event shield a treasurer, if he failed to exercise good faith, is not now before us.

In the situation presented, the provision in Gausman's bond that the surety shall not be liable for any loss occasioned by a bank failure is not available as a defense, because it is contrary to Gausman's obligation, as the statutes then existed.

The surety's third and fourth contentions involve primarily the question of when the loss must be deemed to have occurred and the sufficiency of the evidence to establish such fact. They will accordingly be considered together.

Gausman, as has been indicated, was elected village treasurer for one year, commencing May 5, 1931, and gave bond for the term from May 5, 1931, to May 5, 1932. At the expiration of his term, he was reelected for another year, but he did not furnish a new bond. An auditing committee, appointed by the village board, reported on July 5, 1932, that his accounts were correct. The chairman of the board on August 2, 1932, furnished the surety with a certificate reciting that the treasurer's books and accounts had been examined and "found to be correct in every respect, with all funds properly accounted for." On August 15, 1932, the bank closed its doors. The village had over $7,500 on deposit on May 5, 1932, and substantially the same amount at the time the bank closed, although in the meantime some deposits and withdrawals had been made.

The surety argues in this situation that there was no loss during the term of the bond. The position of the village, on the other hand, is that it would have been impossible for Gausman to have accounted for the funds at the expiration of the bond term, on May 5, 1932, and that the loss therefore had actually occurred before that date. If the condition of the bank was such on May 5, 1932, that it could not or would not then have permitted Gausman to have withdrawn the funds of the village for the purpose of turning them over to a successor, and this situation continued to exist until the closing of the bank, then there certainly was a loss during the term of the bond as to such funds as the village never thereafter received. In these circumstances, Gausman, as village treasurer, should have acted upon the knowledge which he, as managing officer of the bank, had of its financial condition, in time to have prevented the loss. His failure, under these circumstances, seasonably to have communicated the facts to the village board for their appropriate action or to have taken other steps to have the funds withdrawn in proper time would constitute a breach of duty and might create a liabilty on his official bond.

The surety insists that the bank's condition on May 5, 1932, is immaterial and can give rise to no liability on the bond, because Gausman made such an accounting to himself as his own successor and to the village board as to exonerate his bond. The certificate from the chairman of the village board to the surety is said to be conclusive evidence that Gausman made a proper accounting. The mere checking of the treasurer's receipts and disbursements by the village board and the approval of his records would not exonerate his bond. Nor would the fact that the chairman of the board certified to the surety that the treasurer had duly accounted for all funds estop the village to show that no accounting had in fact been made. Gausman certainly could not legally account to himself, if he had nothing to account with. The transfer from his one hand to the other of a checkbook to a worthless bank account would not constitute a legal accounting. *Bush v. Johnson County,* 48 Neb. 1, 66 N. W. 1023.

The question then is whether the evidence sufficiently established that the deposit was worthless on May 5, 1932, because the bank would not or could not have permitted its withdrawal. The evidence is not as detailed as it might have been, but it is a reasonable and natural inference from the record that the village funds were needed to keep the bank open and that any attempt to withdraw them in their entirety would have precipitated its closing. In the light of the examination reports contained in the record, and the fact that the bank closed its doors three months later, the fact is that it was potentially and causatively closed on May 5, 1932. Some deposits and withdrawals were permitted to be made subsequent to May 5, 1932, but, as has already been indicated, the total amount of village funds in the bank remained substantially unchanged. But, in any event, if the amount of the loss was thereby slightly reduced or recouped, it was certainly not obliterated. The funds which the village never received were continuously lost to it since May 5, 1932.

We need not discuss all the evidence bearing on the bank's financial condition. The bank had been operating at a loss. Its cash reserve had been consistently, over a long period of time, lower than the statutory requirement. It was frozen with real estate and slow loans, as were many other state banks in that period. It had approximtely $80,000 in deposits. Of its assets, $7,500 represented banking house and fixtures and $24,000 represented other real estate. Its real estate greatly exceeded the amount contemplated by statute, and it had been carried more than five years under special permission of the banking department. The last extension granted by the department, referred to in the record, was to January, 1932. The history of the property gave no hope of immediate disposition, and the banking department estimated a substantial ultimate loss thereon. In an examination report of November 4, 1931, loans aggregating $14,000 were required to be eliminated. There were other doubtful assets. An additional $19,000, from its past history, was classified as slow, with the prospect of a long

period of liquidation. A report to the banking department on April 16, 1932, showed that the bank had $2,670 cash in its vault and $8,130 on deposit in correspondent banks. Its total available cash resources therefore approximated $10,800. Of this amount, $8,000 represented borrowed cash from the First National Bank of Lincoln, secured by pledged assets, with a maturity date of June 18, 1932. Comparative reports indicated no hope of improvement in the bank's condition, but an inevitable trend toward complete congelation. Its cash assets would not have permitted it to meet its bills payable and pay off plaintiff's deposit. An attempted withdrawal of plaintiff's deposit obviously would have so shattered its reserve as to have precipitated immediate closing of the bank. It is hardly reasonable to believe that the bank would have given plaintiff an unfair preference over its other depositors just before it would be obliged to lock its doors. The conclusion seems to us, therefore, inescapable that Gausman could not, on May 5, 1932, actually have accounted to the village or to his successor for the amount of the funds in the bank.

But, if this conclusion should appear in any way speculative, it is unnecessary to rest Gausman's liability here. A reasonably prudent depositor, familiar with the condition of the bank's assets on May 5, 1932, would certainly have withdrawn his money on that date, had it been possible for him to do so. And so, if the funds of the village could in fact have been withdrawn at the expiration of Gausman's term, his failure to take any steps to have this done constituted a breach of duty which was responsible for the village's loss. If the village board had been given the facts about the bank's condition, which Gausman knew, or copies of the examination reports and comments of the banking department, before the expiration of Gausman's term, it would hardly be contended that they would have permitted the funds to remain in the bank after May 5, 1932. Gausman could not have made a proper accounting, so far as the village was concerned, without communicating to the village board the knowledge which he had of the precarious situa-

tion of the funds. If he had attempted, in silence, to pass the deposit on to a successor, the latter, taking over the deposit without knowledge of the facts, would certainly be entitled to claim, on the closing of the bank three months later, that a proper accounting had never been made. And even if the relationship between the treasurer and his successor might be such as to preclude the latter from making the claim, the village clearly would be entitled to do so and to establish a liability on the original treasurer's bond. *Bush v. Johnson County, supra.* The surety in this case, therefore, cannot escape liability to the village merely because Gausman's receipts and disbursements had been checked and he had purported to enter on a second term as treasurer.

Contention is made that the trial court erred in the amount of the judgment. The testimony as to the salvage received by the village from the receiver of the closed bank and the sureties on the depository bond and the application made of it was not gone into by either party as fully as it might have been. Both parties seem to have been more strenuously concerned about the legal principles involved in the action. There is sufficient, however, in the testimony of Gerald Fenster, the village treasurer, to sustain the trial court's finding on the amount of defendant's liability. It was also proper to allow interest on the amount of the recovery from May 5, 1932, the date of the expiration of Gausman's term, when the loss to the village must be regarded as having occurred. Other minor contentions made by the surety do not call for further discussion. The conclusion of the trial court on the legal principles and facts involved was correct and the judgment should be affirmed.

Plaintiff has been allowed $400 attorney's fees in the district court. An aditional $200 will be taxed as costs here.

AFFIRMED.

PAINE, J., dissenting.

I have been unable to reach the same conclusion that is set out in the opinion adopted by the majority of the members of this court, and therefore file this dissent.

This was a rather unusual case in several particulars, and after the first argument to our court, made November 9, 1938, no opinion was agreed upon, and a reargument was ordered February 20, 1939.

As I understand it from an examination of the record before us, the facts may be briefly stated as follows: This is an action brought by the village of Hampton upon the official bond of the village treasurer for loss of village funds deposited in a bank. Judgment was entered by the district court for $2,500, with interest at 6 per cent. from May 5, 1932, against A. L. Gausman, village treasurer, and the Hartford Accident and Indemnity Company, surety upon his bond.

The bond sued upon appears in the bill of exceptions as exhibit No. 27, and was not signed by the principal, A. L. Gausman, village treasurer, but only by the Hartford Accident and Indemnity Company, being executed by William H. Wallace, its attorney-in-fact, of Chicago, Illinois. This bond was given to cover the specific term beginning May 5, 1931, and ending May 5, 1932, and was approved and accepted by the village board at its meeting held July 6, 1931. In the third paragraph it provided that the surety should not be liable for any loss of public money by reason of the failure of any bank.

The bank's ledger sheets, exhibits Nos. 1, 2, 3, 4, and 5, show the deposit made to the village treasurer's account on May 5, 1931, was $5,926.61, and that the balance in said account fluctuated between $5,000 and $8,000 during the year. On July 6, 1931, the plaintiff village duly designated the Farmers State Bank of Hampton as a depository for its funds, and said bank as principal, with six individuals as sureties, executed and gave to the said village a depository bond in the sum of $7,500. This depository bond requirement, being section 17-515, Comp. St. 1929, did not at that time require a state bank to give such a bond, but it was amended, without an emergency clause, by the legislature on April 18, 1931 (Laws 1931, ch. 33), by omitting four words, "other than state banks," thus thereafter requiring

state banks to give a depository bond. As the legislature adjourned May 2, 1931, the amendment did not take effect until August 2, 1931, but the village board complied with a law which had been duly passed, but had not yet become effective.

The record indicates that the bank failed August 15, 1932, with village funds deposited therein of $8,284.55, and the village began an action on the depository bond, and secured a judgment of $9,055. On said judgment the village was paid by the receiver of the bank $3,000, and collected an additional amount on said judgment from two sureties, this being shown in the minutes of the village board meeting of January 29, 1936, on page 41 of the bill of exceptions, and a portion thereof reading as follows: "It was moved by Feelhaver and seconded by Nickels that the clerk be instructed to make the records of this meeting show the receipt of a $2,000 certified check issued to Attorney I. D. Beynon, as trustee and attorney for the Village of Hampton, as payment or settlement in full of Abe Troester and Mike Troester's liability suit also Whereupon, Attorney I. D. Beynon, issued a personal check to the Village of Hampton, for the sum $1,600 after deducting $400 as his attorney fees as per contract in lieu of the aforesaid $2,000 check dated Jan. 29th, 1936." This makes a total amount collected on depository bond, as shown by the record, of $5,000.

A. L. Gausman was elected treasurer by the village board for one year on May 5, 1931, by a vote of three for and two against him. On July 6, 1931, the fidelity bond in suit of $2,500 and the depository bond of $7,500 furnished by the bank were each accepted and approved.

On April 29, 1932, at the close of his term of office, the village treasurer's annual report was received and set out in the minutes of the board meeting in some detail, showing amounts in the various funds, and a balance on hand May 1, 1932, of $6,089.16. At the board meeting July 5, 1932, the auditor's report was read and accepted. They thereby found the treasurer's full and final report at the end of his term of office correct.

Defendant's exhibit A is addressed to the Hartford Accident and Indemnity Company, and reads:

"This is to certify that on the 28th day of June 1932 the books and accounts of A. L. Gausman, Village Treasurer of Hampton, Nebraska in the position of Village Treasurer were examined up to the close of business on the 5th day of May 1932, and were found to be correct in every respect, with all funds properly accounted for.

"Dated at Hampton, Nebraska this 2d day of August 1932

(Village Seal) Chas. H. Feelhaver
Chairman, Village Board
of Trustees, Hampton,
Nebraska."

This certificate was made after the hired auditors had found the books of the treasurer to be correct and such auditors' report had been approved by the village board.

The minutes of the village board show, under date of April 29, 1932, that A. L. Gausman was elected as village treasurer for the coming year, but no new official bond is shown to have been given for his second term.

In the case of *Thurston County v. Chmelka,* 135 Neb. 342, 281 N. W. 628, in an action against a school district treasurer and his surety, this court held that, when such a "treasurer succeeds himself in that office, he changes his official personality, for each term of office is a separate and distinct entity."

"A surety is not to be held beyond the precise terms of his contract. His liability is *strictissimi juris,* and cannot be extended by construction. Where the term of the officer is for a definite or fixed period, the surety is only liable for his faithful performance of his duties during that period. This is clearly so where the bond itself specifies the period." *People v. Toomey,* 122 Ill. 308, 13 N. E. 521.

In *Morley v. Town of Metamora,* 78 Ill. 394, 20 Am. Rep. 266, where a supervisor was elected his own successor and gave a new bond, and at the end of his first term made a report, showing a certain amount in his hands belonging

to the town, which report was approved, the court was of the opinion that the report should be considered as true.

In another case it was asked: "Can the fact that there was no second bond exacted, and no second sureties given who could be held responsible for the last term, extend the responsibilities of the sureties on the first bond?" That opinion said: "We think not. They were under no obligation to see to it that the treasurer should furnish a second bond—that was a duty devolving upon the board of administrators of the asylum themselves. They cannot make the responsibility for a failure to have had such bond furnished fall on other parties." *Board of Administrators v. McKowen,* 48 La. Ann. 251, 55 Am. St. Rep. 275. See, also, *County of Wapello v. Bigham,* 10 Ia. 39, 74 Am. Dec. 370.

In *Ida County Savings Bank v. Seidensticker,* 128 Ia. 54, 102 N. W. 821, a bank was organized in 1893, and one surety signed the bond of the cashier, who had been elected for one year. Each year the board of directors reelected him cashier, and he continued until March, 1897, when he absconded, owing $7,959.41. The plaintiff brought action upon the bond, and won a directed verdict in the lower court. This was reversed on the ground that the reelection of the cashier each year was more than a meaningless expression of the pleasure of the directors. It was a filling of a vacancy occasioned by the limitation of their previous appointment.

It is a general rule that, in the absence of special circumstances or provisions, the sureties on the bond of a public officer are not liable for his acts or defaults occurring after the termination of the office, and in 81 A. L. R. 14, many authorities are cited from the United States supreme court and many states in support thereof, and in the same annotation it is stated generally that, when an officer is reelected as his own successor, the sureties upon his bond for the first term are not liable for his defaults occurring during the second term. It has even been held, as to money which comes into the hands of an officer on the day immediately following the expiration of his term, that the sureties are not accountable.

Was the bank insolvent during all of the year covered by the fidelity bond sued upon in the case at bar? Exhibit No. 29 is a sworn report of the condition of said bank as of April 16, 1932, which was made to the banking department under date of April 21, 1932, and it showed that $8,133.07 was the total cash balance held in other banks subject to check, and $2,671.60 cash on hand, making a total on hand and subject to check of $10,804.67. The cash reserve as of that date was 13.3 per cent., but the average cash reserve for the last 30 days was 14 per cent. of deposits.

It is claimed that the village treasurer could not have made settlement with himself as his successor in the office of treasurer. However, the board did not demand that he produce in cash the balance shown when he turned in his annual report and the auditor approved his report and books. This bank was on that date a going concern, and paid all checks drawn against it until it was closed on August 15, 1932.

If this sworn report of the officers of the bank, made as of date April 16, 1932, had been that of an insolvent bank, as charged by the village, it was the duty of the state banking department to close it up immediately, which was not done, and it was allowed to continue to do business. Evidence indicates that the bank had in its pouch criticized assets as well as frozen assets, and its cash reserve was slightly under the required 15 per cent., but if this condition made a bank insolvent in the spring of 1932, how many Nebraska state banks would have been solvent?

In my opinion this court does not have before it sufficient competent proof upon which to declare that this bank was insolvent, when the state banking department examined it repeatedly, and permitted it to remain open and do business for some months after this fidelity bond had expired.

After such fidelity bond of the treasurer sued upon in this case had expired by its terms, and his accounts had been duly audited and accepted, and the chairman of the board has certified such fact to the bonding company in writing, then some months later a loss does occur by the closing of

the bank by the banking department, whereupon the village at once brings suit upon its depository bond for its loss, for it had recognized such bank as its legal depository for three months after the fidelity bond had expired.

In *State v. Fidelity State Bank*, 127 Neb. 529, 255 N. W. 781, it was held that it was not illegal to deposit funds in a bank in which a city officer was a bank officer.

In this connection, section 77-2513, Comp. St. 1929, reads as follows: "No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority if the bank has given bond."

The balance on hand belonging to the village at the termination of the first year's term of the village treasurer, and covered by the surety bond in the case at bar, was approximately $6,089.16. What is there in the record to show that treasurer Gausman could not, if it had been required of him by the village board (which it was not), have turned over to the board, with his final report at its meeting that night, checks and drafts for the balance shown to be due the village? If such requirement was not made, how can it be argued that he could not have complied with such a demand? If such a demand had been made that night and complied with, would not the surety on his bond for the first year have been released?

In my opinion, the principles of law involved in the case at bar could well be stated in three paragraphs, as follows:

1. Where the term of an officer is for a definite period set out in a bond, a surety thereon is only liable for the faithful performance of his duties during that period.

2. The fact that an officer was reelected for a second term, but failed to give a bond for such additional term, does not extend the responsibility of the surety furnishing the bond for the first term.

3. A surety on the bond of a public officer is not liable for his acts or defaults occurring after the termination of said bond.

FREMONT FARMERS UNION COOPERATIVE ASSOCIATION, APPELLANT, V. ALVAH MARKUSSEN ET AL., APPELLEES.

286 N. W. 784

FILED JULY 3, 1939. No. 30502.

1. **Creditors' Suit.** It is not necessary to the maintenance of a creditors' suit in this state that some independent ground of chancery jurisdiction, such as fraud or trust, shall exist, but such a suit may be maintained by a judgment creditor to reach any assets of his debtor not immediately subject to execution or garnishment at law, which are not exempt by statute or immune as a matter of public policy. Comp. St. 1929, sec. 20-1565.
2. **Descent and Distribution.** A creditors' suit may be maintained to impress a lien upon the distributive share of a judgment debtor in a decedent's estate, which is in process of administration in the county court, and to require the administrator or executor to account for it, after order of distribution by the county court, to the clerk of the district court or to a receiver appointed for that purpose.

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

John L. Cutright and *Seymour S. Sidner,* for appellant.

Courtright, Sidner, Lee & Gunderson and *William H. Lamme, contra.*

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

JOHNSEN, J.

This is a proceeding in the nature of an equitable garnishment or creditors' suit against the administrator of an intestate's estate and one of the next of kin, to subject the latter's interest in the estate to the satisfaction of some judgments, on which execution at law had been returned unsatisfied. The suit was instituted in the district court for Dodge county, and the estate was being administered in the county court of that county. No decree of heirship or order of distribution had as yet been entered by the county court, but the petition alleged that the judgment debtor would ultimately be entitled to a distributive share in cash,

out of such estate, sufficient to satisfy plaintiff's judgments. The trial court sustained a demurrer to the petition, and, on plaintiff's election to stand on its pleading, dismissed the action.

The appeal involves two questions: (1) Can a suit in equity be maintained to subject, to the satisfaction of a judgment, property which cannot be reached by execution or garnishment at law, where no other independent ground of chancery jurisdiction, such as fraud or trust, is involved? (2) If so, can such a suit be maintained to reach a next of kin's distributive share in a decedent's estate which is in process of administration in the county court?

On the first question, the courts are in hopeless conflict. 5 Pomeroy, Equity Jurisprudence (2d ed.) sec. 2300. The right, in the absence of statutory authorization, to grant such relief, except as an incident in the assumption of chancery jurisdiction on some other recognized ground, such as fraud or trust, has been vigorously denied. *Donovan v. Finn,* Hopk. Ch. (N. Y.) 59; *Greene v. Keene,* 14 R. I. 388; *Harper v. Clayton,* 84 Md. 346, 35 Atl. 1083. This is the rule that, after some vacillation, finally has been adopted by the English courts. 15 C. J. 1383. On the other hand, it has been asserted, with equal force, that the granting of such relief, even where no other ground of equity jurisdiction is present, is a necessary inference from the inherent purpose of chancery to provide a remedy where the inflexible processes and strict rules of legal justice fail. *Pendleton v. Perkins,* 49 Mo. 565; *Bay State Iron Co. v. Goodall,* 39 N. H. 223. The United States supreme court, in *Ager v. Murray,* 105 U. S. 126, 26 L. Ed. 942, declared that it is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and to apply to the payment of his debt any property of the judgment debtor which, by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law.

In many states statutes have been enacted to remove all doubt as to the power of a chancery court to act in such a

situation. 14 Am. Jur. 682. In this state, section 20-1565, Comp. St. 1929, which is part of the statutes relating to proceedings in aid of execution, provides: "Where a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in money, contracts, claims or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods or effects which he may have in possession of any person, body politic or corporate, shall be subject to the payment of such judgment by proceedings in equity, or as in this chapter prescribed."

This provision has been recognized by the courts as conferring jurisdiction in creditors' suits, without the necessity of any other ground of chancery jurisdiction. In *German Nat. Bank v. First Nat. Bank,* 55 Neb. 86, 75 N. W. 531, it was held: "An action in the nature of a creditors' bill may be maintained by a judgment creditor to reach any assets of the debtor subject to the payment of his debts, which cannot be reached by ordinary process of law." On a second appeal (*German Nat. Bank v. First Nat. Bank,* 59 Neb. 7, 80 N. W. 48) the court, though denying relief under the particular facts involved, recognized the right under this statute to maintain a creditors' suit to subject a chose in action to the satisfaction of a judgment. And in *Parsons v. Cathers,* 92 Neb. 525, 138 N. W. 747, the court upheld the right, under this statute, to subject to the payment of a judgment money owing to the debtor on other judgments in his favor against a municipal corporation, which could not be reached by execution or garnishment at law. The opinion says: "In direct terms the equitable remedy extends to the interest of a judgment debtor in a judgment against a 'body politic or corporate.' "

It must therefore be regarded as definitely established that, under section 20-1565, Comp. St. 1929, it is not necessary to the maintenance of a creditors' suit that some independent ground of chancery jurisdiction, such as fraud

or trust, shall exist, but that such a suit may be maintained by a judgment creditor to reach any assets of his debtor not immediately subject to execution or garnishment at law, which are not exempt by statute or accorded immunity on the ground of public policy.

The exemption rights of the judgment debtor involved are not before us on this demurrer. The sole remaining question, then, is whether a distributive share in a decedent's estate, which is in process of administration in the county court, is to be accorded immunity against a creditors' suit, on the ground of public policy.

In *American State Bank v. Phelps,* 120 Neb. 370, 232 N. W. 612, it was declared to be the established rule in this state that garnishment process at law cannot be made to emanate out of one court against another, and it was held that a distributive share in a decedent's estate in the county court, therefore, was not subject to garnishment in the district court. The possibility of jurisdictional clash from the application of the rigid legal process of one court to the other, upon which that decision rests, is an element, however, which the legislature has not deemed it necessary to recognize in dealing with the more flexible processes of a court of chancery in a creditors' suit under the statute. Section 20-1565 makes *any* interest which a judgment debtor may have in money, contracts, claims or choses in action, due or to become due to him, or in *any* judgment or decree, or *any* money, goods or effects which he may have in possession of *any* person, body politic or corporate, subject to a creditors' suit in equity. No qualification or restriction is imposed. It is not required that the judgment or decree sought to be reached must be one rendered by the court in which the creditors' suit is brought, for that would make the statute add nothing to the legal remedy already available in such a case. Any limitation imposed upon the applicability of the statute, as a matter of public policy, is accordingly one of judicial fostering and not of legislative prescription.

The statute, needless to say, can have no application to

judgments in courts of independent sovereignties, such as those of another state or of the federal government, or to property of a judgment debtor within the control of such courts, because the legislature cannot be permitted to exercise jurisdiction over them. Nor, of course, could the legislature, by this statute, be permitted to obstruct the fundamental functioning of our own state courts. It can hardly be said, however, that to give a chancery court jurisdiction to subject a debtor's interest in a judgment or in property in another court of this state, to a creditors' suit, will necessarily constitute a burdensome obstruction to, and an invalid interference with, the process of judicial administration. The courts of this state are intended to function as a unified judicial system, under the supervision of the supreme court. To admit the possibility of uncontrollable judicial conflict in such a situation is to admit our own weakness in judicial coordination. If a situation should arise where an exercise of the jurisdiction created by statute will effect formidable complications in judicial administration or give rise to injustices not comporting with equitable conscience, the court, as in all cases of chancery jurisdiction, has the right to consider the peculiar facts and circumstances of the particular case, within the bounds of recognized equitable principles, and govern the right to relief accordingly. The denial of relief, however, should rest upon a demonstrated injustice, and not on a theoretical or fanciful possibility of judicial complication, such as that upon which the rule applicable to garnishments at law is based.

The jurisdiction of a chancery court to subject the distributive share in a decedent's estate to a creditors' suit, in accordance with the foregoing views, was expressly recognized by this court in *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303, where it was held: "The district courts of the state are invested with ample powers * * * on application of a prior judgment creditor of a beneficiary (of an estate) * * * when such creditor has exhausted his legal remedies, to compel the interest of such beneficiary in such

property, if not exempt, to be applied to the payment of his debts."

The opinion in that case says: "Since the title to the testator's lands, upon his death, vested in his executors, the appellants' judgments are not liens thereon. This suit then must be treated as an equitable garnishment brought by appellants against the executors of the testator's estate to reach the interest of the beneficiaries therein who are debtors of the appellants" (p. 745). "The interest which the heirs have in the estate of the testator, though a contingent one, is still an interest—is property not exempt from being applied to the payment of their debts. * * * The appellants cannot sell the interest of the heirs in this real estate on execution. They cannot seize such interest by attachment process. * * * The appellants have exhausted all the legal remedies for the collection of their debts, and now it is said that this is the end of the law. If this is so, it is a reproach to our system of jurisprudence. But we do not think it is so. It has always been one of the powers possessed by courts of equity to compel the application of a debtor's unexempt property to the payment of his debts when the creditor had no other means of redress. * * * In other words, when all other remedies have failed, a court of equity will, at the suit of a creditor, take the unexempt property of a debtor wherever found, in whatever condition it may be, and cause it to be applied toward the payment of his debt" (p. 734).

The judgment in *Arlington State Bank v. Paulsen, supra,* was reversed on rehearing, in 59 Neb. 94, 80 N. W. 263, on other grounds, but the holding as to the right to maintain a creditors' suit to reach a distributive share in a decedent's estate, which is being administered in the county court, was not challenged.

Defendants rely on *Anheuser-Busch Brewing Ass'n v. Hier,* 52 Neb. 424, 72 N. W. 588, to sustain the ruling of the trial court. In that case it was held that a creditors' bill could not be maintained to reach money held by the clerk of the district court in his official capacity, because such

funds were *in custodia legis*. The opinion says: "The rule that personal property *in custodia legis* is not subject to attachment or garnishment was adopted for the protection of the officer, and to avoid collision of authority and conflict of title. And the same principle forbids the maintaining of an independent equitable action to subject money in the hands of the clerk of the court in his official character." From the facts in the opinion, it appears that the funds in the clerk's hands were awaiting payment by him to the defendant in the creditors' suit, and that suit was brought in the same court where the funds were held. The rule that funds so held are *in custodia legis* in such a manner as not to be subject to garnishment was receded from in *Orchard & Wilhelm Co. v. North*, 135 Neb. 39, 280 N. W. 272, to the extent of holding that money in the hands of the clerk of the court for the sole purpose of payment to the judgment debtor was subject to legal garnishment. The facts in *Anheuser-Busch Brewing Ass'n v. Hier, supra,* would therefore no longer be governed by the premise or the principle which the court there invoked.

It remains to be considered whether a distributive share in a decedent's estate, which is in process of administration, should be clothed with judicial immunity against a creditors' suit, under the doctrine of *custodia legis*. It is clear that the court should not restrict the fullness of the legislative remedy created by section 20-1565 beyond the actual necessities of sound public policy. In this connection, therefore, it is to be borne in mind that the doctrine of *custodia legis* is one of practical convenience only, and not *strictissimi juris*. This court has refused to recognize an absolute immunity in all cases, even as against process at law. In *Pitkin v. Burnham,* 62 Neb. 385, 87 N. W. 160, it allowed garnishment of a sheriff or constable with respect to any surplus property seized by him on execution levy, while at the same time denying the right of another officer to make a levy thereon, on the ground that it was *in custodia legis*. In other words, the court in that case applied the *custodia legis* immunity only to the extent that the necessity and

convenience of the situation required. In *Arlington State Bank v. Paulsen, supra,* while the principle of *custodia legis* was not discussed, the court apparently must not have regarded it as a bar to a creditors' suit against the administrator and the next of kin. In *Oppenheimer v. Marr,* 31 Neb. 811, 48 N. W. 818, the following language occurs in the opinion: "There is to be a limit even to the rule of judicial custody."

These principles control the present case. The immunity of the *custodia legis* doctrine should not be extended beyond the actual demonstrated necessities of a particular situation, since otherwise courts will be making of themselves a sanctuary for property of a dishonest or elusive debtor, on the pretext of safeguarding their officers and agencies from theoretical inconveniences and conjectural confusions. The first concern of a court must always be its availability to a suitor and the fullness of its ability to serve, rather than the convenience of its own officers.

The petition in this case states such a cause of action as *prima facie* to entitle plaintiff to relief. If it is subsequently demonstrated, from the pleadings or the evidence, that such inconvenience and confusion will result as to make the granting of relief inequitable, it should, of course, be denied. In the ordinary case, however, no impairing inconveniences can possibly result from subjecting an administrator to such a suit. The district court necessarily cannot make any order that will interfere with the process of administering the estate and making it ready for final distribution. It can, however, implant a lien on such unexempt portion thereof as may be coming to a particular beneficiary, heir, or next of kin, and require the administrator to account for it, after final order by the county court, to the clerk of the district court or to a receiver appointed for that purpose. In this, there can be no more complication than in the obligation of an administrator to account, on final distribution, to the assignee of a next of kin, or to the guardian of a minor or incompetent beneficiary, or to the administrator of one who has died during the pendency of the proceedings.

Indeed, the court has the power, if necessary, to appoint an actual receiver, and to make such formal order as amounts, in legal effect, to an assignment or transfer to him. In *Riggin v. Hilliard*, 56 Ark. 476, 20 S. W. 402, the court in discussing the manner in which a claim owing to a judgment debtor could be subjected to a creditors' suit said: "That can be accomplished under proper orders of the court—as by a sale or compulsory assignment of the debt for the purpose of applying the proceeds."

It follows that the trial court erred in holding that a creditors' suit could not, under any circumstances, be maintained against the administrator of a decedent's estate, which is in process of administration in the county court, and in sustaining a demurrer and dismissing plaintiff's petition on that ground. The jurisdictional question is the only one that has been considered in this opinion.

REVERSED AND REMANDED.

THURSTON COUNTY FARM BUREAU, APPELLANT, V. THURSTON COUNTY ET AL., APPELLEES.
287 N. W. 180

FILED JULY 11, 1939. No. 30706.

Agriculture. Under the provisions of section 2-1113, Comp. St. Supp. 1937, where there is submitted to the voters of a county at a general election the question of whether or not an appropriation shall be made for the support of agricultural extension work in a county where such support was not being granted when the act was passed, the proposition, in order to authorize the appropriation, must receive a majority of all votes cast at the election at which the proposition is submitted.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti and *A. P. Coleman*, for appellant.

Alfred D. Raun, contra.

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

SIMMONS, C. J.

This is an action for a declaratory judgment construing section 2-1113, Comp. St. Supp. 1937. The matter was submitted upon an agreed statement of facts. The plaintiff herein is a duly organized farm bureau. The defendants are the county of Thurston, its three commissioners, and one resident taxpayer. Prior to September 1, 1938, a proper petition was filed with the county clerk of defendant county, asking for the submission to the voters of the question whether there should be county funds appropriated for the support of agricultural extension work in the defendant county beginning January 1, 1939. Pursuant to law, the county clerk placed upon the ballots for the general election of November, 1938, the following question: "Shall an appropriation be made annually from the general fund of the county for the support of agricultural extension work? Yes ☐ No ☐" There were 1,119 ballots cast against, and 1,465 cast for the proposition, a total of 2,584. The highest number of votes cast for any office or proposition was 4,003. The plaintiff, contending that a majority of all the votes cast *on the proposition* being favorable thereto, filed its estimate and asked the county board of defendant county to set aside in the annual budget the amount authorized to be appropriated for agricultural work. The defendant commissioners refused, contending that before the appropriation could be made the proposition must be carried by a majority *of all votes cast at the election,* and that the proposition failed to receive the necessary favorable votes.

Plaintiff brought this action for a declaratory judgment, to determine its rights and status, and to secure a construction of the statute on the one proposition of law.

The trial court found that "the results of the election held on November 8, 1938, do not entitle plaintiff to any appropriation of funds from the county of Thurston for the year 1939." Plaintiff appeals.

The record presents the single question of law: Does the

statute require the proposition to receive a majority of all votes cast at the election or a majority of all votes cast on the proposition, even though that majority be a minority of all votes cast?

The provision of the act to be construed is set out hereafter in this opinion. The rules of construction require this court to discover, if possible, from the language of the act, the legislative intent and give effect thereto. *Hansen v. Dakota County,* 135 Neb. 582, 283 N. W. 217. The wisdom of the act or the merits of the present proposal cannot be considered in determining the question here presented.

" 'The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the preexisting law and any other acts relating to the same subject.' *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93, 175 N. W. 531." *Chicago & N. W. R. Co. v. Bauman,* 132 Neb. 67, 271 N. W. 256.

" 'In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute.' *Campbell v. Youngson,* 80 Neb. 322, 114 N. W. 415." *Mills v. Mills,* 130 Neb. 881, 266 N. W. 759.

"In order to ascertain the intention of the legislature in the amendment of a statute, the course of legislation on the subject and existing conditions created under the former statutory provisions may be considered." *Union P. R. Co. v. Heuer,* 97 Neb. 436, 150 N. W. 259.

This legislation began with the enactment of House Roll 524 in 1913 (Laws 1913, ch. 227; Rev. St. 1913, secs. 70 to 72, inc.), providing for the employment of county farm demonstrators to aid in the development of agricultural methods. That act provided that upon a "petition, signed by at least *ten per cent.* of the farm landowners * * * the county board may set aside from the county general fund

a sum of money to employ" a county farm demonstrator. The act contained no provision for an election, and provided no way for any one to protest. The petition and the decision of the county board controlled. No limit was placed upon the amount of money that could be appropriated.

The legislature in 1919 repealed the foregoing act (Laws 1919, ch. 203; Comp. St. 1922, secs. 69 to 73, inc.), and enacted a new act providing: "Whenever in any county not less than three hundred *bona fide* residents of the county who are engaged in farming, or a smaller number, when such smaller number is not less than one-half of the *bona fide* farmers in any county, shall have organized themselves into a Farm Bureau, shall petition the county board to appropriate" money for the promotion of agriculture and the employment of a county agricultural agent, "the county board shall set aside annually" sums of money, as provided in the act. Under the conditions of the act, the county board were required to issue warrants to pay claims approved by the farm bureau. The amount that could be appropriated should not exceed an amount equal to a one-mill levy on the assessed valuation of the property of the county, and in no instance more than $5,000.

The legislature in 1923 repealed the foregoing act (Laws 1923, ch. 1) and enacted Senate File No. 9, providing that the county board *shall set aside* money for the purpose of improving agriculture and the employment of an agricultural agent upon the petition of the required number of persons. The act required the petitions to be filed not later than September 1, 1924, and every second year thereafter. The petitioners had to be persons "actually and actively engaged in farming." The number of signers required increased from 100 in counties having a population of 3,000 or less, to 600 in counties having a population of more than 17,000. The act further provided that, if within twenty days after the filing of the petition, there was a remonstrance filed against the allowance of the farm bureau budget, signed by residents actually and actively engaged in farming, numbering one-eighth more than signed the

petition, the county board should submit the question to a vote of the *people of the county* at the next *general election.* The manner of submission was set out, and section 7 provided: "If a majority of the electors voting *on the question* shall express themselves in favor of the creation of a county agricultural agent the county board shall grant the petition. If a majority of such electors shall vote against such proposition, the county board shall deny the request of the petition." The total amount that could be appropriated was reduced to $3,500. In this act, for the first time, provision is made for remonstrances, for an election, and for a decision by the people of the county.

By House Roll No. 36 (Laws 1925, ch. 2) and by Senate File No. 283 (Laws 1927, ch. 55) amendments were made to a part of the act not important to be noted here. The act as so amended became sections 2-1101 to 2-1109, inc., Comp. St. 1929.

In 1933, by Senate File No. 309 (Laws 1933, ch. 3), the last named sections were repealed, and a new act passed which is now sections 2-1110 to 2-1117, inc , Comp. St. Supp. 1937. This last act enlarged the scope of the previous acts, but all the acts had the same general purpose. By this act "a farm operator who is a legal voter" could be a petitioner. The provisions of this act with reference to the petitions, the election, etc., which is to be construed, are as follows:

"If on or before September 1 of any even numbered year, a petition is filed with the County Clerk containing the names of *twenty per cent.* (20%) or more of the 'farm operators' of any county or counties, as determined by the last available Federal Census comprising a district under this act, asking the submission *to the voters* of the question of whether there shall be county funds appropriated for the *continuance* or *support* of County Agricultural Extension Work in said county or district beginning on January 1st after the filing of said petition, it shall be the duty of the clerk of said county to have placed upon the ballot *at the election* following the filing of said petition the question, 'Shall an appropriation be made annually from the

general fund of the county for the support of Agricultural Extension Work?

Yes ☐ No ☐

"If a majority of the votes cast are opposed to such appropriation then the county board shall deny the appropriation. If a majority of the votes cast are in favor of the appropriation then the county board shall annually set aside in the general fund of the county an amount equal to the county farm bureau budget provided such sum shall not exceed an amount equal to a one-fifth mill levy on the assessed valuation nor more than $2,000 in counties having a population of less than 10,000; $2,400 in counties having a population of less than 17,000 and more than 10,000; and $2,800 in counties having a population of 17,000 or over and, as claims are approved by the Board of Directors of the Farm Bureau and filed with the County Clerk, the county board shall order warrants to be drawn upon the general fund of the county in payment of such claims.

"It is further provided that in counties where Extension Work is being conducted in accordance with sections repealed by this Act the county board *shall continue* to appropriate funds for the *continuance* of extension work *until such support is denied by vote as provided for in this section:* Provided further that if before January 1st, 1934, there is filed with the county board, a petition containing the names of 51 per cent., or more, of the qualified voters voting for Governor at the last general election in any county where a county farm bureau exists, said petition praying that the county appropriation for extension work in such county be discontinued, it shall be the duty of the county board to discontinue the appropriation of county funds for the support of extension work in said county." (Italics ours.)

It is noted that by the last act the number of petitioners has again been changed, that remonstrance petitions are not provided for, and that elections by "the voters" are necessary.

It is also noted that the various acts clearly demonstrate a progressive intent on the part of the legislature to restrict

the appropriation of moneys for the purposes of the act unless that expenditure is approved by the voters, and to require clearer proof of that approval.

It will also be noted that by the provisions of the 1923 act the appropriation of the money could be made when "a majority of the electors voting *on the question*" were favorable. By the provisions of the 1933 act, that qualification was removed and "a majority of the votes cast" was required. The fact that each of these acts, while repealing preceding ones, actually was an amendment (see *First Trust Co. v. Smith*, 134 Neb. 84, 277 N. W. 762, second syllabus), and the similarity of the language used in section 2-1107, Comp. St. 1929, and that used in section 2-1113, Comp. St. Supp. 1937, as to the majorities required, indicate that the legislature in drafting the latter act followed the language of the former act and intentionally omitted the qualification "voting on the question," and intended thereby to increase the required majority to one of "all votes cast" at the election. Had the legislature desired to limit the required majority to those voting *on the question*, they could have done so by the simple method of not omitting the language. Such an intent is in accord with the demonstrated progressive purpose of the legislature to require approval of the voters before the expenditure of public moneys for the purposes of the act.

"Statutes are to be construed in the light of a clearly apparent legislative policy." *School District of Omaha v. Gass*, 131 Neb. 312, 267 N. W. 528.

It is also noted that the 1933 act contained a provision authorizing the discontinuance of county assistance to farm bureaus upon petition, where that assistance had been previously authorized. No such provision existed in the prior acts. The provision in section 4 is that, if before January 1, 1934, a petition is filed signed by 51 per cent. or more of the qualified voters, voting for governor in the last general election, in counties where a farm bureau exists, praying for the discontinuance of the appropriation for extension work, the county board shall discontinue the same. This

act was approved in May, 1933. The next *election* at which the question could be submitted would be in 1934. The purpose of this proviso was to enable the voters *by petition* to discontinue the appropriation a year earlier than they could *by an election.* Fifty-one per cent. or more of the qualified voters is more than a majority. The petition, of course, would deal *only* with the proposition of county aid to farm bureaus. Here is shown a specific legislative intent to require *more* than a majority of the qualified voters voting for governor in 1932 to stop the appropriation in January, 1934. It is not reasonable to assume that the legislature intended to require a majority to discontinue the appropriation in 1934, and thereafter to permit a minority of the qualified voters either to discontinue or authorize the appropriation. In this connection, it is interesting to note that the total vote cast for partisan state offices in Nebraska in 1932 was 576,946, and the total vote cast for governor in 1932 was 563,738. A majority of the total vote cast would be 288,474; 51 per cent. of the vote cast for governor would be 287,506, or 968 less than a majority of that large total. These figures were, of course, officially before the legislature when they wrote the 1933 act.

This court has long had the following rule of construction:

"When the legislature, in a statute, employs language which has elsewhere received a fairly well settled construction, it will be presumed that such construction was in the contemplation of the legislature, and expresses the true meaning. * * *

"If the words used had at the time received a settled construction, we must presume that the legislature adopted them in that sense." *Kendall v. Garneau,* 55 Neb. 403, 75 N.W. 852. See 59 C. J. 1063.

In order to determine the proper rule of construction to be applied to the language being construed herein, it is necessary to point out that in the 1923 act it was provided that where petition and remonstrance were filed, the question of the appropriation should be submitted "to a vote of the people of the county at the next *general* election." That

language was continued in the act of 1925 (Laws 1925, ch. 2), and in the 1927 act (Laws 1927, ch. 55). The act of 1933 provided that the proposition *shall* be put upon the ballot at the "election following the filing" of the petition. The words *general election* are not used. However, the act provides for the filing of the petition "on or before September 1 of any even numbered year." The election following September 1 of the even numbered years is the general election. It appears clear that the legislature so intended it. We have then a legislative requirement that this proposition shall be submitted to the voters at a *general election.* Why? It is probable that economy in the expenses of the election was a consideration for that requirement. However, there is a more fundamental reason recited in many of the cases dealing with the construction of such acts. Common experience has shown that a much larger number of voters participate in general elections than in special elections, and that when propositions are submitted to the voters at general elections a more nearly complete decision of the total number of voters can be had. It is also important to note that the act does not call for the proposition to be submitted on a separate ballot, but "upon the ballot at the election." This clearly shows an intent that all voters shall have the proposition submitted to them.

The rule is stated in 20 C. J. 207, as follows: "The authorities also diverge in their construction of the constitutional and statutory provisions where the proposition is submitted at a general election. One construction is that the proposition is carried if it receives the specified majority of the votes actually cast on the proposition." (The cases cited by the plaintiff herein are cited by the above text on that proposition.) "Another construction is that, in order to carry, the proposition must receive the required majority of the votes of the persons who participate in the election and vote for any candidate or on any proposition, regardless of whether or not they vote on the particular proposition." Among the decisions cited sustaining the latter proposition are nine decisions of this court. We have ex-

amined the cases cited by the above authority in the text and in the annotations on both propositions. There is a conflict in the cases, sometimes more apparent than real. The decisions quite often turn upon the particular language used in the provision being construed, upon the historical basis of the provisions, the time when submitted, etc.

An earlier text, 10 Am. & Eng. Ency. of Law (2d ed.) p. 754, states the rule as follows:

"When the law requires, for the election of an officer or the carrying of a measure, a vote of a majority, or a specified proportion of the legal or qualified voters, it is generally considered sufficient if the required proportion of the votes actually cast is in favor of the candidate or measure, and there is no necessity for any inquiry as to the actual number of voters in the district; for it is presumed that all legal electors voted, or, if they did not, that they acquiesced in the action of those who did. It would seem that an application of the same principle would lead to the conclusion that where a measure is submitted to the voters at a general election, or at the same time as other measures, it should be considered carried if a majority, or the required proportion, of the votes actually cast for or against such measure are in the affirmative; and there are cases supporting this view. But the great weight of authority is otherwise, and supports the view that in order to pass such a measure it must have the actual affirmative vote of a majority or the required proportion of those who participate in the election."

Here again decisions of this court are cited among those supporting the rule announced in the last sentence above quoted.

It should also be pointed out that many of the courts make a distinction between propositions which *may be* submitted at general elections and those which *are required* to be submitted at general elections, holding that the rule, that the majority vote must be a majority of all those cast at the election, applies only where the proposition must be submitted at a general election.

There is an interesting discussion of this proposition in 1 Dillon, Municipal Corporations (5th ed.) beginning on page 653. The author places the decisions of this court with decisions of other states, accepting the view that a majority of the voters means a majority of those qualified or entitled to vote, and not merely those voting upon a particular question. He reaches the conclusion that this state among others determines the number entitled to vote by the vote cast upon other questions or candidates for office at the same election. In any event, he lists the decisions of this court as requiring a majority of all the electors voting at the election in order to carry the proposition, and not a majority of those who are voting upon the particular question. This author, like the writers of the other texts, lists the cases cited by the plaintiff as holding a contrary view.

It should also be noted that some of the decisions refer to a majority vote or a majority of those voting at the election. Section 4 of the 1933 act specifically says that, if a majority of the votes cast are opposed, or are in favor of the appropriation, it shall be denied or granted. The words "at the election" are not used in that sentence. However, in the preceding sentence, section 4 requires the submission of the proposition to the voters at the election. Quite obviously, the legislature must have intended the language to read: "If a majority of the votes cast *at the election* are opposed, or are in favor of the appropriation," etc. It is perfectly obvious that the votes could not be legally cast under any other conditions than at the election. So, the words "votes cast" must be construed in connection with the words "at the election" used in the preceding sentence.

In *State v. Lancaster County*, 6 Neb. 474, 482, this court had for construction a constitutional provision authorizing township organization in counties "whenever a majority of the legal voters of such county, voting at any general election, shall so determine." The question was, did it require a majority of all votes cast at the election, or a majority of the votes cast on the proposition. This court held that the "plain meaning of the words used" required a majority

of all legal voters voting at the general election to carry the proposition, and that although the proposition of township organization received a majority of the votes cast on the proposition, nevertheless it had not received the required majority of all those voting at the election, and accordingly was defeated. This case has been repeatedly cited with approval by this court, other courts, and text-writers.

State v. Babcock, 17 Neb. 188, 22 N. W. 372, involved the question as to whether or not a constitutional amendment had been adopted. The proposal received a majority of the votes cast on the proposition, but failed to receive a majority of all votes cast at the election. The Constitution required that amendments be submitted "to the electors" (after certain preliminaries) at "the next election of senators and representatives * * * and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution." Obviously, an election where senators and representatives are elected is a *general election.* This court held that a majority of all votes cast in the state at the election for senators and representatives was necessary to adopt the amendment.

State v. Bechel, 22 Neb. 158, 34 N. W. 342, involved the sufficiency of a vote on a proposition to authorize a street railway company to construct lines on the streets of Omaha. The proposition was submitted at a general city election. It was not required that it be so submitted, but it was so done for convenience. Separate ballots and separate ballot boxes were used. Separate poll lists were not kept. The statute required "a majority of the votes cast at such election" to authorize the construction. The proposition received a majority of the votes on the proposition, but not a majority of the votes cast at the election. This court held that there was but *one* election, and that the proposition required a majority of all votes cast at that election.

State v. Anderson, 26 Neb. 517, 42 N. W. 421, is severely criticized by plaintiff. It involved the question of whether or not a proposal to sell county real estate had received the required vote. The statute there construed is now section

26-113, Comp. St. 1929. It required that the proposition be submitted "to a vote of the electors of the county." It provided: "If it appears that two-thirds of the votes cast are in favor of the proposition," etc. This court held that the words "two-thirds of the votes cast" meant two-thirds of the votes cast at the polls of the general election at which the question was submitted to the electors. It will be noted that, although the proposition in this case was submitted at a general election, the law did not require that it be so submitted. The only other difference in the two cases is that, in the *Anderson* case, the requirement was "two-thirds of the votes cast" while the statute we are construing requires "a majority of the votes cast." The decision in *State v. Anderson, supra,* has been cited with approval by this court in *State v. Clark,* 59 Neb. 702, 82 N. W. 8; *State v. Cornell,* 53 Neb. 556, 74 N. W. 59; *Bryan v. City of Lincoln,* 50 Neb. 620, 70 N. W. 252; *Douglas County v. Keller,* 43 Neb. 635, 62 N. W. 60; and the doctrine of *State v. Anderson, supra,* was held correct and approved and followed in *Stenberg v. State,* 50 Neb. 127, 69 N. W. 849, and has been cited by the text-writers hereinbefore quoted. Plaintiff points out that it was criticized in *Territory of Oklahoma v. Board of Trustees,* 13 Okla. 605, 76 Pac. 165. In that case, the court stated: "We have carefully examined nearly all of them (cases cited by plaintiff in error), and find no reason to differ from them in any case, unless *it might be* in the case of *State v. Anderson,* 26 Neb. 517, 42 N. W. 421, *where the language of the statute is not quoted.*" (Italics ours.) An examination of *State v. Anderson, supra,* shows that the statute is set out in full on page 520 of the official report. It appears that the writer of the Oklahoma opinion had not "carefully examined" the decision of this court. Plaintiff also points out that the supreme court of North Dakota in *State v. Langlie,* 5 N. Dak. 594, 67 N. W. 958, refused to follow *State v. Anderson, supra.* The North Dakota court cited with approval the case of *Gillespie v. Palmer,* 20 Wis. 572 (sometimes cited as page *544) and *Sanford v. Prentice,* 28 Wis. 358. It is interesting to note, however, that

Gillespie v. Palmer, supra, and *Sanford v. Prentice, supra,* were considered by this court in *State v. Lancaster County, supra,* and *State v. Babcock, supra,* and this court refused to follow them. *Sanford v. Prentice, supra,* was cited, and not followed, in *State v. Bechel, supra.* Plaintiff also points out that Chief Justice Cobb dissented in *State v. Babcock, supra.* Judge Cobb in his dissent in that case cited the above Wisconsin cases. It is further interesting to note that in *Sawyer v. Dodge County Mutual Ins. Co.,* 37 Wis. 503, 524, the statement is made that *Gillespie v. Palmer, supra,* had "been subjected to the criticism that the court decided it in accordance with 'the logic of the war,' rather than 'the logic of the law,' " and that the chief justice of the Wisconsin court referred to *Gillespie v. Palmer, supra,* as one of a number of cases "which have long been made a reproach to the court as judgments proceeding upon policy rather than upon principle." *Bound v. Wisconsin Central R. Co.,* 45 Wis. 543. *Gillespie v. Palmer, supra,* was rejected in *Stebbins v. Judge of Superior Court,* 108 Mich. 693, 66 N. W. 594, as not "supported by reason or authority." It is not followed in *Belknap v. City of Louisville,* 99 Ky. 474, 36 S. W. 1118. It is further interesting to note that the North Dakota case cites, along with the Wisconsin decisions, one federal case, and the cases of *Board of Commissioners v. Winkley,* 29 Kan. 36, and *State v. Echols,* 41 Kan. 1, 20 Pac. 523. The *Echols* case follows the *Winkley* case, and *Territory of Oklahoma v. Board of Trustees, supra,* followed the *Echols* case, and the *Winkley* case in turn cited *Gillespie v. Palmer, supra,* as one of the five cases relied upon.

The federal case cited in the North Dakota case is *Armour Bros. Banking Co. v. Board of County Commissioners,* 41 Fed. 321. The court in that decision cited the two Kansas cases and the two Wisconsin cases herein referred to, and stated that the decision of this court in *State v. Lancaster County, supra,* was "in conflict, to some extent," with the cases it had previously cited. The only other case cited in 41 Fed. 321 on this proposition is *County of Cass v. Johnston,* 5 Otto (U. S.) 360. This court referred to

the *Cass County* case in *State v. Roper,* 47 Neb. 417, 66 N. W. 539, as "of little practical value in this state." It was cited and not followed in *State v. Bechel, supra.* Further, with reference to *State v. Langlie, supra,* and *State v. Grace,* 20 Or. 154, 25 Pac. 382, also cited by plaintiff, the supreme court of Mississippi in *State v. Powell,* 77 Miss. 543, 27 So. 927, referred to these as cases "of very little value" and pointed out that they both quote *Gillespie v. Palmer, supra,* "a case thoroughly repudiated by many courts and of no authority."

In commenting upon the decision in *State v. Anderson, supra,* plaintiff quotes the following part of a sentence from the opinion of Judge Cobb with reference to *State v. Babcock, supra*: "It is hardly worth while to remark that the writer did not at the time concur in that opinion." The remainder of the sentence is not quoted by the plaintiff, and is as follows: "But it followed in principle an earlier decision of the court, and probably *is supported by the weight of authority,* and may be regarded as expressing the *settled doctrine in this state.*" (Italics ours.)

It is now interesting to review the decision written by Chief Justice Cobb in *State v. Benton,* 29 Neb. 460, 45 N. W. 794. In that case, the statute required the proposition of the issuance of bonds to be submitted "at an election called for that purpose, or at any regular election * * * to the qualified voters * * * and if a majority of the ballots polled at such an election" shall favor the bonds they might be issued. The proposition was submitted at the city election, and did not receive a majority of the total ballots polled in the city election, although it received a majority of the votes cast on the proposition. Judge Cobb cited *State v. Lancaster County, supra, State v. Bechel, supra,* and *State v. Babcock, supra,* and, with reference to the last case, said: "The writer concurred in that opinion, not that he assented to its conclusions as an original proposition, but because it had become the *settled rule of construction* of the court, and *was, therefore, no longer to be disputed.*" The holding was that the issuance of the bonds had not been sanctioned by

the required number of votes. It is again noted that *Gillespie v. Palmer, supra,* was cited to the court in *State v. Benton, supra,* and not followed.

We need not pay further attention to the criticism of *State v. Anderson, supra,* in the cases cited by the plaintiff.

In *State v. Van Camp,* 36 Neb. 91, 54 N. W. 113, this court construed a statute which required "a majority of the legal voters of Holt county to give their assent" to a boundary change "at the next general election" before certain territory could be added to that county. The proposition did not receive a majority of the votes cast in the county, and this court held that it was defeated.

State v. Roper, 46 Neb. 724, 61 N. W. 753, involved a special election for the relocation of a county seat. The statute provided: "Any place receiving three-fifths *of all the votes cast* shall become and remain * * * the county seat of said county." This court said: "The meaning of the law is that a county seat of a county shall not be relocated at any place unless three-fifths of all the electors of the county shall express their will to that effect by their votes at an election held for that purpose; and the law presumes that when such an election is held that all the electors of the county vote at such election." Upon a rehearing (47 Neb. 417, 66 N. W. 539) the question considered was whether or not certain ballots should be counted as votes cast. However, in arriving at that proposition, this court reviewed *State v. Lancaster County, supra,* and then said: "It is unnecessary to consider other authorities cited in the aforesaid opinion in this case, for they clearly support the same general principle, and that is, that when a proposition of the nature of that under consideration is submitted at a *general* election, the *highest* number of votes cast *on any proposition* or for any candidate is assumed to be the total number of which the requisite majority must be obtained." Later in the same opinion, this court said: "Where there occurs at the same time a general and a special election, there is given an exact basis from which to ascertain the number of electors, and that is the greatest number of votes cast for any candidate or proposition."

In *Bryan v. City of Lincoln,* 50 Neb. 620, 70 N. W. 252, the question was presented as to whether or not a bond issue had received the required favorable vote. The statute provided that the bonds could be issued "when the same shall have been authorized by a vote of the people." The proposition was submitted at the general city election and the same officers, registration lists, polling places, and voting booths were used for the general election and the election on the bonds. Separate ballot boxes were used "and probably separate poll lists." This court held that the word "people" meant electors or voters and that there was but one election when considered for the purpose of determining how many persons participated as voters. This court reviewed a large number of the decisions of this court, and stated on page 630: "We have thus referred to the foregoing decisions of this court for the purpose of calling attention to the fact that through and in each and every one of them there is the element or principle that if a proposition is submitted at a *general state or municipal election,* under a law which requires for the adoption of the proposition a *majority of all the votes cast,* it must receive more than one-half of the total number of votes polled at such election on any matter or the filling of any office on which a vote is taken." The court held that the statute required a majority of all the votes cast at the election to approve the issuance of the bonds.

Because of the importance of and public interest in the question, we have thus reviewed a large number of the decisions of this court. The rule announced in these decisions is too firmly established to be further questioned in this state. To the student of the problem we cite the additional cases of *Douglas County v. Keller,* 43 Neb. 635, 62 N. W. 60; *Tecumseh Nat. Bank v. Saunders,* 51 Neb. 801, 71 N. W. 779; *State v. Clark,* 59 Neb. 702, 82 N. W. 8.

We will now consider in paragraphs numbered 1 to 6 the cases upon which plaintiff relied in its brief and at the bar of this court.

(1) *Walker v. Oswald,* 68 Md. 146, 11 Atl. 711. Here the

language of the statute with reference to the return of the election results was considerably stressed as showing the intention of the act. It relied upon the case of *County of Cass v. Johnston, supra,* which was cited and not followed in *State v. Bechel, supra,* and which this court refused to follow in *State v. Roper, supra. Walker v. Oswald, supra,* was cited to this court and not followed in *State v. Benton, supra.* In many other jurisdictions it is referred to and not followed.

(2) *Cashman v. City Clerk,* 213 Mass. 153, 100 N. E. 58, was decided in keeping with "an unvarying policy of the legislature to make the acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question." In the footnotes it cites as "in consonance" *County of Cass v. Johnston, supra*; *Gillespie v. Palmer, supra*; *Walker v. Oswald, supra*; which decisions this court has refused to follow.

(3) *City of South Bend v. Lewis,* 138 Ind. 512, 37 N. E. 986, requires more attention. First, it should be pointed out that in that case the law authorizing the submission of the proposition of city consolidation did not require that it be submitted at a general election, but it was so submitted. The act provided in detail for a return of the election results not involved in the statute we are now construing. The court on the general proposition of what majority was required cited, among other cases, *Gillespie v. Palmer, supra,* and *County of Cass v. Johnston, supra.* The court then said that in every case the decision rested upon the construction of the statute under which the election was held. The court also said: "It is equally well settled that where a question is required to be submitted at a general election, and a 'majority of the voters' at 'such election' is required to adopt the measure, a majority of *those voting at the election* is required, and not merely a majority of those voting *on the proposition.*" The court cited, among other cases, *State v. Lancaster County, supra.*

The court then stated:

"It appears from an examination of these cases, that

when an act of the legislative body provides that the votes of a majority of the voters of any subordinate corporation shall be requisite to the adoption of any measure, then the only question is, did the measure receive a majority of the votes of the electors voting on the proposed measure; but when the act requires that the question shall be voted on at some general election and receive a majority of the votes cast at such election, *then it must be voted for by a majority of all the electors taking part in such general election.*

"In the case under consideration there was no requirement that the question of annexation should be submitted at a general election, but it was left to the officers of the city and town to determine when the election shall be held. The forms of ballots to be used are prescribed and provision made for casting and counting the votes cast on the question of annexation alone. No votes, except those upon the subject, are mentioned or contemplated in the act, and the only election named is the one which is to be agreed upon between the city and town authorities."

The court then discussed the statute and reached the conclusion that the legislature contemplated no other election than the one on the proposition and pointed out the distinction between the Indiana statute and that under consideration in *State v. Babcock, supra.* The court then asked the question as to whether the fact that the proposition, while not required to be so submitted, was submitted at a general election would change the result and have the effect of counting against the proposition those who voted at the general election but who failed to vote on the proposition. The court there discussed a number of cases, which, as we have heretofore pointed out, have not been followed by this court. The court then said:

"From what we have said, we think it clearly appears that four leading principles may be considered as fully established, namely: First. Where a measure is proposed to the people, and its adoption is made to depend on a vote of the majority, those who do not vote are considered as

acquiescing in the result declared by those who do vote, even though these voting constitute a minority of those entitled to vote. Second. *Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at 'such election,' a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question.* Third. Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary. Fourth. Where a legislative body provides that a proposition shall be submitted to the voters, that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to the proposition shall cast a negative vote, and that a 'majority of the votes given' shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved. Of the correctness of these four principles we think there can be no dispute. The only doubts which can arise are those occasioned by a confusion of the second and third."

The court held that under the facts of the *South Bend* case, applying the principles announced, it required only a majority of those voting on the proposition to give it the required vote.

Plaintiff cites the "Fourth" rule in its brief. Clearly, the "Second" rule applies to the statute which we are now construing. The decision in *City of South Bend v. Lewis, supra,* sustains the position of the defendants in the instant case.

(4) *In re Todd,* 208 Ind. 168, 193 N. E. 865. This case involved the question of the majority necessary for the adoption of a constitutional amendment. The court reviewed the decision of Judge Dailey in *City of South Bend v. Lewis, supra,* and quoted that part which we have quoted herein;

next recited the language which they were construing and stated on page 193:

"The foregoing does not require a proposed amendment to be submitted to the electors at a general election. Consequently Judge Dailey's second principle does not govern. We find a perfect example for the application of the second principle in paragraph 15 of the Schedule of the Constitution (*supra,* p. 184) which authorizes the submission of a proposal to 'the voters of said county, at a general election' and further provides that 'a majority of all the votes given at said election' shall be required to carry the proposal. Another example is found in art. VIII of the Constitution of 1816. This article authorized the General Assembly to submit a proposal for a constitutional convention to the 'electors' of the state at a general election, and, for the approval of such proposal, specifically required a 'majority of all the votes given at such election.' * * * In short, the effect of omitting any reference to a general election is to treat a submission of a proposed amendment as a separate and distinct election, even though the submission be on the day of a general election and even though the machinery at the general election be used to poll, canvass and return the votes cast in the election on the amendment."

The court further stated: "And since there is an absence of any language which requires a majority of all 'persons possessed of the legal qualifications entitling them to vote' or a majority of all votes cast at a general election we believe the submission clause falls within the first and third propositions of Judge Dailey."

(5) *Territory of Oklahoma v. Board of Trustees,* 13 Okla. 605, 76 Pac. 165. We have already discussed this case. Only one added comment is needed. There the statute did not require, but permitted, submission of the proposition at a regular election, and it was so submitted. There the statute provided: "The votes on said question shall be canvassed, * * * and if a majority of all the votes cast shall be in favor of," etc. The court clearly placed its decision upon the provision of "votes *on said question.*"

(6) In its reply brief, plaintiff quotes from *Stebbins v. Judge of Superior Court,* 108 Mich. 693, 66 N. W. 594. That case involved a bond issue. The city charter provided that bonds could not be issued unless the qualified electors authorized it "by a majority of their votes cast at any regular election, or at a special election called for the purpose of voting upon such question." The proposition was placed on a general election ballot. The vote on the proposition was favorable, but it did not receive a majority of all votes cast. Hence, the same question arose that has been discussed in the other cases. Those who contended that a majority on the proposition was sufficient cited, among other cases, as supporting their contention, *Gillespie v. Palmer, supra,* and *Walker v. Oswald, supra.* The court in one paragraph reviewed the cases so cited. For some undisclosed reason, plaintiff herein dips into the middle of that paragraph and quotes a part of the discussion, stopping just before the court's reference to *Walker v. Oswald, supra.* Plaintiff does not point out that in the next paragraph the court say: "We must hold that the above authorities" (among others, those quoted by the plaintiff herein) *"are not controlling,* and must look elsewhere for authority and reason on which to base our conclusion. * * * To say that the legislature meant that a majority of those voting at the general election on the proposition should control would be to place in the statute words and an intent not found in it. We see nothing absurd, however, in the legislature providing that at a special election a majority of the votes * * * cast at the election should control." The court looked "elsewhere," found, and cited, among other cases, *State v. Babcock, supra,* and held that a majority of all the votes cast at the general elections was required.

Section 2-1113, Comp. St. Supp. 1937, is the only act which was before the trial court and which is before this court for construction. This proceeding was started in the district court March 4, 1939; decree was rendered April 1, 1939; the transcript filed in this court April 24, 1939; and oral argument made June 7, 1939. By act of the legislature,

with an emergency clause, approved June 8, 1939, the provisions of sections 2-1110 to 2-1117, inclusive, Comp. St. Supp. 1937, were repealed and legislative bill No. 212 enacted. The construction of the 1939 act is not before us in this proceeding. However, "In order to ascertain the proper meaning of a statute, we may refer to later as well as earlier legislation upon the same subject, * * * and a subsequent statute may often aid in the interpretation of a prior one." *Campbell v. Youngson*, 80 Neb. 322, 114 N. W. 415. The act of 1939 amends the 1933 act in several particulars. Three changes are important to be considered here. First, section 4 (2-1113, *supra*) is amended to provide that, "If a majority of the votes cast *on this question* are opposed to such appropriation, then the county board shall deny the appropriation. If a majority of the votes cast *on this question* are in favor of the appropriation, then the county board shall" etc. The two insertions of the words "on this question" are the material changes here. It is suggested that the legislature attempted thereby to clarify the provision of the 1933 act. However, the second change in the section was to strike out that part of the 1933 act, hereinbefore discussed, which provided for the discontinuance of an appropriation on January 1, 1934, upon the petition of 51 per cent. of the qualified voters. While the provision so stricken was not operative unless the petition was filed before January 1, 1934, yet the power to discontinue appropriation by that method could have been extended by the legislature by a change of the date. The legislature did not extend that power. Had the legislature merely repealed that provision, it might have been argued that the purpose was to discontinue an inoperative provision rather than to change the policy of the 1933 act. However, the third change is the addition in the place of the omitted provision of a sentence, not in the 1933 act, authorizing an appropriation *for one year*, in counties not receiving an appropriation, upon a certain showing made before August 1 of any odd numbered year, and providing for the submission "of the question of continued support at the general election as

provided when a twenty per cent. petition is filed in an even numbered year." Here the use of the words "general election" confirms the interpretation which we have put upon the 1933 act. The omission of any provision authorizing a discontinuance and the enactment in its place of a provision authorizing an appropriation, without an election, is a distinct reversal of policy. The title of the 1933 act recited that it was an act "* * * to authorize county boards to appropriate, under certain conditions, funds, * * *" the comparable language in the title of the 1939 act is "* * * to provide procedure for creating or abolishing the appropriation of county funds. * * *" These changes of the 1933 act show, not an effort to clarify the act on the proposition here presented, but an effort to change materially the provisions of the 1933 act, and is a change in legislative policy and not a clarification. The 1939 act does not alter but affirms the construction placed herein upon the 1933 act.

There remains one further proposition to be considered. Plaintiff contends that, if the statute is construed as we construe it, then we must reject as meaningless or superfluous the sentence in section 4, "If a majority of the votes cast are opposed to such appropriation then the county board shall deny the appropriation;" that to hold there was not a majority of votes cast as opposed and to hold there was not a majority of votes cast in favor of the proposition would be an absurd result; and that, upon no theory, can it be claimed that a majority of the votes cast were opposed to the appropriation. This contention fades out in the light of an analysis of the statute. In the act of 1923, the legislature recognized that there were counties where farm bureau maintenance was being allowed under the previous law, and it was provided that, in those counties, the county board should continue to appropriate funds to maintain the county agent until January 1, 1925. Between the date of enactment and January 1, 1925, the question of continuing aid to those counties could be determined under the provisions of the new act of 1923. The same situation was recognized in the act of 1933, and it was provided that in

counties where extension work was being conducted the county board should continue to appropriate funds "for the *continuance* of extension work until such support is denied by vote as provided for in this section" (Section 4). It is clear that the legislature intended in the 1933 act that in counties where extension work was receiving county appropriations the question submitted would be the "continuance" thereof, and that in counties where no aid had been granted and was asked for the question would be on the granting of "support."

The language in the first sentence of section 4 provides for "the submission to the voters of the question of whether there shall be county funds appropriated for the continuance *or* support of county agricultural extension work." The use of the alternative "or" is noted.

Two questions can be submitted. First: Shall aid be continued? Second: Shall the farm bureau be supported? The question to be submitted depends upon the status of county aid in the county when the act was passed. The same language is to be used in submitting either proposition. It is next provided: "If a majority of the votes cast are opposed to such appropriation" then it shall be denied "as provided for in this section." So interpreted, the language just quoted is in entire harmony with the provision, hereinbefore discussed, providing for the discontinuance of the appropriation upon the petition of 51 per cent. of the voters. If the question of "support," where aid has not been previously granted, is submitted, then a majority of the votes cast must be in favor of the appropriation. The language of the sentence, "If a majority of the votes are opposed to such appropriation, then the appropriation shall be denied," indicates an appropriation already being made which shall be discontinued. The language of the sentence, "If a majority of the votes cast are in favor of the appropriation then the county board shall annually set aside in the general fund of the county," etc., indicates that an appropriation shall be made where none was being made theretofore. So construed, the language of the act is in entire harmony, and no provision need be disregarded.

Neither the pleadings nor the agreed facts recite, in so many words, that county aid was not previously being granted in Thurston county. There does not appear to be a question as to that however. The positive statement is made in defendants' brief that the plaintiff was not receiving aid from the defendant county; the statement of facts recites that the petition asked "funds for the support of agricultural work" and that the defendant taxpayer will "suffer substantial damage if such appropriation" is made. His answer recites that if the appropriation is granted his taxes "will be materially increased." Hence, we conclude that the proposition submitted to the voters of Thurston county was that of granting support in the future and that such support was not being given.

Plaintiff in the oral argument before this court conceded the correctness of the three following propositions of law submitted by the defendants:

(1) "A county or any of its subdivisions has no inherent right to make an appropriation for special purposes."

(2) "The effect of making an appropriation by a county for agricultural purposes is to create a lien upon all property in the county for the payment of said appropriation and the right to make an appropriation is derived entirely from the statute, the terms of which must be substantially complied with."

(3) "The provisions of statute regulating the procedure for the authorization of an appropriation should be strictly construed, and, if any doubt arises it should be resolved in the interest of the taxpayer and the appropriation should be denied."

In order to authorize the appropriation of funds, for the purpose expressed in the act under consideration, for the support of county agricultural work in counties where appropriations for that support were not being made when the 1933 act was passed, it is necessary that the proposition receive a majority of all votes cast at the election at which the proposition is submitted.

"There is in the entire range of judicial investigation no

principle more firmly established or resting upon sounder reasons than the rule requiring public bodies like counties, when acting under a special power, to act strictly within the conditions prescribed for the exercise of such power." *Douglas County v. Keller, supra.*

The action of the defendant board of county commissioners was proper in refusing to set aside, in the general fund of the county, funds for the support of agricultural extension work, and in refusing to make the appropriation.

The judgment of the trial court is

AFFIRMED.

FRED ASCHE, JR., ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.
287 N. W. 64

FILED JULY 11, 1939. No. 30561.

1. **Eminent Domain**: DAMAGES. "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.
2. ———: ———. "The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239, 78 N. W. 521.
3. ———: ———. In a proceeding to acquire an easement for an electric transmission line across a farm, fear of danger, if any, from electric currents is not an independent item of damage but may be considered in estimating depreciation in the fair market value of the farm by construction of the transmission line.

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

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

Walter, Flory & Schmid, Philip M. Wellman and *Franklin L. Pierce, contra.*

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

ROSE, J.

The Loup River Public Power District commenced this proceeding in the county court of Platte county under the power of eminent domain to acquire a right of way and perpetual easement for a 115,000-volt electric transmission power line across the 160-acre farm of Fred Asche, Jr., four miles northeast of Columbus, Platte county. The county court appointed appraisers who awarded Asche $75 in damages. He appealed to the district court as plaintiff and claimed damages in the sum of $2,400. The power district, as defendant, alleged that the appraisers' award of $75 was in full of all damages sustained by plaintiff by reason of the construction of the transmission line.

There was a trial to a jury in the district court and they rendered a verdict in favor of plaintiff for $1,600. Defendant appealed to the supreme court.

Plaintiff was damaged to some extent and the issue was the amount. The farm is the home of plaintiff and family and consists of a quarter-section of level, fertile, tillable land with seven-room house, barns and fences. It was well equipped and used for farming and stock raising. The transmission line intersects the farm diagonally not far from the buildings from southwest to northeast, crosses a corner of the hog lot and practically cuts the farm in two. Across the farm the transmission line is suspended on five two-pole structures and has a minimum clearance of 28 feet and 5 inches. The ground on which the poles stand is permanently taken. The easement permits perpetual ingress of defendant for the purposes of inspection and repairs of poles and cables. Farming, cultivating crops and harvesting around the poles beneath the overhanging high-voltage line will necessarily interfere with farming operations and cause annoyance and inconvenience. The measure

of damages for the taking and damaging of private property for public use was stated in former opinions as follows:

"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.

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

The rules stated were followed in the recent power-line case of *Lilienthal v. Platte Valley Public Power and Irrigation District,* 134 Neb. 281, 278 N. W. 492. It was therein held that danger from the power line was not an independent item of damage but could be considered in estimating depreciation, if any, in the market value of the land by condemnation of the right of way and construction of the transmission line. The trial court observed the rules stated in submitting the case at bar to the jury.

Plaintiff testified in his own behalf and estimated the reasonable market value of his farm before construction of the transmission line at $130 an acre and that it was damaged by the easement from 12 to 14 dollars an acre, basing depreciation on inconvenience and annoyance in farming around poles and in operating farm machinery near them and consequent danger. Twelve witnesses testified to a depreciation of $10 an acre at least or damages of $1,600, the amount of the verdict.

On the proper measure of damages the verdict is supported by the evidence and the damages are not excessive. The instructions, when considered together, do not contain error prejudicial to defendant.

AFFIRMED.

FILLMORE M. WOLFINGER, APPELLANT, V. FRED SHAW ET AL., APPELLEES.
287 N. W. 63

FILED JULY 11, 1939. NO. 30605.

Judgment. "A judgment notwithstanding the verdict can only be rendered when the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment." *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N. W. 393.

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

Walker & McArthur and *George I. Craven*, for appellant.

Flansburg, Lee & Sheldahl and *Crossman & Barton, contra.*

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

EBERLY, J.

This is an action at law to recover damages for personal injuries alleged to have been inflicted upon plaintiff by and through negligence of defendant's agent. Issues were joined and trial was had to a jury. The jury were duly instructed by the trial court, and on May 19, 1938, at 9 o'clock p. m., this jury returned their verdict in favor of plaintiff and assessed the amount of his recovery against the defendant Iowa-Nebraska Light & Power Company in the sum of $2,500, and on the same day judgment was entered thereon as provided by law. On May 21, 1938, defendant filed in this cause its motion for a new trial in regular form. On June 1, 1938, defendant filed its motion for a judgment in favor of defendant and against plaintiff, notwithstanding the verdict, upon the following grounds and reasons, to-wit:

"I. That the verdict is not sustained by the evidence.

"II. That the verdict is contrary to the evidence.

"III. That the verdict is contrary to law.

"IV. That the pleadings and evidence in the above case

will sustain no other judgment than a judgment in favor of the defendant."

On September 26, 1938, the trial court heard the motion of defendant for judgment to be entered in its favor, notwithstanding the verdict. Said motion was then sustained, and judgment was thereupon entered accordingly. Plaintiff appeals.

It also appears that all proceedings referred to were had in the district court for Lancaster county, which adjourned *sine die* on September 26, 1938.

A careful examination of the pleadings discloses that the plaintiff's petition contained allegations ample to constitute a cause of action, and in no manner entitled defendant to judgment. The pleadings of plaintiff and defendant formed issues of fact which the Constitution requires be submitted to a jury for determination.

The sole motion in terms sustained by the trial court by its judgment of September 26, 1938, was filed ten days after the return of the jury's verdict. As applicable to the situation here presented, the rule announced by this court in *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N. W. 393, is controlling, viz.:

"A judgment notwithstanding the verdict can only be rendered when the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment."

It follows that the trial court erred in the entry of the order of September 26, 1938, sustaining defendant's motion for judgment *non obstante veredicto*, and this order, in all respects, is hereby reversed, rescinded, canceled, annulled, and set aside, and the case is remanded for further proceedings in harmony with this opinion.

REVERSED.

DOROTHY A. HENDERSHOT, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

286 N. W. 909

FILED JULY 11, 1939. NO. 30675.

1. **Workmen's Compensation.** Where a public employee of the city of Lincoln suffered a serious accidental injury to the back of his head, which lowered his resistance to infection, so that a few days thereafter he died of lobar pneumonia, it is held that his death followed the accident with reasonable certainty.
2. ———. The definition of a public employee should be more liberally construed than that of a private employee.
3. ———. Simply because the wages of a public employee are paid from federal funds does not negative his being the employee of the city, which had entire charge of directing and controlling his work.
4. ———. Under the more liberal provisions affecting public employees, it is immaterial that the city did not fix the wages of such employee.
5. ———. If the city has the power to accept or reject the services of a public employee, this, under the circumstances in this case, established the relation of employee and employer.
6. ———. The whole scheme of the workmen's compensation law makes compensation for accidents almost inseparable from the relation of employee and employer.
7. ———. The relation of employee and employer, within the compensation law, is not defeated by the fact that the employee receives the work under a plan of the federal government designed primarily to relieve unemployment.

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

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

Roland M. Anderson, contra.

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

PAINE, J.

This is an appeal by the city of Lincoln from a judgment of the district court affirming an award of the compensation court for the death of Warren Hendershot.

The facts disclose that the deceased was a strong, healthy

man, who had scarcely been sick a day since he was operated on for appendicitis about ten years before the accident. He was married in 1923, and had resided at 301 North Forty-fourth street, Lincoln, for 12 years, and was the father of four children, who with his wife, the plaintiff, survive him.

On Saturday, March 30, 1935, he was working at his trade of a bricklayer, as an employee of the city, at Fifteenth and Garfield streets, on Project 7-A, No. 59, which was the construction of an extension of the regular storm sewer system, with arched-over top, being built entirely of brick to use more labor than cement construction would use. This extension of the sewer system was being built for the sole and exclusive use and benefit of the city of Lincoln, and under its direction and control.

In getting bricks down to the bottom of the deep excavation, three men were used to handle them. The first, who was at the street level, picked up two bricks and tossed them down to a second man standing on a plank about three feet below the top of the bank, and he tossed them to the third in the bottom of the excavation.

At about 1:30 o'clock in the afternoon, Hendershot, who was laying bricks in the bottom of the sewer, raised up and the bricks hit him on the back of the head, cutting through his cap and hair, and making a gash in the skin which bled. The foreman, Meredith W. Phillips, testified that there was a little blood on the inside of his cap, and the gash was about one-half inch long. He would have fallen from the force of the blow had not a fellow worker, James Webber, caught him, and foreman Phillips took him out of the ditch and down to the city clinic, and remained with him, and brought him back to work in an hour and a half, and testified that he worked the rest of the day. The work stopped at 4:30 p. m. Webber rode home with him and, while Hendershot drove his own car, he complained of headache, and Webber said "he looked like he didn't feel very well."

Dr. Underwood, the city physician at the clinic, made an examination and dressed the wound, and after about an hour and a half told him he could go home and report back

if he had any complications. He was pale, and immediately laid down on a day-bed, and asked for aspirin, which he had never taken before. His wife applied cold packs to his head. He did not eat much supper, and went back to the day-bed and laid there until about 9 o'clock, when he went to bed. He laid down nearly all the next day, which was Sunday, with cold packs on his head, and was dizzy, and this condition continued for several days. On Monday a man asked him to do some mantel work as a bricklayer. He tried to do the work, but only stayed an hour and a half, and went home to bed. On Tuesday he tried to work again, and gave it up, and returned home, suffering from headache and dizziness. He appeared weak. On Wednesday he tried to work, but gave it up after a while, remained home the rest of the day, and complained of dizziness. On Thursday he got some groceries, but returned home, and headache continued. On Friday he thought he would have to go back to work on the sewer or lose his position. He came home complaining of headache and pain in the head. He went back to work Saturday morning on the sewer job, and while sitting on a pile of sacks, just before 8 o'clock in the morning, he fell forward and collapsed, and was taken by a fellow employee to the city clinic. When he arrived there he was suffering from a severe chill. The doctor then diagnosed his case as lobar pneumonia. He was taken home and never got out of bed, and died of lobar pneumonia on April 13, just two weeks from the day he was injured.

Dr. Arthur L. Smith was called as a medical expert by the plaintiff, and after being duly qualified and describing lobar pneumonia, which he said might be caused by 32 types of organism, he was asked a hypothetical question, embodying all of the pertinent facts relating to Mr. Hendershot's death, the question ending thus: "Are you able to state with reasonable certainty whether or not the accident and injury which Mr. Hendershot sustained on March 30, 1935, when he was hit on the head by these two bricks, was the producing cause of the pneumonia from which he died?" After objections were ruled upon, he stated: "Well, it is my opinion

that the man had a concussion of the brain and which existed during that period of time which you have described and he couldn't work. Therefore, he was weaker than he normally was before and, in a weakened condition, his resistance to the lobar pneumonia organisms was lowered, and the lobar pneumonia was the direct result, therefore, of the injury to his head and the concussion of the brain."

The deceased was not a common laborer, but a skilled bricklayer, and was paid $1 an hour, and was working under Charles Simon, who was foreman of the bricklayers.

It is conclusively shown by the record that the city engineer's office drew the plan and blueprints for the storm sewer, Project 7-A, No. 59; that the project was that of the city, which had made application for the funds. The city had the direction and supervision of the construction work itself. It provided all the supervisors and foremen, who were all paid by the city. The project was a continuation of, and a part of, the storm sewer system of the city of Lincoln. The deceased reported for work to Phillips, the city foreman. He was given a chance to see if he was capable of doing the work. He was satisfactory and was continued on the job. If his work had not been satisfactory, the foreman would have reported him to the timekeeper, and they would have transferred him to some other job. He would have been off this job.

The first assignment of error is that the death of Hendershot from lobar pneumonia was not the result of the injuries sustained by him on March 30, 1935.

Dr. Underwood, who had moved to Colorado, and whose deposition was taken, testified that he treated Hendershot at the clinic on March 30, and he did not come back; then on April 6, when he was brought in, he had lobar pneumonia, and from that time on he treated him until he died April 13. In his opinion, the slight head injury did not show any complications, and had no connection with the man's death.

Dr. Harry Everett was called by plaintiff and subjected to a very spirited cross-examination, but maintained posi-

tively that Hendershot had sufficient injury to his head to lower his resistance to infection, and that his injury was directly followed by lobar pneumonia, which was the immediate cause of death.

In the opinion of the court, the facts bring it within the statute (Comp. St. 1929, sec. 48-152), "violence to the physical structure of the body and such disease or infection as naturally results therefrom," and that his death followed the accident he suffered with reasonable certainty.

The second and last assignment of error charges that the district court erred in finding that Warren Hendershot, at the time of his injury, was an employee of the city of Lincoln, and insists that such finding is not supported by the evidence.

It is impossible to analyze or consider the conflicting decisions of the courts of the various states in relation to the employment situation without a glance at the rapid growth of this problem and the diverse manner in which it has been met in various cities and states.

When the depression began to extend itself year after year, the care of the unemployed, which first rested upon municipalities and counties, was undertaken by the states, and when the burden proved too heavy for the states then the federal government began to gradually get under the burden. Mass unemployment brought many new problems, and the early campaigns of welfare departments of municipalities, with the slogans of "Share the work" and "Give a job," proved entirely inadequate to the steadily increasing needs of the millions out of work.

In August, 1932, the emergency relief and construction act, 47 St. at Large, 709, 15 U. S. C. A. sec. 605a, was passed to provide employment through public works projects. In May, 1933, the Federal Emergency Relief Administration provided greater funds to be given directly to the states, and in November, 1933, the Civil Works Administration was initiated, which terminated March 31, 1934.

On April 1, 1934, the various states took over the administration of federal funds, under a new act of congress, which

act required contributions from the local units sponsoring the various work projects, usually of the material necessary, and this lasted until August 1, 1935, when the federal government again assumed the role of sole employer of relief workers through the creation of the Works Progress Administration. 49 St. at Large, 115, 15 U. S. C. A. sec. 728, note. Thereafter each session of congress has enacted new legislation, but for the purposes of the case at bar we need not consider later legislation by congress.

This brief summary of the federal efforts indicates clearly that Hendershot's injury, which occurred March 30, 1935, came within the period from April 1, 1934, to August 1, 1935, when the state of Nebraska itself was primarily responsible for work relief administration projects, and that the funds were furnished directly to Nebraska by the government, and that this state could make such requirements from local units sponsoring the work projects as it desired.

It will thus be seen that the set-ups between the federal government, the states, and the municipalities varied from year to year, and that in examining decisions from various courts it is helpful to know under which particular phase of the various set-ups the injury occurred. It has been stated by one authority that generally in 14 jurisdictions the relief worker on such projects is compensated in practically the same manner as a worker in private industry. These jurisdictions are given as Arizona, Colorado, Illinois, Maryland, Montana, New Hampshire, New Mexico, Oregon, South Dakota, Utah, Virginia, District of Columbia, Hawaii, and Porto Rico, and in many other states compensation is granted depending upon the special facts in each case. The statement is also made that compensation has been denied relief workers in the following states: Alabama, California, Florida, Georgia, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, North Carolina, South Carolina, Tennessee, and Texas. In considering the reason for the denial, it is said that it has been done in Massachusetts because the corporation counsel of the city of Boston has ruled that under the Poor Law (Mass. Gen. Laws 1932, ch. 117) the over-

seer of public welfare has a right to their services, and the attorney general took the same position, and the supreme judicial court has affirmed rulings denying compensation. *Commonwealth v. Pouliot,* 292 Mass. 229, 198 N. E. 256. In Georgia all claims have been effectively barred by the opinion of the attorney general. In Iowa compensation is denied on the theory that no contract of employment is created. In one of the late cases, *Hoover v. Independent School District* (1936) 220 Ia. 1364, 264 N. W. 611, denied compensation because the four painters injured had no contract of employment with the school district. It is stated that congress by special act extended to all Civil Works Administration workers all the benefits accruing to injured employees of the federal government, and the claimants are now receiving benefits thereunder.

In at least one state, North Dakota, the relief worker is excluded from the benefit of the compensation law by statutory enactment. N. Dak. Laws 1935, ch. 286. In three of the states denying compensation, Alabama, Missouri, and Tennessee, the compensation coverage is optional with local units, and in Kentucky and Kansas the act is elective.

One of the leading cases denying compensation is the case of *Vaivida v. City of Grand Rapids,* 264 Mich. 204, 249 N. W. 826, 88 A. L. R. 707, being followed by an annotation, which annotation is continued at greater length in 96 A. L. R. 1154. In the *Vaivida* case a man was injured while working in the city park in Grand Rapids. He was given an award for compensation. He was compelled to do the work as a condition to receiving relief from the city, and was paid 40 cents an hour in script. The Michigan court, with five judges supporting the opinion and four dissenting, held that such persons receiving such public aid as relief work were not employees of the municipality so as to be entitled to compensation under the workmen's compensation act.

Another leading case denying compensation is that of *McBurney v. Industrial Accident Commission* (1934) 220 Cal. 124, 30 Pac. (2d) 414. In this case it was held that

the recipient of aid from county welfare department, who was injured while clearing a drainage ditch for the city of Monrovia, was not an employee within the compensation act, as there was no contract of hire, and because he was an indigent person, receiving relief from the county, and therefore in a sense was the county's ward.

Cases cited by the California court in this decision involve the American Red Cross, Boy Scouts of America, Trustees of St. Patrick's Cathedral, and New England Sanatarium and Benevolent Association, while the question before the court involved an employee engaged in industrial work, and not charitable work.

Many decisions of the states refusing compensation do so on the ground that there is no contract of employment with relief workers. Possibly they have overlooked the fact that the definition of a public employee has been more liberally construed than that of a private employee. In *County of Monterey v. Industrial Accident Commission,* 199 Cal. 221, 248 Pac. 912, 47 A. L. R. 359, a bystander, who was summoned by a sheriff to help arrest some bootleggers landing a cargo of intoxicating liquor, was shot through the heart, and recovery was allowed under the workmen's compensation act for his death, on the theory that he was a public employee. A petit juror, being injured while on duty, was held to come within the compensation law. *Industrial Commission v. Rogers,* 122 Ohio St. 134, 171 N. E. 35. And a convict injured when doing road work was held entitled to compensation as a public employee. *California Highway Commission v. Industrial Accident Commission,* 200 Cal. 44, 251 Pac. 808.

Where the taxpayer had the option of paying a road tax or working it out, and chose to do the latter, and was killed, he was held to be a public employee, in *Town of Germantown v. Industrial Commission,* 178 Wis. 642, 190 N. W. 448, 31 A. L. R. 1284, with three judges dissenting. See, also, *City of Winfield v. Peeden,* 8 Kan. App. 671, 57 Pac. 131.

While a relief worker was operating a plow for the city of Ogden, he fractured his leg. It was held that, because

his wages were paid from federal funds, it did not negative his being an employee of the city, which controlled and directed his work. *Weber County-Ogden City Relief Committee v. Industrial Commission,* 93 Utah, 85, 71 Pac. (2d) 177. See, also, *Mayze v. Town of Forest City,* 207 N. Car. 168, 176 S. E. 270; *Hattler v. Wayne County,* 117 Pa. Super. Ct. 570, 178 Atl. 513.

In the case of *Forest Preserve District v. Industrial Commission,* 357 Ill. 389, 192 N. E. 342, one sent by relief organization to work for the forest preserve district held entitled to compensation for injuries from the district, even though the district could not fix wages, yet had complete control of his services. In this case the man received a card from the Illinois emergency relief commission, and was sent to the district to work six days a month at $5 a day. He cut his hand on a bottle while loading trash onto a truck; blood-poisoning followed; adhesions, scar tissue, and ankylosis impaired the use of that right hand. The court said: "The case presents a situation similar to that where an employee is injured while working for a second employer to whom he has been loaned temporarily. Under the common law an employee in the general employment of one master may with his consent be loaned to another and become the employee of the master to whom he is loaned. *Allen-Garcia Co. v. Industrial Commission,* 334 Ill. 390, 166 N. E. 78. The existence of the workmen's compensation act does not change this rule and the test remains the same—that is, whether or not the employee becomes wholly subject to the control and direction of the second employer, and freed, during the temporary period, from the control of his original master. Under this rule it is immaterial that the plaintiff in error did not fix the wages and did not select Putkonen as an employee. The record shows it had complete control of his services and that it refused to permit him to go to work on August 5, 1932. The power to refuse to accept him implies the power to dismiss him, if for any reason the plaintiff in error had seen fit to do so. The relation of employer and employee is established by such a showing as is here pre-

sented. See *McLaughlin v. Antrim County Road Commission,* 266 Mich. 73, 253 N. W. 221."

Many of the articles in law reviews, as well as a few opinions, refer to an English case as the pioneer case, because the unemployed workmen act of 1905 (5 Edw. 7, ch. 18) preceded our laws on this subject. This case of *Porton v. Central (Unemployed) Body for London* (1909) 1 K. B. 173, was disposed of in 1908 by the King's Bench division. Action was brought by the widow, and the facts may be briefly stated as follows: In January, 1908, Albert G. Porton, a parishioner, being out of work, applied to the Kensington distress committee, which satisfied themselves of the propriety of the application, and referred him to the central (unemployed) body for London, which gave him an employment card and a leaflet giving the rules for employment in parks, covering the wages paid, the hours, time allowed for dinner, traveling expense, and deduction of time lost through bad weather, and that a pay ticket would be given each Friday. On April 29, 1908, while so employed, he went to a latrine and was seized with an epileptic fit, and fell into the trench, and died the same day. The county court judge held he died from injuries which arose out of his employment, and assessed compensation of 150 pounds. The barrister for the central body argued it was not employment, but administrative relief, and there was no free choice on each side. However, the court said he was a deserving man, really unemployed, and, because he was hard up, was willing to take work under more disadvantageous conditions than he would at other times. He accepted the job offered under the conditions. "If it was not a contract of employment I cannot imagine what it was." Lord Justice Sir J. Fletcher Moulton adds: "I am of the same opinion. To my mind it is clear that the intention of the Legislature was to constitute this Central Body as a body empowered to employ at wages those who were in a destitute condition. They did employ this man at wages, and the scheme of the workmen's compensation act, to my mind, makes compensation for accidents almost inseparable from wages, and cer-

tainly inseparable from a contract of service, which I think existed here."

In the annotation, 96 A. L. R. 1163, it is said that a respectable line of authorities (which are cited) sustain what is called this English view, that the relationship of master and servant, within the meaning of the compensation laws, is not defeated by the fact that the employee is receiving work under one of the various plans designed to relieve unemployment.

In an entirely new subject, such as compensation to injured relief workers, the law magazines have been most helpful. Among the articles we have found to be of value may be mentioned: 85 University of Pennsylvania Law Review, 230; 16 Boston University Law Review, 772; 2 University of Chicago Law Review, 660; 20 St. Louis Law Review, 186; 7 Rocky Mountain Law Review, 158; 10 Washington Law Review, 218; 9 University of Cincinnati Law Review, 311. The compilations of the states into classes in this opinion, and many other helpful suggestions, have been taken from the excellent article in 36 Columbia Law Review, 555.

It is not possible to say that the majority of courts have held for or against the proposition submitted in the case at bar, for while many states have adopted the old idea that, when the sovereign supports an indigent man, it is entitled to his services and earnings to aid in his support (48 C. J. 543), other states, where right to recover compensation is denied relief workers, not only follow the old ideas in regard to paupers and charity workers, but believe a relief worker should not have a two-fold benefit of relief pay and also compensation when injured, and that no contract of employment exists.

"Where the work is given merely to keep idle hands busy, denying relief seems not undesirable. * * * But where the work has substantial economic value in advancing public improvement, the policy of the acts to impose the cost of human wear and tear upon the employer might well be decisive." 47 Harvard Law Review, 363.

Now, in the case at bar, the defendant insists that under sections 48-114, Comp. St. 1929, and 48-115, Comp. St. Supp. 1937, no person can have the status of an employee within the provisions of the workmen's compensation act unless he is in the service of the corporation sought to be charged under any contract of hire, express or implied, oral or written, and further charges that the relationship of employer and employee does not exist between a governmental body and a workman who is selected and paid by an employment relief organization and assigned by it to work provided for him by such governmental body, when such type of work constitutes a project specifically designed to furnish work for the unemployed; or, to state it another way, the city claims that the national government through the FERA, here known as the Nebraska emergency relief administration, apportioned to each of the states a large sum of money to pay those who do the work, and the state government takes charge of that money and pays it out for work done in that state, and the city insists that, where the government provides all the funds to pay for such labor, there is no relation of employer and employee between the city and the men working on such a project.

To meet these contentions, the plaintiff argues that, when the city exercised control over all the details of the work through the city's employees, with the right to object to and stop the service of any employee, when the city accepts the service and the results of the work, which is for its sole and exclusive benefit as a part of its public sewer system, the city is then bound by the provisions of the Nebraska compensation law, even though the wages are paid with federal funds as a relief project.

And here is a case exactly in point. It is the case of *Blake v. Department of Labor and Industries* (1938) 196 Wash. 681, 84 Pac. (2d) 365. An employee was injured while working on the Skagit river hydroelectric project. The foreman in immediate charge of the crew was employed by the county relief agency and also by the city of Seattle. The injured man received from the city clothing, lodging and

board, and from a relief agency $3 a week. This work at Skagit was a part of the city of Seattle's regular municipal operations. The court held that the respondent was an employee of the city of Seattle. Judge Millard, concurring in the result, states the rule of the supreme court of Washington, as follows: "In other words, we are committed to the rule that if the city or county engage one for compensation in the performance of extra-hazardous work in which the city or county is engaged the relationship of employer and employee is created and the employee is under the protection of the workmen's compensation act, irrespective of the fact whether the compensation of the employee be by supplies, or whether he be paid in cash which is contributed by a charitable organization, or by the Federal Government in whole or in part."

In Canada very liberal provisions have been made for relief workers. In Manitoba, on projects sponsored by municipalities, compensation is universal. In Ontario, Alberta, and Nova Scotia, relief workers are paid practically the same as in private industry.

There is a growing sentiment in many states of the Union to liberalize former laws and decisions to build a higher morale in relief workers. A few states will not go as far as one group of states and allow compensation to relief workers exactly the same as to other public employees, but have enacted laws setting up special relief administration machinery to handle compensation to injured relief workers. These states embrace several where courts have previously denied relief of this nature, and are Connecticut, Louisiana, Minnesota, Rhode Island, Washington, West Virginia, Wisconsin and Wyoming.

In eight other states special legislation was enacted to meet the local situation. In many of these, relief workers had been denied relief under the former workmen's compensation laws. The eight states are Idaho, Indiana, Nevada, New Jersey, New York, Ohio, Pennsylvania and Vermont.

These special acts in several of these states make the

amount of compensation paid relief workers considerably lower than the amounts provided for other workers.

It appears to be reasonable to distinguish between those who work for their support on relief projects and those who do not, but are simply kept in county farms or poorhouses. It is sound public policy to preserve the self-reliance of relief workers by granting them the same compensation for injuries as applies to all other public employees.

It is not often that such claims for compensation come before a court of last resort, because the financial position of a relief worker is such that, without outside help, litigation is practically impossible, and the plaintiff in the case at bar states in her brief that she regrets that lack of funds will permit her to file a brief only a fraction of the length of the brief of the city.

The city calls our attention to two Nebraska cases which may throw a little light on the question. In the case of *Dabelstein v. City of Omaha*, 132 Neb. 710, 273 N. W. 43, a large number of workers, as well as the timekeeper, foreman, and first-aid man, were all directly employed and paid by the federal government. The work at the time plaintiff was injured was to take up street railway rails, and one rail fell on the instep of plaintiff's right foot. He brought suit against the city of Omaha and the street railway company. His injury was caused by fellow men working for the government. The trial court and this court concluded that the evidence was insufficient to bear a construction that the plaintiff was an employee of any kind of either defendant.

The case of *Drum v. Omaha Steel Works*, 129 Neb. 273, 261 N. W. 351, involved the construction of a bridge over the Loup river south of Columbus as a federal aid project. It was said: "While this federal enactment does not abrogate the provisions of the workmen's compensation law of the state, the federal government could provide that the contract should contain the same conditions. The contract in this case between the state of Nebraska and the Omaha Steel Works did contain these provisions."

The city of Lincoln had full control of, and dictated, the details of the work, and had the right to accept Hendershot's services or to discharge him from the job. Hendershot had the right to accept the proffered work or reject it. It was entirely voluntary. The city accepted the services, and is now using the public sewer system upon which the work was done. The relations between them were clearly that of a municipal corporation as employer and Hendershot as a public employee. The city to all effects said: "If you want a job, come down and my foreman will try you out." He came and was found satisfactory, and became a public employee.

The fact that the federal government had furnished funds to the Nebraska emergency relief administration, out of which the wages were paid, does not prevent the operation of the Nebraska compensation law, for the city applied to be granted money to complete this sewer project, and accepted the money to pay the men, and controlled their labor on the sewer construction, which was for the sole benefit of the city, and therefore cannot avoid paying the award. Affirmed, with an attorney's fee of $150 in this court.

AFFIRMED.

JOHNSEN, J., concurs in the result.

GEORGE W. ALLEN ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT: DAN B. BUTLER ET AL., INTERVENERS, APPELLANTS.
286 N. W. 916

FILED JULY 11, 1939. No. 30545.

1. **Municipal Corporations.** Where the board of trustees of the police relief and pension fund, created under the provisions of sections 14-610 *et seq.*, Comp. St. 1929, fail upon demand to enforce the payment by the city of the amounts therein described, a beneficiary under the fund may properly maintain an action against the city to recover the amount due for the use and benefit of such fund.
2. **Costs.** Where the services of a litigant's attorney result in rescu-

ing or preserving a large amount of property or funds, not only for the benefit of the particular litigant, but for the benefit of all others in the same class, and by means of these services the property or funds are conserved for the benefit of all, the expense thereof, including attorney's fees, should be borne by those benefited by it.

3. ———. The most equitable method of securing a proper proportion of the expense from each of the parties benefited is to make such expense a charge on the fund.
4. **Municipal Corporations**: PENSION FUND. Where a fund is made up from moneys received from and through certain operations of the police department of a city, and not by general taxation, and where such fund is segregated for the specific purpose of paying benefits to retired and disabled policemen, the fund is not, strictly speaking, a public fund, even though the city treasurer is made the custodian thereof.
5. **Attorney and Client.** In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
6. **Parties.** One having an interest in the result of pending litigation may intervene as a matter of right by virtue of section 20-328, Comp. St. 1929.

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

Seymour L. Smith, Harold C. Linahan, W. W. Wenstrand and *Louis T. Carnazzo,* for appellants.

McKenzie & Dugan, Williams, Beynon & Nye and *Francis V. Robinson, contra.*

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

CARTER, J.

This is an action against the city of Omaha to recover the amounts due the police relief and pension fund of the city under the provisions of section 14-610, Comp. St. 1929.

The action was commenced by three retired police officers now on pension as beneficiaries of the fund. A petition in intervention was filed by the members of the city council in their capacity as trustees of the police relief and pension fund. The trial court entered a judgment against the city for $466,058.84, allowed an attorneys' fee of $46,605.88, and dismissed the petition in intervention. From this judgment the defendant and interveners appeal.

Since 1909 the statutes of Nebraska have provided for a police relief and pension fund and designated the sources of revenue to maintain the fund. Laws 1909, ch. 15. In the original act it was provided, among other things, that "all moneys, pay, compensation or salary, or any part thereof, forfeited, deducted or withheld from any member or members of the police force for or on account of absence for any cause, lost or sick time, suspension, sickness or other disability, physical or mental, * * * and all moneys realized, derived or secured from the sale of any condemned, unfit or unserviceable personal property belonging to or in the possession or under the control of the police department, after deducting all expenses incident thereto," should be set apart for the benefit of the fund. These provisions are still in force and now appear in section 14-610, Comp. St. 1929.

It was stipulated by the parties that since July 1, 1909, lost and withheld pay in the amount of $264,675.38 has been wrongfully retained in the general fund of the city, and that unfit and unserviceable automobiles of the value of $63,334.83 have been sold and not credited to the fund. It was further stipulated that, if said amounts had been timely credited, the sum of $138,048.63 would have been earned by their investment. The total sum of these items constitutes the amount of the judgment entered against the city of Omaha.

This appeal raises four questions for our consideration: (1) Were the plaintiffs proper parties to bring this suit? (2) Did the court have the power to allow an attorney's fee payable out of the funds recovered? (3) If so, was the

amount of the attorneys' fee excessive? (4) Was the petition in intervention properly dismissed? We will devote ourselves to these questions in the order designated.

By express terms, section 14-612, Comp. St. 1929, makes the members of the city council the board of trustees of the police relief and pension fund. The plaintiffs, and others similarly situated, were unquestionably beneficiaries of the fund. A trust relationship therefore existed. The defendant contends, however, that payments made from the fund are on general obligations of the city and will have to be paid whether the fund is strictly maintained as provided by the statute, or not. It is upon this premise that defendant bases his argument that plaintiffs, as retired police officers, are not prejudiced by the failure of the city to make the payments for which suit was brought, and therefore they are not proper parties. 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, this is not a controlling factor in determining whether a beneficiary under the pension fund may maintain a suit for himself, and others similarly situated, to preserve or augment the fund. The statute does not provide for a general levy by taxation as a means of raising the revenue necessary to carry out the purposes of the law. The fund is made up from moneys received from and through certain operations of the police department, and while under the holdings of this court the city is liable for pension payments where the rights thereto have vested, whether the funds have been thus provided or not, the beneficiaries will not be relegated to the single remedy of suing for their pension payments. While the city is ultimately liable, the plaintiffs as beneficiaries of the trust are proper parties to invoke the power of the courts to compel compliance with the statute creating the fund. To require the beneficiaries of the fund to wait until the money was exhausted, and then limit them to a suit at law to enforce their individual rights, does not afford the only remedy. Demands were made upon the board of trustees of the fund, demanding that they take steps to enforce

compliance with the statute without result. Under such circumstances, the plaintiffs have sufficient interest to maintain a representative suit on behalf of all the beneficiaries of the fund.

It is urged that this is not a proper case for the allowance of an attorneys' fee out of the fund recovered. The applicable rule is as follows: Where the services of a litigant's attorney result in rescuing or preserving a large amount of property or funds, not only for the benefit of the particular litigant, but for the benefit of all others in the same class, and by means of these services the property or funds are conserved for the benefit of all, the cost thereof, including attorney's fees, should be borne by those benefited by it. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N. W. 836; *In re Estate of Creighton*, 93 Neb. 90, 139 N. W. 827. Clearly, in the case at bar, all of the beneficiaries of the police relief and pension fund were benefited by the litigation carried on by these plaintiffs. The application of equitable principles requires that all beneficiaries should contribute their due proportion of the expense. The most equitable way of securing such contribution is to make the expenses a charge on the fund.

It is further contended that the fund in question was a public fund and could not for that reason be subjected to the payment of an attorneys' fee. The rule contended for by defendant and interveners is well stated in *Wood v. State*, 125 Ind. 219, 25 N. E. 190, as follows: "The law will not permit the administration of governmental affairs to be embarrassed by the seizure of public property, or public funds, to pay debts due individuals. * * * This settled rule rests upon considerations of public policy, and it is its object to prevent embarrassment in governmental affairs, and not to protect or assist public officers. It is difficult to conceive a case where there is stronger reason for the rule than one, such as this, where a public officer seeks to embarrass the collection of the public revenues by tying up money due a governmental subdivision by asserting a lien."

While we agree with the principle announced therein, we do not believe that it controls the decision in the case before us.

An authoritative text in discussing the subject of public funds says: "The term 'public funds' means funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose; and in this sense it applies to the funds of every political division of the state wherein taxes are levied for public purposes. The term does not apply to special funds, which are collected or voluntarily contributed for the sole benefit of the contributors, and of which the state is merely the custodian." 50 C. J. 854. In conformity therewith it has been held that a state hail insurance fund raised from hail insurance premiums was not a public fund. *State v. Jorgenson,* 29 N. Dak. 173, 150 N. W. 565. A state bonding fund raised from the collection of bond premiums was not a public fund. *State v. Taylor,* 33 N. Dak. 76, 156 N. W. 561. A state compensation fund maintained by contributions of employers is a special and not a public fund. *State v. Olson,* 43 N. Dak. 619, 175 N. W. 714. Funds paid to the state forester for fire protection by those whose property was benefited are not state funds. *State v. Pape,* 103 Wash. 319, 174 Pac. 468.

The foregoing authorities support the proposition that the funds of the police relief and pension fund were not, strictly speaking, public funds. They were not raised by taxation. They were segregated by operation of the statute for a specific use. They could be used lawfully for no other purpose, governmental or otherwise. The moneys in the fund do not belong to the city of Omaha, but are deposited with, and held by, the city treasurer in trust, for the benefit and protection of those who under the terms of the act may become claimants against such fund. In no event do such moneys become the funds of the city. They can be paid

out only as provided in the statute creating the fund. We necessarily conclude that the police relief and pension fund was not a public fund within the purview of the rule contended for by the defendant and interveners.

The trial court allowed an attorneys' fee payable from the funds resulting from the litigation in the amount of $46,605.88. Defendant and interveners contend that this allowance was excessive. It appears from the record that the accounting of the amounts due the police relief and pension fund was made by two employees of the police department in the pay of the city of Omaha, with some supervision on the part of plaintiffs' attorneys. The principal amounts were stipulated to be owing, and, after some negotiations, the earnings of the principal amounts, had they been paid over as they become due, were also agreed to by the parties. A judgment was then entered on the stipulation, and, except for the allowance for attorneys' fees, there was no contest as to the amounts included in the judgment. The principal legal work performed by plaintiff's attorneys was in the presentation of a demurrer and in making preparations for trial. We have examined the evidence as to the value of the services rendered, including the testimony of the expert witnesses based upon the hypothetical questions submitted to them. In determining the value of the services rendered by the plaintiffs' attorneys, we have considered the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorneys, and the customary charges of the bar for similar services. See *Andrews v. Commercial Casualty Ins. Co.*, 128 Neb. 496, 259 N. W. 653; *Hemmer v. Metropolitan Life Ins. Co.*, 133 Neb. 470, 276 N. W. 153; *Prince v. Pathfinder Life Ins. Co.*, 133 Neb. 705, 276 N. W. 661.

A detailed history of the case and of the services rendered are set forth in the record. A complete examination of the evidence viewed in the light of the law applicable thereto

convinces us that the allowance made by the trial court was excessive. We think, under the circumstances of the case and upon consideration of every factor that can be properly considered in fixing an attorneys' fee of this kind, that the sum of $8,500 constitutes a reasonable fee. It is therefore ordered that the proceeds of the judgment, when paid into the police relief and pension fund, be charged with the payment of $8,500 for the benefit of plaintiffs' attorneys.

Interveners complain of the action of the trial court in dismissing their petition in intervention. The interveners as the board of trustees of the police relief and pension fund were charged with the duty of conserving and protecting the trust fund created by the statute. This they failed to do upon demand. Plaintiffs then commenced the suit on behalf of all the beneficiaries of the fund, which they had a lawful right to do. Plaintiffs asked in this petition for a judgment for the amount found to be due and in addition thereto prayed "that the court shall enter such orders, judgments or decrees with reference to said fund and to attorneys' fee, expense and costs of the prosecution of this litigation and the maintenance of said fund as shall to the court may seem just and equitable in the premises." It will readily be observed that upon the payment of the judgment the defendant city of Omaha would have no direct concern in the ultimate disposition of the fund. It would have no direct interest in contesting the allowance of attorneys' fees, expenses and costs out of the proceeds of the fund. The board of trustees would have a direct interest in this phase of the case as well as in any judgment obtained. It is provided by statute section 20-328, Comp. St. 1929: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely

to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." Under this section of the statute the board of trustees of the police relief and pension fund are permitted to intervene as a matter of right for the purpose of protecting any right that they were obligated by law to protect. We think the trial court erred in not entering a judgment on the petition in intervention for the full amount of the judgment and costs, and directing the payment of a reasonable attorneys' fee from the proceeds of the judgment. The judgment of dismissal entered on the petition in intervention will be reversed and the cause remanded, with directions to enter a judgment thereon in accordance with this opinion. It is, of course, evident that a satisfaction of either judgment would amount to a satisfaction of the other.

AFFIRMED IN PART AND REVERSED IN PART.

JOSEPHINE O. SCHURMAN, APPELLANT, V. EDWARD A. PEGAU, APPELLEE.

286 N. W. 921

FILED JULY 11, 1939. No. 30526.

1. **Trusts.** "A trust * * * is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." *Parker v. Bourke*, 131 Neb. 617, 269 N. W. 102.
2. **Judgment: PRIVITY.** "Privity depends upon the relation of the parties to the subject-matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. *Stryker v. Goodnow*, 123 U. S. 527, 540." *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 216, 89 N. E. 193.
3. **Divorce: ESTOPPEL.** Where a certificate of stock of 200 shares is indorsed to two separate parties, each apparently owning 100 shares thereof, and one of such parties, in a suit for divorce,

alleges ownership of the entire 200 shares of stock, and subsequently testifies that, had she succeeded in obtaining judgment on her cross-petition, the other party would have been entitled to one-half of the stock, the latter person, not a party to the divorce action, is not subsequently estopped from bringing an action for the purpose of procuring such party's interest in the stock as evidenced by the indorsement on the certificate thereof.

4. Equity: LACHES. "'Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immediate parties to the transaction.' 13 Am. & Eng. Ency. of Law, 674." *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405.

5. ———: ———. The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position. *Felix v. Patrick*, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719.

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

O'Sullivan & Southard and *George B. Thummel*, for appellant.

Munger & Rhodes, contra.

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

MESSMORE, J.

Plaintiff alleges in her amended petition that the defendant, Edward A. Pegau, held in trust for her the sum of $34,239.13, which was the sale price of 100 shares of stock in the Western Auto Supply Company, in which she claimed ownership, and which stock was sold by the defendant in 1920; that defendant had never accounted to her, and that he is entitled to credit for whatever he has expended for schooling, and prays for an accounting. The answer to the amended petition is a general denial, and pleads estoppel, laches and a parol agreement alleged to have been made by and between defendant and plaintiff, which will be more fully set out in the opinion. The reply denies the making of an oral contract and seeks to credit the defendant with

the sum of $6,900, disbursed by him for schooling, maintenance and income tax assessment, and contains a plea of estoppel. On the issues the trial court found generally for the defendant and dismissed the plaintiff's action. She has appealed from this order, assigning as error that the court's decree is not sustained by the evidence and is against the great weight thereof. This assignment of error requires an analysis of the pertinent evidence. The record is voluminous, and to set out the evidence in detail would unnecessarily lengthen the opinion. We therefore refer to a brief history and the pertinent facts as developed in the record.

Plaintiff was the daughter of John and Grace Schurman. She was born in Fremont, Nebraska, August 9, 1901. Her brother, John Ernest Schurman, was born March 30, 1906. Her father died in 1906, and her mother, Grace Pegau, married the defendant in 1909. The mother at the time was 37 and the defendant 29 years of age. They subsequently removed to Omaha, where they purchased a home, Mrs. Pegau making the down payment and moving her household goods and equipment to Omaha. In 1913 the defendant and one Kohn purchased the Western Auto Supply Company. The defendant borrowed $5,000 from the City National Bank; his wife signed the note, and, in order to obtain further working capital, Mrs. Pegau borrowed in Fremont on her own note the sum of $3,000. She owned one-fourth interest in the corporation, evidenced by certificate of stock, 100 shares, and was the secretary and a director. The profits of the business retired the notes. Subsequently, the defendant procured Kohn's interest in the business, and in 1915 Arthur Storz bought into the business, and Mrs. Pegau's stock was reassigned or indorsed to her husband, the reason given being that Mr. Storz did not desire to be associated in business with a woman. On December 25, 1919, the defendant indorsed 100 shares of stock to Mrs. Pegau and 100 shares of stock to the plaintiff, evidenced by certificate No. 52. The stock remained in his possession in his safe deposit box. The reason for so indorsing the 200 shares of stock, as given by the defendant, was in order to protect

Mrs. Pegau and plaintiff, in the event of his death, and in addition for income tax purposes. Mrs. Pegau always claimed ownership in the stock and requested the indorsement of the 200 shares as hereinbefore stated.

On May 24, 1920, the 200 shares of stock, evidenced by certificate No. 52, were assigned by plaintiff and Mrs. Pegau, each as owner of an undivided half-interest therein, to Arthur Storz, and each consented to the sale and that the consideration therefor be paid to the defendant. The sale of the business was made at that time to Storz, and the consideration for the 460 shares of stock was the release of a note by the defendant to the company for $7,500; $25,000 cash paid on the date of signing the contract May 25, 1920; $25,000 on December 1, 1920; $25,000 on June 1, 1921, $25,000 on December 1, 1921, and $25,000 on June 1, 1922, the deferred payments bearing 6 per cent. interest. The balance of $25,000 was paid at the rate of $1,000 a month, and was for the purpose of requiring the defendant to remain out of business for two years.

Much has been stated in the record as to the finances of this family. We here discuss it, to show the pertinency and association of the family finances with the transaction had, in reference to the indorsement of the stock and the sale of the business. There is a discrepancy in the following testimony: Mrs. Pegau claimed that she and the two children inherited, including life insurance and rents, approximately the sum of $60,000 from her first husband. The figures were fixed in the decree in a divorce action, showing Mrs. Pegau's share of the estate to be $18,286, and the children's share $21,574, which included a 5,000-dollar inheritance to the children from their grandmother, making the total amount of $39,860. In 1918 the family moved to more spacious quarters. The record shows that they lived extravagantly and lavishly, and in this respect they were all transgressors. The inheritance, as above stated, was expended by 1920, apparently for the benefit of the family, and, in addition thereto, a monthly allowance of $150 to $200, given by defendant to his wife. The children at this

time were approximately 14 and 18 years of age. They had been educated out of this amount up to that time.

The question to be determined is whether or not the plaintiff owned the 100 shares of stock. It is admitted that none of the inheritance of either Mrs. Pegau or the two children was ever invested in the business, with the exception of the use of Mrs. Pegau's credit in the first instance. The evidence shows that the money received from the stock was at one time placed in a bank or in Liberty bonds. The defendant stated that it was mostly spent. He testified: "Q. So really, as far as you were concerned, she (referring to plaintiff) owned that one hundred shares of stock, did she? A. Yes. * * * Q. In your estimation at that time did Mrs. Pegau own one hundred shares of stock? A. Yes. * * * A. As far as the stock records were concerned they owned the stock. And they were put,—they were assigned to them in blank for protection and tax purposes. Q. I didn't ask you about the stock records. I asked about as far as you were concerned. Your intention. Did they own the stock? A. Well, my intentions were just as the stock records showed. Q. So that they did own the stock? A. They did own the stock." The foregoing testimony was elicited upon the trial of the divorce action between Mrs. Pegau and defendant. In the instant case, defendant testified on cross-examination: "Q. Now, when you were talking, you didn't deny but what Josephine actually owned this one hundred shares of stock did you? A. No. Q. That is a fact, that she actually owned that stock? A. That is right, so far as the records go * * * So far as the records of the business were concerned it is absolutely correct. * * * Q. And she did own the stock? A. She owned the stock; yes, sure. * * * Q. Now, you knew all the time that Josephine O. Schurman,—you acting as her agent and Gilchrist Company acting for you,—was claiming the absolute ownership of one hundred shares of this stock; you knew that, didn't you? A. In the first place, I only acted as her agent once in signing that paper, and in the second place I knew that she owned a one hundred shares of stock."

Without doubt, the testimony of the defendant shows for itself that he intended the plaintiff to be the owner of the 100 shares of stock. This is further borne out by the record, in that the defendant signed an income tax return, showing the profits from the sale of 100 shares of stock in favor of the plaintiff. In reference to income tax, the defendant testified that he obtained the services of experts, and presumably acting on their advice the transfer of the 200 shares of stock was made, the purpose being to lessen the amount of income tax payable, which would result in no tax in the upper or surtax bracket. A controversy arose, in reference to the ownership of the stock, between the defendant and the United States government. The defendant's claim that he did not own the 200 shares is evidenced by an affidavit furnished by Mrs. Pegau at his request, showing the history of the ownership of the stock and her interest and ownership therein, and also the ownership of the 100 shares in plaintiff, and that they were entitled to the profits from the sale of the stock. Fortifying this evidence is the testimony of the original partner, Kohn, with reference to the ownership of the stock in Mrs. Pegau. We are not concerned with the controversy between this defendant and the government, but we must conclude that the evidence of ownership of the 100 shares, in view of all the circumstances of this case, is clear, unequivocal and convincing, in that plaintiff did, for all intents and purposes, own the 100 shares of stock.

The following questions and answers are also pertinent on this point. Defendant testified: "Q. Well, did Josephine O. Schurman have any interest in the proceeds derived from the one hundred shares of stock sold to Arthur Storz during the year 1920, after May 24th, 1920? A. Yes; she had an interest in that stock until the fall when we came back from California. Q. She had an interest in the proceeds; is that what you intend to say? A. She had an interest in that stock, that share of stock, from the time the sale was made until the agreement was made in the fall before they went to school."

The plaintiff was five years old at the time of her mother's

marriage. She stood in the relationship of a daughter to her step-father, and he assumed the obligations of a father. When the assignment of the 200 shares of stock was made, he presented the instrument to her, and she remarked that she thought she was to read over what she signed; and he told her: "Don't be smart about it, don't talk about it, do it." She then signed the instrument. It is only natural, considering the family relationship, that the plaintiff, then a girl of 18 years, would do as she was told. She had implicit confidence in and respected the defendant's ability and judgment. She knew vaguely of the sale of the business, but knew none of the details.

Defendant's contention is that the trust, if any, as alleged by the plaintiff, is an express trust and arises only from the intentional act of the parties to create it; that in the instant case no words were spoken indicative of any intention to create an express trust, or to recognize its existence, for 17 years, and that the contract dated May 25, 1920, shows a contrary intention, since it is an intentional assignment of the stock by the plaintiff to defendant of any interest that she might have therein. The defendant goes farther, claiming that there were family discussions about finances, concerning the education of the children and concerning extravagances on the part of this plaintiff, and that no mention was ever made by the plaintiff that defendant was holding any money in trust for her.

We believe the evidence shows, by the admission of the defendant, that he intended to create the ownership of the stock in the plaintiff, and so expressed this intention by his acts and conduct. He admitted her ownership of the proceeds of the sale until August, 1920, when he claimed that the parol agreement was made. The facts and circumstances are sufficient to create a trust.

"A trust * * * is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." The above defi-

nition is set forth in *Parker v. Bourke,* 131 Neb. 617, 269 N. W. 102.

The defendant's answer alleges a parol agreement had in August or September, 1920, when the plaintiff, Mrs. Pegau, plaintiff's brother and defendant attended and participated in a family conference. The finances, plans and prospects of the family group were discussed, and it was orally agreed by all that Mrs. Pegau and the plaintiff would have no further interest in the proceeds from the sale of the 200 shares of stock, or any right, title or interest therein, or any claim of ownership, and, in consideration of such fact, defendant was to defray the expenses for education of the plaintiff and her brother and make and execute a will leaving all of his estate to Mrs. Pegau, and at her death to go to her children, to the exclusion of his relatives; that the plaintiff subsequently, in 1920, 1921 and 1922, orally ratified and confirmed the family agreement and settlement. The record shows that defendant claims the matter was discussed every summer, and was discussed by the plaintiff in 1923, after she had finished school, wherein she was concerned with the education of her brother. Defendant's contention with respect to the education is that he spent $14,000 for the schooling of the plaintiff and approximately $25,000 for the schooling of her brother. The account, as to exact amounts and dates of payment, as disclosed by the record, is indefinite, but the fact remains that the plaintiff was sent to Kemper Hall and Smith College for at least two years, possibly more, while her brother attended Hill Preparatory School for five years and Yale University for four years. Without question a great deal of money was expended by the defendant for the education and maintenance of plaintiff and her brother during the school period.

The testimony with reference to the making of the oral agreement is that defendant and his wife had talked it over first when they were in an automobile. In the divorce action he testified that he had no discussion with Mrs. Pegau in August or September, 1920, with reference to their affairs or her interest in the stock certificate and

had no discussion with plaintiff relative to her interest therein. There is evidence that a will was made by the defendant at the request of Mrs. Pegau, excluding his relatives and making her the chief beneficiary. This will was destroyed in 1935, after the divorce decree was rendered. The evidence is sufficient to show the expenditure of considerable sums of money by the defendant on the education of the plaintiff and her brother, which would be in keeping with the conception of the oral agreement. We believe that, by the oral agreement, considering the circumstances of the case and that no benefit from the expenditure of the children's inheritance, with respect to further education, inured to them, the evident intent of the parties was that the defendant pay for the education of plaintiff and her brother, and that such amounts as he has expended should be deducted from the proceeds of her interest in the 100 shares of stock.

The defendant pleads estoppel. This defense is based on the following state of facts: The plaintiff finished school in 1923. She was employed in New York and made occasional visits to Omaha. There had been considerable difficulty in the family at all times in reference to money matters, and Mrs. Pegau claimed to be the owner of an interest in the business. The defendant denied her ownership in any part of the business. Many controversies arose in reference to this matter, until Mrs. Pegau consulted some attorneys in reference to an accounting for the 200 shares of stock, as evidenced by certificate No. 52. Suit was brought by her to compel an accounting by defendant. In the divorce action filed in 1934, Mrs. Pegau, by cross-petition, pleaded the ownership of the 200 shares of stock, and asked for $75,000 as the value of the stock, in addition to an allowance for permanent alimony. In 1935 a decree of divorce was granted to the defendant, and the court found that the equities were even, gave Mrs. Pegau $50,000 alimony; stated that $39,860 had been expended on the education of her children, and found that she had no interest or ownership in the 200 shares of stock. Mrs.

Pegau testified in the instant case that, had she prevailed, one-half of the recovery would have gone to the plaintiff in this action. In addition, it is claimed that the plaintiff heard the oral argument in the divorce action wherein the ownership of this stock was discussed; she knew all of the facts and circumstances with reference thereto, and that she is now estopped by her acquiescence to assert any right of ownership in the 100 shares of stock.

With this contention we cannot agree. Mrs. Pegau's suit for an accounting was dismissed without prejudice in 1936. Plaintiff in the instant case testified in the divorce action of her mother as to the allegation of cruelty; that she had been very sick for a period of time. She was not a party to the action and in no manner were her rights adjudicated therein. The ownership of this stock was in the plaintiff for a considerable period before the divorce action was brought.

"Privity depends upon the relation of the parties to the subject-matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. *Stryker v. Goodnow,* 123 U. S. 527, 540." *Old Dominion Copper Mining & Smelting Co. v. Bigelow,* 203 Mass. 159, 216, 89 N. E. 193.

"Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action." *Stamp v. Franklin,* 144 N. Y. 607, 39 N. E. 634.

In *Northwestern State Bank v. Silberman,* 154 Fed. 809, the court, in quoting from 1 Greenleaf, Evidence, sec. 523, said: "No man ought to be bound by proceedings to which he was a stranger * * * Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce the testimony, and to cross-examine the witnesses adduced on the other

side. Persons not having these rights are regarded as strangers to the cause."

The following rule stated in Jones, Evidence (2d ed.) sec. 290, is pertinent: "The rule allowing the silence of a person to be taken as an implied admission of truth of allegations uttered in his presence * * * does not apply to silence at a *judicial proceeding* or hearing. Thus, it is error to admit evidence that a party to a suit was silent where his adversary testified to certain facts on a former trial which were prejudicial to him. There can be no inference of acquiescence in such case, as the party is not at liberty to contradict the statement of a witness while testifying. He could not interfere and deny the statement. To do this would be to charge the witness with perjury which would be alike inconsistent with decorum and with the rules of law. For similar reasons no unfavorable inference is to be drawn from the silence of a party *during* the comments or *argument* of counsel." The above rule applies to the taking of testimony in open court.

We now come to the defendant's contention of laches; that is: The plaintiff made no demand on the defendant for any part of the moneys alleged to have been held by him in trust for the plaintiff from 1920 until the time of the commencement of this action in June, 1937, or for a period of 17 years.

The defendant testified that there had been constant difficulty in the family for a period of 25 years. The record bears out this testimony. The plaintiff was aware of the situation. She made no demand, and her reason for not doing so is: "In the first place, I thought he was better able to take care of money and make money, and save money than I was, and in the second place, things had not been very (interrupted) * * * Well, the family situation was not a good one, and I did not want to cause a rift. Mother's married life was more important to me, her peace of mind, and I knew if I started anything it would simply throw the whole family situation into a divorce court, and that I felt sure was true. And, on the other hand, I thought that this

will, taking care of me, as I had heard several times, I felt that there wasn't any reason why I should jeopardize the future to take something in the present." The plaintiff further testified she did not know that the defendant claimed ownership of the 100 shares of stock until such time as she heard him testify in the divorce action in reference to the parol agreement.

The situation of the parties has not changed materially since the time of the sale of the stock. Since the sale of the business in 1920 defendant has engaged in business on his own account, and an audit of such business appearing in the record reflects his success. There has been no material change in that respect since the sale of the 100 shares of stock in 1920. The defendant contends that by the delay there has been a material change, to his disadvantage. This is probably based on the fact that he was not able to obtain in detail the accurate amounts expended on the education of plaintiff and her brother and for their maintenance. However, there is evidence that his business records are fairly complete from 1922 to 1934.

The defense of lapse of time, that is, laches, is an equitable one. The lapse of time and the relation of the defendant to the rights must be such that it would be inequitable to permit the plaintiff to maintain her claim.

The defendant cites *Severson v. McKenzie,* 122 Neb. 827, 241 N. W. 774, wherein this court held: " 'Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations.' *Hawley v. Von Lanken,* 75 Neb. 597." And in *Abraham v. Ordway,* 158 U. S. 416, 15 S. Ct. 894, it was held: "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked."

In the instant case, we believe, the facts and circumstances as disclosed by the entire record offer a reasonable excuse for the delay, and that no injustice results to the defendant

thereby. To sustain this conception of the record, we must look to the facts and circumstances of the particular case. The principle of law from the following cited cases is pertinent:

In *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405, the court, in quoting from 13 Am. & Eng. Ency. of Law, 674, said: "Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immediate parties to the transaction."

The opinion in *Geiss v. Trinity Lutheran Church Congregation*, 119 Neb. 745, 230 N. W. 658, sets forth a number of authorities which are pertinent to the proposition here involved, and found on page 751:

"In *Galliher v. Cadwell*, 145 U. S. 368, 36 L. Ed. 738, it was held: 'Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.'

"In a note to *Felix v. Patrick*, 36 L. Ed. (145 U. S. 317) 719, 720, we find the following: 'The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position.' * * *

"In *Garden Cemetery Corporation v. Baker*, 218 Mass. 339, it was said, in effect, that, where no one has been misled to his harm in any legal sense by the delay and the situation has not materially changed, the delay is not fatal. And in *Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840, it was held that, the defense being an equitable one, the lapse of time and the relations of the defendants to the rights must be such that it would be inequitable to permit plaintiffs to maintain their rights. * * *

"In *Hawley v. Von Lanken*, 75 Neb. 597, it was held: 'In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether a reasonable excuse is offered for the delay.' "

The rule in *Hawley v. Von Lanken, supra,* was reaffirmed in *Harrison v. Rice,* on rehearing, 78 Neb. 659, 114 N. W. 151, and a similar rule was announced in *Northwest Ready Roofing Co. v. Antes,* 117 Neb. 121, 219 N. W. 848.

In granting the plaintiff relief, we again review the contract for the sale of the stock in question. The actual amount of the stock, in which plaintiff had an interest, must be based upon the figure of $125,000. The release of the 7,500-dollar note was a personal consideration and affected only the defendant. The $25,000 paid in monthly instalments was personal to the defendant for not engaging in the business for a period of two years; it constituted no part of the sale of the stock. Therefore, plaintiff's share of the proceeds of the sale of the stock is 100/460 of $125,000. The ratio of the plaintiff's interest in the $125,000 is placed at 21.7 per cent., or in an amount equal to $27,125. This constitutes the value of her 100 shares of stock.

Having found that the plaintiff is entitled to an accounting and using the above amount as a basis, fixing the rate of interest at 6 per cent. as being equitable in view of the fact that the contract of sale of all the stock called for 6 per cent., and making the proper deductions as credits that should be allowed the defendant for the education and maintenance of plaintiff and her brother, we find that there is due and owing from the defendant to plaintiff the sum of $7,810.95, for which amount plaintiff is entitled to judgment, with interest thereon at the rate of 6 per cent. per annum from June 11, 1939.

The judgment of the district court is reversed, with directions to enter judgment in accordance with this opinion.

REVERSED.

CARTER and JOHNSEN, JJ., dissent.

BAINTER F. AMERINE, APPELLANT, V. MATHEW O'NEAL, APPELLEE.
287 N. W. 56

FILED JULY 11, 1939. No. 30632.

Automobiles. A motorist, who attempts to turn back onto an icy pavement from the dirt shoulder of the highway, where he has swung to avoid a head-on collision with a car violating the rules of the road, and who catches his rear wheel on the edge of the pavement, which is three inches higher than the shoulder, of which condition he is aware, and whose automobile by reason thereof is forced sideways and caused to skid in front of another car, is not guilty of "gross negligence" within the meaning of the automobile guest statute (Comp. St. Supp. 1937, sec. 39-1129), where his speed of 20-25 miles an hour is not claimed to be excessive for the general traveling condition of the highway, and where, except that he is without chains, the manner of his driving, up to that moment, is admittedly beyond reproach.

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

Stewart, Stewart & Whitworth and *Charles B. Paine*, for appellant.

Chambers, Holland & Locke, contra.

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

JOHNSEN, J.

This is an action for damages under the automobile guest statute. At the close of plaintiff's evidence, the trial court discharged the jury and dismissed the action, on the ground that there was no proof of gross negligence. Plaintiff has appealed.

The accident occurred on the evening of December 24, 1937, west of Forty-Eighth street, on Highway 77, north of the city of Lincoln. Plaintiff and defendant were returning from work at the Burlington roundhouse in West Lincoln to their homes in Havelock. Plaintiff had not driven his car to work because some sleet had fallen the night before. Defendant offered to give him a ride home. Part

of the ice had been worn off by traffic during the day, but the pavement, as described by plaintiff, was still icy and slippery in spots. Defendant drove without chains, but, other than possibly to slide a little now and then, his car had not skidded up to the time of the accident. In fact, there is no complaint in the briefs about defendant's driving, until the moment preceding the collision.

As defendant was approaching Forty-Eighth street, about 20-25 miles an hour, another car, traveling 40 miles an hour in the opposite direction, swung onto defendant's side of the pavement, in an effort to pass traffic. To avoid a head-on collision, defendant turned his car quickly to the right, off the pavement and onto the dirt shoulder. After traveling about 100 feet, he attempted to swing it back. The pavement was approximately three inches higher than the shoulder of the highway. The left rear wheel caught in some manner on the edge of the pavement, causing the car to swing sideways and to skid in front of an automobile approaching from the opposite direction. A collision resulted. The evidence shows that the highway shoulder was approximately 10 feet wide, and that it would have been possible for defendant to have proceeded on it, without turning back onto the pavement, for a distance of approximately 200 yards.

The argument in plaintiff's brief, summarized, is that, while under ordinary conditions it might not constitute gross negligence for defendant to turn his car from the shoulder of the road onto the pavement at the place where the accident occurred and at the speed that he was traveling, yet a jury might properly find that it was gross negligence to do so when the pavement was icy and a car was approaching from the opposite direction.

Gross negligence, under our guest statute, has repeatedly been defined as negligence in a very high degree or the absence of even slight care under the circumstances. We can see nothing in defendant's attempt to return to the pavement that would justify an inference of gross negligence under this definition. Except that he was without chains,

his driving up to that moment was admittedly beyond reproach. His speed had not been excessive. His preceding caution and regard for his guest's safety are evidenced by his efforts to avert a collision, in swinging onto the shoulder of the highway. The consequence of his attempt to return to the pavement was unusual. His failure to anticipate, even with his knowledge of the conditions, that the wheel of his automobile might catch on the edge of the pavement, and that the car might thereby be caused to skid into a position of peril, cannot be said to have been such indifference to safety as amounted to a higher degree of negligence than want of ordinary care. Whether defendant was guilty of ordinary negligence, we are, of course, not called upon to determine.

The trial court properly dismissed plaintiff's action.

AFFIRMED.

THOMAS PROKOP, APPELLANT, V. CHARLES S. MLADY ET AL., APPELLEES.

287 N. W. 55

FILED JULY 11, 1939. No. 30617.

1. **Appeal.** In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined. In such case, if the pleadings sustain the judgment, it will be affirmed.
2. ———. A written stipulation of facts forms no part of a record for review unless made so by a bill of exceptions.
3. **Pleading.** New matter in the reply to the answer is treated as denied.
4. **Appeal.** Pleadings examined and found to sustain the judgment of the district court.

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

James P. Marron and *D. E. Rissler,* for appellant.

Leigh & Krajicek and *Arthur L. Burbridge, contra.*

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and LIGHTNER, DISTRICT JUDGE.

LIGHTNER, District Judge.

Suit on a promissory note executed by Charles S. Mlady and Charles Pavlik, Sr. Mlady made all the payments and Pavlik pleads the statute of limitations. The finding was in favor of Pavlik, and plaintiff appeals.

The note was dated April 7, 1925, due in two years, and plaintiff alleged in his petition that interest was paid up to and including April 7, 1930. Suit was filed March 3, 1933. Plaintiff claims that the note did not outlaw by reason of a provision in it to the effect that payment may be extended from time to time by agreement without notice and that after such extension or extensions the liability of all parties shall remain as if no extension had been made. The case was tried to the district court upon a stipulation of facts, and it also appears from the findings of the district court that defendant Pavlik testified at the trial. There is no bill of exceptions, but what purports to be a stipulation of facts is found in the transcript. Mr. Pavlik's testimony no where appears. The court did not make any special findings, but only a general finding in favor of defendant Pavlik.

"In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined." *Backes v. Schlick,* 82 Neb. 289, 117 N. W. 707. See, also, *State v. Barney,* 133 Neb. 676, 276 N. W. 676; *Hayes v. Pilger,* 110 Neb. 609, 194 N. W. 727; *In re Estate of Raymond,* 128 Neb. 568, 259 N. W. 522. In such case, if the pleadings sustain the judgment, it will be affirmed.

A written stipulation of facts forms no part of a record for review unless made so by a bill of exceptions. *State Ins. Co. v. Buckstaff Bros. Mfg. Co.,* 47 Neb. 1, 66 N. W. 27; *Keeler v. Manwarren,* 61 Neb. 663, 85 N. W. 839. Other cases to the same effect are *Herbison v. Taylor,* 29 Neb. 217, 45 N. W. 626; *Bankers Life Ass'n v. Commissioners of Douglas County,* 61 Neb. 202, 85 N. W. 54.

"It is not clear whether any evidence was adduced other than what purports to be a stipulation of facts made at the trial. This is attached to the transcript, but not settled and allowed as a bill of exceptions and is not a part of the record, and cannot be considered. * * * We can only determine whether the pleadings support the judgment." *Hayes v. Pilger*, 110 Neb. 609, 194 N. W. 727.

An examination of the pleadings shows that the petition sets forth the promissory note in question in the first paragraph, and in the second paragraph alleges that payments were made thereon on April 7 of the years 1926 to 1930, inclusive. The answer filed by defendant Pavlik does not admit that any payments were made. It denies each and every allegation of the petition not admitted, pleads the statute of limitations, and alleges that at no time did defendant make any payments on the note set forth in the petition. He alleges in paragraph 3 of his answer that he signed the note as surety only for the defendant Charles S. Mlady and received no part of the proceeds of the note. The reply admits paragraph 3 of the answer, and pleads several affirmative matters, including that the note was extended by agreement with Mlady at the time of the last interest payment on April 7, 1930, but inasmuch as there is no evidence before us to support the allegations of the reply, they need not be further noticed. New matter in the reply to the answer is treated as denied. *Sawyer v. Sovereign Camp, W. O. W.*, 105 Neb. 395, 181 N. W. 191.

The matters argued in the briefs are interesting, but are not in our judgment presented to the court. If on appeal from a judgment of the district court the record contains no bill of exceptions and the pleadings are sufficient to support the judgment, it will be affirmed. *In re Estate of Raymond*, 128 Neb. 568, 259 N. W. 522; *Occidental Bldg. & Loan Ass'n v. Carlson*, 134 Neb. 574, 279 N. W. 162.

Our examination of the pleadings shows, as above explained, that they are sufficient to sustain the judgment, and it therefore should be and hereby is

AFFIRMED.

CLARENCE W. WOODRING ET AL., EXECUTORS, APPELLEES, V. HERMAN SEIBOLD, APPELLANT: CLARA W. HICKS ET AL., APPELLEES.

287 N. W. 75

FILED JULY 18, 1939. No. 30498.

1. **Deeds.** Courts should not set aside the disposition of property made by will or deed without good reasons, based upon clear and satisfactory proof.
2. ———: SETTING ASIDE. In this case the evidence has been examined, the rules announced in *Gidley v. Gidley*, 130 Neb. 419, 265 N. W. 245, followed and applied and the cause reversed and dismissed.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

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

Fred J. Schroeder and *Perry, Van Pelt & Marti, contra.*

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

SIMMONS, C. J.

This is an action to set aside a deed to certain real estate and personal property. The plaintiffs are the executors of the estate of Amanda Barry, deceased. The defendants are the grantee in the deed, Herman Seibold, and a sister and nieces and nephews, heirs at law of the deceased. While the action is brought nominally in the name of the executors, it is actually a contest between the heirs at law and the defendant Seibold. All parties except the defendant Seibold will be referred to as the plaintiffs. The trial court found for the plaintiffs and against the defendant Seibold. The defendant Herman Seibold appeals. The insufficiency of the evidence to support the verdict is the principal assignment of error.

Plaintiffs charge generally that the deed was without consideration, that Amanda Barry was incompetent because of old age and physical and mental disease, and that the defendant occupied a position of trust and confidence with Amanda Barry, and that the deed was given as a result of

a violation of his trust and undue influence on the part of the defendant.

The record in this case is 500 pages of testimony and numerous exhibits. We have read the record in its entirety and checked the citations of the evidence in the briefs against the record. In many particulars the record does not sustain plaintiffs' statements as to the evidence. Plaintiffs' witnesses are largely those who have benefited from Mrs. Barry's bounty and who are interested in the success of this action. Defendant's witnesses are largely those not interested in the outcome of this litigation.

Amanda Barry was a pioneer of southwestern Nebraska. She inherited a considerable estate from her husband. For almost thirty years after his death she managed her farms and ranch properties efficiently, and arrived at old age possessed of considerable real and personal property. She had neither living children nor direct descendants. There were sisters, nieces and nephews living outside of Nebraska, and a stepdaughter living nearby in Nebraska. When she was 83 years old, and her competency not questioned, she made a will providing bequests for the stepdaughter, her sisters and friends. These bequests were for sums as high as $10,000 to each of two sisters, and ranging down to sums of a few hundred dollars to others. The will contained a provision giving $2,000 to a neighbor and employee "for faithful services and attention during the past." She provided that, if her estate was insufficient to pay the bequests, all bequests be prorated, and that if any advancements were made during her lifetime they be deducted from the bequests. By codicil dated November 24, 1934, she changed the bequests somewhat, increasing some of the bequests, and increasing the number of beneficiaries. She revoked the bequest to the neighbor and former employee, changed her proposed executors and affirmed the provisions of her prior will not specifically altered or revoked by the codicil.

By codicil dated October 10, 1935, she made certain changes in the bequests, reducing legacies to those not her

heirs, devised specific real estate to certain beneficiaries, named other beneficiaries, again bequeathed the sum of $2,000 to the former employee "for his faithful services to me," and devised to the defendant, "who is working for me at the present time," the land involved in this action, "together with all personal property belonging to said farm, except the live stock." She next provided: "It is my will that those whom I shall pay off in full according to my will during my lifetime, shall not share any more whatever in my estate." She nominated new executors and affirmed the provisions of her will and first codicil as to all parts not revoked or altered.

Thereafter, on October 25, 1935, by warranty deed she conveyed to the defendant the farm described in the codicil of October 10, 1935, "together with all personal property upon and belonging to said farm, except the live stock, reserving however to this grantor the income from said farm during the lifetime of this grantor." The recited consideration was $1 in hand paid "and faithful services rendered to the undersigned grantor." The actual payment of the $1 is proved. This deed was recorded October 26, 1935. This action is to set aside this deed.

On November 7, 1935, she issued a check for $10,000 to a beneficiary named in the October, 1935, codicil "for inheritance," and on November 25, 1935, conveyed certain real estate to the same beneficiary.

January 10, 1936, she caused to be delivered to a sister, one of the plaintiffs, government bonds valued at $4,000 "as part of inheritance," and on June 19, 1936, conveyed to said sister plaintiff certain real estate, the deed reciting "The purpose of this deed conveys to Clara W. Hicks her part share of my estate and I am to retain a life estate in and to said premises during my natural life." On October 6, 1936, she further gave this sister a check for $745.85 for a "new car." In March, 1936, she issued a total of $13,000 in checks to six of the plaintiffs for "inheritance," and delivered $1,000 in bonds to a witness for the plaintiffs, who was an old friend.

Amanda Barry died in 1937. Her estate at the time of her death is probably insufficient to pay costs of probate and all specific bequests.

Mrs. Barry disposed of some of her personal property while living; she reserved a life estate in the real property conveyed. So far as this record of the distribution of her estate is concerned, it shows the carrying out of a natural, normal desire of an old lady to distribute her estate among relatives, friends and employees.

There is some evidence of forgetfulness and illness prior to 1935. For some years after the death of her husband Mrs. Barry lived on the property involved in this action, which was her home. Later she spent a winter or two in California, and lived with friends near her home in the summer months. In 1932 she met the defendant, a brother-in-law of the former employee. The defendant became first a part time, and from 1935 a full time, employee of Mrs. Barry. The defendant was a young unmarried man in his middle thirties. Shortly after meeting the defendant, Mrs. Barry moved to a residence in Curtis where she had friends, and still later in 1935 returned to her ranch home to live. Her desire to live alone and to return to her ranch home is a natural one. The plaintiffs charge that from the time she moved to Curtis she was under the dominance and control of the defendant, and that he assumed complete control of her and her property, and was actuated by the sole purpose of gaining possession and ownership of her property. There is nothing in this record indicating that his services as an employee were inefficient or unsatisfactory. Mrs. Barry was not as active as formerly. She found difficulty in writing. He performed many services for her, and not only took care of her farm operations and her home, but also attended to many business transactions for her. Some time prior to the delivery of the deed in question she gave him a general power of attorney. The facts with reference to the making of the power of attorney are not shown. The record does not disclose that he ever used the power of attorney improperly, or ever profited from its use. He

used it a few times in writing checks for the payment of the expenses of the farm, and in payment of wages to himself. Her bank account often was several thousand dollars, yet defendant did not use the power of attorney to improperly withdraw any funds, unless it can be said that the unexplained raise in wages was an improper exercise of his power of attorney. Beginning in January of 1936 his wages were increased from $45 to $55 a month. This increase is not explained, but is a natural increase to a satisfactory employee. The checks for wages were made out by the defendant and signed by Mrs. Barry until July, 1936. Thereafter she signed three of the checks, and the remainder were signed "Amanda Barry by Herman Seibold." It may be assumed that he wrote, Mrs. Barry signed, and the defendant assisted in the delivery of checks totaling $23,000 to the various beneficiaries. No complaint is made that the defendant interfered with or profited by the payment of those sums; on the contrary, there is evidence that he advised and encouraged it. Defendant was Mrs. Barry's agent in the delivery of the bonds, and assisted her in making conveyances of real estate to the beneficiaries under her will. Defendant was with Mrs. Barry when she sold bonds, and secured the money with which to make the advancements that were made. The inventory of Mrs. Barry's estate shows that she had $11,211.06 "cash in bank" at the time of her death. In assisting in the handling of all of these matters there is no charge that the defendant personally profited or misappropriated any of Mrs. Barry's personal property. There is evidence from disinterested witnesses that Mrs. Barry expressed appreciation of the defendant's services, his care of her, and that she was going to do handsomely by him because of it.

It should be noted that, while the defendant had access to bonds and intangibles and power of attorney covering her bank account, the property which he is charged with having improperly received from her is land and tangible farm property, no part of which could be hidden, or easily disposed of, or moved away.

The will and the first codicil were in the hands of a relative in Iowa prior to the summer of 1935. Mrs. Barry was living at home and had a maid, who later was adjudged insane and did not testify. The maid contacted Mr. L. H. Cheney, an attorney of McCook, and asked him to stop by the Barry home the next time he went to Stockville. He was also contacted by the defendant. He never received a direct request from Mrs. Barry to come, although when he did do so she apparently knew of his coming and talked with him about changing her will. Although he had known her since 1891 he had never been her attorney. He had furnished Mrs. Barry her executrix' bond when her husband's estate was being probated. Her attorney had been Mr. J. A. Williams of Stockville, and he was deceased prior to 1935. Mr. Cheney apparently had been the attorney for the maid. He did not know the defendant prior to 1935. Mr. Cheney called at one time in the summer, found Mrs. Barry at home and ill, talked with her about her will. She was not then ready to designate the changes to be made in it. Mr. Cheney did not think her able at that time to change it. There is testimony indicating that Mr. Cheney thought her incompetent at that time to make a will, although the record does not show what the basis of that opinion was, except that she was sick and did not have the changes definitely in mind. Either at that time or subsequently he suggested that she write out the provisions that she wanted in the will and bring the memorandum to him. This was done. In the meantime Mr. Cheney wrote for the will and after some delay the Iowa relative brought it to him, so that he had it for reference when the second codicil was prepared. The memorandum is in evidence in her handwriting, showing 19 proposed bequests ranging up to $10,000, and including the defendant's bequest. Plaintiffs contend that the defendant and the maid prepared the changes and then had Mrs. Barry copy it. There is some questionable evidence that later the maid admitted that was done. Mrs. Barry was taken to McCook by the maid, the defendant and others. The testimony shows that she had difficulty

in traveling alone. The defendant made the appointment for her with Mr. Cheney. Defendant was not with Mr. Cheney and Mrs. Barry while they discussed each item with Mrs. Barry and prepared the codicil October 10, 1935. After it was first written Mrs. Barry returned, had the codicil changed so as to increase the bequest to the stepdaughter and the codicil was executed in due form. Mr. Cheney, his secretary and others testify that at that time she was competent, knew the changes which she wanted made, knew her property and to whom she wanted it to pass upon her death.

Thereafter on October 25, 1935, she was brought to McCook again by the defendant and had Mr. Cheney prepare the deed to the defendant. No one who had any connection with either of these transactions indicates any serious doubt of her complete competency and understanding and free-will action on both of these days. The defendant, while present in McCook, was not present in Mr. Cheney's office when the codicil and deed were prepared.

Subsequent to her death the will and the first and second codicils were contested and on appeal were admitted to probate with the exception of the paragraph devising the property to the defendant. By stipulation of all the parties that paragraph was not admitted to probate. Permission was given the heirs to employ counsel and to bring an action to set the deed aside in the name of the executors. The failure to probate the one paragraph was to be without prejudice to the rights of plaintiffs and defendants in said action. Mr. L. H. Cheney and his son are representing the executors in the probate of the estate in all matters except this litigation. In view of the probate of the will and both codicils it must be conceded that all of the parties to this action believed that Mrs. Barry was competent to make the will and codicils and dispose of her property by those instruments. The evidence of her competency otherwise is convincing.

Mrs. Barry's banker testified that the defendant in the fall of 1935 told him that he had a power of attorney and that it was difficult for her to transact business. The banker

testified that the defendant usually came with Mrs. Barry to the bank, once or twice her sister was with her; that on one occasion she came in, asked defendant what she was there for, the defendant told her she intended to sell some bonds; that Mrs. Barry appeared not interested; that it was in his opinion possible for a person to dominate her to some extent and to determine her actions; that he did not at those times consider her incompetent to transact ordinary business. The record shows that subsequent to the time the deed here in question was executed the banker sold several thousand dollars worth of securities for Mrs. Barry; that the money was put to the credit of her account and the bank paid the checks, largely to the beneficiaries, drawn against the account.

Two doctors who treated her testified that during that period she was unusually keen and competent, and testified to the facts upon which their opinion was based. Neighbors, friends and employees testify to the same extent covering the entire period. While there is some testimony to the contrary, it is largely based on isolated instances. Those disinterested parties who assisted her in the conveyance of other property testify to her competence. We cannot extend this opinion by a recital of the testimony. The evidence as to her competency to dispose of her property is convincing.

Is there evidence of undue influence? It must be conceded that the defendant had the opportunity to exercise an influence over Mrs. Barry. The record, however, does not establish that undue influence was exercised. As we have pointed out every act of Mrs. Barry, in disposing of her property, including that to the defendant, fits into the general scheme of an old lady desiring to distribute her property during her lifetime and by will. In September, 1935, she told an old friend of her plans for the distribution of her property, along the lines subsequently followed. She provided generously for her sister and her sister's children, she remembered old friends, she bequeathed $2,000 to the former employee who apparently had previously been fully

paid the contract wages for his services. Prior and subsequent to this deed the defendant was fully paid the contract wage for his services. The extra bounty that she gave him, while large in itself, is not large in comparison with the gifts to the former employee or to others who had rendered no services to her and who were not with her in her declining years. Defendant after receiving the deed continued for 23 months to perform every service requested during her lifetime.

On November 26, 1935, just a month after he received the deed, the defendant wrote the plaintiff sister, Mrs. Wicks, advising her that Mrs. Barry wanted her to come to see her once more and "to have your share of inheritance by your own choice in either land or cash, $10,000. Mrs. Barry has decided to divide her property up while alive according to her 'will' to spare her heirs any trouble and hard feeling after her death. She is reserving however the whole income of her farm for herself and her estate even if she is giving deeds to certain parts of her farm to her heirs while alive. She already has given Ella M. Johnston $10,000 and her Curtis property. She also has given to me the quarter where we live and the next joining north. Now I wish that you and Ira would come down to see and find out for yourself how I am running Mrs. Barry's affairs and what dirty robber I am supposed to be. She has also given to Grace Chitwood McConnville's two boys their share in land, not part of her home farm. * * * Mrs. Barry is feeling fairly well, physically, but is failing slowly, her vitality is giving out. She is up every day, but mostly on the couch. Her appetite is pretty good. Will close for this time in the hope of seeing you soon." We do not see in this letter any evidence of a scheming, conniving individual. If he were, why would he invite in the sister to get her inheritance, to find out for herself what was going on and tell her of Mrs. Barry's gifts, *including the one he had received?* In response to that letter, the sister came and remained with Mrs. Barry until her death. The sister testified to a somewhat theatrical story about the defendant's

power over Mrs. Barry and that Mrs. Barry was practically a prisoner in her own home. Parts of her story are positively disproved by a nurse and a doctor. The antagonism of the sister to defendant seems to be based upon her contention that the defendant persuaded her to accept land as a part of her inheritance, and that she would have been better provided for had she taken all cash.

This sister remained in the home of Mrs. Barry until the latter's death. During that time she accepted securities and lands and evidently thought that Mrs. Barry was fully competent to bestow them upon her and was not influenced improperly in so doing. She assisted in mailing out the checks to others who also received their inheritance.

The evidence of undue influence comes largely from interested witnesses and is not convincing. We shall not extend this opinion by specific reference to it further.

In *Gidley v. Gidley*, 130 Neb. 419, 265 N. W. 245, this court held:

"1. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.

"2. Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless.

"3. A case of undue influence is made out where it is shown by clear and satisfactory evidence (1) that the testator or grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence."

Applying the above rules to the instant case, there is no clear and satisfactory evidence (1) that Mrs. Barry was subject to such influence; (2) the opportunity to exercise the influence existed; (3) a disposition to exercise such influence is not clearly or satisfactorily shown; (4) the deed to the defendant does not appear to be the result of such undue influence, but, as we have pointed out, is the result of the execution of a plan for the distribution of all

of Mrs. Barry's property, which is one quite often followed by people of advanced years. See, also, *Little v. Curson*, 114 Neb. 752, 209 N. W. 737.

Courts should not set aside the disposition of property made by will or deed without good reasons, based upon clear and satisfactory proof.

Appellees contend that a fiduciary relationship existed between Mrs. Barry and the defendant, and that because thereof the burden of proof shifted from the plaintiffs to the defendant, and that the defendant had the burden of establishing that the deed to him was untainted by undue influence. This court held in *Gidley v. Gidley, supra*, that under certain circumstances the burden might be cast upon the grantee to make such a showing. The more accurate statement of the rule is that, where a fiduciary relationship is shown to exist, under certain circumstances a presumption of undue influence arises, and the grantee is required to produce evidence to overcome that presumption. Assuming that this case calls for an application of that rule, it is clear that the defendant has met the burden in that regard.

Appellees further contend that it amounts to a constructive fraud for the defendant, as the agent of Mrs. Barry under the power of attorney, to take title to her property.

We do not consider the rule applicable in this case. The power of attorney established a principal and agency relationship between Mrs. Barry and the defendant, which was in existence at the time the deed in question was executed. The power was, in general terms, "to sign, execute and acknowledge any and all papers necessary to the transaction of my business affairs." It does not specifically refer to the conveyance of property. It was never so used. The power of attorney was not used in securing the deed in question. The deed did not result from the existence of the power of attorney, nor from the relationship created by that instrument. The deed was the result of a purpose independent from and not connected with the power of attorney. In the execution of that purpose, Mrs. Barry had the independent advice and assistance of an admittedly competent and

reputable lawyer. The transactions between a principal and agent that are viewed with suspicion and scrutinized carefully are those respecting the "subject-matter of the agency," where it is required that the agent act in entire good faith, and without any undue influence or imposition, and upon a full disclosure of the facts. The existence of the relation does not itself forbid transactions between the principal and agent. 2 C. J. 706; 3 C. J. S. 25, sec. 145.

Under the circumstances of this case, the existence of the power of attorney, and the relationship created thereby, do not prevent the application of the general rules announced in *Gidley v. Gidley, supra.*

The decree of the district court is reversed and the petition of the plaintiffs and the cross-petition of the defendant appellees is dismissed.

REVERSED AND DISMISSED.

CARTER, J., dissents.

SAM NANFITO V. STATE OF NEBRASKA.

287 N. W. 58

FILED JULY 18, 1939. No. 30463.

1. **Homicide**: DYING DECLARATIONS. In a prosecution for murder, the admissibility of dying declarations by the victim of the homicide is a question of law for the trial court.
2. ———: ———. "In a prosecution for murder, a statement by the victim of the homicide that he was shot by defendant may be admitted in evidence, if made under a sense of impending death, and the foundation for its admission may be shown by circumstances." *Johnson v. State,* 112 Neb. 530, 199 N. W. 808.
3. ———: ———. Dying declarations may be made in the language familiar to declarant.
4. ———: ———. Dying declarations may be admissible in a prosecution for murder, though expressed in a foreign language through an interpreter to the person reducing them to writing.
5. ———: ———. Dying declarations in the form of questions and answers, when made under a sense of impending death, are not inadmissible because also made under oath.
6. ———. Evidence *held* sufficient to prove murder in the second degree beyond a reasonable doubt.

7. Trial: INSTRUCTIONS. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism.

ERROR to the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

John C. Mullen, for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Sam Nanfito, defendant, was accused of murder in the first degree, having killed his wife. The specific charge was that, in Douglas county, Nebraska, January 10, 1938, he then and there feloniously, purposely and of his deliberate and premeditated malice shot Santina Nanfito with a revolver and as a result thereof she died January 11, 1938. He pleaded not guilty and upon a trial the jury found him guilty of murder in the second degree. For that felony he was sentenced to the penitentiary for the term of his natural life. As plaintiff in error, defendant presents for review the record of his conviction.

The shooting occurred at the Nanfito home in Omaha. Defendant testified he was cleaning his gun and that the shot was accidental. Santina Nanfito was taken promptly to the Nicholas Senn hospital and was examined there by Dr. N. H. Attwood, who testified she had suffered a gunshot wound in the left chest on a level with the breast; that the bullet passed through her body, went through the stomach and across the top of the liver, causing a severe hemorrhage therefrom, and lodging beneath the skin; that he removed the bullet; that her death resulted from the gunshot wound.

The principal assignments of error are directed to dying declarations which the trial court admitted in evidence over

the objections of defendant. The declarations contained among other statements the following, in substance: Defendant shot her at 10:30 in the forenoon of January 10, 1938. She was standing by the heating stove in the little room next to the kitchen combing her hair within three or four feet of defendant. Heard a shot and saw defendant with the gun in his hand; had nothing else in his hand; was not cleaning the gun; he helped her into a chair close by and said: "Finally, the day has come," then ran towards his daughter's house; the wife saw him again at a filling station and he said to her in presence of police officers: "Tina, Tina, I really didn't want to do it." Defendant and his wife had previously had trouble; he was jealous of her; she never could understand the reason for jealousy; had frequent quarrels during which he threatened to kill her; would only cost him $200 to get out of it; had six children by defendant; she had never called the police, but her children and neighbors had sometimes done so.

The declarations were made in the form of questions and answers reduced to typewriting and signed by declarant making her mark with the attending physician and nurse as witnesses, the latter holding the pen. Declarant spoke Italian and was not well versed in English. The questions were asked in English by a deputy county attorney, who called to his assistance a capable interpreter of both English and Italian, who was also an assistant in the office of the county attorney. He took an oath as interpreter and translated the questions in English into Italian and directed them to declarant. She replied in Italian and the interpreter translated the questions and answers into English. They were transcribed from shorthand notes into typewriting by the county attorney's secretary and read to declarant and her answers as read were approved by her as correct.

One of the objections to the admission of the declarations in evidence was that no foundation was laid, there being no testimony before the court or jury to show that declarant was conscious of impending death. The admissibility of the evidence was a question of law for the court. *Johnson*

v. State, 112 Neb. 530, 199 N. W. 808. The foundation was shown on the face of the exhibit containing the declarations. Asked therein if declarant realized the seriousness of her condition, she answered, "Yes;" replying to other questions she said she did not think she had a chance of life; was prepared to meet her Maker; was a Catholic; had her confession and received Holy Communion; priest had given her the last Sacrament and last Rites of the Catholic Church. The circumstances related evidenced her sense of impending death. The declarations were voluntary. No improper influence was exerted. The rule of evidence applicable has been stated as follows:

"In a prosecution for murder, a statement by the victim of the homicide that he was shot by defendant may be admitted in evidence, if made under a sense of impending death, and the foundation for its admission may be shown by circumstances." *Johnson v. State,* 112 Neb. 530, 199 N. W. 808.

Admissibility of the declarations was also challenged because they were made in a foreign language. They were made in the language familiar to declarant. "Dying declarations may be admissible, although they are given in a foreign language through an interpreter to the person writing them down." 30 C. J. 260.

It is insisted further that declarant was not in a condition to make the declarations, owing to the effect of morphine administered for pain and to treatment for hemorrhages from gunshot wounds. The evidence is clear that, notwithstanding the medicine given, declarant was mentally alert, understood the questions and answered them intelligently under oath. The oath did not make the declarations inadmissible. 30 C. J. 260. They were made under a sense of impending death and the oath was unnecessary. The dying declarations were properly admitted in evidence.

Was the gun accidentally discharged? Defendant so testified, but he left evidence to the contrary. The question was one for the jury. With the gun from which the fatal shot was fired, with a bullet exactly like the one taken from

the body of his wife, and with the dress worn by her at the time, the ballistic expert of the Omaha police department made scientific tests, which, with the powder stain on the dress, showed that the muzzle of the gun was within approximately one inch of the dress when the shot was fired. Defendant's wife was then standing on her feet combing her hair, as already narrated, and the bullet entered her left chest on a level with her breast. That is not the way guns are held while being cleaned and the jury did not believe the defendant's testimony that the shooting was accidental. There is evidence that defendant had recently threatened to kill his wife; that he had violently assaulted her; that he had kicked her and had chased her with a razor. The verdict has abundant support in the evidence.

Rulings in refusing requested instructions and in giving other instructions are assigned as erroneous, but the charge to the jury when considered as a whole, as it should be, does not contain error prejudicial to defendant.

AFFIRMED.

SIMMONS, C. J., dissenting.

I do not agree with the majority opinion in this case. The defendant was charged with murder in the first degree. He was found guilty of murder in the second degree. Murder in the first degree involves a killing "purposely and of deliberate and premeditated malice." Comp. St. 1929, sec. 28-401. Murder in the second degree involves a killing "purposely and maliciously, but without deliberation and premeditation." Comp. St. 1929, sec. 28-402.

Under the evidence received, the defendant was guilty of first degree murder or his defense of an accidental shooting was true. If the defendant murdered his wife purposely and maliciously, he did it "deliberately and of premeditated malice." The evidence shows no quarrels or disagreements, and the alleged dying declaration, hereinafter referred to, positively denies any disagreement, threats, or trouble immediately preceding the shooting. An element of murder in the second degree is that it be "without deliberation and premeditation." This verdict cannot be sustained except

upon the fiction of the law that the greater crime, involving the elements of the lesser crime, permits a conviction of the lesser. But where we are dealing with a person's liberty, we should not sustain a conviction in the face of an absolute want of proof of guilt of the lesser offense. Likewise, a conviction of a felony should not be affirmed where there is reasonable doubt of the admissibility of material and controlling evidence.

The jury's verdict is patently a compromise.

This conviction, to stand at all, depends upon the admissibility of the statements of the deceased made in an alleged dying declaration. The admissibility was challenged. There is an almost unanimous accord in the evidence that the deceased could converse intelligently in the English language. The dying declaration was secured by two assistants to the county attorney. The questions were asked in English, translated into Italian, answered in Italian, and translated into English. The honesty and ability of the interpreter is not questioned. However, where a conviction depends upon the meaning of interpreted language, the declaration should be scrutinized closely; for the words are those of the interpreter, not those of the deceased.

Here the prosecution examined the deceased, and the defendant did not have the opportunity to cross-examine. *He was not present.*

In *Rakes v. People,* 2 Neb. 157, this court said: "When it appears that the deceased, at the time of the declaration which is offered in evidence, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible." That holding has not been modified.

The rule as to admission of dying declarations is stated in 30 C. J. 255. It is "essential that it be made when he has abandoned *all hope of recovery* from the injury inflicted by accused and is under the firm conviction that his death is inevitable and near at hand. The fact that the declarant believes himself in great danger and entertains a fear that he must die is not sufficient. * * * But according to the clear

preponderance of authority, if deceased had the slightest hope of recovery when the declarations were made they are inadmissible." See, also, 30 C. J. 263.

The opinion recites that Mrs. Nanfito had received the last Rites of the Catholic Church. The only proof of that is found in the declaration itself. More important, however, is the fact that those Rites were administered before she had been told of the seriousness of her condition. The deceased was shot about 10:30 in the morning. She took a turn for the worse about midnight. The county attorney's assistants were called. At that time, the doctor told the patient that "she was getting weaker and that she might die, that her chances of recovery were getting poorer all the time." The nurse testified that she called Mr. Garrotto; that he came about 12:35 a. m. to take the deceased's statement; that the deceased "was told that she *might* die, and that her condition was much worse, and that they wanted a statement;" and that she *was not told anything different thereafter.* She was not told that she was dying.

Was there a conclusive conviction of impending death in the mind of the deceased at the time she was examined by the state's attorneys? She was asked, "Do you realize the seriousness of your condition?" She answered, "Yes." She was asked, "Mrs. Nanfito, have you now given up all hopes of living?" She did not answer that she had, she answered, "I don't think I have any chance because the doctor has taken X-rays. He *knows* better than I do." The X-rays were taken over twelve hours earlier, immediately following the shooting, and long before her condition became serious. She said that the doctor "knows better than I do." He had told her only that she "might die." She was asked, "Mrs. Nanfito, are you now prepared to meet your Maker?" She answered, "Yes, I do. I just had my confession and received Holy Communion." She was then asked, "knowing the *seriousness of your condition,* do you now want to make a statement as to what actually took place on the morning of January 10, 1938?" She replied, "Sure." The statement followed.

At the close, she was asked, "Everything you have told us here is the truth?" She answered, "It was all the truth. No lies. I have just had a confession and I received Holy Communion, and I want to meet my God without a lie." She was asked, "You make this statement * * * knowing the seriousness of your condition?" She answered, "Yes, everything that I said is the truth." This evidence does not conclusively establish that the deceased had given up all hope of living.

However, assuming that the majority opinion is correct in holding that the deceased had abandoned all hope of living, there are other rules of law that must be applied before a dying declaration is admissible in evidence.

"Dying declarations are substitutes for sworn testimony and must yield to the general rules governing the admissibility of evidence. * * * They are restricted to the act of killing and the circumstances immediately attending it and forming part of the *res gestæ*. * * * Dying declarations are not pertinent or relevant to the issue when they deal with distinct and separate transactions." 30 C. J. 272.

"A dying declaration clearly shown to have been actuated by malice, venom, ill will, and desire for revenge should be excluded." 30 C. J. 252. In this statement, the deceased said of her husband: "He says he was jealous of all men;" "he was faking as though he was sorry" "he was terribly jealous of me;" "there wasn't any truth" at all in some of his statements; "he is a liar." She accused him of deserting her and the family. The statement does not show the lack of motive that justifies its admission.

There is also another rule that was violated by the admission of this declaration:

"Declarations tending to show the state of feeling that existed between accused and deceased prior to the homicidal act are *not admissible* in evidence for the prosecution. For example, it is not permissible thus to prove that accused had previously threatened violence to deceased, or any other former and distinct transaction not relating to the particular facts constituting the subject-matter of the charge or the

identification of defendant, from which the jury might infer malice toward deceased." 30 C. J. 277.

The alleged dying declaration included the following: (1) She always watched when he went near the dresser where he kept the revolver; (2) she had had trouble with her husband prior to that day; (3) he was jealous of her from the day they were married; (4) there had been "arguments" "always" before that day, as often as once a week; (5) while specifically denying that he threatened her the day of the shooting, that "before this day" "he always threatened to kill me" "every time we quarreled," "and always said that if he did kill me it would only cost him $200 to get out of it;" (6) he threatened to kill her with a gun "last year;" (7) they had had numerous quarrels in which the police were called; (8) he had been arrested "because he left me and my children and left us without any food."

The majority opinion sets out the following rule from 30 C. J. 260: "Dying declarations may be admissible, although they are given in a foreign language through an interpreter to the person writing them down." I do not disagree with that rule, if it is properly applied. Two cases are cited in the text as authority for the rule. I find no additional cases in the annotations. In the second case cited, the dying declaration is not set out. In the first case, *Commonwealth v. Mika,* 171 Pa. St. 273, 33 Atl. 65, the dying declaration is set out in full in the official state report. It is interesting to note that the trial court in that case excluded parts of the dying declaration which related to the fact that the deceased had given a gun to the accused earlier in the evening prior to the fatal shooting; that the accused "was afraid;" and that the accused and deceased had had "a little trouble" *a week before.* These statements were objected to on the grounds that they related to antecedent matters and were no part of the facts immediately connected with the shooting and were too remote. In the instant case, the trial court admitted *all* of the declaration that fell within that category.

Another principle of criminal law was violated in the admission of this statement. "The state is not entitled to introduce evidence of the bad character or reputation of the accused unless he has clearly and expressly put his character in issue by introducing evidence of good character." 16 C. J. 581. The state offered this statement as a part of its case in chief. In it the defendant was called a liar, a faker, a family deserter, and his arrest, *but not conviction for misdemeanors,* was told to the jury by the admission of the declaration.

Certain of the offensive statements were predicated upon facts never proved by the state as a foundation, such as, "Q. Your husband claims he was cleaning a gun this morning. Did you see him cleaning the gun? A. No; he is a liar." "Q. Did he tell you anything about cleaning his gun at all? A. I knew very well that was what his excuse would be, that he was cleaning his gun, and that he shot me accidentally, but there is no truth at all in it."

"A mere conclusion or expression of opinion or belief by a dying man is not admissible as a dying declaration." 30 C. J. 274.

Disregarding the question of the admissibility of the entire statement, the only statements made in the declaration that were properly admissible under the rule adopted by the majority regarding the shooting are: "He shot me at 10:30;" she told where they were each standing; she saw him with a gun in his hand after she was shot; he was "trying to hide it;" she told him to put it down; she did not see whether his finger was on the trigger; prior to the shooting he had not threatened to harm her; he helped her to a chair and ran to his daughter's house after the shot was fired; that he said, "Finally, the day has come;" and later said, "Tina, Tina, I really didn't want to do it." (This last statement was made in the presence of two officers whom the state did not call to testify.)

The statement, "Finally, the day has come," is an interpretation of something she said to the interpreter. What does it mean? It was not explained. The deceased could

neither read nor write English or Italian. The defendant is a day laborer, an immigrant obviously not well educated. Such people do not ordinarily speak in vague phrases. The inference, wholly unsupported except by old threats, etc., is that this was the day he had looked forward to—the day of her murder.

"All vague and indefinite expressions which do not point distinctly to the *res gestæ* of the fatal occurrence, but require a resort to inference or supposition to establish facts tending to incriminate the accused, should be excluded." 30 C. J. 277.

The other expression, which was uncorroborated by witnesses who could have been called and cross-examined, was, "I really didn't want to do it." It is an interpretation. Had he actually said: "I really didn't mean to do it," it would have been in full accord with his defense of an accidental shooting.

Five witnesses were called to lay a foundation for this alleged dying declaration. Fifty pages of record were consumed by it. The jury must have been impressed by the foundation proof, but only *one of the five witnesses knew* what the deceased was saying to Mr. Garrotto in Italian or what he was saying to her.

The same general principles which I have quoted from Corpus Juris are found in Underhill, Criminal Evidence (4th ed.) secs. 210 to 255; 2 Wigmore, Evidence, secs. 1439 to 1446; and 1 Wharton, Criminal Evidence (11th ed.) secs. 525 to 575.

"The presumption of innocence, which is a presumption both of fact and of law, is founded on the first principles of justice, and is intended, not to protect the guilty, but to prevent, so far as human agencies can, the conviction of an innocent person." 16 C. J. 535.

A criminal trial must be conducted under such rules as will protect the innocent. 16 C. J. 806.

This conviction cannot stand except upon the basis of this declaration being properly admitted in evidence. That it was prejudicial to the defendant cannot be denied. The

case should be reversed and remanded because of its admission.

MARTIN GABLE, APPELLEE, V. TERRY CARPENTER ET AL., APPELLANTS.
287 N. W. 70

FILED JULY 18, 1939. No. 30512.

Evidence in the record examined, and *held* ample to support the judgment challenged on appeal.

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

Mothersead & York, for appellants.

Beatty, Maupin, Murphy & Davis, contra.

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

EBERLY, J.

This is a suit in equity to enjoin the violation of a restrictive covenant contained in a contract made and entered into by and between plaintiff Gable and defendant Carpenter, on April 18, 1935, and to recover damages resulting from the breach thereof. The petition further alleges, with necessary particularity, that Martha Hillerege, the mother of Terry Carpenter, and George Hillerege, who is the second husband of Martha Hillerege, and Chester Guthrie conspired together with Terry Carpenter to attempt to evade the contractual provisions referred to, and, as hereinafter set forth, in violation thereof; and in furtherance of their conspiracy said defendants engaged in and carried on a gasoline and oil business in the city of North Platte, Nebraska. Issues were joined and trial had, which resulted in a finding and judgment for plaintiff, permanently enjoining the further continuance of the oil and gasoline business carried on by defendants Terry Carpenter, Martha Hillerege, George

Hillerege, and Chester Guthrie, in North Platte, Nebraska, and assessing damages against defendants Terry Carpenter and Martha Hillerege, jointly and severally, in the sum of $500. From the order of the trial court overruling their several motions for new trial, defendants appeal, and likewise plaintiff prosecutes a cross-appeal as to the recovery permitted him.

The record before us evidences the fact that the determinant issues in this litigation are questions of fact. This being an appeal in equity, it is the duty of this court to retry the issues involved in the case upon the evidence preserved in the bill of exceptions, and, upon a trial *de novo*, to 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 by the district court. Comp. St. 1929, sec. 20-1925. But when the evidence on material issues so conflicts that it cannot be reconciled, this court considers the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 254 N. W. 869.

It must also be conceded that much important testimony in this case comes from parties closely connected by blood and affinity, and, in addition, closely associated together in business generally, as well as in the particular adventure here under investigation. Under circumstances involving principles somewhat similar, Redick, District Judge, in the opinion adopted by this court in *Dvorak v. Kucera*, 130 Neb. 341, 264 N. W. 737, made the following observations, viz.:

"It is extremely difficult for a reviewing court to arrive at a satisfactory conclusion when the testimony is in conflict and the principal fact to be determined rests upon the evidence of interested witnesses. In such case the judgment of the trial court who had the benefit of seeing the witnesses and observing their deportment while testifying is of considerable weight, notwithstanding the requirement of the statute that the reviewing court shall try the case *de novo*."

There seems to be no substantial dispute in the evidence that Terry Carpenter and Martin Gable were engaged in the gasoline and oil business in North Platte, Nebraska, during 1932 and thereafter, as partners, though the business was conducted and carried on under the name of Terry Carpenter exclusively. In addition, Terry Carpenter was largely engaged in similar lines of business and also as a wholesaler of oil and gasoline, as well as a refiner thereof, in surrounding towns, and throughout the immediate territory in that section of the state. A large and prosperous retail business was developed by these parties at North Platte, under the name or trade-name of "Terry Carpenter." Plaintiff's name was not used in connection with said business, or in the advertising carried on in connection with it, because of the importance and value of the trade-name, "Terry Carpenter." An extensive and valuable good-will was founded and built up by said partnership using the trade-name "Terry Carpenter." In 1935 this partnership was dissolved by mutual consent, and the interest of Terry Carpenter therein, and in the business thereof, as well as in the property owned thereby, including the good-will in connection therewith, was purchased by plaintiff Gable from defendant Terry Carpenter. As evidencing this fact, Gable and Carpenter entered into an agreement in writing, bearing date April 18, 1935, and subscribed by the parties thereto. This agreement recites: "Terry Carpenter is selling to the said Martin Gable all of his interest in and to the gasoline and oil business now owned by the two parties at North Platte, Lincoln county, Nebraska, and all of the property owned and used in connection therewith. * * * So that the said Martin Gable is to own the entire oil business and equipment heretofore owned and used in connection with said business." It also specifies: "It is further agreed by and between the parties that the partnership agreement heretofore made between the parties is dissolved as of March 28th, 1935, but that the said Martin Gable may continue to use the trade-name or the name of Terry Carpenter in connection with the gasoline and oil business for a period of

five years from this date, and the said Terry Carpenter agrees not to engage in the gasoline or oil business within a radius of fifty miles of North Platte, Nebraska, for a period of five years from this date."

The record supports the conclusion that this agreement was substantially performed approximately on the day of its date by the mutual transfers of the respective interests of the parties thereto as required by the terms thereof.

It seems a generally accepted principle that, "Where a contract for the sale and transfer of a business omits to mention the good-will, the presumption is that it was the intention of the parties that the good-will should pass with other assets." 12 R. C. L. 985, sec. 8.

So, also, "On the sale or dissolution of a partnership it is usually held that the succeeding partner or partners have the right to carry on the business under the old name, and this rule has even been extended to a case where the individual's name was the only one that appeared in the name of the firm." 12 R. C. L. 987, sec. 10. See, also, *Churton v. Douglas*, John. (Eng.) 174, 28 L. J. Ch. 841.

In view of the terms of the contract in suit, including the restrictive covenant constituting an essential part thereof, it is obvious that the rights assured thereby to plaintiff herein must mean every advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. And it necessarily follows that in the transaction and carrying on of the oil and gas business, so acquired by plaintiff, for the limited period and to the extent of territory in the aforesaid contract provided, and by virtue thereof, he acquired the right to use the name "Terry Carpenter" simpliciter and exclusively. The rights claimed in this proceeding being the rights created and vested by the contract in suit, the only question remaining is whether such have been substantially infringed or impaired by defendants,—a clear question of fact.

We will now enumerate the relevant facts, as we deem them to be established by the evidence, bearing in mind that, when evidence on items is conflicting, that which does not support the statement here made is rejected.

The defendant Martha Hillerege, who is the mother of Terry Carpenter, and the general manager of his business affairs, properties and enterprises generally, and exclusively so functioning in his absence, was present in Terry Carpenter's office in Scottsbluff, Nebraska, when the discussion and negotiations were had between Carpenter and plaintiff, which terminated in the written agreement, a part of which is hereinbefore quoted. She had served in that capacity since 1933, and during this period was credited on his books with a salary running from $250 to $300 a month. She was possessed of much authority in relation to Terry Carpenter's business. She employed and discharged employees, had authority to and did draw checks upon Terry Carpenter's account in banks in which he had money on deposit; occasionally paid operating expenses, wages, and other bills from her private funds and reimbursed herself by merely writing a check to herself upon certain of Terry Carpenter's bank accounts. She received credit for her regular salary continuously since 1932. However, she has withdrawn but $15 a week. The balance of her wages earned, exceeding $7,000, stands as a credit on Terry Carpenter's books. George Hillerege is Terry Carpenter's stepfather, and the present husband of Martha Hillerege. He has been continuously employed by Terry Carpenter since 1932, and still is so employed, on a salary basis substantially identical with that of his wife. He has also withdrawn but a small portion of his earnings, and an amount in excess of $7,000 now stands to his credit on the books of his employer. His duties consisted in having charge of Carpenter's motive equipment for transportation, and the routing of trucks in connection with Carpenter's business. Chester Guthrie, the defendant in the instant case who was the operator of the oil and gasoline station involved in this litigation, at North Platte, Nebraska, which it is claimed by defendants was

owned by Mrs. Hillerege and her husband, had been employed by Terry Carpenter between the years 1931 and 1936, and thereafter from 1936 to November, 1937, was employed in a store claimed to have been owned by persons other than Terry Carpenter but located within his place of business at Scottsbluff, Nebraska. However, upon the procuring of the lease upon the station enjoined in this proceeding, Guthrie immediately came to North Platte and commenced work upon the station preparatory to its being opened, and thereafter continued as operator thereof, and the agent in immediate charge of the business at North Platte.

The foregoing constitutes the previous relation of the parties who are the defendants in this action.

The immediate events leading up to the present litigation are, viz.: In November, 1937, Terry Carpenter approached plaintiff with a proposition to lease the oil station and oil and gasoline business which plaintiff had received through the deal of April 18, 1935. The expressed purpose of Carpenter was that he might secure an additional outlet for his petroleum products. The negotiations were unavailing. Later, during the same month, Carpenter conferred in North Platte with a Mr. A. A. Hastings, a real estate dealer, who, it appears from defendants' evidence, had long been a close personal friend and political ally of Carpenter, wherein Carpenter advised Hastings that he wanted to lease a good filling station in North Platte, Nebraska. Hastings informed him of a station then available known as the Whelan station. Upon Carpenter's suggestion, Hastings introduced Carpenter to Whelan, and negotiations were then entered into concerning the leasing of these premises. As a result of these conversations a lease was prepared by Evans & Simon, North Platte attorneys, providing for the leasing of the Whelan filling station to George Hillerege for a term of two years. In connection with this lease another instrument was prepared, entitled "Guaranty and Ratification," by the terms of which Terry Carpenter agreed to indemnify Whelan by reason of any default to pay the rent due or to con-

form to the covenants of the lease. The evidence sustains the conclusion that, at or previous to the time of these negotiations, George Hillerege had had no conversation regarding same and knew nothing of the proposed agreement, but has been cooperating as required by his employment. It is certain that, upon receipt of these papers at Scottsbluff by Carpenter, they were finally turned over to Mrs. Martha Hillerege. In the meanwhile Hastings learned that another more desirable station in North Platte was available for rental, which is called the Ryan station. Hastings thereupon called up Carpenter by telephone at Scottsbluff and advised him of the facts. Carpenter replied that he would send some one down to look it over. A few days later Mrs. Martha Hillerege, accompanied by a nephew, Don Hillerege (also an employee of Terry Carpenter), came to North Platte, and both the Whelan station and the Ryan station were investigated. On this trip Mrs. Hillerege returned to Hastings the two instruments which had been previously prepared by leasing the Whelan station. She and her nephew then returned to Scottsbluff without finally completing a deal. Shortly thereafter, on November 27, 1937, Mrs. Hillerege and her nephew returned to North Platte, completed a deal for leasing the Ryan station (the one in issue in this proceeding), and executed a lease for the same for a period of ten years for the sum of $2,000. In payment of this sum, Mrs. Hillerege gave her checks on the Scottsbluff National Bank, one for $1,480 and one for $120, and executed her promissory note of $400 payable on or before January 1, 1938. On the completion of this transaction Mrs. Hillerege told Hastings that she did not want Gable or any one else to know about it. The $400 note was paid in due time by the maker, but the evidence fairly discloses that the ultimate source of the moneys from which the checks were paid and the note satisfied was the funds of Terry Carpenter. The facts and circumstances in the record fully sustain the conclusion that he was the real party in interest in making this purchase. In addition to this, there is evidence in the record of a petroleum transporter

from Alliance, in reference to a conversation had with Terry Carpenter by such petroleum transporter in November or December, 1937, concerning the hauling of gas and oil for Carpenter to North Platte, Nebraska, at which time Carpenter stated to him that a contract for such hauling could not be made since Carpenter could not operate his station at North Platte under his own name on account of a deal he had with Martin Gable, and that he had some of his relatives then operating the station at North Platte for him. Immediately upon the acquisition of this lease of the Ryan station, employees of Terry Carpenter came to North Platte and engaged in remodelling the station. An extensive advertising campaign was immediately undertaken, in which the name of Terry Carpenter and his products were widely emphasized in connection with the new station. Gasoline pumps were installed bearing Terry Carpenter's name; employees displayed his name upon their uniforms; the gasoline truck used for local transportation bore the name and advertised the products of Terry Carpenter. Large import trucks bearing the name of Terry Carpenter delivered their products to the station. The name of Hillerege did not appear in connection with the business either upon buildings or equipment, or upon supplies, sales slips and the like used in the course of the business. After the institution of the instant action a change of the methods of carrying on this business became evident, and the name "Hillerege" was placed on sign, etc., for the first time. The wide publicity and the advertising campaign thus carried on convinced the public that the new station was that of Terry Carpenter, with resulting damages to plaintiff in loss of business and loss of customers. In the evidence we have proof as to sales made by the new station, the nature of products sold, the amounts paid for them, and to whom. It is quite obvious that Terry Carpenter, in the new station, found what he was seeking when he endeavored to lease plaintiff's station in November, 1937, viz., an additional outlet for his petroleum products.

In consideration of the proof in this record we keep in

mind that "equity regards the substance and intent, not the form." 21 C. J. 204. So considered, the facts of the record clearly establish that the transactions carried on by defendants are fraudulent and constitute fraudulent devices by which it is sought to circumvent and destroy the obligations imposed on Terry Carpenter by the contract of April 18, 1935; that the business carried on is, substantially, owned, controlled, and directed by, and pursuant to the policies of, Terry Carpenter, in plain, wilful violation of the terms of his contract. In accomplishing this object he is receiving the aid and cooperation of the other defendants. These defendants, including Carpenter, are in truth and in fact conspirators cooperating to accomplish this desired end. Therefore, the injunction issued and served in this case was proper and fully justified by the pleadings and the evidence, and is, in all respects, sustained.

We have carefully examined the subject of damages awarded by the trial court. We are convinced that the amount awarded is fairly supported by the evidence, and equally certain that an increase thereof is not justified by the record before us.

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

AFFIRMED.

HANNAH E. AMY, APPELLANT, V. RUBY MANN ET AL., APPELLEES.
287 N. W. 84

FILED JULY 18, 1939. No. 30622.

1. **Mortgages: ASSIGNMENT: UNDUE INFLUENCE.** Undue influence which will avoid a written assignment of a mortgage is an unlawful and fraudulent influence which controls the will of the assignor. The affection, confidence, and gratitude of a grandmother to a granddaughter which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.

2. **Assignments.** "The rights and liabilities of the parties having an interest in the subject-matter of an assignment are such as naturally follow from the operation of the rule that an assignment vests all the title in the assignee that the assignor possessed." 6 C. J. S. 1152, sec. 95.

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

Porter, Skaggs & Porter, for appellant.

F. S. Baker and *Charles A. Fisher, contra.*

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

PAINE, J.

This is an equity action, brought to set aside two assignments of real estate mortgages made by the plaintiff to defendant Ruby Mann, her granddaughter, on the ground of undue influence. After hearing the evidence, the trial court dismissed the action, and entered judgment that the Tipton and Baker notes were the property of the defendant Ruby Mann. The plaintiff appeals. The motion for a new trial set out as grounds for reversal that the decision was not sustained by sufficient evidence, was contrary to law, and for errors of law occurring during the trial.

On September 6, 1933, plaintiff filed an action in equity to set aside two assignments of real estate mortgages which she had made to her granddaughter. Plaintiff alleged that the defendant Ruby Mann was her granddaughter, and made her husband, John E. Mann, also a defendant; that Ruby Mann, when a very young child, was given into her charge as her grandmother, and that she raised, clothed, and schooled her as she would her own daughter; that about five years before the petition was filed, the plaintiff, being a widow with considerable means, was induced by Ruby Mann and her husband to go to Sioux county, Nebraska, and make her home with them, where she continued to reside until the month of July, 1933; that Ruby Mann and her husband induced plaintiff to purchase, in the name of her

granddaughter, Ruby Mann, a rental property in Sioux county, the rents from which were collected by the plaintiff herself for some time; that on October 12, 1931, plaintiff loaned $600 to Mrs. Avis Tipton at 8 per cent., which was secured by a mortgage upon a property in the village of Harrison; that on January 5, 1933, plaintiff loaned B. N. Baker $1,080, which note was also signed by F. S. Baker, this loan being secured by a mortgage executed and delivered by the defendants Baker to the plaintiff as mortgagee upon 775 acres of land more or less in Sioux county; that during the summer of 1932 the plaintiff became bedfast at the home of the defendants Mann, and was attended by doctors and nurses, and it was thought that she would not recover. She charges that on March 20, 1933, an assignment of the Tipton mortgage was made, which purported to have been signed and acknowledged by her on June 30, 1932, to defendant Ruby Mann, and there was recorded an assignment to Ruby Mann of the Baker mortgage, purporting to have been signed and acknowledged by her on January 9, 1933; that she has no recollection whatever of having signed or executed said assignments; that if said instruments were actually signed by her, her signature was secured by undue influence of the defendants Mann, or one of them, wholly without consideration; that the defendants have never paid or accounted to plaintiff for any of the money or property represented by said instrument; that the mortgagors threaten to pay the amount of the mortgages to the defendant Ruby Mann as assignee, and will do so unless restrained by an order and injunction of the court, and plaintiff prays that the defendants Mann be required to account for all of the property hereinbefore described, and that a decree be entered quieting title thereto in the plaintiff as against defendants Mann, and that a lien be impressed upon the property of the Manns.

To this petition a motion to strike and a demurrer were filed, which were overruled by the court, and leave given to make certain amendments to the petition, which were made by interlineation.

Hannah E. Amy, plaintiff, died in Council Bluffs on July 16, 1934, leaving a last will, which was probated in the district court for Pottawattamie county, and W. E. Mumby, of Sioux county, was appointed administrator with will annexed, and this action was revived in his name.

On August 7, 1936, the defendants Ruby Mann and John E. Mann, her husband, filed answer, admitting the death of the plaintiff, the relationship of the parties, and alleging that the grandmother had returned to Sioux county and solicited and received care and the comforts of a home from her granddaughter until July, 1933, when she was spirited away by an invalid nonresident daughter during the absence of the Manns from their home; that on April 21, 1927, the plaintiff grandmother had conveyed to Ruby Mann lot 6 in block 7, village of Harrison, for love, affection, care, nurture, and making a home for the frail old lady by her affectionate grandchildren, where she remained for more than five years, and that this care was equal to the cash value of the premises conveyed by deed; that this conveyance was made upon the initiative of the grandmother, and in consideration of providing a home for her.

Defendants admit, as charged in the petition, that assignments were made of the two mortgages to Ruby Mann, and that such assignments were duly recorded, and allege that such assignments were made by the plaintiff in good faith, and that she was then of sound mind. Defendants deny that said Hannah E. Amy, the grandmother, ever since the date thereof had in her possession and custody the note given by Avis Tipton, or the note given by B. N. Baker.

The defendants Mann say they are solvent and of sufficient financial ability to answer any judgment which may be recovered against them; that they now own unencumbered real estate and personal property of a sum of not less than $20,000, which is subject to execution, and ask that the title and possession of Ruby Mann to the negotiable paper, and securities assigned to her, be confirmed. The reply was a general denial.

The evidence of Hannah E. Amy was taken by deposition

in Council Bluffs on March 10, 1934. She testified that she lived with different relatives, and for some time at Harrison with her granddaughter, being her second daughter's daughter. She testified that she wanted to lend her money out, because she had been through one bank failure, and thought farm mortgages would be better; that she loaned $600 to Mrs. Avis Tipton, for which she received a mortgage. She did not know for sure whether the exhibits her attorney offered her were the proper papers or not; did not know to whom Mrs. Tipton paid her interest money.

She testified that she loaned $1,100, "or pretty near," to B. N. Baker, and that they gave a note and mortgage for it; that the land was located a little west and north of Harrison, adjoining Harrison. She says that she thinks the Manns had or stole the mortgage; that they did the same thing once before. She says that the Baker note was not paid, and denied that she ever gave or sold it to the Manns.

On cross-examination she told of the various members of her family, and the difficulty some of them had getting along; said that she had a will made out at Harrison, and Baker, as her attorney, wrote a will for her. On cross-examination she testified that she did not recall going to Mr. Baker's law office to make out assignments of the mortgages. She admitted that there had never been any difficulty, or any bad feeling, between her and her granddaughter Ruby until after she got sick in Ruby's house, "not until I found out;" that before that the grandmother trusted her in everything; that she always trusted attorney Baker, and that he told her that Ruby had an assignment of the mortgages. She said that she did not learn anything about it until March, 1933, and that she was sick then.

Her answers disclose her great age and feeble condition at the time the deposition was taken in the dwelling-house of plaintiff. Many questions had to be asked her several times, and then failed to elicit direct or pertinent answers. The whole deposition indicated a mind distracted by family troubles, and failing in many respects.

F. S. Baker testified that he had lived in Harrison 28

years, during all of which time he had been in the practice of law; that he handled law business for the plaintiff, and that on June 30, 1932, the plaintiff, Mrs. Amy, came to his office, and he executed an assignment of the Tipton mortgage for her, being exhibit No. 10, and the other one, assigning the Baker mortgage, was executed January 9, 1933; that Mrs. Amy was there both times alone; that she used to often come to him for advice; that after he executed the two assignments he turned them over to her, and that is the last he saw of them.

Ruby Mann, defendant, testified that she had lived in Sioux county for 26 years; that she took over a relinquishment of her grandmother's homestead, and proved up on it; that her grandmother sometimes came out and lived with her on the homestead in the summer. She told about her grandmother saying that she was entitled to her mother's share in her property, and once she wanted her to consent to have a new will made out with certain changes, and defendant said, "No; I don't want any trouble with my aunt," saying that she had never been able to get along with her aunt. She testified that the first she knew of the assignments of the two mortgages which are in litigation in this case was when her grandmother brought the two assignments home from Mr. Baker's office and gave them to her, and said, "Babe, these are yours. Take care of them. The principal is to be yours after my death; the interest is to be mine as long as I live." She denied that there had ever been any solicitation of the grandmother to give her the assignments of these mortgages. She testified that her grandmother was in good health up to that time.

In this case the assignment of these mortgages to defendant Ruby Mann, as her deceased mother's share in the grandmother's property, was fair and reasonable, and was voluntarily made by the grandmother as a surprise to Ruby Mann, the evidence showing that she knew nothing about it until after both assignments had been made at the office of an attorney, and then brought up and delivered to her by her grandmother. At that time the grandmother was entirely

competent to do as she pleased with this property. 2 Restatement, Law of Contracts, 956, sec. 498.

" 'There is no fraud where there is nothing wrong, and fraud cannot be deduced or inferred from that which the law pronounces honest.' 12 R. C. L. 237, sec. 8." *Meyer v. Schmidt,* 135 Neb. 850, 284 N. W. 337.

In a recent case this court said: "Undue influence which will avoid a deed is an unlawful and fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor." *Blochowitz v. Blochowitz,* 122 Neb. 385, 240 N. W. 586. With a slight change in the wording, this announced rule applies in every particular to the case at bar.

"The rights and liabilities of the parties having an interest in the subject-matter of an assignment are such as naturally follow from the operation of the rule that an assignment vests all the title in the assignee that the assignor possessed." 6 C. J. S. 1152, sec. 95.

While the testimony is somewhat conflicting, yet the trial court observed those witnesses who testified orally before him, and weighed their creditability, and accepted the version of the facts supported by the evidence of the defendant, and this fact has some weight with this court. *Southern Surety Co. v. Parmely,* 121 Neb. 146, 236 N. W. 178; *Krelle v. Bowen,* 128 Neb. 418, 259 N. W. 48.

The judgment entered by the trial court on September 15, 1937, finds generally in favor of the defendants and against the plaintiff, and further finds that the facts stated in the petition are not true, and the action should be dismissed. The court further finds that the money which has been paid into court, together with notes and mortgages, should be delivered to the defendant Ruby Mann.

From a reading of the bill of exceptions, we find no prejudicial error made by the trial court, and believe the

weight of the evidence supports the findings of the court, and the judgment of the trial court is hereby

AFFIRMED.

CARTER, J., concurs in the result.

JOHN ULRICH, APPELLANT, V. JOSEPH O'GRADY, APPELLEE.
287 N. W. 81

FILED JULY 18, 1939. No. 30631.

1. **Criminal Law: SENTENCE.** "The time for executing a sentence of imprisonment, or for commencement of its execution, is not an essential element of the sentence. The essential part of the sentence is the punishment, including the kind and amount thereof, without reference to the time that it is to be inflicted." *Riggs v. Sutton*, 113 Neb. 556, 203 N. W. 999.
2. ———: ———. "Any prisoner at large upon parole * * * who shall commit a fresh crime and upon conviction thereof shall be sentenced anew to the penitentiary, shall be subject to serve the second sentence after the first sentence is served or annulled; said second sentence to commence from the termination of his liability upon the first or former sentence." Comp. St. 1929, sec. 29-2628.
3. ———: ———. "Where a sentence for a second offense sets the commencement of imprisonment prior to the completion of a prior sentence by a different court, under which the convict is paroled at the time of the commission of the second offense, it is erroneous, and may be corrected by a proper proceeding." *Mercer v. Fenton*, 120 Neb. 191, 231 N. W. 807.
4. ———: ———. "A paroled prisoner, whose parole has been revoked, will not be relieved from serving the unexpired term of his sentence for the reason that, during the parole, he was convicted of a second felony and served his sentence therefor." *Vernon v. Miller*, 121 Neb. 748, 238 N. W. 528.

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

J. A. Hayward, for appellant.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

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

PAINE, J.

A petition for a writ of habeas corpus was filed in the district court for Lancaster county on October 22, 1938, to secure release of John Ulrich, who it is alleged is being illegally restrained of his liberty by the warden of the state penitentiary. Upon hearing, the writ was denied and the petition dismissed. Motion for rehearing was filed on the ground that the court erred in dismissing the relator's writ, and in the application of the law and the facts. Motion for rehearing was overruled. Relator excepts and appeals.

The petition for a writ of habeas corpus, and the exhibits attached, set out that John Ulrich was sentenced from Dodge county on June 22, 1928, to serve a period of 18 months in the reformatory. He escaped from the reformatory August 5, 1928. He was recaptured, and on September 25, 1928, was sentenced by the district court for Lancaster county, on his plea of guilty, to serve a period of five years, to commence at the termination of his original 18 months' sentence from Dodge county. The term of that 18 months' sentence expired October 8, 1929, at which time his five-year sentence began to operate; he being given a new number. Under the rules of the board of pardons, he was paroled July 1, 1932, having under the rules 11 months and 24 days of the five-year sentence still to serve.

The applicant was arrested in Douglas county, charged with the crime of robbery, on October 20, 1932, and was tried before Honorable Arthur C. Thomsen, district judge of Douglas county, and the jury found him guilty as charged, and thereupon the following judgment was pronounced: "It is therefore considered, ordered and adjudged by the court that the defendant John Ulrich (impleaded with Arthur Costello, alias Arthur McDaniel) be taken hence to the Douglas county jail, and *they* thence within thirty (30) days and as early as practicable, he be taken by the sheriff of Douglas county, to the Nebraska State Peni-

tentiary at Lincoln, Nebraska, and there imprisoned at hard labor for a period of nine (9) years from there afterwards the 9th day of October A. D. 1932, no part of which said period of time, by virtue of this sentence to be spent in solitary confinement, and that he pay the costs of this prosecution, taxed at $——."

In other words, it was arbitrarily stated in the sentence given him in Douglas county that his nine-year sentence should begin 11 days prior to the day on which it was pronounced, and this nine-year sentence with good time allowances was entirely served on October 21, 1938.

The board of control ordered his release on October 21, 1938, from the sentence of nine years imposed upon him in Douglas county, but did not order his release from the sentence imposed him of five years in Lancaster county, and Warden O'Grady further replies that the board of pardons understood the law to be that he should still serve out that part of his sentence he had not served when his parole was revoked on July 13, 1932.

The return to the writ of habeas corpus of Warden O'Grady further sets out that on July 1, 1932, before the termination of said five-year sentence from Lancaster county, the said John Ulrich was again paroled from the Nebraska state penitentiary. But said parole was revoked, a copy of said revocation being attached as exhibit B, which is an order of Charles W. Bryan, Frank Marsh, and C. A. Sorensen, who were the board of pardons, which order, entered July 25, 1932, sets out his release on parole July 1, 1932, and that on July 13, 1932, he engaged with others in the commission of several felonies in Dodge, Douglas, and other counties in Nebraska, and that the parole granted the said John Ulrich on July 1, 1932, is revoked, "and it is hereby ordered that the said John Ulrich be returned to the penitentiary to be there further dealt with under the aforesaid sentence as the law in such case provides, July 13, 1932, is hereby fixed as the date of delinquency under this parole."

It thus appears that since October 21, 1938, he has been serving time on the 11 months and 24 days left on the old

five-year sentence from Lancaster county, from which he had been paroled and broke his parole.

Counsel for the appellant bases his petition for writ of habeas corpus upon section 29-2628, Comp. St. 1929, which provides: "If any prisoner in the judgment of the board shall violate the conditions of his parole or release as fixed by the board of pardons, he shall thereafter be treated as an escaped prisoner owing services to the state and shall be liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest, shall not be counted as any portion or part of time served; and any prisoner at large upon parole or conditional release, who shall commit a fresh crime and upon conviction thereof shall be sentenced anew to the penitentiary, shall be subject *to serve the second sentence after the first sentence is served or annulled;* said second sentence to commence from the termination of his liability upon the first or former sentence."

These questions have arisen in Nebraska quite frequently, the facts in each case being different. In *Brott v. Fenton*, 120 Neb. 792, 235 N. W. 449, in which a habeas corpus petition was denied, Brott was sentenced to the penitentiary from Lancaster county for two years and six months for chicken stealing. He was released on bond pending proceedings in error to the supreme court. He went to Hall county, where he stole a calf, and was sentenced to three years in the penitentiary, which sentence he commenced serving December 19, 1927. Nine days later the supreme court affirmed the conviction for chicken stealing in Lancaster county, and issued its mandate. Brott completed serving the Hall county sentence on April 11, 1930. The petition for habeas corpus was denied.

In the case of *In re Walsh*, 37 Neb. 454, 55 N. W. 1075, the prisoner was sentenced to imprisonment on May 9, 1892, for one year and sentenced to an additional one year upon the second count of the information, the sentence providing that the second sentence should begin on May 9, 1893. The

first term of imprisonment by good conduct was cut to ten months, at which time his second term had not commenced to run. The prisoner was ordered discharged on a writ of habeas corpus, and it was held that the second judgment of imprisonment was illegal, and the prisoner was entitled to his discharge, the second sentence being also unauthorized, since both counts charged only one crime. It was held that, where different counts charge the same offense, in case of a conviction on each count, it is the rule to render a single sentence upon all counts for the one entire offense. 11 Neb. Law Bulletin, 458.

In such a case, the judgment should not fix the day on which each successive term of imprisonment should begin, but should simply direct that each successive term should commence at the expiration of the one imposed by the previous sentence. *Brown v. State,* 115 Neb. 366, 213 N. W. 339.

In *Riggs v. Sutton,* 113 Neb. 556, 203 N. W. 999, a wife brought habeas corpus to discharge her husband from confinement. On December 8, 1923, on a liquor charge he was sentenced to the county jail for 60 days, and the court fixed the supersedeas bond in the sum of $500. As he never gave the supersedeas bond, and did not prosecute error, the condition of the suspension of the sentence was never complied with. No warrant of commitment was issued until September 13, 1924, long after the defendant's imprisonment would have expired if it had begun on the day of sentence. Riggs was taken into custody, and the habeas corpus proceeding was begun. It is contended that the sentence began to run from the date of the sentence, and expired 60 days thereafter, although he suffered no imprisonment. It is held that, where a convict is permitted to absent himself from prison, the time when he is absent is no part of his sentence, and therefore when a convicted defendant is at liberty and has not served his sentence, he may be arrested on the unexecuted judgment, and as defendant has not suffered the punishment which his offense merited it would be mockery to hold that the mere neglect of ministerial officers to enforce the judgment of a court could annul it and hold it for

naught, and the petition for habeas corpus was properly dismissed. It is said: "The time for executing a sentence of imprisonment, or for commencement of its execution, is not an essential element of the sentence. The essential part of the sentence is the punishment, including the kind and amount thereof, without reference to the time that it is to be inflicted."

In the habeas corpus action of *Mercer v. Fenton,* 120 Neb. 191, 231 N. W. 807, the trial court granted the writ and a release from custody. Upon appeal this order of the trial court was reversed. Mercer was sentenced on October 6, 1924, to the state reformatory for one to ten years for horse stealing. On March 27, 1926, he was paroled, and on April 14, 1926, his parole was revoked when he stole two ladies' watches from the home of his employer in Lancaster county, and departed for parts unknown. On May 6, 1926, he was arrested in Omaha and pleaded guilty to attempted robbery, and was sentenced to three years in the penitentiary, from which sentence he was discharged October 5, 1928. The question arises whether defendant, having committed a fresh crime while on parole, for which he was sentenced and served his time until paroled, can now be compelled to serve the unexpired portion of his first sentence for horse stealing from Sioux county. On the date when his parole was revoked, April 14, 1926, he had a maximum of eight years and six months to serve in the reformatory for horse stealing.

It is clearly provided in section 29-2628, Comp. St. 1929, that when a prisoner out on parole shall commit a fresh crime, and be sentenced anew to the penitentiary, he shall be subject to serve the second sentence after the first sentence is served or annulled, and said second sentence is to commence upon the termination of his liability upon the first or former sentence. This section of the statute is mandatory, and governs the trial judge, the warden of the penitentiary, and all other officers.

It is said that one convicted of a felony is not entitled to discharge from liability of punishment for said violation

because the court erroneously required him to first serve the second sentence. But in *Mercer v. Fenton, supra,* it was held: "Where a sentence for a second offense sets the commencement of imprisonment prior to the completion of a prior sentence by a different court, under which the convict is paroled at the time of the commission of the second offense, it is erroneous, and may be corrected by a proper proceeding."

In *Vernon v. Miller,* 121 Neb. 748, 238 N. W. 528, the defendant was sentenced to the reformatory for a term of one to ten years. After serving a part of the sentence he was paroled, and while on parole he was convicted of the offense of larceny as bailee, and was sentenced to the penitentiary for a term of 18 months, and his parole on the first sentence was revoked. At the termination of the sentence upon the second felony, which was served in the penitentiary, he was remanded to the reformatory to complete the unexpired term of the first sentence. "A paroled prisoner, whose parole has been revoked, will not be relieved from serving the unexpired term of his sentence for the reason that, during the parole, he was convicted of a second felony and served his sentence therefor."

While the petitioner's second sentence should have commenced at the expiration of the first sentence, the unexpired part of which he had still to serve, it would seem to the court immaterial which sentence was first served; the length of the penal service would be the same, whether one or the other was first served.

In the very similar case of *Volker v. McDonald,* 120 Neb. 508, 233 N. W. 890, it is held that the neglect of the officers should not defeat the very object of the prosecution, which is the punishment of the defendant. A judgment allowing the writ of habeas corpus is reversed, with directions that Volker be imprisoned in the penitentiary for the time designated in the sentence.

In 70 A. L. R. 1511, is an exhaustive note on sentences running concurrently or consecutively. It is said that a sentence to commence after the expiration of previous

sentences must state definitely what sentences and from what court.

In view of these many holdings of our court in somewhat similar cases, we find no error in the record, and the order of the district court is hereby

AFFIRMED.

STATE, EX REL. ERNEST L. TRUAX, APPELLEE, V. OLIVER P. BURROWS ET AL., APPELLANTS.
287 N. W. 178

FILED JULY 18, 1939. No. 30668.

1. **Mandamus.** Mandamus does not lie to compel the performance of a discretionary power of a public officer, unless his action is arbitrary and capricious.
2. **Estoppel.** Where a board of county commissioners give an insufficient reason for their refusal to approve a nominee for the position of deputy register of deeds, such commissioners are not estopped to set up other reasons for their action in defending against an application for a writ of mandamus, where it appears that the relator did not rely or act upon such insufficient reason to his prejudice.

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

Frank L. Glebe, Floyd E. Wright and *Howarth N. Olsen,* for appellants.

Mothersead & York, contra.

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

CARTER, J.

This is an appeal from the issuance of a peremptory writ of mandamus against the respondents as county commissioners of Scotts Bluff county, Nebraska.

The record discloses that the relator was, during all the times herein mentioned, the regularly elected and qualified register of deeds of Scotts Bluff county. On January 5,

1939, the relator nominated and named Estelle C. Laughlin as deputy register of deeds, and submitted her name to the respondents, then sitting as the board of county commissioners of said county, for approval as required by section 33-112, Comp. St. 1929. The board of county commissioners refused to approve the appointment. It is the contention of the relator that such refusal was arbitrary, capricious and without just cause.

It appears that, shortly after the submission of the name of Estelle C. Laughlin to the board of county commissioners for approval, relator was informed by J. Ned Allison, a member of the board, that the appointment had been disapproved because she was a married woman and did not need the job. The other two commissioners were present and made no further statement.

The evidence of the respondents was to the effect that they had made independent investigations as to the qualifications of the nominee for the position, with the result that they discovered many taxpayers were opposed to her appointment, that she was not in good health, that she was inclined to "carry tales," and that her disposition was such as to not fit her for the office. Her reputation, character and ability as a typist were conceded to be good. There is evidence in the record that Estelle C. Laughlin was a married woman, and that her husband held positions which paid him approximately $275 a month. The evidence of the respondents is to the effect that their disapproval of the appointment was not based on the fact that she was a married woman, or that she did not need the job.

To state that a married woman is not disqualified to hold the position of deputy register of deeds needs no citation of authority. Neither is the fact that a nominee to such an office does not need the job a disqualifying factor. A reading of all the evidence in the record convinces us that, unless the respondents are estopped, as contended by the relator, from producing other evidence as to the lack of qualifications of the nominee, the board of county commissioners had sufficient evidence before them upon which they could formu-

late their judgment without being arbitrary or capricious in so doing. The case, then, necessarily turns on the question whether relator can successfully invoke the doctrine of estoppel.

It is the contention of the relator that, when Commissioner Allison informed him in the presence of the full board that the appointment was disapproved because "she didn't need the job," they thereby estopped themselves from putting the disapproval on any other ground. The evidence shows that they gave only one reason for their action when they could have given several. We fail to find any evidence tending to show that relator relied or acted upon the information given to his prejudice. The case is governed by the following principles of law:

"To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." *Walker v. Ehresman,* 79 Neb. 775, 113 N. W. 218.

"The silence of one party does not operate as an estoppel in favor of another, unless it appear that such other party has been induced thereby to change his position to his injury." *Columbus State Bank v. Carrig,* 3 Neb. (Unof.) 592, 92 N. W. 324.

In a case involving the same principle of law, the supreme court of Kansas said: "The transaction between them had been concluded before they assigned the reason for refusing payment. The statement made by appellees did not induce appellant to change his attitude nor lead him to assume a disadvantageous position. An estoppel should not be applied unless the statement or action of the party has injuriously affected others. It appears that appellant lost nothing by the statement of appellees. He had nothing to assign or surrender and when appellees refused

payment on any grounds he lost nothing. * * * A mistake in the enumeration of defenses will hardly operate as an estoppel where there is no other claim of injury than that a suit was brought by appellant to enforce an agreement upon which there never was a liability. One who has no claim or cause of action against another cannot be defrauded or injured by a denial of liability by the other on any ground, whether it be good or bad. A representation by one, even if false, does not work an estoppel unless the party asserting it has acted on the representation to his prejudice." *Glover v. Berridge,* 86 Kan. 611, 121 Pac. 1130.

In another case very similar in principle the court said: "Moreover, as this application (for a writ of mandamus) is discretionary, though the facts existing were not stated by the superintendent as his reasons, though he did not act on them, it is unchallenged that they are facts, and so long as they exist this court must consider them. Otherwise, on relator's theory, this court must find that the action of the superintendent was capricious and arbitrary, by reason of the refusal to receive the check, though actual facts are existing, which are of vital interest to the state, and, if made the reason for the refusal, would be sufficient to have warranted that refusal." *People v. Stevens,* 67 Misc. Rep. 529, 124 N. Y. Supp. 769.

Mandamus does not lie to compel the performance of a discretionary power of a public officer unless his action is arbitrary and capricious. It is a well-established principle, where discretion is lodged with an official, the courts will not interfere with the exercise thereof, except in cases where his discretion is so abused as to result in capricious and arbitrary action. The relator is in no position to urge an estoppel, for the reason that he was in no way prejudiced by the statement made by the board of county commissioners. A representation, even if false, does not work an estoppel unless the party asserting it has acted upon it to his prejudice. The relator being in no way prejudiced, a necessary element of a binding estoppel is absent. It must also be borne in mind that the issuance of a peremptory writ of

mandamus is discretionary with the court. Certainly, when it appears from all the evidence adduced that the board of county commissioners had sufficient evidence before them upon which to base their action, the court ought not to substitute its judgment for that of the board, and declare the board's action arbitrary and capricious when in truth and in fact it was not. We necessarily conclude, after determining that no binding estoppel exists, that the board of county commissioners were acting upon evidence that warranted the exercise of the discretionary powers conferred upon them by the legislature. While their decision might be wrong, the statute casts upon them the duty of deciding, and, they having done so in the proper exercise of their discretion, there is no justifiable cause for interference by the courts.

The relator cites many cases, including *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, and *Pittenger v. Salisbury & Almquist*, 125 Neb. 672, 251 N. W. 287, in which the parties were not permitted to mend their holds after litigation was commenced. These are cases where the statement or refusal made by one party operated to the prejudice of the other, or where the objection finally made, if it had been made earlier, might have been obviated. The principles stated in these cases can have no application in the case at bar.

REVERSED.

GEORGE BURRY, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.

287 N. W. 66

FILED JULY 18, 1939. No. 30520.

1. **Negligence.** "In actions to recover damages for personal injuries, issues of negligence and contributory negligence are questions for the jury, where the evidence is conflicting." *Frish v. Swift & Co.*, 97 Neb. 707, 151 N. W. 165.
2. **Appeal.** "A verdict of a jury in a law action based upon con-

flicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795.

3. Trial. "The credibility of witnesses and the weight to be given their testimony are questions for the jury." *Davis v. Bixby*, 132 Neb. 25, 270 N. W. 834.

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

Cleary, Suhr & Davis, Thomas F. Hamer and *George C. Holdrege*, for appellant.

B. J. Cunningham and *W. P. Lauritsen, contra.*

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

MESSMORE, J.

This is an appeal from a jury verdict rendered in the district court for Hall county, in favor of the plaintiff and against the defendant in the sum of $1,436.52, for injuries sustained by the plaintiff and damage to his truck as the result of the negligence of the driver of defendant's bus in maneuvering his bus to negotiate a turn on a detour road north from the Lincoln highway, running east and west near the westerly edge of the city limits of Cozad.

The plaintiff's petition sets forth several specific acts of negligence on the part of the driver of defendant's bus and evidentiary facts which will be covered in the opinion, and prays for damages. Defendant's answer is a general denial; in addition, alleges contributory negligence on the part of the plaintiff; by cross-petition alleges specific acts of negligence on the part of the plaintiff, and prays for damages to the bus and in the loss of its use. Plaintiff's reply is a general denial; and the answer to the cross-petition of defendant realleges negligence on the part of the driver of the defendant's bus. The substance of the pleadings of the respective parties referring to negligence will be more fully covered in the opinion as occasion requires.

Defendant, at the close of the plaintiff's evidence and at the close of all the evidence, moved for a directed verdict.

The court overruled the motions, and the ruling of the court in this respect is assigned as error; in addition, the defendant assigns as error that the verdict of the jury is clearly against the weight of the evidence. These two assignments will be considered together and require a review and an analysis of the evidence. The accident is admitted. The record discloses the following facts:

On the night of May 8, and the early morning of May 9, 1933, the plaintiff, one Charles Sherlock and a hitch-hiker, riding with them, were proceeding in an easterly direction en route to Grand Island with a load of live stock, in plaintiff's 1929 G.M.C. semi-trailer model truck. After they had passed about 12 miles beyond North Platte, Charles Sherlock took over the driving of the truck. The plaintiff was seated at his right and had dozed off to sleep. The hitch-hiker was sitting on the extreme right of the driver. At a distance of about a mile or two from the westerly edge of the city limits of Cozad, the defendant's bus passed the truck. The speed of the truck was approximately 30 miles an hour, and the speed of the bus was fixed at 55 miles an hour. Both the truck and the bus at the time were proceeding in an easterly direction. Upon arriving at the westerly edge of Cozad and crossing a small bridge, a graveled road just east of the bridge constituted a detour. This road runs to the north. The turn onto the north road was at a sharp or acute angle, a little narrower than a right angle, and, in order to negotiate the turn onto the north road, it was necessary for the bus driver, owing to the length and size of the bus, with a capacity of 33 passengers, A.C.S.,—at the time containing 31 passengers,—to maneuver the bus.

The driver's handling of the bus to negotiate the turn to the north, concisely stated, follows: The bus had reached the point in question about 3 a. m.; the driver pulled up into the intersection, and, not being able to make the turn, had to pull up a little farther, with the front wheels east of the intersection. There was a barrel just north of the black line and about 40 feet east of the east side of the bridge, and the front wheels of the bus were even with the barrel. The

rear end of the bus was in the intersection. The driver then cramped the wheel to the right again and "backed up so that the front wheels of the bus were about to drop off the pavement, and turning to the left again," he started up, hardly moving, as the bus was in low gear. The bus "had about reached the black line with the front wheels" at the time of the impact and was stopped. (The bus driver was evidently referring to the black line designating the center of the paved highway running east and west.) The front wheels of the bus occupied a position to the south of the black line on the pavement and to the east of what would be the black line on the road north and south. The front wheels of the bus were never off the pavement. The bus driver, in backing the bus, was busily engaged in handling the bus and did not look to the west. He was maneuvering the bus in the intersection for a period of two or three minutes. He should have looked to the west; he had just previously passed the truck a mile or two west. When he did look to the west the truck was a distance of from 25 to 75 feet west of the bus. The right front wheel of the truck struck the left front wheel of the bus at about the hub of the wheel. The front end of the bus slid around 6 to 10 feet to the east. The tire marks on the pavement caused by the sliding of the front wheel of the bus indicate the distance that the bus slid to the east, where it was standing at the point of impact. The left front wheel of the bus at the time of the impact was from 20 to 25 feet from the east line or edge of the bridge. The truck came to a stop after the impact in the ditch at the northeast corner of the intersection, about 45 feet distant from the front of the bus. The estimated length of the truck was 30 feet. The position of the bus after the impact, as testified to by other witnesses, follows:

John Dietz, a bus driver, westbound, having come over the north detour, stated that the truck was off the highway and the bus was partly on the pavement, headed north. There was room enough for him to get around or drive through between the point west of the black mark, caused

by the sliding of the front wheels of the bus, and the end of the road on the west, with two feet to spare. One Davis testified that he was present at the place where the accident occurred about 8 o'clock in the morning. He took several pictures of the intersection from different directions and at different angles, the pictures appearing in the record as exhibits and used quite extensively in the trial to indicate the location of the bus, by demonstrating the position of individuals appearing in the pictures as corresponding to the position of the bus, all of which had the effect of sustaining the bus driver's version of the accident. In some of the pictures were white streaks, indicating the lane of travel to the north road after crossing the bridge and turning off the pavement. One witness testified that from the point of the black streak where the tires on the front of the bus slid to the east, to the white streak, indicating the lane of travel to the north road, the distance was 15 feet; that is, 15 feet east of where the lane of travel to the north road turns off the highway. All of the evidence offered by defendant is an attempt to definitely fix the position of the bus in the intersection before and at the time of the impact; that is, far enough east of the east line of the bridge or where the detour road turns to the north and far enough removed from the turn on the north road and from the north side of the pavement running east and west; that is, the front wheels of the bus resting about on the black line of the pavement, marking the center thereof.

The version of the plaintiff and his witnesses of the accident may be briefly summarized as follows: The driver of plaintiff's truck testified that the bus had come off the side road south upon the paving running east and west. The front of the bus was headed north. The bus jerked and came to a stop and covered the full length of the pavement north and south, except about three feet from the north side thereof. The pavement was 20 feet wide. Witness could not see the headlights on the bus and they were not visible when the bus was crossways and until the bus had driven onto the highway. He could have seen the bus within the

range of vision of the lights of the truck at a distance of 300 feet if the bus at the time had been in the intersection. When the truck was about 50 to 55 feet from the bus he observed the bus. He had previously observed the "Slow" sign on the highway, and the sign with an arrow pointing to the north, indicating a detour road to the north. The truck was then traveling at a speed of about 20 miles an hour. He released his foot from the gas feed and placed his foot on the foot brake. When he saw the bus he yelled "Look out." The plaintiff, who had been sleeping, then awakened, and he saw the bus at a distance of 25 feet from the truck. He immediately braced his foot against the dash and applied the emergency brake assisting the driver of the truck to turn the steering wheel to the left, the driver having tried with all of his strength to turn to the left. The right front wheel of the truck struck the left front wheel of the bus at about the hub of the wheel. The position of the bus, east and west, was not fixed by either plaintiff or the driver of plaintiff's truck. The plaintiff testified that the bus was standing still at the time the truck struck it, and the lights on the interior of the bus were not burning. At the time of the impact the trailer pulled the fifth wheel loose from the truck and broke in the back of the cab, striking the plaintiff between the shoulders and against the small of his back, and striking the driver of the plaintiff's truck across the hip. The plaintiff testified he asked the bus driver why he came out on the pavement the way he did, being familiar with the road, and that the bus driver stated: "If he had looked both ways he wouldn't have drove on it," and that the bus driver later made a written statement to the same effect. The brakes on the bus seem to have jammed in such a manner that they would not release, requiring the rocking of the bus back and forth a few times to accomplish the release of the brakes. When this was done, the bus left under its own power.

The plaintiff prepared a sketch, showing the paved road east and west, the detour to the north, and the south road, the position of both the truck and the bus at the time of the

impact. The bus was located, on the sketch, near the center of the intersection of the road running north and south, with 12 or 13 feet of the bus on the south road, the bus facing north. The truck was located slightly into the intersection of the north and south road, the front of the truck facing northeast. An exhibit appears in the evidence prepared by the bus driver, containing a diagram of the roads in question, and the position of the bus and truck. The bus is shown in about the center of the intersection, running north and south, with about a third of the rear end of the bus extending onto the south road. The front part of the bus was headed north. The position of the truck was farther into the intersection than in the plaintiff's sketch, and not headed as far to the north, but more to the east. In this report the bus driver also stated: "The turn is to left off a bridge and is too short to make with the bus. Ran up ahead and backed into old highway off south side of pavement." Defendant contends further that the plaintiff did not intend to make the turn to the north, but intended to continue traveling east; that plaintiff had stated the road to the east was clear. The evidence is in conflict on this point. A further contention is made by defendant that plaintiff's driver failed to see or obey the road sign. We have previously related the testimony of plaintiff's driver in this respect. The evidence is in conflict as to the existence of a barrel at the place where the defendant's driver claimed it was located, and whether or not a barricade was up to the east of the location of the barrel. The barricade was apparently down, and this fact was discovered by the plaintiff and the defendant's bus driver. The torches at the road signs were not burning, and it is claimed by the defendant and reported by its driver that the driver of the truck did not notice the torches and kept traveling east. The "Road Closed" sign back of the paved road to the west was down, and the flares which were put out beside the "Road Closed" signs, and which were supposed to be on the pavement at the point of the detour, were not burning. The plaintiff, in addition, testified that the tracks of the bus extended back on the

south road 75 to 80 feet. There was also evidence that it had rained, and that the road signs were only partly visible. The brakes and the lights on the truck were in good repair. Plaintiff's driver was helped into the truck immediately after the accident, having sustained an injury.

We have detailed a greater portion of the evidence as to the accident and are convinced that in several instances there is a sharp conflict in the evidence, and especially so on the essential point submitted to the jury by the trial court in instruction No. 1, in referring to the negligence of the bus driver, if any, in the following manner: "That said bus was driven onto the highway from the south without stopping and without any signal or warning to the plaintiff of any intention to do so."

We conclude that the rule of law applicable to a case where the evidence is in conflict and controverted on many essential points is reflected by the following authorities:

"In actions to recover damages for personal injuries, issues of negligence and contributory negligence are questions for the jury, where the evidence is conflicting." *Frish v. Swift & Co.*, 97 Neb. 707, 151 N. W. 165.

"A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795; *Schindler v. Mulhair*, 132 Neb. 809, 273 N. W. 217. See *Boehler v. Kraay*, 130 Neb. 233, 264 N. W. 745; *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N. W. 537.

"Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison required by the statute rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury." *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224, 140 N. W. 135. See, also, *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125, 193 N. W. 257.

We are also convinced that the facts in this case present a case where an instruction on comparative negligence is applicable and such instruction was given by the trial court; in fact, none of the instructions of the trial court are attacked. The plaintiff's petition presents a variance with the facts, in that the petition states that plaintiff was driving his truck at the time of the accident, when, in fact, the witness Sherlock was driving the truck. The variance exists, but the defendant was aware, within a reasonable length of time before the trial, of the fact that Sherlock was driving the truck, and was not taken by surprise.

In addition, the record presents a statement in writing by plaintiff's driver, Sherlock, apparently signed by him, and in his testimony he denies the signature. The defendant contends that testimony of this nature is unworthy of belief. The jury had the benefit of his testimony. They are the constitutional triers of fact and the sole judges of the credibility of the witnesses. "The credibility of witnesses and the weight to be given their testimony are questions for the jury." *Davis v. Bixby,* 132 Neb. 25, 270 N. W. 834.

Defendant complains that the damages are excessive. We have considered the damage to the truck, the testimony as to its value immediately before and immediately after the accident, and the fact that the plaintiff received $135 for the truck, which was sold for junk, and have reviewed the medical testimony offered by the plaintiff. The plaintiff was injured between his shoulder blades and across the small of his back and at the time of trial, nearly five years later, was complaining of a stabbing pain, stating that he at times would go two or three months with no trouble; that he was not able to do any heavy lifting or to sit in one position for long at a time without causing pain across his shoulders, and the small of his back, and that the only manner in which he was able to sleep was by lying on the flat of his back. He had paid about $325 for chiropractic treatments in Alliance and in Omaha since the accident. He apparently was not examined by a medical doctor or a surgeon until about the time of trial. The defendant's con-

tention is that the jury allowed $1,000 for the personal injuries sustained by the plaintiff, which was excessive, for the reason that the plaintiff was suffering, at the time of trial, with chronic infectious arthritis, resulting, probably, from infected teeth and tonsils, which was in no way connected with the accident. We are unable to say definitely the amount that was allowed by the jury for the injuries sustained by the plaintiff.

The medical testimony for the plaintiff discloses a slight lipping of the sixth cervical vertebra, suggestive of an old traumatic injury, such as a compression fracture of slight degree; that arthritis of the spine, which is a thickening of the cushioned tissues between the vertebræ, suffered by the plaintiff, was due to the injury he received in the automobile accident.

The physician testifying for the defendant found, by examination of the X-rays, no fracture and no evidence of misplacement, and attributed the condition of the plaintiff to systemic infection. This constitutes a direct conflict in the medical testimony, presenting a question for the jury as to the credibility of the witnesses testifying as to plaintiff's condition.

Doctor Byers, a chiropractor, who had attended the plaintiff for a period of three years and had given him 36 or 38 treatments, testified that he found "a taut muscular condition and a slight sublaxation between the spinal processes of the spine." "Sublaxation," as used by this doctor, means a nerve impingement. He had examined the plaintiff a week before trial and found him to be extremely lame in the lower spinal region. His condition at that time was about the same as when the doctor first saw him.

We conclude from an examination of the testimony that the damages are not excessive.

AFFIRMED.

IN RE ESTATE OF WILLIAM A. LINCH. WILLIAM R. LINCH, APPELLANT, V. CLARENCE LINCH, APPELLEE.

287 N. W. 88

FILED JULY 18, 1939. No. 30621.

1. **Trusts.** Sections 30-1801 to and including 30-1805, Comp. St. Supp. 1937, apply to all trustees appointed either before or after enactment, and relate to procedure requiring the trustee to make and return to the county court a true inventory of all the property coming into his possession, to faithfully execute the trust under the direction of the court, and to settle his account with the court at the expiration of his trust.
2. ———. Evidence with reference to the account of the trustee, as shown in his report, and of the expenditures made by him in behalf of the trust estate, examined and found sufficient, and the finding of the county and the district court in approving such report will not be disturbed.
3. ———. A trustee, in the management of a trust estate, is required to use that degree of care and diligence that an ordinarily reasonable and prudent man would use in his own business under like or similar circumstances.
4. ———. Where a building belonging to a trust estate is repaired and remodeled under the direction and supervision of the trustee, for the preservation of the estate and to create an income for the beneficiary of the trust, and without objection by the heirs, objection made by part of the heirs years later, that the trustee failed to obtain proper orders from the court to make such repairs and for remodeling, come too late to be properly considered and constitute an acquiescence in and ratification of the trustee's acts by the heirs, and under the circumstances of the case such objection by a part of the heirs is barred by laches.
5. ———. Trustees possess general power to lease trust property on such terms, conditions and rentals as are reasonable and customary for that class of property in the particular vicinity, and where the evidence shows that such rents collected by the trustee are the fair and reasonable rental value of the property, under the circumstances, and for the advantage and protection of the beneficiary of the trust, the trustee has properly performed his duty in such respect.
6. ———. Where a trustee installs a cooling system in a building belonging to the trust estate, and the evidence develops that such system is primarily for his own use and benefit, an order disallowing the claim therefor was proper.

7. ———: **Trustees. ACCOUNTABILITY.** It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term, therefore, includes every omission or commission which violates in any manner either of three obligations: (1) Of carrying out the trust according to its terms; (2) of care and diligence in protecting and investing the trust property; and (3) in using good faith.

In the instant case, evidence examined as to breach of trust, and *held* that, under the circumstances as presented therein, the trustee was guilty of negligence in failing to exercise the degree of care and diligence in protecting the trust property as required of him by law.

8. ———: ———: **Compensation.** In allowing compensation for services performed by a trustee for the benefit of a trust estate, such matter is addressed to the sound discretion of the court, and it is the duty of a court of equity to exercise a just discretion and make or withhold allowances as to particular circumstances required. In the instant case, beneficial services were performed by the trustee for the benefit of the estate for a period of years, and the allowance by the county and the district court for compensation for services so rendered by the trustee will not be disturbed.

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

Burkett, Wilson & Van Kirk, for appellant.

Perry, Van Pelt & Marti and *L. B. Fuller, contra.*

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

MESSMORE, J.

William A. Linch departed this life December 24, 1906, leaving surviving him his widow, Arvilla J. Linch, four children by his first and eight children by his second marriage. His last will and testament was admitted to probate. Executors were appointed, and on October 9, 1917, final settlement of the estate was had and accounts of the executors approved and executors discharged. William R. Linch, the appellant, was then appointed successor-trustee, the

will of William A. Linch having created a trust, terminable, according to the terms of the instrument, at the death of his widow, and such trust had not yet closed. The successor-trustee came into possession of personal property from all sources in the amount of $385.83, and of real estate, known as Nos. 235-237 North Tenth street, in Lincoln, Nebraska. The title to the real estate was vested in Arvilla J. Linch for her natural life, with the remainder over to the children of William A. Linch, share and share alike, according to the terms of the will, and, in addition, all the net income of said property over and above $80 a month, later changed by codicil to $70, was to be held by Arvilla J. Linch as trustee for the children of her husband, to be distributed as the residue of his estate. Arvilla J. Linch departed this life January 15, 1937, at which time her life estate was terminated, and the title to the trust realty was vested in the children of her husband. The appellant (hereinafter designated trustee) filed his report February 26, 1937, in the county court of Lancaster county, praying that such report be approved and that he be discharged as trustee.

At the time of the trustee's appointment there was no specific statute in this state governing trusteeships. However, where the provisions of a will created a trust, the county court, having exclusive and original jurisdiction over the probate of wills and administration of estates, generally appointed a trustee to carry out the provisions of the trust so created in the will, after the accounts of the executors had been approved and the executors discharged. In 1931, chapter 42, Laws 1931, was passed, vesting the county court with jurisdiction over trust estates. This law now appears as sections 30-1801 to and including 30-1805, Comp. St. Supp. 1937, and controls the handling of trust estates, applying to all trustees appointed either before or after its enactment. *In re Estate of Greenamyre*, 133 Neb. 693, 276 N. W. 686. Under the provisions of the statute cited, the trustee is to make and return to the county court a true inventory of all the property coming into his possession, to faithfully execute the trust under the direction of

the court, and to settle his account with the court at the expiration of his trust. The provisions of the statute relate to procedure only.

The appellant (trustee), seeking to comply with the provisions of the statute, filed his final report, showing his receipts and expenditures as trustee, as follows: Total paid out $55,354.51; items received from rents in the aggregate sum of $54,720.54, leaving a deficit of $633.97. The trustee's accounts were gone over by an expert accountant procured by appellee Clarence Linch, a brother of the trustee. Five or six discrepancies were found and corrections made, as evidenced by a supplemental report. While we do not place the stamp of approval upon the manner in which the trustee's accounts were kept, and recognize that to make the best accounting the accounts of a trustee should be kept separate from other accounts, we are not unmindful of the manner in which the business of the trust in question was carried on by the trustee for a period of years, without objection from any of the heirs; in fact, three-fourths of the heirs, owning the greater interest in the fee title of the trust estate, are satisfied with every item, for which the trustee accounts, and acquiesce in the allowance made by the court for services rendered the trust estate by him. The foregoing statement is made for the reason that the trust funds were seemingly carried by the trustee with his own funds, and claim is made that the account and report were made up at one time. The county court, after an examination of the items shown in the report and the vouchers received in evidence, approved the report, as did the district court. The case is tried *de novo* in this court.

In 65 C. J. 935, it is said: "As a general rule it is the duty of a trustee to take and preserve vouchers for payments which he makes. * * * When proper vouchers are produced, they are of themselves sufficient evidence of disbursement without further proof. Failure to support each item by vouchers does not warrant disregarding the whole account."

We have examined the final report, the receipts and the account of the trustee and come to the same conclusion as

did the county and the district court, that the account should be approved and the trustee discharged. The findings of the district court in this respect will, therefore, not be disturbed.

Clarence Linch, the brother (hereinafter referred to as appellee), filed objections to the report, setting forth therein several different items. The county court overruled the objections, with the exception of an item for $750, which was disallowed, this amount evidencing the installation of a cooling system in the building belonging to the estate, which will be referred to later in the opinion. The county court also allowed the trustee $1,000 as fee for his services. From the judgment of the county court Clarence Linch appealed to the district court, where the objections of appellee and cross-appellant (as designated in this court) were sustained as to one item in the amount of $3,176.71 for breach of trust, and also the item in reference to the cooling system, above mentioned, comprising a total of $3,926.71, constituting the liability of the trustee to the estate, and the court overruled all other objections of the appellee to the report, and, in addition, allowed the trustee $1,000 for his services. The final judgment entered against the trustee, after making deductions for allowance of services, was in the amount of $2,225.93. From this judgment the trustee appealed to this court, and Clarence Linch filed a cross-appeal.

We have carefully examined the evidence in reference to all items objected to by the appellee in the district court, and, without restating the evidence as to each separate item, we conclude that the items to be reviewed in this court are: (1) The item for alleged breach of trust in the amount of $3,176.71, as hereinafter discussed in the opinion; (2) the item involving the expenditure of $1,138 for the cooling system, the claim being made that such system was placed by the trustee in the office building belonging to the estate expressly for his own benefit. We shall also discuss the objections of the appellee to the compensation awarded the trustee for his services and the collection of rents by him, his accounting therefor, and the objection on the part of

appellee that the trustee did not account for the reasonable and fair rental of the real estate belonging to the trust estate.

When the trustee took possession of the building, it was in a bad state of repair and had been unoccupied for a long period of time. He procured an order from the county court allowing $1,200 for the purpose of repairing the building, and an assessment was made against the heirs in the amount of $210 each; later on some of the heirs paid an additional $65. The repairing of the building covered a period of 90 days, and the work was supervised by the trustee. The repairs consisted of a new front, general repairs throughout, cementing or stuccoing the front and back of the building, raising and leveling the floors and strengthening the building. The object in repairing it was to create an income for Arvilla J. Linch, and the matter was discussed with the heirs, some of them being present at different times during the progress of the work. The building was then rented for a garage to John Linch, a brother of the trustee, and subsequently to the Western Furniture Company, the Capital Supply Company, and the Richmond Candy Company. All rents were collected by the trustee from such time until 1926, when the building was two-thirds destroyed by fire. Out of the rentals the trustee claimed to have paid his mother the sum of $100 a month, in addition to paying for repairs, upkeep and taxes. As a result of the fire the trustee received $15,000 insurance carried on the building. After the fire there was some controversy as to whether the building should be rebuilt or the ground sold and the proceeds placed at interest for the benefit of Arvilla J. Linch. However, it was finally determined that the building should be reconstructed. The trustee supervised the work of reconstruction and the purchase of material, and the building was then made into a two-story structure, requiring his services for a period of four months.

The appellee contends that the trustee received no orders from the court to make the repairs or remodel the building, except the order permitting the expenditure of $1,200 for

such purpose, and cites the following rule: "It is the general rule that a trustee has power to make whatever repairs are necessary for the preservation of the estate, but has no power to make large and extensive improvements, unless expressly authorized by the instrument creating the trust,"—citing cases. *Maynard v. Columbus,* 150 Ky. 817, 150 S. W. 1019.

In the instant case the heirs made no objections to the repairing of the building in the first, or to the remodeling thereof in the second, instance. They recognized that Arvilla J. Linch had a life interest in the estate, and that by such repairs and remodeling of the building she would obtain an income from the rents, and that this was the only way that the property of the trust estate could be utilized for her benefit. We hold that the repairs and remodeling of the building, under the circumstances as shown by the evidence, were proper; that the heirs acquiesced in and ratified the trustee's act; that objections made come too late to be considered and are barred by laches.

The rental history of the building since the time of its reconstruction shows that the average rental per month, from 1928 to 1936, was $156. The upper or second floor was given over to offices, housing a lightning rod company, of which the trustee was president, the Lincoln Hail Insurance Company, in which he at one time held the office of secretary-treasurer, the Western Finance Company and another small insurance company in both of which he had an interest. The lower part of the building was given over to various business concerns. The appellee's claim is that the fair and reasonable rental value of the building from June 1, 1927, to January 15, 1937, was $225 a month, or a total of $25,987.50, whereas the trustee accounted for only $18,050, leaving a balance of $7,937.50 in rents unaccounted for. The evidence is conflicting as to the reasonable rental value of the property. However, we must consider the location of the property, the rents payable in the immediate vicinity by other tenants, and while it is true that the trustee has rented the second story of the building to companies in

which he had an interest, yet it was by his efforts and his interest in the various business enterprises that the second floor was rented. In view of all the circumstances and the evidence disclosed by the record, we arrive at the same conclusion as did the district court that the trustee rented the building for the trust estate for a reasonable and fair amount.

The appellee contends that it was not proper for the trustee to become a lessee of the trust estate, and cites in support thereof 65 C. J. 792, wherein it is said: "It is improper for the trustee himself * * * to become lessee." Preceding this statement, the text reads (section 664): "Trustees possess general power to lease trust property on such terms, conditions, and rentals as are reasonable and customary for that class of property in the particular vicinity, provided it be for the advantage and protection of the *cestuis que trust.*" In the case at bar, appellant, himself, was not the lessee. The companies in which he owned an interest or held office were the lessees of the second floor.

We believe that, where a trustee has acted in good faith, a court of equity will hold him accountable only for what he actually received, and will not charge him with proceeds or profits which he might have received. *Van Buskirk v. Van Buskirk,* 148 Ill. 9, 35 N. E. 383.

With reference to the item objected to by appellee in that the trustee failed to account for $3,176.71, as above stated, the evidence discloses that the trustee was secretary and treasurer of the Lincoln Hail Insurance Company, a tenant in the building. A written lease was negotiated with the insurance company extending from January 1, 1931, to January 1, 1936, at a rental of $65 a month. The trustee did not sign the lease as secretary and treasurer, but it was signed by an officer of the insurance company. The company occupied the premises during 1931 and for about four months in 1932, when the department of insurance of the state of Nebraska took over the company. The trustee employed counsel to file a claim in the case of *State v. Lincoln Hail Ins. Co.,* 133 Neb. 496, 276 N. W. 169, for the unpaid

rent. Such claim and objections thereto were filed. The record does not show that there was ever a hearing had on the claim and objections filed. The final decree in the case of *State v. Lincoln Hail Ins. Co., supra,* does not specifically mention the claim, but does show an adjudication of some of the claims. The claim was apparently never allowed. It is contended by appellee that, by an interpretation of the decree, the claim was, in fact, disallowed. The assets of the insurance company were later sold to one Carr, acting for and in behalf of himself, and the trustee, the latter becoming coowner of the assets of the insurance company.

The district court found that the account for the unpaid amount of rent in the sum of $3,176.71 against the Lincoln Hail Insurance Company was a just claim and collectible, and that, the trustee having failed to collect the amount, it is chargeable against him. Under the circumstances as disclosed by the evidence and as set out above, we conclude that the trustee was negligent and failed to exercise the degree of care that a prudent and reasonable person would exercise in the management of the business of the trust estate. The trustee was negligent in that he failed to pursue the claim of the estate against the insurance company, and, in fact, in owning and holding the assets of the insurance company and at the same time standing in a trust relationship to the estate, and, having the assets in his hands, made no effort to apply the same towards the payment of rents as evidenced by the lease.

The following rule, adopted by this court in *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 258 N. W. 44, and in *Wells v. Carlsen,* 130 Neb. 773, 266 N. W. 618, applies: "It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations * * * of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property,

and of using perfect good faith." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1079. And the following authorities are likewise applicable under the circumstances of the instant case as shown by the evidence:

In 2 Perry, Trusts and Trustees (7th ed.) p. 892, it is said that where trustees have the management of property they must use due diligence in collecting rents, and at page 1541 the author states: "A loss that happens through the negligence of the trustee must be borne by him."

"A trustee commits a breach of trust not only where he violates a duty in bad faith, or intentionally although in good faith, or negligently, but also where he violates a duty because of a mistake as to the extent of his duties and powers. This is true not only where his mistake is in regard to a rule of law, whether a statutory or common-law rule, but also where he interprets the trust instrument as authorizing him to do acts which the court determines he is not authorized by the instrument to do. In such a case, he is not protected from liability merely because he acts in good faith, nor is he protected merely because he relies upon the advice of counsel." Restatement, Trusts, 531, sec. 201.

For the foregoing reasons, we conclude that the district court was right in finding against the trustee in the amount of $3,176.71 for breach of trust on his part.

The appellee objects to the installation of a cooling system in the building, placed therein by the trustee. This claim was disallowed by the county and the district court. We find from a review of the evidence that such ruling should not be disturbed; that the cooling system was beneficial to the trustee, and to him only, and did not enhance the value of the property or increase the rents therefor.

Appellee contends that the trustee, at the time of his appointment, agreed to serve without compensation, and that the court is without power to allow him compensation. The evidence shows that the appellee contemplated his appointment as trustee, but, due to the fact that he was a resident of Omaha and that the trust estate could be more easily handled and with less expense by a resident of Lincoln,

where the trust property was situated, he was not appointed. The evidence upon which he bases his contention that the trustee should not be paid an allowance for his services is a conversation alleged to have occurred at the mother's house, where the appellee, the trustee, a sister and the mother were present, and in which it is claimed the trustee stated he would serve without compensation. This statement the trustee denied. The following authorities are cited to support appellee's contention:

"A trustee's waiver of his commissions is a fact to be shown by the evidence, either by express declarations, or by acts and declarations manifesting an intent and purpose not to charge commissions, or by a course of conduct from which such intent and purpose may be implied. Waiver has been held to have been established where it appeared that the trustee agreed to serve gratuitously if appointed to the office and his appointment was made with that understanding; where the ultimate period for accounting was allowed to pass without claim made for commissions." 65 C. J. 913.

"A trustee who, through friendship, accepts money for safe-keeping and investment, without any agreement for compensation, is not necessarily entitled to pay for his services where he fails to perform his duties." *Baird v. Lane,* 115 Neb. 413, 213 N. W. 512.

Unquestionably, it is apparent from the record that services beneficial to the trust estate were rendered by the trustee over a period of a number of years,—his supervision over the repairing of the building, in the first instance, the obtaining of tenants and collection of rents; his supervision over the remodeling of the building for a period of time, and the collection of rents and accounting therefor.

In 2 Perry, Trusts and Trustees (7th ed.) 1556, sec. 919, the author states: "In many states the commissions and compensation of the trustees depend upon their fidelity in the administration of the trust. If they are guilty of any breach of trust, or of any vexatious or improper conduct, the courts can withhold all compensation, or they can allow

such compensation as will pay for the value of their services so far as they have been beneficial to the estates."

In 65 C. J. 910, with reference to compensation allowance to trustees, we find the following language: "The accepted rule in this country at the present time, however, is * * * for courts of equity to exercise a just discretion and make or withhold allowance as they consider the particular circumstances require."

The judgment of the district court is affirmed, with directions to remand the cause to the county court for distribution of the funds remaining in the hands of the trustee, as provided for by law.

AFFIRMED.

YORK LIVESTOCK COMMISSION COMPANY, APPELLANT, V. NORTHWESTERN LIVESTOCK COMMISSION COMPANY, APPELLEE.

287 N. W. 94

FILED JULY 18, 1939. No. 30537.

1. **Corporations**: NOTICE. A corporation is not chargeable with the knowledge of one of its officers in a transaction where he is in no way representing the corporation, but is dealing with it as a private individual and in his own interests.
2. ———: ———. Where the president of a corporation is indebted to it and indorses over and delivers a check to the bookkeeper as a payment on his account, the corporation is not chargeable with the president's knowledge that the check represented the proceeds of a sales transaction handled by him as agent for another to whom he owes a duty to account.
3. ———: ———. The knowledge of the president in such a situation does not constitute notice to the corporation under the negotiable instruments law. Comp. St. 1929, sec. 62-406.

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

Charles F. Stroman, for appellant.

Kirkpatrick & Dougherty, contra.

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

JOHNSEN, J.

Plaintiff has appealed from a dismissal of its suit to impress a trust upon the proceeds of a check, of which defendant claimed to be a holder in due course under the negotiable instruments law.

Both parties are corporations, and each operates a live stock commission business and a sales barn at York. Charles Houston was president of defendant corporation but not its managing officer. He was a live stock trader on his own account and had been purchasing cattle at both plaintiff's and defendant's barns. As a result thereof, he owed each of them a balance, and each had been pressing him for payment.

To clear up his indebtedness to plaintiff, he entered into an arrangement with plaintiff's president, Roy Tucker, by which he was to bid in cattle at plaintiff's barn, truck them to Omaha, sell them in his own name, account to plaintiff for the proceeds, and receive credit on his account for any resulting profit. Two transactions were handled in this manner, in which Houston duly accounted for the proceeds. In the first, he indorsed over to plaintiff the check received on the Omaha market. In the second, he issued plaintiff his personal check and deposited the Omaha check to his own account. On the transaction involved in this suit, he made no accounting to plaintiff for the proceeds, but indorsed the check in blank and delivered it to defendant's bookkeeper, without any explanation as to its source, and was given credit on his indebtedness. The check was in the sum of $407.34, and the amount of his indebtedness to defendant at that time was $1,294.92.

Under section 62-202, Comp. St. 1929, which is part of the uniform negotiable instruments act, acceptance of the check, for application upon Houston's preexisting debt, constituted defendant a holder for value. Under section 62-404, it was not a holder in due course, however, if it had notice

of the defect in Houston's title. The controlling question therefore is whether defendant knew that the check was not Houston's, and that he had no right to apply it on his indebtedness.

It is admitted that the agreement which Houston and Tucker had made was kept a secret between them, presumably because it was violative of plaintiff's obligation as a factor. There is accordingly no contention that any officer or agent of defendant, except Houston, knew of his duty to account to plaintiff for the check or its proceeds. If then, it is to be held that defendant had no right to take the check, it must be on the ground that defendant was chargeable with Houston's knowledge as a matter of law.

But Houston was not representing the corporation at the time; he was merely making payment of part of his personal debt, upon which he had been pressed for payment. He turned the check over to defendant's bookkeeper in the same manner that he had made other payments on his account in the past. On previous occasions defendant's bookkeeper had succeeded in obtaining payments from him by representing that the corporation was overdrawn at the bank. Houston claims that this was one of the considerations that prompted him to turn over the check on this occasion. He was not the treasurer of the corporation, however, and was not charged with the responsibility of its financial problems. He had neither the duty nor the power to raise funds for it. In his relationship to the corporation, all that he could do, and all that he did in the present situation, was to make a payment on his account.

Under these circumstances, where he made no disclosure at the time, the corporation was not chargeable with his knowledge regarding the check. We have several times declared that a corporation is not chargeable with the knowledge of one of its officers in a transaction where he is in no way representing the corporation, but is dealing with it as a private individual and in his own interests. *Koehler v. Dodge,* 31 Neb. 328, 47 N. W. 913; *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123, 58 N. W. 734; *Exchange Bank v. Ne-*

braska Underwriters Ins. Co., 84 Neb. 110, 120 N. W. 1010.

In 1 Restatement, Agency, sec. 279, the rule is stated thus: "The principal is not affected by the knowledge of an agent as to matters involved in a transaction in which the agent deals with the principal or another agent of the principal as, or on account of, an adverse party." The illustrations in the text demonstrate the applicability of the rule to the present situation.

The knowledge of Houston accordingly did not constitute notice to defendant under the negotiable instruments law. Comp. St. 1929, sec. 62-406.

Plaintiff argues that evidence on the part of defendant to show good faith and lack of notice was erroneously admitted. It is unnecessary to consider that question, however, because defendant's status as a holder in due course was in any event sufficiently established, without the evidence of which plaintiff complains, by the testimony of Tucker and Houston, plaintiff's own witnesses. Under the record, the determining question, as we have already indicated, stood narrowed down to whether defendant was chargeable with Houston's knowledge as a matter of law.

The trial court properly held that plaintiff could not impress a trust upon the proceeds of the check in defendant's hands.

AFFIRMED.

DISBROW & COMPANY, APPELLANT, V. MILDRED V. PETERSON ET AL., APPELLEES.

287 N. W. 220

FILED JULY 21, 1939. No. 30549.

Mechanics' Liens. The purpose of the mechanics' lien statute is to protect the diligent contractor, subcontractor, or laborer. A subcontractor is not entitled to a mechanics' lien under the facts recited in the opinion herein.

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

De Lamatre & De Lamatre, for appellant.

A. C. R. Swenson, contra.

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

SIMMONS, C. J.

This is an action for the foreclosure of a mechanics' lien. The plaintiff is a subcontractor who furnished millwork to a contractor in the erection of a duplex house. The defendants are the contractor and the owner of the property. The case was tried, and at the conclusion of plaintiff's case, the defendant Peterson, owner of the property, moved to dismiss the cause as to her. The trial court sustained the motion and plaintiff appeals. The questions presented on appeal involve only the right of the plaintiff to a lien on defendant Peterson's property.

The defendant contractor had built similar buildings for others, and, with minor changes, was to build the same building for the defendant Peterson. Plaintiff had furnished the millwork for the prior construction, and orally agreed to furnish the same millwork for the job in question at the agreed price of $1,050. Certain extras were also furnished which do not alter the question here presented. Plaintiff furnished materials for the job and made final delivery of all items, except two window screens, on October 30, 1936. On October 30, 1936, plaintiff billed the contractor for the balance due under the estimate of $1,050, explaining, however, that such statements were often sent out ahead of full delivery for the convenience of the contractor in making estimates and collections. The two screens were a part of the items making up the $1,050 total. The last item of extras was delivered, and plaintiff billed the contractor therefor on November 12, 1936. On May 6, 1937, the defendant delivered two window screens to the premises. On July 1, 1937, plaintiff filed the mechanics' lien, which it now seeks to foreclose. Plaintiff testified that these screens were within the original contract, and they were not de-

livered with the other millwork because not on hand, and that had they been on hand they would have been delivered in October. That the delivery of these two screens had not been made was noted in plaintiff's records. Plaintiff did not deliver merchandise except upon order. On May 6, 1937, the contractor ordered the screens delivered, and that was done. Plaintiff did not deliver the screens prior to that time because the contractor had not ordered them sent out. Had they not been so ordered, they would not have been delivered. There is no showing that the defendant Peterson knew that the screens were within the contemplation of plaintiff's proposal to furnish millwork to the defendant contractor, or that the screens had not been delivered, or the job not completed, or that the defendant Peterson requested that the screens be delivered to her property. At the time of delivery the house was evidently complete and was being occupied.

Under these circumstances, is plaintiff entitled to a lien?

Under the provisions of section 52-102, Comp. St. 1929, the statement of the amount due the subcontractor must be filed within sixty days from the furnishing of such material. It must be conceded that the plaintiff has no lien unless the delivery of May 6, 1937, brings plaintiff's claim within the statute. "* * * the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days" provided in section 52-102, during which time the statement for the lien may be filed. Obviously, after sixty days have elapsed following the last delivery, the owner can pay the contractor in safety. It is clearly the purpose of the statute to protect the diligent subcontractor if he acts within a specified and limited time.

This court held in *Buchanan v. Selden,* 43 Neb. 559, 61 N. W. 732, that where more than sixty days intervene between two items of a lien account, the presumption is that all the items following the hiatus were furnished under a separate contract. While the screens in this case might have been within the contemplation of the plaintiff and the contractor as a part of the original contract *when made,*

it is clear from the plaintiff's testimony that the screens never would have become a part of that job had they not been ordered delivered in May, 1937, and that their delivery to plaintiff's premises resulted, not from the original agreement to furnish them, but from the contractor's order for them in May, 1937. Plaintiff concedes that the time for filing mechanics' liens cannot be extended by tacking one contract to another. *Walker v. Collins Construction Co.*, 121 Neb. 157, 236 N. W. 334.

It is obvious that the statute does not contemplate a lien under the circumstances here shown. "If the time which is restricted by the statute can be thus indefinitely extended by acts of this kind, the 60-day limitation fixed by the legislature in which to file this class of liens can and will be utterly and completely defeated, so that in every case where a right to file a lien has ever existed, the title to the property may for an indefinite period remain in an unsettled and not ascertainable condition, with reference to the character and extent of the mechanic's liens which may be claimed against such property." *Gem State Lumber Co. v. Witty*, 37 Idaho, 489, 217 Pac. 1027.

"After a contract is substantially completed there must be no unnecessary or unreasonable delay under all the circumstances in fully completing the work, and the time for filing a lien cannot be extended by a delay for a considerable time to do a small piece of work necessary to full completion." 40 C. J. 198, and cases there cited.

The decree of the trial court is affirmed.

AFFIRMED.

WILLIAM A. EHLERS, APPELLANT, V. MARTHA SEIP ET AL., APPELLEES.

287 N. W. 202

FILED JULY 21, 1939. No. 30610.

1. **Deeds.** The delivery of a deed is purely a question of intent, to be determined from all the facts and circumstances.

2. ———. The burden of proof rests upon the party asserting the delivery of a deed.
3. ———. One of the essentials to the validity of a deed is the acceptance thereof by the grantee, with the mutual intention of the parties to pass the title.
4. ———. There is no delivery if the grantor keeps the deed in his own possession, particularly if he keeps possession of the real estate as well.
5. ———. If grantor has the deed recorded, it is *prima facie* evidence of delivery.
6. ———. But no such intent to deliver appears if recorder was expressly instructed to redeliver deed to the grantor, or where the deed was executed and recorded without the knowledge or assent of the grantee.

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

William A. Ehlers and *H. G. Greenamyre,* for appellant.

Jack Koenigstein and *M. S. McDuffee, contra.*

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

PAINE, J.

This is an action in the nature of a creditor's bill, asking that a deed made by parents to their minor children be declared made without consideration, fraudulent, and void, as having been made to hinder and delay creditors, and to subject the premises to payment of a judgment against the mother. The defense is that, when Mrs. Seip gave the note upon which the judgment sought to be collected was based, the real estate involved was not owned by her, as the records disclose, and also that she received no consideration for signing the note. The trial court found for defendant, and dismissed the action. Plaintiff appeals.

The evidence discloses that William Seip, now deceased, was a farmer, who lived on a quarter-section owned by his wife, and the loan on this homestead was foreclosed by the Stuart Investment Company the day before she testified in court in the case at bar. To carry on his cattle-feeding operations, Mr. Seip was compelled to borrow $800 from the Farmers Bank of Battle Creek. The note, exhibit No.

2, dated April 28, 1932, bears 8 per cent. interest, and was also signed by his wife, Martha Seip, but it did not contain a married woman's clause.

This debt was renewed, usually on payment of interest, by similar notes, on November 1, 1932, again on January 5, 1934, and was renewed the last time on June 14, 1934, at which time it was signed only by the wife. In reference to the wife alone signing this last renewal note, it appears from the evidence that the husband was sick at home. He conducted his business from a wheelchair for about six years, and then was in bed part of the last year, and died April 17, 1936. The widow was asked the question: "What was said by the banker to you about the signature of your husband, Mrs. Seip? A. He was saying when Will was able to sign again, he was very sick at that time, he would have his signature with mine again. * * * He was very sick and couldn't have nobody come in." She was asked: "Would you have signed that note alone that Mr. Ehlers brought suit upon if you had known your husband wasn't going to sign it? A. No; I don't think so."

The testimony of the cashier and of Mrs. Seip discloses that she had no intention of binding her separate estate when she signed the first note or any of the renewals thereof. She received no consideration of any kind at any time. The money was originally borrowed on the first $800 note in the fall of 1932 for feed. She testified that Mr. Seip got all the $800, and also testified: "When he shipped cattle they did not bring the money they should have, they kind of slumped."

The last renewal note, signed by the wife alone, was placed in judgment on June 13, 1935, in the county court of Madison county by B. H. Saunders, superintendent of banks in Nebraska, when he closed the Farmers Bank. This judgment was by Saunders sold and assigned to William A. Ehlers, plaintiff herein, on May 6, 1937.

The cashier was asked: "This item which is the note on which Mr. Saunders brought the action that is a continuation of the debt William Seip owed you? A. Yes, that is true."

We have given in some detail the evidence relating to the note and the judgment and assignment thereof. We will now briefly set out the evidence relating to the land which plaintiff desires to impress for the payment of this judgment. It is stated in plaintiff's brief that in July, 1931, the husband, William Seip, had received from the estate of his deceased brother an undivided one-half interest in the northeast quarter of section 8, township 21 north, range 3 west, in Madison county, Nebraska, subject to the life estate of the widow of Adam Seip. Exhibit No. 5 is a quitclaim deed, dated July 9, 1931, and acknowledged by William Seip, sole grantor, before Ernest L. Reeker, county judge, on the same day, by which William Seip transferred this same tract of land to his wife, Martha Seip, as grantee, and the annotation on the back shows that it was filed for record in the office of the register of deeds on July 18, 1931, and in lead-pencil at the bottom appear these directions: "Chg & Ret E. L. Reeker Chg 1.00."

The defendant Martha Seip testified positively that she never, at any time, knew anything about this quitclaim deed having been made, or put on record in her name, until her attorney told her about it after plaintiff brought this action against her, and that this quitclaim deed was never delivered to her. She said she was not in Judge Reeker's office when it was made out, and no one ever told her about it. Defendants insist that, as it was never delivered, it never became effective, and never transferred title to her, citing 18 C. J. 196; *Roepke v. Nutzmann,* 95 Neb. 589, 146 N. W. 939; *Brown v. Westerfield,* 47 Neb. 399, 66 N. W. 439.

Now, on the other hand, the plaintiff argues generally that, when property is conveyed to a grantee without her knowledge, the law declares an acceptance by her when the deed is delivered to her, or when such deed is recorded and she fails to repudiate it the first time she learns that fact. He further argues that Mrs. Seip recognized her ownership of this land when she joined with her husband in giving a deed of it to her minor children on March 22, 1933, and that, by reason of such fraudulent conveyance, she is now estopped

to deny the effect of it as against the creditor whom she defrauded. In reply, the defendants say that the plaintiff, being the assignee of a judgment obtained by the superintendent of banking on a note held by a failed bank, is in no position to raise the question of estoppel, as he is not in privity with either the grantors or the grantees.

This court will consider the law relating to the quitclaim deed, dated July 9, 1931, running to the wife as grantee from the husband as grantor, and of which there is no evidence that the wife ever had any knowledge until after the petition was filed in the suit at bar.

Delivery of a deed is purely a question of intent, to be determined by the facts and circumstances of each particular case. *Roepke v. Nutzmann,* 95 Neb. 589, 146 N. W. 939.

"The recording of a deed will not of itself constitute a delivery to the grantee in the absence of an acceptance by him of the instrument, but if subsequently accepted the deed will be valid." 18 C. J. 213.

In *Exsted v. Exsted,* 202 Minn. 521, 279 N. W. 554, no particular formula is necessary to the delivery of a deed, but it is sufficient if there is a surrender of the control of the deed by the grantor, together with an intent to convey title. Whether there has been a delivery of the deed is a question of fact. There is no evidence of delivery in the case at bar.

"Where the delivery of a deed is placed in issue, the burden of proof rests upon the party asserting delivery, although it need not be proved by positive testimony, but may be inferred from circumstances, or from acts and declarations of the parties constituting parts of the *res gestæ* and which show such an intention." 18 C. J. 413.

The law is clearly set out in 16 Am. Jur. 497, under the subject of "Deeds," as to delivery and acceptance of deeds. Section 108 says that one of the essentials to the validity of a deed is the acceptance thereof on the part of the grantee, with mutual intention of the parties to pass the title, and this intention of the parties is said in section 115 to be one of the essential and controlling elements. In section 128

it is said there is no delivery in law where the grantor keeps the deed in his own possession with the intention of retaining it, particularly if he keeps possession of the property as well, and that, where the proof fails to show that the grantor did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of intent becomes immaterial, for if there is no evidence of an intention to part unconditionally with the deed there is no delivery. Section 135 says that, when the grantor has the deed recorded, it is *prima facie* evidence of delivery, but the actual recording does not constitute delivery as a matter of law, for the question remains whether by so doing the grantor intended to deliver the deed. No such intent appears where the recorder was expressly instructed to redeliver the deed to the grantor, or where the deed was recorded without the knowledge or assent of the grantee, for in such cases there is no ground for holding that the recorder was the grantee's agent.

Plaintiff charges that Martha Seip has been at all times since July 9, 1931, the date of the quitclaim deed to her, the real, lawful, and equitable owner of the premises sought to be applied to the judgment against her; that the minor children (Leonard being 17 and Norma 14 at the time of the trial), by their failure to appear or offer any testimony, have abandoned any claim to the property. He supports his contention with the case of *Christensen v. Smith,* 123 Neb. 388, 243 N. W. 118, in which it is said: "A deed by a father to members of his family is presumptively fraudulent as to an existing creditor and in litigation between the creditor and grantees on that issue the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence."

But on this phase of the case, this court, after considering the facts and the law, has reached the conclusion that, at the time Martha Seip signed the renewal note of her husband's debt on June 14, 1934, she had no knowledge that on July 9, 1931, her husband had conveyed any property to her; that when she signed the warranty deed with her hus-

band on March 22, 1933, to their minor children, the mere fact that her name appeared first in the deed did not conclusively prove that she knew the property had been conveyed to her by a quitclaim deed, and that she joined in said deed without fraud, or intent to defraud.

In reference to the note she signed to the bank, upon which judgment was entered, it was dated June 14, 1934, and she had more than a year before deeded her interest in this property to her children.

Where the intent of a married woman is a direct issue, it is competent for her to testify that she had no intent to bind her separate estate, such intent being in the nature of an existing fact which she knows more about than any one else, the weight of such testimony being a matter for the jury to consider. A renewal note, executed by a married woman as surety only for her husband, where no other or new consideration is shown, is subject to the same defense as the prior note. *First Nat. Bank v. Ernst*, 117 Neb. 34, 219 N. W. 798; 8 Neb. Law Bulletin, 280.

In *Harbine Bank of Fairbury v. McCune*, 131 Neb. 419, 268 N. W. 358, it is held: "A married woman's contract can only be enforced against the separate estate she possessed at the date of entering into the contract."

There is absolutely no evidence showing that, when the bank took the last renewal note signed by Martha Seip, it relied in any way upon the ownership of said property by the defendant Martha Seip.

In our opinion, neither the grantees nor the grantors had any intent at any time to defraud or delay the bank, which held the note, or the superintendent of banking, who took over the bank when it failed, or the plaintiff, who purchased an assignment of the judgment which was obtained. Therefore, the trial court was right in dismissing the plaintiff's petition. A guardian *ad litem's* fee is fixed in this court of $50, and the judgment of the lower court is hereby

AFFIRMED.

JOHNSEN, J., concurs in the result.

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

DON L. BROWNRIGG V. STATE OF NEBRASKA.
287 N. W. 193

FILED JULY 21, 1939. No. 30614.

1. **Criminal Law.** One who aids, abets, assists, or procures another in the commission of a crime is a principal offender. Comp. St. 1929, sec. 28-201.
2. **Larceny.** Where defendant, by his own testimony, connects himself with another who actually committed the larceny, whether he was present as an honest dupe, or a criminal accessory, is a question for the jury under all of the circumstances of the case.
3. **Criminal Law.** Where evidence was sufficient to justify the court in submitting it to the jury, the verdict will not be disturbed on appeal.

ERROR to the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Archie M. Smith and *Boyd P. McGuire,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

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

PAINE, J.

This is a criminal case, wherein the defendant is charged with the crime of stealing a hundred-dollar bill from the person and against the will of one Nels Person, but without putting him in fear, and without threats or the use of force or violence. The information thus charges larceny from the person, as set out in section 28-510, Comp. St. 1929. The jury returned a verdict of guilty, and the sentence was two years in the penitentiary.

In the information, one Paul Hamilton is charged jointly with Don L. Brownrigg, the defendant herein, for the same offense. They were given separate trials, and the defendant Don L. Brownrigg was tried first.

The complaining witness, Nels Person, a farmer, 58 years of age, living five miles west of Walthill, Thurston county, received a check on or about May 9, 1938, from Melvin McGuire, known better as "Mickey" McGuire, for $378, but which is sometimes also referred to in the evidence as one for $350, which check on the same day he presented for payment at the bank in Wisner, Cuming county, receiving in payment therefor United States currency, some twenties and a hundred-dollar bill. Person put the money into two pockets in the bib of his overalls. Part of it was in the right bib pocket, and only the hundred-dollar bill and his glasses were put in the left bib pocket. With this money in his pockets, he had his son drive him to Walthill, where he went to the toilet in Bourelle's pool hall, still in possession of the money, and left immediately. As he came out of the pool hall, he saw the defendant and one Hamilton, who came right up to him, shook his hands, and put their arms around him. It was the first time he had seen them that day. While being thus greeted, Person said, his glasses commenced to rattle, and as they left him he looked in his pocket and the hundred-dollar bill was gone.

Pat Young, a 16-year-old boy, states that the defendant had his hand on one of Person's shoulders, and that Hamilton took the bill from the pocket. How it was done is not so important, except in determining what aid the defendant furnished to Hamilton, who, during this greeting and ceremony, actually removed the hundred-dollar bill from the bib pocket. Immediately after the larceny, both Hamilton and the defendant left the scene of the crime and proceeded up the street together. On direct examination, Pat Young testified that he saw Hamilton hand the money to the defendant when they got up the street a short distance. On cross-examination he reduced the statement to the extent that it was something that looked like a bill. The defendant positively denies that Paul Hamilton handed him anything of any kind.

Nels Person immediately called the police. Night Marshal Riley responded, and found the defendant and Hamilton

sitting in a car belonging to Dave Ring, who they had hoped would take them home. Riley placed them both under arrest, and asked Ring to drive to Coleman's office, which was done, Riley riding on the outside of the coupé. When they reached Coleman's office, Riley took them inside and charged them with taking the hundred-dollar bill. They both denied it, and said, "You can search us." Riley said, "Wait a minute, I will look the car over." Riley immediately found the hundred-dollar bill on the little ledge back of the seat.

The defendant took the witness-stand in his own behalf, and stated that he was 39 years old, and had a wife and four children, ranging from 6 to 16 years of age. He worked at farming and common labor. On this day in question, he said, he was pretty drunk; that he had met Mason Brown in the pool hall, and gave the answer: "I asked Mason, I says, 'I got some alcohol. Get a bottle of pop and we will mix up a drink.' So we had a drink. Q. Did Mason say anything to you about going home? A. He said, 'You are getting pretty drunk. You better go home,' or words to that effect."

Defendant says that, when he came out of Bourelle's pool hall, Paul Hamilton was talking to the complaining witness, who was sitting on a bench, and looked like he was drunk. He also says Hamilton was "shagged up." He admits he slapped Nels Person on the shoulder as he greeted him. He said when Riley came up to the car in which they were sitting, and "pinched" them, he did not think anything about it, as they had both been drinking. He denied that he took the hundred-dollar bill, or had ever seen it.

U. G. Austin was called as a witness for defense, and said that same evening he was talking with the complaining witness, who told him that he gave Hamilton and Brownrigg a dollar to buy beer with when they came up and greeted him. This might have given the jury the idea that he gave them the hundred-dollar bill by mistake for a one-dollar bill, but in direct examination of the defendant he was asked what "Lys" Austin told him coming over to Pender, and the answer was, "He said, 'Nels said to me, Nels told me he gave

Paul a dollar.' I said, 'I don't know anything about it.'" So whatever the purpose of this evidence, the defendant himself disclaims all knowledge of it.

The defendant insists that, if any crime at all was committed, it was done by Paul Hamilton, who is now serving time in the reformatory on another charge. Section 28-201, Comp. St. 1929, says: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." This court said that this section means that the same rules as to information, conduct of the case, and punishment heretofore applicable to the principal should hereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the fact than are required against his principal. *Scharman v. State,* 115 Neb. 109, 211 N. W. 613; 10 Neb. Law Bulletin, 170.

The second proposition of law of defendant is that mere presence at the place of crime does not create guilt. We are cited to 1 Bishop, Criminal Law (8th ed.) sec. 634: "Since mere presence at a crime does not create guilt, if while two or more are lawfully together one does a criminal thing, the others whose wills did not concur therein are not answerable."

In an old case in Iowa in 1879, concerning the robbery of a safe at a saw-mill, when a third man admitted he was with the two who did the act, it was said: "Where * * * he (the defendant) connected himself with others who it was claimed actually committed the robbery in question, *held,* that whether he was so with them as an honest dupe or criminal accessory was properly left with the jury to determine upon all the circumstances of the case." *State v. Lucas,* 10 N. W. 868 (57 Ia. 501).

The evidence in this case impressed the jury that the defendant was not teamed up with Hamilton by accident, or as an honest dupe, and the evidence supports the verdict.

The third and last proposition of law argued by the defendant for a reversal is: "Larceny involves a felonious

intent, and if one who takes property is too drunk to have any intent, he is not guilty of it."

It may be admitted that there are many references in the evidence of the defendant to the fact that defendant Brownrigg and Paul Hamilton were intoxicated at the time. To support this third proposition of law, the defendant cites us to *People v. Walker,* 38 Mich. 156, which says: "While it is true that drunkenness cannot excuse crime, it is equally true that when a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. In larceny the crime does not consist in the wrongful taking of the property, for that might be a mere trespass; but it consists in the wrongful taking with a felonious intent; and if the defendant, for any reason whatever, indulged no such intent, the crime cannot have been committed."

Defendant also relies upon *Jones v. State,* 101 Neb. 847, 166 N. W. 252, which was cited during argument, where we held: "To constitute the crime of stealing, there must have existed a felonious intent in the mind of the accused at the time of the taking;" and also *Cheney v. State,* 101 Neb. 461, 163 N. W. 804, to the same effect.

In *O'Grady v. State,* 36 Neb. 320, 54 N. W. 556, Judge Babcock gave an instruction reading as follows: "The jury are instructed that voluntary intoxication or drunkenness is no excuse for a crime committed under its influence, nor is any state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act. Where without intoxication the law would impute a criminal intent, proof of drunkenness will not avail to disprove such intent where the drunkenness is voluntary." It was held, in an opinion by Chief Justice Maxwell, that the rule as stated in the second part, without qualification, is too broad, and that "at the present time evidence of intoxication may be admitted to determine whether or not a crime has been committed or where it consists of several degrees depending on the intent, the grade of the offense."

It has often been said that at common law voluntary

drunkenness at the time of the commission of a crime was regarded as an aggravation rather than an extenuation, and that voluntary drunkenness was no defense whatever to one charged with crime, but the rule has been modified in many jurisdictions, in which it is held that the fact of voluntary drunkenness is admissible in evidence for the purpose of showing lack of malice or intent. *Blackburn v. Commonwealth,* 200 Ky. 638, 255 S. W. 99.

One cannot, because he is intoxicated, avail himself of his intoxication to exempt him from any legal responsibility which would attach to him if sober. *Commonwealth v. Taylor* (1928) 263 Mass. 356, 161 N. E. 245.

It is held that, when intent is a necessary element of the crime, and where the intoxication entirely suspended the power of reason, then the accused is incapable of forming an intent, and he cannot be held guilty unless the intent was formed before intoxication. *People v. Cochran,* 313 Ill. 508, 145 N. E. 207.

"Although voluntary intoxication is not an excuse for crime, it has an important bearing on the question of guilt as regards any crime of which a specific intent is an essential element. Of course, the mere fact that a person was intoxicated at the time he did a criminal act does not show that he was incapable of forming an intent, for a man may be drunk and at the same time be able to deliberate." 15 Am. Jur. 30, sec. 340.

The defendant's counsel, in his final appeal, says that their drinking habits, their acquaintance with Person and his drinking habits, lead us to the inevitable conclusion that the only purpose of Hamilton and Brownrigg approaching Person on this occasion was because they wanted to get a loan of 50 cents or a dollar with which to buy liquor.

Doubtless this same argument, and more of it, was made to the jury, but the jury would recall that they did not need liquor, because the defendant had testified that he had a bottle of alcohol. The defendant recalls many details of the entire occurrence, with a memory much too keen to show any serious effect of the liquor he had been drinking.

We have now carefully examined all of the cases cited by the defendant, together with the argument in his brief, upon his third proposition of law, that if one who takes property is too drunk to have any intent he is not guilty of taking it. As the trial court gave no instruction on the subject of drunkenness, and as the defendant requested no instruction to be given on that subject, it only becomes pertinent to the issues under the first paragraph of the motion for a new trial, that the verdict is not sustained by the evidence. It may be admitted that the evidence of the defendant keeps this subject of intoxication in the forefront from beginning to end. The jury weighed the evidence touching this question, as they did all other questions, and this court is content to rest this question with the jury, who found that he was guilty on the information filed.

The sentence could have been for seven years under this verdict of guilty, but the trial court, considering all the facts, gave a sentence of only two years. We see no error in the record, and the sentence is hereby

AFFIRMED.

MARY F. STAKE ET AL., APPELLEES, V. WESTERN ASSURANCE COMPANY, APPELLANT.

287 N. W. 222

FILED JULY 21, 1939. No. 30636.

1. **Justices of the Peace.** A justice of the peace shall not have jurisdiction in any civil case where the amount in controversy shall exceed $200. Const. art. V, sec. 18.
2. **Costs.** While the amount claimed in the petition determines whether a justice of the peace has jurisdiction in the first instance, yet jurisdiction must not be confused with the right to recover costs, which is a statutory right.
3. ———. It is generally considered that attorneys' fees are taxed as costs, and are no part of the judgment.
4. ———. Section 20-1709, Comp. St. 1929, provides that, if a justice of the peace has jurisdiction of an action which has been brought in the district court, the plaintiff shall not recover costs.

It is *held* that this prohibits taxing up an attorney's fee as part of the costs.

5. ———. Having required a remittitur to be filed in this court, no attorney's fee can be allowed for services in this court.
6. Insurance. When an insured, who has become a coinsurer by failing to carry the amount of insurance he has contracted to carry in order to receive a reduction in premium, suffers a loss, the jury, in order to reach the correct verdict, should be instructed to make the proper deduction from the total loss as ascertained.

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

Chambers, Holland & Locke, for appellant.

Sterling F. Mutz and *Kenneth Anderson, contra.*

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

PAINE, J.

An action was brought in the district court for a small fire loss to a building, alleged to be in the amount of $291. This building was insured by defendant company in the sum of $3,000. The amended answer admitted a fire loss in the sum of $43.58. On March 5, 1938, a jury returned a verdict for $85, which was set aside on motion of plaintiff, and a new trial granted. On October 4, 1938, the jury at the close of the second trial returned a verdict in the sum of $145.90. Defendant filed a motion for a new trial, which was overruled. On October 31, 1938, upon motion of plaintiff for an attorney's fee, setting out that two jury trials have been held, the court ordered that an attorney fee in the sum of $100 be allowed plaintiff. Defendant filed supersedeas bond in the sum of $1,000, and brings the case to this court.

The four errors relied upon for reversal are that the verdict and judgment are contrary to law and contrary to the evidence, that the court erred in giving instruction No. 6 on its own motion, and also erred in allowing plaintiff an attorney's fee.

We will first consider the last objection, which is to the allowance of attorney's fee in a case within justice court jurisdiction when the action was brought in the district court.

The defendant charges that the plaintiff filed her original action in the district court for $620, and later amended her petition, praying for the sum of $291 only, and that at the second jury trial a verdict was returned for only $145.90, which amount is within the justice court jurisdiction, and as plaintiff did not bring the case in the justice court she is not entitled to any costs whatever, under section 20-1709, Comp. St. 1929, which provides: "If it shall appear that a justice of the peace has jurisdiction of an action and the same has been brought in district court the plaintiff shall not recover costs."

In *Shields v. Gamble,* 42 Neb. 850, 61 N. W. 101, plaintiff sued in district court to recover $365 commissions due for services. The jury returned a verdict for plaintiff for $200. Upon appeal it was said that the amount of recovery was within the jurisdiction of the justice court, and therefore each party was required to pay his own costs.

In *Frazer v. Myers,* 95 Neb. 194, 145 N. W. 357, a jury in the district court returned a verdict for $154 on a suit asking for $433. The judgment was affirmed upon appeal to this court, but the question of costs was reversed, with instructions that, as the verdict returned was in favor of the plaintiff, each party must pay his own costs.

In *City of Hastings v. Mills,* 50 Neb. 842, 70 N. W. 381, suit was brought in the district court for damages of $5,000 for falling into an excavation. Plaintiff recovered judgment of $200, which was within the jurisdiction of the justice of the peace, and it was said by this court that the amount claimed by the plaintiff in his petition determines whether a justice of the peace has jurisdiction; but jurisdiction must not be confounded with the right to recover costs, for the right to recover costs is a statutory right, and that the statute does not say that if he claims more than $200 he may oust the justice of the peace of jurisdiction and still

recover his costs in some other court. If his recovery be within the jurisdiction of the justice of the peace, the statute does not award him costs.

The jurisdiction of a justice of the peace is limited by section 18, art. V of the Constitution, that a justice shall not have jurisdiction in any civil case where the amount in controversy shall exceed $200.

Commissioner Irvine, in *Adams v. Nebraska Savings & Exchange Bank*, 56 Neb. 121, 76 N. W. 421, says: "Some statutes, notably those regulating the jurisdiction of the federal courts, by their express terms, either include or exclude interest for this purpose. Where the statute is silent * * * there is no reason and should be no authority for saying that such amount refers to the principal alone. * * * All our decisions indicate a want of power in a justice to render judgment for more than $200. This must be because the demand cannot be raised beyond that figure, by allowance of interest or otherwise." He concludes: "In computing the 'amount in controversy' to ascertain whether a case is within the jurisdiction of a justice of the peace, interest accrued at the time of suit on an interest-bearing debt should be considered."

Judge Letton said in *Henke v. Deemer*, 101 Neb. 126, 162 N. W. 510, that where the bill of particulars and summons disclosed that the plaintiff claimed $197, with interest from January 3, 1914, a justice of the peace had no jurisdiction of the suit, although it is generally held that, if the interest accruing before final judgment increases the amount to more than the jurisdictional limit, it will not defeat jurisdiction. See 77 A. L. R. 994, Ann., in which same annotation it is held that attorneys' fees other than those stipulated for in a note or contract obligation, or recoverable under the statute, are not elements in computing the jurisdictional amount, the test being whether such attorney fees are considered as costs or penalties. See note, 77 A. L. R., beginning on page 1013.

The interesting case of *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 507, 160 N. W. 738, does not appear to have

been cited by our court since it was written in 1916. The plaintiff there began action in the district court to recover damages for delay in the shipment of six cars of cattle, and recovered a judgment for $374.36, and upon appeal to this court, in an opinion by Judge Letton, the plaintiff was required to remit $194.93 of the judgment, as shown in 100 Neb. 275, 159 N. W. 408. Upon a second appeal to this court, upon a motion to retax costs, it was set out that the filing of this remittitur reduced the plaintiff's recovery to $179.43 and interest at 7 per cent., making the total amount of the recovery $208.25, and the statute (now section 20-1709, Comp. St. 1929) was discussed by Judge Sedgwick, and he says that to enforce the rules strictly would prevent a fair trial in some cases, and that the statute is for the court in which the action is tried, and the determination by that court that the action is of such a nature as justifies bringing it in that court will enable the plaintiff to recover his costs at that trial, and this court refused to retax the costs in the district court, but sustained the motion to retax the costs in the supreme court.

"A plaintiff may, for the purpose of conferring jurisdiction, remit interest or enough of his claim to reduce it to the statutory amount." Dame, Inferior Court Practice (2d ed.) 31, sec. 36. See, also, *Hill v. Wilkinson,* 25 Neb. 103, 41 N. W. 134; *Miller v. Henderson,* 76 Neb. 383, 107 N. W. 586; *Goodman, Bogue & Sherwood Co. v. Pence,* 21 Neb. 459, 32 N. W. 219.

It has generally been considered by our court that attorneys' fees are taxed as costs, and are no part of the judgment. *Allen v. Tallon,* 120 Neb. 611, 234 N. W. 411.

A recent case involving attorneys' fees in a compensation case, which may throw some light on the case at bar, is *Solomon v. A. W. Farney, Inc., ante,* p. 338, 286 N. W. 254.

We have reached the conclusion that no costs can be taxed against the defendant in this case, because it is forbidden by section 20-1709, Comp. St. 1929, and that "costs" includes an attorney's fee, because the final judgment is clearly within the jurisdiction of a justice of the peace. We therefore find

that the trial court was in error in taxing an attorney's fee of $100 for services in the district court, and the same is hereby set aside.

The third error relied upon for reversal by the defendant is that the court erred in giving instruction No. 6 on its own motion. In the brief it is stated that, as the amount involved in this error is not large, defendant is not inclined to quarrel about it, yet in the oral argument in this court it was discussed at some length, and it was charged to be a reversible error.

In the proof of loss submitted by the plaintiff, found in the bill of exceptions, the plaintiff sets out that the actual cash value of her property at the time of the fire was $5,000. The insurance policy on the building was for $3,000, and the policy carried the provision which required the insured to carry at least 80 per cent. of the cash value of the property at the time of loss, and, failing so to do, it provided that she should to the extent of such deficit bear her proportion of any loss. Therefore, the policy required that insurance be carried of 80 per cent. of $5,000, or $4,000. She had only $3,000 of insurance upon the property, and therefore she failed to carry $1,000, or 25 per cent. of the $4,000 that she was required to carry, and thereby became a coinsurer with the company to that extent. In instruction No. 6, covering this feature of the case, the court said that she became a coinsurer with the company to the extent of one-fifth of the amount of the loss, and that the jury should determine the entire loss, deduct one-fifth therefrom, and add interest to the remaining four-fifths. Defendant is right, and the court was in error, and she failed to carry 25 per cent. of the required $4,000.

To ascertain approximately the error of this instruction, we will assume in round numbers that the jury found the loss to be $170. They were instructed by the trial judge to deduct one-fifth thereof, which would be $34, leaving $136. To this they were to add interest to the day the verdict was rendered, which gave the amount of $145.90 as their verdict. Instead of this, they should have deducted one-fourth from

the amount of the loss, leaving $127.50, which shows an error of about $8.50, if we disregard the small item of interest, and therefore a remittitur should be filed by the plaintiff for $8.50. The plaintiff having been compelled to file this small remittitur in this court, no additional attorney's fee can be allowed the plaintiff for his services in this court. If plaintiff files a remittitur of $8.50 within 30 days of this date, the judgment will be affirmed, less the $100 attorney's fee taxed by the district court in error, otherwise the same will be reversed and remanded.

AFFIRMED ON CONDITION.

ROSE RICHARDS, ADMINISTRATRIX, APPELLEE, V. MATHIAS ABTS, APPELLANT.

287 N. W. 199

FILED JULY 21, 1939. No. 30680.

1. **Workmen's Compensation.** Mere negligence is not sufficient, but such conduct must be shown on the part of the workman as manifests a reckless disregard of consequences coupled with a consciousness that injury will naturally or probably result.
2. ———. "An employer who attempts to avoid liability on the ground that employee was wilfully negligent must prove a deliberate act knowingly done, or at least such conduct as evidences a reckless indifference to his safety." *Hoff v. Edgar*, 133 Neb. 403, 275 N. W. 602.
3. ———. In a liberal interpretation of the workmen's compensation law, it is held that the deceased met his death while in his line of duty, and that the fatal accident, by the explosion of the tank, arose out of and in the due course of his employment.

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

F. J. Reed, for appellant.

James H. Anderson and *Floyd E. Wright, contra.*

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and CHAPPELL, District Judge.

PAINE, J.

This is an appeal by the defendant, Mathias Abts, in a workmen's compensation case, from an award entered in the district court in favor of Rose Richards, administratrix, for $15 a week for a period of 325 weeks, with burial expense of $150, and hospital and medical bills of $72. The defendant charged wilful negligence on the part of William Richards, deceased. From the award the defendant appeals.

On October 12, 1937, William Richards, an employee in the defendant's blacksmith shop, was engaged in welding a small leak in a 500-gallon molasses tank with an oxy-acetylene torch. The tank exploded, killing Richards.

This is the second appearance of this case in this court, for on October 7, 1938, an opinion, written by Judge Carter, reversed and remanded the cause for a new trial. This is found in 135 Neb. 347, 281 N. W. 611, and in that opinion the facts are set out in greater detail.

An award was made by Judge Jackman, of the Nebraska workmen's compensation court, at Gering, on March 30, 1938. From this award defendant waived right of hearing before the entire compensation court, and appealed directly to the district court. The defense alleged by the defendant before the compensation court and district court, and also at the first hearing before this court, was that the deceased met his death by reason of his own wilful negligence, which barred a recovery under the workmen's compensation law. This court reversed the trial court at the former hearing for the reason that an offer of proof had been made to the effect that one Gibson had warned the deceased of the danger on several occasions, and the exclusion of this evidence was held to be prejudicial error.

In the retrial of this case in the district court, a written stipulation, signed by counsel for both parties, was introduced as exhibit No. 1, which set out all of the undisputed facts in the case.

Morris Gibson, a portion of whose evidence appears to have been rejected at the first trial, testified that he had lived at Morrill for 30 years, had been employed by John R.

Jirdon for the last 12 years, and had taken one or two molasses tanks for his employer to have leaks welded by the deceased, being the same sort of molasses tank that the deceased was working on at the time of his death. He detailed the conversation he had with the deceased at one time, when he said they noticed a kind of blue smoke that was raised when they were welding on the tank; that it had a bitter odor, and they wondered if it was explosive, and the deceased told him that he knew a chemist at the sugar factory at Mitchell, and he would inquire of him to see if there was any danger. Several days later, when Gibson was going by the blacksmith shop, the deceased told him that he had checked with the chemist, and that as long as the welding was done in open buildings, with plenty of circulation of air, there was no danger.

In the latter part of the summer, when Richards was welding on one of their tanks, Gibson said he removed the cap and told him that, as far as their tanks were concerned, he wished he would weld with the caps removed, and that the deceased just laughed and kind of joked about it, and that was the end of it.

On cross-examination Gibson said he had never studied welding, that the deceased was not an employee of his, and that, on the occasion when he took the cap off, the tank had not been inflated with a pump, and so far as this evidence on the part of Morris Gibson is concerned this court cannot see that it adds anything of vital importance to support the claim of the defense that it shows previous acts of negligence and of reckless indifference to safety, which defeats recovery, to secure which evidence of Gibson the case was remanded for a new trial.

At this last trial the defendant, to sustain his defense, produced the deposition of H. F. Reinhard, which was read in evidence. He testified that his office was at 30 East Forty-second street, New York City; that he was a chemical engineer by profession, and for the last eight years had been secretary of the International Acetylene Association, whose membership comprises all producers of such welding and

cutting apparatus, members of the engineering profession, operators and those having supervision of welding operations; that he was a member of the American Welding Society, and many other national societies. He testified that the use of an acetylene welding torch upon a thin metal 500-gallon tank which was entirely closed would be dangerous, and that welders were universally familiar with that fact. He testified that the association of which he is secretary publishes a pamphlet entitled, "Safe Practices for Installation and Operation of Oxy-Acteylene Welding and Cutting Equipment," and that on pages 39 and 40, under M-12, it gives as a rule never to do any hot work on drums, barrels, or tanks until they have been thoroughly cleaned; that steam will remove volatile materials; that washing with strong caustic soda solution will remove heavier oil, and wherever possible the container should be filled with water before any hot work operations are performed. Many other safety rules were given in this lengthy deposition read in evidence, and a hypothetical question was asked this expert, to assume that a 500-gallon tank, formerly containing commercial molasses, is empty except for molasses which may have adhered to the inside walls of the tank, and that the cap is screwed tight on the three-inch vent on the top of the tank, and that nothing has been done to free the tank of molasses, or residual molasses, or the vapors of gases, and the acetylene torch is applied, would such an act be dangerous? His answer was that within such a tank would be alcohol vapors produced by fermentation, and the torch might char residual molasses, producing combustible gases, which, when mixed with the air, would produce a violent explosion, and that all welding operators receive instructions, from the welding school, or from an experienced welder, as to all such facts.

This evidence is all very interesting and highly scientific, but we fail to find any proof in the record that the deceased ever attended any welding school, or read this safety manual for welders, or that he knew anything of the profession except what he had picked up, working in this blacksmith

shop, from the proprietor, where welding was only very incidental to the many activities carried on in the shop. The proof is lacking that the deceased deliberately, and of his own wilful negligence, failed to take any precaution which he had been taught in that blacksmith shop by his employer, or learned from his own experience.

In rebuttal the plaintiff called as a witness J. B. McDonald, the assistant superintendent of the Great Western Sugar Factory at Gering, Nebraska, for the last 14 years. He testified that he learned welding operations some 20 years ago, and for the last 10 or 12 years has had the supervision of welding operations at this factory, and with his crew of four or five welders he only takes charge of direct work when it is of a technical or unusual nature, at which time he sometimes does the actual welding himself.

He testified that he has read many manuals and handbooks on the subject, and keeps up to date with all the literature in the welding magazines, which he passes on to the welders working under him. He had been present in court and listened to the testimony taken, and said that the explosion of the molasses tank did not come from pressure, but from inflammable gases. He said the temperature of the flame of the acetylene torch is about 6,700 degrees, and that the application of flame from an ordinary tip could not raise the temperature of the air inside such a large tank to 212 degrees; that a small pressure of five pounds per cubic foot on the inside is not ordinarily dangerous, and that he would not consider it dangerous to attempt to close a small hole by welding a tank, with such a pressure in the tank, if there were no explosives or inflammable materials in the container; that in all their experience in handling molasses tanks and pipes at the factory, they make it a general practice to weld upon molasses containers without purging the container of residue molasses.

He testified that, if there were explosive gases in the tank, the tank would have exploded just the same, even though the vent of three or five inches in the top of the tank had been open, for when the gas ignites it expands so

rapidly that the vent could not take care of the pressure. He testified that he had heard the evidence that the deceased pumped some air into the tank with the air-pump, five or ten strokes, for the purpose of finding where the leak was, and that such a few strokes from a pump of that size would increase the pressure in a 500-gallon container very little.

This witness was subjected to a lengthy and vigorous cross-examination, going into the various physical laws of pressure, and various causes of explosions of large tanks, but, in the main, the bringing out of these many details did not change his testimony in chief to the effect that what the deceased had done was rather common practice, and nothing in the conduct of deceased would show any wilful negligence which would defeat an award in this case.

In discussing the law relating to this case, section 48-101, Comp. St. 1929, provides that the employee cannot recover if he was wilfully negligent at the time of receiving such injury. And it is further provided in section 48-107, Comp. St. 1929, that the burden of proof to establish wilful negligence of the injured employee shall be on the defendant.

Mere negligence is not sufficient, but such conduct must be shown on the part of the workman as manifests a reckless disregard of consequences coupled with a consciousness that injury will naturally or probably result.

"An employer who attempts to avoid liability on the ground that employee was wilfully negligent must prove a deliberate act knowingly done, or at least such conduct as evidences a reckless indifference to his safety." *Hoff v. Edgar*, 133 Neb. 403, 275 N. W. 602.

In *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42, being a compensation case, this court said: "In the absence of intoxication on part of the injured party, wilful negligence may be defined as (1) a deliberate act; or (2) such conduct as evidenced reckless indifference to safety. As a statutory term it involves more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in a degree, a willingness to take a chance."

In *Moise v. Fruit Dispatch Co.*, 135 Neb. 684, 283 N. W. 495, it was held by this court that, when an inveterate pipe smoker was warned not to smoke by one not his employer, but disregarded said warning, and lighted a match in the doorway of a gas-filled banana-ripening room, killing himself and three others by the explosion which followed, his widow might recover for his death, and that his negligence was not wilful, for he simply responded to an automatic habit, without the volition essential to a wilful act of negligence. Under this recent holding of this court, we cannot regard the acts of William Richards, deceased, in going about the business of welding the molasses tank as he did, to be so intentionally wilful, and with such a reckless indifference to his own safety, as prohibit an award in this case.

In a liberal interpretation of the workmen's compensation law, it is held that the deceased met his death while in his line of duty, and that the fatal accident arose out of and in the due course of his employment.

The plaintiff's attorney is allowed a fee of $150 in this court, and the award of the district court is hereby

AFFIRMED.

CHARLES LOWDER, APPELLEE, V. STANDARD AUTO PARTS COMPANY, INC., APPELLANT.

287 N. W. 211

FILED JULY 21, 1939. No. 30586.

Workmen's Compensation. In order to recover in a compensation case, the burden is upon the plaintiff to show with reasonable certainty that his ailment was caused by the injury sustained; and this proof must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N. W. 655.

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

Chambers, Holland & Locke, for appellant.

Wayne L. Landon, contra.

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

MESSMORE, J.

The plaintiff was granted an award by the compensation court in the original hearing, and on rehearing the court, sitting *en banc,* granted him an award for temporary disability, medical and hospital fees. The defendant appealed to the district court for Lancaster county, where its appeal was dismissed, the court finding from the record competent evidence to support the award, and from such order of dismissal defendant appeals to this court, where the case is tried *de novo.*

The principal errors relied upon for reversal are: (1) That the award of the compensation court is based upon speculation and conjecture and not sustained by any evidence with reasonable certainty; (2) that the evidence clearly preponderates against the claim of the plaintiff.

The plaintiff, 46 years of age, a metal cleaner employed by defendant, on the evening of July 30, 1937, between 5 and 6 o'clock, pursuant to an order given by defendant's agents, started to replace a spring in a Model "A" Ford automobile. The car was jacked up, with the front wheels sitting upon two crank case pans. The motor was loose from the frame of the front end of the car. The tires were resting upon two oil cans. The plaintiff had to raise the front of the motor in order to get the front spring out, took hold of the jack and started to raise the front end a little higher; the car slipped off the pans and off the jack and struck the plaintiff on the right shoulder, bending him over to the left on the cement floor. At the time, he was in front of the radiator, his head being between the radiator and the bumper, with his left leg under him and his right leg straight out. After the accident the plaintiff was unable to tell his exact position. He stated that he got out from under the

car, but could not straighten up; that it was hard for him to get his breath; that he had shooting pains in his chest and in the upper and lower part of his left side; that he went to the office and related to his employer what had occurred and was immediately sent to the office of Doctor Hilton, who taped his lower left side and across his chest, gave him some medicine and some liniment to be applied, told him to go home and rest, and treatments were continued by application of heat from electric rays. On September 26, 1937, Doctor Hilton told plaintiff that he had done all he could for him and advised him to go to a hospital, presumably on account of tuberculosis. However, there is no testimony of Doctor Hilton in regard to any such statement. Plaintiff next consulted Dr. Czar Johnson, who immediately referred him to Dr. Arthur L. Smith, who has since treated him continuously.

The disability complained of, as reflected by plaintiff's petition in the compensation court, follows: After describing the nature of the accident, the petition alleges that the accident caused a severe contusion of plaintiff's left shoulder and left chest wall; fractured his left fifth rib, separated his right and left second rib from the sternum, producing a severe strain of the back, aggravating a pneumonitis, producing an active tuberculosis of the lungs, and aggravating a latent arthritis of the vertebræ. Defendant's answer is that the plaintiff's present disability was in no way caused by injuries sustained by the accident occurring July 30, 1937, but charges that his condition was caused by disabilities existing long prior thereto.

The record discloses that the plaintiff had claimed service-connected disability by virtue of his service in the World War, and had, since 1918, been confined in different hospitals from a period of a few days to five months at a time, and, on occasions, was placed under observation, to determine whether or not he had pulmonary tuberculosis, for which compensation might be awarded by the federal government, but on each occasion the conclusion was contrary to his claim that he had tuberculosis. His condition, as far

as the government is concerned in awarding him compensation based upon a 45 *per centum* disability, has been diagnosed as moderate chronic bronchitis and neurasthenia. The plaintiff on various occasions had exhibited the symptoms of pulmonary tuberculosis.

The plaintiff claimed to be in good health two years prior to the accident; that he was off work from his present occupation a part of a day on account of illness. This claim is disputed by the testimony of his employer, who stated, in substance, that plaintiff had told him he was not physically able to do the kind of work that he was then doing; he coughed a great deal, and for convenience a place was fixed for him to work, to enable him to be out of doors a portion of the time. He had stopped work on numerous occasions, on account of illness, at various times of the day and had gone home. Previous to the employment with defendant, plaintiff had worked at intervals at different places, as shown by the record, but had not done much work, due, perhaps, to his physical condition and hospitalization. Plaintiff claimed that he carried a basket of metal to weigh in just prior to the accident. His employer stated that after the accident plaintiff carried the basket of metal, weighing 90 pounds, 90 feet, to be weighed in.

A summary of the medical testimony received in plaintiff's behalf follows: Dr. Arthur L. Smith, the attending physician, testified that he had made 17 physical examinations of the plaintiff, had taken 13 X-ray pictures, had made 114 hospital calls, had attended the plaintiff for a period of five months and had taken tuberculin and sputum tests. His history of the case showed a bubo opened in 1909, tonsillotomy, appendectomy, and herniotomy in 1924, and right thumb removed in 1930. The tuberculin test resulted in a positive tubercular reaction upon a concentrated dilution of tuberculin, .005 milligrams; the reaction to the ordinary test, .002 milligrams, was negative.

At this point it is proper to state that, as a general rule, an arrested tuberculosis will show a positive tuberculin test in the ordinary dilution, for the reason that generally

there is a slight sensitivity to it, and therefore a concentrated dose of tuberculin is not ordinarily required, under such circumstances, to bring a positive reaction.

Doctor Smith found fractures of three ribs, which, however, were not discovered by him until after the first hearing in the compensation court. This fact is significant, considering the physical examinations and calls made by the doctor, and, further, that Doctor Hilton treated plaintiff from July 30, 1937, to September 26, 1937, and the evidence contains no statement by him of fractured ribs. Doctor Smith also found evidence of tubercular trouble, such as old hardened lesions, manifested by deposits of calcium in various parts of the lungs, and concluded that plaintiff had a fracture of three ribs on the right side, an aggravation of arthritis in the fifth dorsal vertebra, a separation of the second left and right costo-cartilages from the sternum margin, and an activation of an old tubercular condition, all of such conditions the result of the trauma suffered in the accident of July 30, 1937.

There also appears in the evidence a signed statement by Dr. Roscoe L. Smith, dated April 29, 1929, that the plaintiff had a chronic fibroid tuberculosis, as well as a signed statement of Dr. Miles J. Breuer, dated January 5, 1930, under the heading, "Present Illness:" "Comparison of present condition with condition ten years ago; cannot work now, could not work then; is more nervous, has more pains in the chest," and Doctor Breuer's diagnosis was: "Chronic low-grade tuberculosis with severe allergic manifestations and no extensive pathological changes." A statement in the record by Dr. L. J. Owen follows: "I diagnosed him as having tuberculosis;" the activity was "in the right upper lung." This was in 1932, and the records of the city clinic show that there was an active pulmonary tuberculosis on December 19, 1932. Doctor Owen testified that in March, 1937, in examining an X-ray picture taken at the city health department under his direction and control, there was no evidence of active tuberculosis, that the apexes were clear so far as the ordinary signs of activity are concerned; that,

if there is any evidence of any tubercular condition ever having been in the chest, it was at that time in an arrested stage. Dr. Allan Campbell, in speaking of the X-ray pictures of March, 1937, testified: "Left apex clear, right apex shows fibrous hilar shadows, * * * suggests complete arrest of activity;" "denies any signs of activity." Dr. Czar Johnson, witness for the plaintiff, did not pose as an expert in diagnosing tuberculosis, and left the matter to the judgment of Dr. Arthur L. Smith. Dr. Carl Kail did not testify, but a written statement signed by him (exhibit 15), in reference to the chest, relates that there was some evidence of "old tuberculosis infection."

Contra to the foregoing testimony, Dr. L. J. Owen, who took certain X-ray pictures in February, 1938, and wrote reports thereon, testified that he found no evidence of a tubercular condition activated by the accident of July 30, 1937, and no apparent change from the previous condition of the plaintiff. Drs. John C. Thompson, Clayton Andrews and W. W. Carveth made an extensive and complete examination of the plaintiff on February 28, 1938, and obtained a complete history of the plaintiff, who gave the same reluctantly. The blood pressure of the plaintiff was taken during the time he was being questioned and was found to be in an aggravated state for a man of his age, so much so that the examining physicians each took his blood pressure, and within a period of a few moments, when the questioning ceased, the blood pressure had dropped to 118. Considering the blood-pressure tests, as given, together with the history recited by the plaintiff and the examination made by the doctors, the examining physicians concluded that the plaintiff was not sincere in his claim. The doctors first gave him a test to determine what injury, if any, was sustained in plaintiff's back. He reacted favorably to the test, which indicated to the doctors clearly that he had no back injury that was a result of the accident. They found no evidence of fracture of the ribs and nothing upon which a finding that plaintiff's ribs were fractured can be based. They did find an indication of childhood tuberculosis, which

had not been active for a long period of time, a complete absence of adult tuberculosis, and no cavities in the lungs indicative of adult tuberculosis; that the breath sounds were not feeble but loud over the area supposedly involved. The plaintiff had gained in weight. Had there been activity he would, ordinarily, have lost weight.

The foregoing medical testimony substantiates the diagnosis made by the government doctors in reference to the disability for which plaintiff receives compensation. Doctor Carveth had previously examined the plaintiff and treated him in 1929, 1931 and 1932. He testified that plaintiff did not suffer any disability in the chest or any place in his body as the result of the accident. He thought in 1929 that plaintiff might have tuberculosis, but that it cleared up quickly, and he now knows that plaintiff did not have it.

Dr. Allan Campbell testified that the records of the city clinic showed that there was no evidence of any tuberculin test performed by them in March, 1937; that there was a blood test made and an X-ray picture taken, and that he had never made a tuberculin test of the plaintiff personally. Doctor Smith testified that he relied upon the tuberculin test performed by the city clinic, in fact by Doctor Campbell personally, and that he saw it in the report. He testified he was present and supervised the taking of the X-ray pictures at St. Elizabeth Hospital on February 14, 1938, and that Doctor Owen was not present. We have the testimony of Doctor Owen that he was present, took the X-ray pictures, and that Doctor Smith was not present. The record is void of evidence that tubercular bacilli were ever found in the sputum by any examining physician. The plaintiff testified to coughing up blood and pus on numerous occasions. He is the only witness so testifying. He states that his wife is the only other person who has seen him cough up blood and pus. However, she did not testify.

The record further shows that plaintiff's last attending physician, who diagnosed his case as active tuberculosis, which was lighted up by the accident, did not give the plaintiff medicine for such disease from September 26 until No-

vember 12, when he entered St. Elizabeth Hospital. The same physician testified that he obtained a history from the plaintiff which assisted him in his diagnosis. He took the plaintiff's general statement as to hospitals in which he had been treated and been under observation, accepted Doctor Breuer's statement, appearing in the record, and relied upon it extensively. He inferred that the history, or the number of hospitals the plaintiff had been in previously, would make no difference. Then the plaintiff, himself, testified that during the period of time that he worked for the defendant he walked 16 blocks each way to and from work and walked a mile or so each evening after work, attended parties and danced. His previous physical condition, the testimony of his employer as to conditions under which he worked, and the complaints made by him certainly disclose a conflict and inconsistency in the plaintiff's testimony and the testimony offered in his behalf. Plaintiff had been examined by Dr. Charles Arnold and Doctor Breuer in reference to his chest condition, and also by Dr. H. H. Johnson. However, plaintiff did not see fit to call any one of these three physicians. Many other discrepancies and inconsistencies are disclosed by the record.

From an examination of the entire record, the great weight of the evidence is that there was no activation of an arrested pulmonary tuberculosis as a result of the accident, and the evidence fails to show any activation in any preexisting condition, whether it be tuberculosis, moderate chronic bronchitis, arthritis, neurasthenia, or any other alleged condition. The X-ray pictures taken before and after the accident show that the same condition existed at both times, according to the testimony of Doctors Thompson, Andrews, Carveth and Owen.

The law of this state on the burden of proof in a compensation case is properly stated in *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N. W. 655, which held that, in order to recover in a compensation case, the burden is upon the plaintiff to show with reasonable certainty that his ailment was caused by the injury sustained, and this proof

must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. Cases so holding are too numerous to require citation.

It will thus be seen that the burden of proof is on the plaintiff in this case to prove by a preponderance of the evidence that the injuries complained of and the disability accruing therefrom resulted from the accident of July 30, 1937, and this tribunal is bound by the principle that awards for compensation cannot be based on possibilities or probabilities. *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Townsend v. Loeffelbein,* 123 Neb. 791, 244 N. W. 418. See, also, *Milton v. City of Gordon,* 129 Neb. 888, 263 N. W. 208.

Plaintiff may have received some injuries of a temporary nature as a result of the accident. He has failed to meet the burden of proof, as required of him by the law of this state, as to the disabilities claimed by him in his pleadings. The court, in determining cases of this character on issuable facts, must take into consideration the credibility of the witnesses, the weight of the testimony, and the motivating circumstances surrounding a given situation; otherwise, the workmen's compensation law of this state would become an effective instrument of exploitation.

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

REVERSED AND DISMISSED.

EBERLY, J., dissents.

JOHNSEN, J., concurring in part, dissenting in part.

I agree that the award in this case should be reversed, but not that the proceeding should be dismissed. I think it should be sent back to the workmen's compensation court for a new trial and further evidence.

As the record now stands, opposing medical experts have testified, on the one hand, that plaintiff is totally disabled from the accident involved and will continue so indefinitely, and, on the other, that he has absolutely no existing disability from the accident and is as able to work as he was

before it occurred. Among other incidents in the record, diametrically opposite physical interpretations are made of the same X-ray films. The question of disability turns, not on subjective symptoms of the claimant, but on the objective findings of the doctors. A determination of the controversy on the present record, therefore, means simply a conjectural evaluation of the professional credibility of the medical witnesses in the case.

I believe that compensation rights or liabilities ought not to have to depend on this questionable criterion. The legislature has declared that the administration of the workmen's compensation law is "affected with a vital public interest." Comp. St. Supp. 1937, sec. 48-162. That interest is entitled to some certainty in processes and results. A compensation trial cannot be allowed to degenerate into a medical experiment in judicial credulity or a judicial speculation on medical credibility.

The history of this case forcibly illustrates what I have in mind. The compensation court, first by the single judge who heard the case, and then, on a rehearing *en banc,* accepted the testimony of plaintiff's medical witnesses and gave plaintiff an award. The district court, to which an appeal in the nature of an error proceeding was taken, upheld the award because of the conflict in the evidence; but, according to the brief of appellant, the trial judge declared, that if he were hearing the case in the first instance, or *de novo,* he would have found in favor of defendant. On a *de novo* hearing here, some of the members of this court apparently believe the medical witnesses of plaintiff and others those of defendant. To me, the antipodal disagreement of these experts on whether demonstrable physical conditions exist or not is disappointing and bewildering. It shakes my faith a little in the skill of the medical profession or in its scientific impartiality. I do not want, in this situation, to be called upon to speculate on the question of personal credibility, but feel that the case should be sent back to the compensation court, with the request that it call in some disinterested members of the

medical profession and invite their cooperation to clarify the path, by making proper physical examinations and stating their findings in open court, subject to cross-examination by the parties. I believe that this procedure will clear up the Hippocratic shadows and bring the truth into sharper focus.

On the right of the compensation court to do what I am here suggesting, a reference to the statutes is sufficient. A discussion of the general power of a trial court to call witnesses will be found in 5 Wigmore, Evidence (2d ed.) sec. 2484, and in 3 Chamberlayne, Modern Law of Evidence (1912) sec. 2376, but it is neither necessary nor useful to go into that subject here. The legislature has expressly declared that the compensation court has power to adopt all rules necessary to effectuate the public interest in the administration of the compensation law, and that it "may upon * * * its own motion require the production of * * * any facts or matters which may be necessary to assist in a determination of the rights of either party." Comp. St. Supp. 1937, sec. 48-167. It has also specifically authorized the judges of the compensation court "to examine under oath or otherwise any person * * * or any medical practitioner." Comp. St. Supp. 1937, sec. 48-153. These provisions include the right to call independent medical experts as witnesses; and, in a case such as this, where the furtherance of justice demonstrates its sound necessity, there should be no hesitation in exercising the power. No nonjudicial function is involved. *Jessner v. State,* 202 Wis. 184, 231 N. W. 634.

I had hoped that by remanding the case the organized medical profession might have joined us in accepting the challenge involved. The expert witness evil, which is a blight on judicial administration and a discredit to the medical profession, must sooner or later be faced. The procedure which I have here suggested would, I believe, effectively have demonstrated where the truth lies in the present case. I, for one, feel the need of a compass.

PAINE, J., dissenting.

I believe that the workman is entitled to compensation, and that his petition should not be dismissed, and therefore dissent from the opinion adopted by a bare majority of this court.

This case was argued to this court February 20, 1939, and involved such disputed questions of fact in the testimony of medical experts that several views could each be upheld, depending on which doctor's testimony was believed.

I desire to state the facts and law to support my views that this man, who is entirely helpless, is entitled to be compensated.

This is an appeal from an order of the district court, dismissing the appeal of the defendant to that court from an award of the compensation court sitting *en banc*.

On October 20, 1937, plaintiff filed petition in the Nebraska workmen's compensation court, alleging that on July 30, 1937, while employed as a mechanic by the Standard Auto Parts Company, Inc., of Lincoln, he was working under an automobile, and it slipped off the jack, crushed him to the floor, causing injuries to the left shoulder, left chest wall, and ribs, producing an active tuberculosis of the lungs. He further alleged that the injury was permanent; that his wages at the time of the injury were $18 a week.

A hearing was had December 22, 1937, before Honorable Frank M. Coffey, one of the judges of the Nebraska workmen's compensation court, at St. Elizabeth Hospital, where the plaintiff was being hospitalized.

Judge Coffey made an award on January 31, 1938, finding that plaintiff was injured while making adjustments under an automobile, as described in his petition, and found that previous to this accidental injury plaintiff had had a degree of tubercular infection, but that such infection had been arrested and plaintiff was able to perform manual labor, and was not receiving medical attention at the time of his accidental injury on July 30, 1937, which injury was the direct cause of lighting up the arrested tubercular con-

dition, and awarded payment of claims for hospital and medical services, together with $12 a week to plaintiff for not more than 300 weeks from July 30, 1937.

Defendant filed waiver of rehearing and notice of appeal directly to the district court, and certificate thereof was duly entered by the Nebraska workmen's compensation court.

On February 7, 1938, the plaintiff filed a petition for rehearing from the award entered by Judge Frank M. Coffey, setting up that he was suffering total and permanent disability as a result of active tuberculosis, and an aggravation of a latent arthritis. He also appealed from the disallowance of the claim of $240 of Dr. Arthur L. Smith, and its allowance in the sum of $140 only.

The next day defendant asked leave to withdraw its waiver and election to appeal directly to the district court, and also asked for a rehearing before the full Nebraska workmen's compensation court.

On March 7, 1938, it came on for rehearing before the three members of the workmen's compensation court sitting *en banc* at St. Elizabeth Hospital, where the evidence of the plaintiff was taken. The hearing was then concluded at the compensation courtroom in the State House, and the evidence duly taken by an official shorthand reporter of said court, in accordance with section 48-174, Comp. St. Supp. 1937, and each party rested. Thereupon, the parties were directed to furnish briefs to the court.

Thereafter, on May 9, 1938, an award was made by said court, describing the injuries received in the accident, and finding that prior to this accident plaintiff had a degree of tuberculosis infection, which had been arrested, and that he was not receiving medical attention at the time of the accident. The award allowed the plaintiff $12 a week for not to exceed 300 weeks from July 30, 1937, and set aside the award made on January 31, 1938, by Honorable Frank M. Coffey, which had allowed lesser amounts for hospital and medical services.

Thereupon, defendant appealed to the district court,

where a hearing was had on September 21, 1938. As was said in *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352: "It will be noted that, where a retrial has been had before the full compensation court, the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding."

No further evidence was taken in the district court, and after the arguments of counsel said matter was taken under advisement, and judgment was entered October 22, 1938, finding that there is conflicting evidence in the record, but that there was competent evidence to support the award made by the Nebraska workmen's compensation court, and it was therefore ordered, adjudged, and decreed that the award so made on May 9, 1938, be affirmed, and the appeal of the defendant dismissed at defendant's costs. Thereupon, the defendant filed a motion for a new trial, and upon its being overruled, filed a supersedeas bond in the sum of $3,000 and appealed to this court.

When such an appeal comes before this court, it is provided "that a judgment, order, or award of the district court may be modified or set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the judgment, order or award was procured by fraud. (3) That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record. (4) That the findings of fact by the court do not support the order or award." Comp. St. Supp. 1937, sec. 48-174.

In the bill of exceptions it is shown that the evidence of the plaintiff was taken before the full compensation court on March 7, 1938, at St. Elizabeth Hospital, where plaintiff was confined, and more than a dozen X-rays were received in evidence when offered by plaintiff.

Dr. Smith testified that he had made 114 personal calls, and 17 physical examinations of plaintiff's chest and lungs, taken seven X-ray pictures at his office, and had six more taken at the hospital, also took tuberculin and sputum tests.

In his long description of plaintiff's chest, he said he found fractures of three ribs, and abundant evidence of former tubercular trouble, such as old hardened lesions, manifested by deposits of calcium in various parts of the lungs, and he got a positive tubercular test after 24 hours. Dr. Smith took up each X-ray exhibit, and told in detail the exact condition which it indicated. His conclusions may perhaps be inadequately condensed to these facts: That the plaintiff had a fracture of three ribs on the right side, an aggravation of arthritis in the dorsal vertebræ, a separation of the second left and right costocartilages from the sternum margin, and in his lungs there was an activation of an old tuberculosis; that all of these conditions are the proximate result of trauma suffered in the accident.

Dr. Czar Johnson testified at length of the conditions found by him, and that the proximate cause of these conditions was the accidental injury when plaintiff was crushed between a car and the cement floor. His specific findings agreed in nearly every detail with those of Dr. Arthur L. Smith.

The plaintiff introduced exhibit No. 17, being a five-page signed statement of Dr. Miles J. Breuer, dated January 5, 1930. This gives in greatest detail the results of a careful examination of plaintiff, made presumably in connection with plaintiff's claim for disability from the government. Briefly, it shows plaintiff's history, as follows:

He grew up on a farm and in lumber woods until he was 23 years of age, when he went to work on a cattle ranch in Texas for a year, then in a steel mill in Pueblo, Colorado, for two years, after which he entered military service. He was in training at Camp Custer, Michigan, three months, got sick from drilling and hiking in mud and water, was in hospital two weeks; was with A. E. F. in France nearly a year; on discharge, has never been able to hold a job since; willing, but not physically able to carry out the work. The statement ends with the sentence: "It is necessary that a chronic tuberculosis of this type, though it does not show extensive pathology, be recognized as a total disability."

I will now discuss the testimony of the medical experts called on behalf of the defendant.

Dr. John C. Thompson testified that he examined plaintiff at St. Elizabeth Hospital, together with Dr. Clayton Andrews and Dr. W. W. Carveth. The history which they took of plaintiff covers seven pages of testimony. He said his condition clearly indicated a childhood tuberculosis, which had not been active for a long time, but he found a complete absence of adult tuberculosis. He stated positively that he saw no evidence in the X-rays of any fractured ribs. One answer gives Dr. Thompson's conclusions in regard to plaintiff, as follows: "We have not only the X-ray findings, we have the history, got the interpretation of a mass of evidence through a period of time, and finally, we have what we had in this test, and that's nothing but bronchitis. Furthermore, especially on this X-ray, from this evidence of the blood pressure finding, I think this man is a deliberate liar."

In the examination of plaintiff by the three doctors, Dr. John C. Thompson took his blood pressure and found it 154 over 88, which he says is definitely aggravated for a man of his age. Later Dr. Andrews took it, and got it 142 systolic. Then later Dr. Carveth took it, and got 118. Dr. Thompson explains this by saying that, when they began their rapid cross-questioning and plaintiff was embarrassed, the blood pressure was high, and when the questioning stopped it dropped to 118. He adds that blood pressure readings are an important part of the instrument devised at Northwestern University for the detection of lies.

Dr. Carveth then told of the examination of the plaintiff by the three doctors for the defendant; that they began at 9:30 a. m. and finished at 12:30 p. m. on February 28, 1938; that they did not take any X-ray pictures, nor take any tuberculin test.

Dr. Carveth testified that in his opinion plaintiff's chronic alternating activity is not tuberculosis, but bronchitis.

Dr. Clayton Andrews could find no disability in the back due to arthritis, and no disability due to the accident, and

said there was no reason why plaintiff could not be doing as much work now as he did before the accident. He also doubted the sincerity of the plaintiff.

I have now given a very brief summary of the expert medical testimony of the defendant. These experts do not agree on any point with plaintiff's doctors, and defendant argues that we must find that Dr. Arthur L. Smith and Dr. Czar Johnson are entirely wrong, and Dr. Owen, Dr. Carveth, Dr. Andrews, and Dr. John C. Thompson are right, and set aside the award.

The evidence of Dr. Arthur L. Smith, who has been in constant attendance for so many months upon the plaintiff, is definite and positive, and founded upon a patient study of the case from day to day. It stands up well under cross-examination, and is supported by X-rays, and by the testimony of Dr. Czar Johnson.

On the other hand, the testimony of the three medical experts called in by the defendant, and who for three hours subjected him to such surprise tests and experiments that his blood pressure fluctuated between 118 and 154, is to the effect that they think the plaintiff is lying, and that the effect of the accident was merely trivial, and conclude that he is suffering from bronchitis, and not tuberculosis.

It will be seen that the decision in this case depends upon the weight to be given to the testimony of these expert medical witnesses.

Now, take a case where an unfortunate employee, who was not physically strong, but sought and obtained work, was injured while doing the very best he could, and has never been able to work a day since the injury, files a petition for compensation, and is only able to employ two reputable doctors; that their bills run to several hundred dollars. Is it required that their testimony be rejected because, if the employee secures an award, it will carry with it an allowance of their medical bills? I think not.

On the other hand, the defendant corporation, who is fighting the allowance of any compensation to an injured employee, is able to employ more than twice as many

equally reputable doctors, who testify exactly contrary on every proposition, including their testimony that the X-ray photographs tell an entirely different story when read by them.

I cannot believe that it resolves itself to a question that, as only two doctors testified for plaintiff and five or six against him, therefore the weight of the evidence is against allowing any award. Weight of evidence is not determined merely by counting the witnesses on either side.

To prove that this difficulty arising when eminent medical experts testify to exactly opposite conclusions existed sixty years ago, I quote from an article by G. Brooke Freeman in the Law Magazine and Review of London in February, 1878: "On some special branches of inquiry the same two eminent experts * * * confront each other daily. * * * When the evidence is only as to a matter of opinion, the witness, of course, cannot be indicted for perjury, and it is clear that this will allow the assertion of anything which a skilled witness may think likely to advantage the cause of his employer, or add importance to his theories and himself. The serious mischief caused in this way, added to the frequent inability of the court to obtain any other kind of evidence, or to arrive at a conclusion which does not depend mainly on such testimony, naturally produces great dissatisfaction with any decision in an expert action." Rogers, Expert Testimony (2d ed.) 468.

One of the earliest complete discussions of expert testimony is that following the case of *Hammond v. Woodman*, 66 Am. Dec. 219, 228-246 (41 Me. 177).

The situation presented courts by medical experts is covered by Jones, Commentaries on Evidence (2d ed.) 2509, sec. 1370, in this pertinent discussion: "It is the inherent infirmity of expert testimony that it consists largely of matters of opinion. In addition to those elements of weakness and uncertainty which enter into the testimony of those who relate simply what they have seen and heard, we have in expert testimony the deductions and reasoning of the witness with all the chances of error incident to human

reasoning. The notorious fact that experts of equal credibility and skill are found in almost every important cause testifying to directly opposite conclusions illustrates both the fallibility of such testimony and the fact that a conviction for perjury based upon such evidence would be very difficult. It is a matter of common observation in the courts that witnesses of the highest character and of undoubted veracity may be easily led as experts to espouse and defend a theory with all the zeal of the advocate. Again, the practice prevails of employing expert witnesses and paying them for their services, as compensation, amounts depending upon their skill, or, perhaps, the result of the action. These and similar considerations have led to those strictures upon expert testimony so often made in instructions to juries or in judicial decisions."

In an article on "Opinion Evidence of Medical Witnesses," by Henry W. Taft, of New York City, he quotes Dr. Sloan, president of Illinois State Medical Society, who says that in Civil Law countries of Europe "the expert is a part of the judicial system. He is an officer of the court and treated as such. * * * They are free from partisan bias, possessed of great judgment, a judicial mind, scientific experience and knowledge, and their expert opinions upon the questions submitted to them occupy a position like that of judicial opinions in weight and decisiveness."

On the other hand, in the United States a regrettable situation sometimes arises, for Mr. Taft quotes a committee of the American Bar Association to the effect that "medical witnesses in personal injury cases, dependent for their compensation upon the success of the side retaining them, 'magnify the seriousness and permanence of the injury, while the defendant's witnesses, although sure of their compensation from a responsible client, minimize the injury.'" 14 Va. Law Review, 81.

"The remedy therefore seems to lie in removing this partisan feature, i. e., by bringing him in court free from any committal to either party. Such a status for the expert would indeed not secure perfection. But it can be asserted

that no measure can be effective which does not secure such a status for the expert witness. How can this be done? The essential features, in the abstract, are that the state, not the party, shall be the one to pay his fee, and that the court, not the party, shall be the one to select and summon him." 1 Wigmore, Evidence, sec. 563.

"Expert witnesses are produced to support a certain theory by their opinions, often upon facts which have been detailed by others; they are frequently selected because of ability to express opinions which are favorable to the party who calls them and to whom they are to look for their compensation beyond that paid as witnesses' fees to all witnesses. Their opinions may be swayed one way or the other by bias or interest without conscious dishonesty. * * * Its value and usefulness are attested by the fact that resort to it is constantly increasing in all courts and in respect of an ever-widening range of subjects. Many cases are to be found in which expert testimony is commended and held not properly subject to deprecating remarks in the court's instructions, or else is declared to be entitled to the jury's unbiased consideration, free from the court's prejudicial remarks either in its favor or against it." 20 Am. Jur. 1058, sec. 1207.

An excellent article on medical experts, and the difficulties from their standpoint, is that by Dr. H. Mason Smith, of Tampa, and found in 8 Fla. Law Journal, 33.

In the case at bar, awards were made to this injured workman after both of the hearings before the compensation court, and affirmed in the district court, based upon the weight given to the expert medical witnesses for the plaintiff. The reasons for accepting their opinions, findings, and testimony, supported by the X-rays, seemed to be satisfactory to three courts. Why should this court reject such findings now?

It is true that injury resulting solely from disease is not compensable (*Svoboda v. Mandler*, 133 Neb. 433, 275 N. W. 599), but where the injury and a latent disease combined to produce disability, recovery may be allowed (*Gilcrest Lum-*

ber Co. v. Rengler, 109 Neb. 246, 190 N. W. 578), in which case a disease of the blood was aggravated by trauma. See, also, *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N. W. 688.

The writer of this dissent, considering the liberality with which we must consider all compensation cases, believes that plaintiff suffered an injury in the accident, and is not yet able to work, and accepts the testimony of his doctors that the injury to his chest lighted up an old tubercular condition, which was dormant when he was injured and has now become active, and believes that this unfortunate is entitled to compensation.

HAROLD S. WHALEY ET AL., APPELLEES, V. JACK MATTHEWS, APPELLANT.
287 N. W. 205

FILED JULY 21, 1939. No. 30640.

1. **Judgment.** Section 20-1302, Comp. St. 1929, contemplates that a judgment may be rendered by the court against one or several parties in the discretion of the court, and in rendering judgment the court may determine the ultimate rights of all of the parties to the controversy.
2. ———. "To ascertain the meaning of a judgment entry it is always permissible to read it in the light of the entire record." *Burke v. Unique Printing Co.*, 63 Neb. 264, 88 N. W. 488.
3. ———. Effect should be given to every word and clause contained in a judgment, and such words and clauses should be construed according to their natural and legal import, and the whole context of the judgment considered.
4. ———. A judgment should be so construed as to give effect to each and every part of it and bring all the different parts into harmony as far as this can be done by fair and reasonable interpretation.
5. ———. A judgment entry containing in separate paragraphs the different items constituting the amounts of the judgment, and containing after each item a reservation as to the liability of one of the defendants named in such judgment, in the following language: "The liability of" such defendant "for the return and payment of the said sum shall not cease until such time as

he shall have paid the same in full, despite any prior return or payment which may be made by" defendant corporation, upon an analysis and examination, discloses that such judgment is not a joint judgment, within the intent of the court rendering the same.

6. ———. A judgment should be construed as a whole to determine its meaning.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD and ELLWOOD B. CHAPPELL, JUDGES. *Affirmed.*

Beghtol, Foe & Rankin, Walter E. Nolte and *Chambers, Holland & Locke,* for appellant.

John S. Logan, Bernard S. Gradwohl and *Meredith K. Nelson, contra.*

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

MESSMORE, J.

This is the second appearance of this case in this court, the original opinion appearing in 134 Neb. 875, 280 N. W. 159. We will set forth sufficient subject-matter contained therein to disclose the nature of the original action, the relationship of defendant Jack Matthews to the company, and the findings and judgment of the court.

Originally, the plaintiffs and three interveners, all holders of certain types of insurance contracts, brought an action in equity against Jack Matthews and the Cosmopolitan Old Line Life Insurance Company, on behalf of themselves and others similarly situated, for breaches of trust and violation of duty. They charged defendant Matthews, president of the company, with wrongful diversion of moneys from various funds belonging to the company. The result was a judgment against Matthews and the company. The items making up the total sum of the judgment are as follows: (1) $65,000 removed and overpaid from the cumulative endowment funds and $9,750 interest thereon, making the total of the first item $74,750; (2) $90,000 removed and overpaid from the general fund, plus interest thereon in

the sum of $17,250, making the total of this item $107,250; and (3) $9,300 for the negligent and wrongful purchase of securities known as the Neverve mortgages. Matthews was a director of the company continuously from 1922, vice-president from 1922 to 1927, president from 1927 to 1930, and again in 1935, chairman of the investment committee from 1927 to date of trial, and chairman of the board or executive committee from June, 1935. As a result of the alleged unwarranted action of the company in taking money from the cumulative endowment fund and the additional excess of payments which came from the general fund, to pay substantial bonuses from already matured thrift certificates, those funds have been depleted so that it is claimed to have jeopardized payment of certificates to mature later. The judgment of the district court was affirmed.

It will be observed that the original action was brought in equity by minority policyholders for themselves and for policyholders similarly situated, the plaintiffs claiming that the company was under the domination and control of the defendant Matthews, and upon written notice the company refused to institute suit. Therefore, the company was made a party defendant, although the suit was for its benefit. In considering this appeal, we are concerned with the decree and judgment of the district court in the original action dated December 10, 1936, and certain other proceedings had which are set forth, in substance, in their order:

On December 7, 1936, the following journal entry was made by the district court for Lancaster county: "The court finds generally in favor of the plaintiffs and interveners and against the defendants (certain exceptions were then made referring to certain paragraphs of the petition);" finds the relationship of the defendant Matthews to the company; "that the assets of the company were and are the property of the membership and its certificate or policyholders and that the defendants at all times stood and now stand in the relation of trustees to them, and were and are charged with the duty of keeping safely all of the moneys and investments of the company and of keeping safe and separate all

of the various funds established and maintained by the company in connection with its several plans of insurance, and were and are liable to the plaintiffs and interveners and to said membership for any loss occasioned by default of duty on their part, that defendants were negligent and guilty of breach of trust." The journal entry then refers to the 9,300-dollar Neverve mortgages and refers to the 65,000-dollar item and the 90,000-dollar item, heretofore set out, stating that loss occurred in said sums, and that plaintiff and interveners *et al.* are entitled to judgment therefor, with interest, against the defendants.

On December 10, 1936, a decree was entered by the same court as a decree *in extenso*. The court found generally in favor of the plaintiffs and against the defendants and each of them; found specifically that the defendant Matthews held various trusts and offices for the company during the period of time of its existence and his connection therewith, and that the defendant Matthews has encouraged and participated in the violation of his trust in all the various acts and things for which recovery is allowed. The next three paragraphs of the finding refer to the 65,000-dollar item, the 90,000-dollar item, and the 9,300-dollar Neverve mortgages, finding that the defendants in each instance have wrongfully, unlawfully and in breach of trust, removed and overpaid the two larger sums, and in breach of trust purchased the Neverve mortgages; found that the plaintiffs made various demands for relief, directed to the officers and directors of the company, and any further demands or applications, other than those made, would have been futile and unavailing.

In paragraph 11 the court states: "By stating certain specific facts the court does not narrow or limit its said general findings for plaintiffs and said interveners." In that part of the decree where the judgment is made on the findings, the defendants and each of them are ordered to forthwith return the respective sums (the amounts as hereinbefore stated) and in each instance, where the sums are specifically referred to, and in each paragraph of the decree

referring to such sums, we find the following language: "The liability of defendant Matthews for the return and payment of the said sum shall not cease until such time as he shall have paid the same in full, despite any prior return or payment which may be made by the defendant Cosmopolitan Old Line Life Insurance Company." The decree then provides for an allocation of certain amounts, and that plaintiffs recover expenses incurred with reference to the suit, and costs.

On December 30, 1936, the plaintiffs and the company entered into a stipulation. Defendant Matthews was not a party thereto. The stipulation provides for the transfer of $84,050 from the general fund into the cumulative endowment fund. It may be remarked here that this sum of money was at all times money belonging to and for the benefit of the certificate holders of the company and money that was in the hands of the company. The moneys, as stated in the decree of December 10, 1936, were moneys that had been paid out by the defendant Matthews and for which judgment was rendered.

In paragraph 3 of the stipulation provision is made that upon the payment of the said amount of $84,050 into the cumulative endowment fund, "that portion of the decree, and that portion only, which requires the defendant Cosmopolitan Old Line Life Insurance Company (as distinguished from the defendant Matthews) to pay various sums of money shall be deemed complied with upon the part of said company (except for the payment of expenses, costs and attorney fees for which separate provisions are hereinafter made)." It is provided specifically, however, that any payment or transfer by the company of funds under any of the paragraphs of the stipulation or decree "shall in no manner affect the liability of defendant Matthews under the said decree nor shall it reduce the said liability of the defendant Matthews, but the defendant Matthews remains liable for the full amount of $191,300, as provided in the said decree, together with costs. The said decree, as to the said defendant Matthews, remains uncomplied with in any part and

continues with the same force and effect as when originally entered." The stipulation then provides for future accumulations and specifically provides for sums paid by defendant Matthews, he to receive credit therefor, and provides for attorney fees and expenses, and contains an agreement on the part of defendant company to withdraw its motion for a new trial.

On January 2, 1937, an order was entered in the same court on the stipulation, stating that the case had come on for hearing upon motion made by the plaintiffs and interveners, respecting compliance with the decree by the defendant company, and evidence was adduced. The court found that the company, by and through the department of insurance of the state of Nebraska, is ordered and directed to pay into the cumulative endowment fund of the company all the surplus of the company not to exceed $84,050, for the credit and benefit of the plaintiffs *et al.;* provided for the allocation of the funds upon payment of the amount, and provided further: "That portion of the decree dated December 10, 1936, and that portion only, which requires the defendant Cosmopolitan Old Line Life Insurance Company (as distinguished from the defendant Matthews) to pay various sums of money shall be deemed complied with upon the part of said company (except for the payment of expenses, costs and attorney fees), * * * provided specifically, however, that any payment or transfer by the company, under any of the paragraphs of this order or of said decree, shall in no manner affect the liability of defendant Matthews under the said decree of December 10, 1936; nor shall it reduce the said liability of the defendant Matthews, but the defendant Matthews remains liable for the full amount of $191,300 as provided in the said decree, together with costs. The said decree, as to the said defendant Matthews, remains uncomplied with in any part and continues with the same force and effect as when originally entered." Then the order further provides for any credit to be given to defendant Matthews in the event any payment is made by him.

On January 8, 1937, the defendant company withdrew its motion for a new trial; an order was made by the court subsequent to January 2, 1937, and on February 24, 1937, a hearing was had, and attorney fees, expenses and costs were allowed, to be paid out of the cumulative endowment fund as shown in the order of January 2, 1937. On January 16, 1937, the transfer of the funds was made by the company in the amount of $84,050 from the general fund of the company to the cumulative endowment fund.

On March 9, 1937, defendant Matthews filed a motion to require the clerk of the district court to satisfy the judgment as against him, referring to the decree of December 10, 1936, as rendering a joint judgment, and to the order of January 2, 1937, and, upon the transfer of the fund, as hereinbefore stated, that the company be released from all liability. On September 24, 1938, the plaintiffs applied to the district court for an order to require defendant Matthews to appear and answer concerning certain property owned by him and to bring with him certain books and papers designated in the application. On this application, an order was entered requiring Matthews to appear on October 17, 1938, to be interrogated concerning his property. On October 13, 1938, defendant Matthews filed a motion to vacate the order requiring him to appear, setting forth in the motion that the order was entered without notice to the defendant; that a joint judgment had been entered against the defendant Matthews and the company, set up the order of January 2, 1937, the compliance therewith, and asked that the order be vacated, requiring him to be interrogated as to property owned by him. By agreement of the parties, both motions were heard at the same time, viz., on November 5, 1938, and were overruled by the court. From this order overruling the two motions as hereinbefore referred to, defendant Matthews appeals to this court.

The assignments of error made by the appellant follow: (1) The court erred in overruling defendant Matthews' motion to require the court to satisfy the judgment, in overruling his motion to vacate the order requiring him to

appear, and in overruling his motion for a new trial respecting the above matters. (2) The court erred in holding that plaintiffs' agreement which released one joint debtor did not also release the remaining joint debtor.

Appellant first contends that the judgment is a joint judgment, and refers to the original petition. It may be here stated that, in analyzing the original cause of action, the nature of the suit must be kept in mind. While the petition does refer to the defendants as being negligent in breaching trusts and in diverting moneys and paying out the same when not authorized, it also refers to the acts of defendant Matthews concerning the breaching of trusts and diverting of funds, stating his relation to the company, that he dominated the company and controlled its action. The prayer of the original petition is that the defendant Matthews be compelled to return and pay to the company (setting out the amounts and the paragraphs of the petition referring to the amounts), and further that the company be required to pay (setting forth the amounts); and then stating that the defendants be required to render a full accounting of the funds and to produce all books and records, etc., and all costs of the suit to be taxed against defendant Matthews; that the plaintiffs be reimbursed by defendant company for expenses incurred, including allowance of attorney fees, and for general equitable relief.

The appellant also specifically refers to paragraph 4 of the decree dated December 10, 1936, which follows: "The plaintiffs and interveners (naming them), upon behalf of all of the thrift certificate holders in said company similarly situated, are hereby awarded judgment against defendants and each of them for the sums hereinbefore set forth, to wit, the total sum of $191,300." The substance of the decree, as heretofore stated, contains language which specifically applies to the liability of the defendant Matthews. The appellant contends that said paragraph 4 constitutes the only statement in the original decree of a money judgment as against specific parties.

The appellant cites 33 C. J. 1126, as follows: "A judgment

that plaintiff recover of two or more named defendants a specified sum of money is in form a joint judgment." In the same paragraph we find this language: "Whether such a judgment is joint or several depends upon whether the liabilities or interests involved are joint or several."

In determining whether a judgment is joint or several, the circumstances in reference to the case may be considered. Naturally, this calls for an analysis of the decree of December 10, 1936, to ascertain the meaning of such judgment entry. In so doing, it is always permissible to read the judgment entry in the light of the entire record. See *Burke v. Unique Printing Co.*, 63 Neb. 264, 88 N. W. 488.

In *Gade v. Loffler*, 171 Okla. 313, 42 Pac. (2d) 815, it was held:

"In construing the judgment of a court, effect should be given to every word and part thereof, including such effect and consequences that follow the necessary legal implications of its terms, although not expressed.

"When the wording of the judgment is not clear, it should be construed so as to carry out the evident purport and intent of the action, rather than defeat it."

And in *Deboe v. Brown*, 231 Ky. 682, 22 S. W. (2d) 111, it was held: "A judgment should be read as a whole to determine its meaning."

In *Lamb v. Major & Loomis Co.*, 146 N. Car. 531, 60 S. E. 425, it was said: "It (referring to a decree) should be so construed as to give effect to each and every part of it, and bring all the different parts into harmony, as far as this can be done by fair and reasonable interpretation."

"It is a general rule, applicable to judgments, that, if possible, effect should be given to every word and clause therein. Such words and clauses should be construed according to their natural and legal import, and the whole context should be considered." 15 Standard Ency. of Procedure, p. 92. In this connection it is, therefore, proper to consider all the subsequent proceedings had in reference to the judgment.

Section 20-1302, Comp. St. 1929, contemplates that a judg-

ment may be rendered by the court against one or several parties in the discretion of the court, and in rendering judgment the court may determine the ultimate rights of all the parties to the controversy.

In the instant case, the general fund from which the $84,050 was transferred and the cumulative endowment fund which received the $84,050 belonged to the thrift certificate holders; that is, said funds and the moneys therein are held by the company for the benefit of the certificate holders. The transfer from one fund to the other, as above stated, did not satisfy the damage caused by the overpayments made by defendant Matthews, as specifically set forth in the decree dated December 10, 1936. The moneys paid out under the direction of Matthews to the certificate holders, as shown in the original opinion and in the original judgment, have not been returned to the company; that is, there is no new money in the company, evidenced by the conduct of either the company or Matthews in complying with the original judgment. There is merely a transfer of funds which had not been diverted or paid out, but which were always under the control of the company for the benefit of the certificate holders.

In applying the rules of law, as set forth in the foregoing authorities, it is obvious that it was not the intention of the court as expressed by the language in the decree dated December 10, 1936, in the event of a transfer of funds as disclosed by the stipulation and the order of January 2, 1937, that the judgment should be considered a joint judgment. The liability of defendant Matthews is specifically stated in the decree where a reservation is made in the following language: "The liability of defendant Matthews for the return and payment of the said sum shall not cease until such time as he shall have paid the same in full, despite any prior return or payment which may be made by the defendant Cosmopolitan Old Line Life Insurance Company." This statement appears in the decree of December 10 four times, —after each item constituting the amount of the judgment. Such language is a reservation in that any satisfaction of

the judgment had with the company would in no manner affect the liability of the defendant Matthews. In addition, paragraph 3 of the stipulation, providing for the transfer of funds, states that any payment or transfer by the company of funds under any paragraph of the stipulation or decree shall in no manner affect the liability of defendant Matthews under said decree; nor shall it reduce the liability of defendant Matthews, but defendant Matthews remains liable for the full amount of $191,300, as provided in said decree, together with costs. Matthews was not a party to the stipulation, which is in conformity with the judgment respecting his liability. Then, we turn to the order of January 2, 1937, entered on the stipulation after a hearing, and contained in the order is the same provision respecting the liability of Matthews as found in the stipulation, as hereinbefore set out. All of such instruments clearly disclose that the judgment is not a joint judgment, and, in addition, considering the very nature of the suit,—one representative in character,—the judgment is not a joint judgment. The language is plain and explicit in that it provides expressly that defendant Matthews is not released under the circumstances here presented.

In this opinion we do not attempt, nor are we required, to review the original case as to the merits, or the decision as rendered therein, but confine ourselves to the nature and kind of judgment rendered and the liability of defendant Matthews as stated therein.

We therefore hold that the trial court did not err in overruling the motions of defendant Matthews, as hereinbefore set out. In view of our holding, the question of the release or satisfaction of the judgment, wherein the company was released by the transfer of funds, as constituting a release or satisfaction in favor of the defendant Matthews, and other matters raised in the briefs of the parties need not be discussed.

AFFIRMED.

LINDEN N. ELSON, APPELLANT, V. CHARLES SCHMIDT ET AL., APPELLEES.

287 N. W. 196

FILED JULY 21, 1939. No. 30594.

1. **Injunction.** Equity will not issue an injunction where the act is already committed and the injury is done.
2. **Corporations.** Subscription for capital stock pursuant to the provisions of adopted articles of incorporation is a condition precedent to corporate existence under the general incorporation laws of this state.
3. ———. Where articles of incorporation, adopted by the officers of an old corporation, whose charter has expired, to enable the stockholders to continue its business, provide that all stockholders shall automatically be issued the same amount of stock as in the old corporation, this is a sufficient provision for stock disposition, and the assent of the stockholders to the plan, no matter how informally indicated, is all that is necessary to satisfy the general requirements of the law relative to stock subscription, for the purpose of creating corporate existence.
4. **Partnership.** Where articles of incorporation have been adopted, but the corporation sought to be created never acquires a legal existence, those associated under the articles, or subsequently becoming members, occupy the status of partners, and title to any personal property transferred to the association will vest in the partnership.

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

F. B. Morrison and *F. J. Schroeder,* for appellant.

Butler, James & McCarl, contra.

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

JOHNSEN, J.

This is a suit for an injunction, in which plaintiff was denied relief and has appealed.

Plaintiff was a stockholder in Curtis & Fox Creek Telephone Company, a dissolved corporation. Most of his stock had been purchased after the corporation's charter had expired. Defendants were the directors of the corporation at the time of its dissolution, and, under section 24-107,

Comp. St. 1929, were thereby constituted as its liquidating trustees. This suit was brought to enjoin defendants, as such trustees, from disposing of twenty-two shares of capital stock in Curtis Telephone Company, another corporation, which was part of the assets of the dissolved corporation, for a less amount than plaintiff had offered the trustees for it, and to require them to offer the stock publicly for sale. The petition alleged that defendants were intending to sell the stock to a third purported corporation, the Curtis and Southwestern Telephone Company, for $1,100, while plaintiff had offered and was willing to pay $4,225 for it.

The answer of defendants set out that the stock had already been sold and transferred to the Curtis and Southwestern Telephone Company at the time suit was instituted; that the consideration had been fully paid to the trustees, and that, since the transaction was completed, plaintiff was not entitled to an injunction against them. It was further alleged that the sale had been made pursuant to a previous obligation on the part of the dissolved corporation.

The reply alleged, in substance, that the purchaser, though purporting to be a corporation, had no actual corporate existence; that it could accordingly not take title to the stock; that the sale therefore was ineffectual and void, and that the trustees under these circumstances still held title to the stock.

The record indicates that behind the suit lies a controversy over plaintiff's attempt to get control of the Curtis Telephone Company, which had been incorporated by, and was being used as a central office or exchange for, a number of rural telephone companies. With that controversy, however, we have no concern here. The controlling question on this appeal is whether the trustees have been divested of title to the stock. If title does not remain in them, the decree of the district court must be affirmed. Equity will not issue an injunction where the act is already committed and the injury is done. *Vogel v. Rawley,* 85 Neb. 600, 123 N. W. 1037; 1 High, Injunctions (4th ed.) sec. 23. To do so would be merely a useless gesture.

Plaintiff contends that title to the stock never actually passed from the defendants, because the purchaser was neither a *de jure* nor a *de facto* corporation and so did not have legal capacity to become a transferee of the stock. His argument is that the capital stock of the Curtis and Southwestern Telephone Company had never been properly subscribed for, and that, therefore, under *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, the company did not have a corporate existence. *Livesey v. Omaha Hotel Co., supra,* established the rule in Nebraska that subscription for capital stock is a condition precedent to corporate existence under our general incorporation statute, and that, unless the articles of incorporation otherwise provide, the authorized capital must be subscribed in full in order to create either a *de jure* or a *de facto* corporation. While this rule represents the minority view (8 Fletcher, Cyclopedia Corporations (Perm. ed.) sec. 3817), it must nevertheless be accepted as the settled law of this state as to any situation within its limited scope,—and this notwithstanding that the court appears not to have applied it in *Porter v. Sherman County Banking Co.*, 36 Neb. 271, 54 N. W. 424, where a corporation was treated as having a *de facto* existence, although its capital stock had never been fully subscribed for, pursuant to its articles.

In the case before us, the charter of the original corporation known as the Curtis and Southwestern Telephone Company had expired in 1933. Seemingly oblivious of the corporation's dissolution, its officers continued to operate the business in the usual way, and its directors and stockholders held meetings and elected officers as before. When they awoke to the situation in 1938, the president and secretary had new articles of incorporation drawn, which they executed in their official capacity and which recited that, acting for the stockholders of the Curtis and Southwestern Telephone Company, they had associated themselves together for the purpose of reorganizing the corporation. The articles purported to date back the corporate existence to the expiration of the previous charter. Provision was made

for capital stock in the same amount and of the same par value as under the original articles, and it was further provided that "All holders of shares in the old Curtis and Southwestern Telephone Company shall be issued shares in this company in equal amount as their holdings in the old company."

While technically the new corporation was a separate entity from the old, the effect of what was done was simply to preserve the business of the old Curtis and Southwestern Telephone Company and the relationship of the stockholders to it. The articles automatically made the old shareholders the stockholders of the new corporation. No condition precedent was imposed on them. In this situation, a formal subscription for the stock was not necessary. All that was required of the old stockholders was assent. The assent did not have to be evidenced in any particular form, so long as it actually existed. It might be inferred from circumstances. It was legitimately inferable from the evidence in this case.

The new articles of incorporation were executed and filed in January, 1938. The assets of the old corporation and the operation of its business were immediately taken over. A meeting was called of all the stockholders of the old corporation, at which officers and directors were elected for the new corporation, and a dividend was directed to be paid by it out of the assets acquired. Subsequent directors' meetings were held. The corporation borrowed money at a local bank to pay for the Curtis Telephone Company stock involved in this suit. It executed a note for the loan and an assignment of the stock certificate as collateral thereto. Its telephone business was thereafter continuously operated, and had been so down to the trial of this case in August, 1938, unquestioned, so far as the record indicates, by any stockholder. While no certificates of stock had been issued, all of these events together were sufficient, for the purpose of this suit, to indicate the assent of the old stockholders to the new corporation and their acceptance of it. The trial court was accordingly justified in holding that such provision for stock disposition had been shown as gave the new

corporation at least a *de facto* existence. The evidence detailed also establishes all the other elements necessary to constitute a *de facto* corporation. *Parks v. James J. Parks Co.*, 128 Neb. 600, 259 N. W. 509.

But there is another ground that would defeat plaintiff's right to injunctive relief, even if his contention had been sound that the Curtis and Southwestern Telephone Company was utterly without corporate existence. If no corporation was created, those who associated themselves under the articles or subsequently became members occupied a partnership status. Their liability as partners in such a situation is expressly declared in *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, and *Hughes Co. v. Farmers Union Produce Co.*, 110 Neb. 736, 194 N. W. 872. They are similarly accorded the rights and advantages of a partnership. 13 Fletcher, Cyclopedia Corporations (Perm. ed.) sec. 6663. Where, therefore, personal property is transferred to such an association,—that lacks corporate existence,—it will take as a partnership. *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 40 Pac. 457; *Sterne v. Fletcher American Co.*, 204 Ind. 35, 181 N. E. 37; *Smith v. Texas & New Orleans R. Co.*, 101 Tex. 405, 108 S. W. 819. In this case, if no corporation had existed, the trustees would nevertheless have been divested of title to the stock, and it would have vested in the partnership, consisting of William J. Price and J. W. Rittenburg, by whom the articles were executed, and who had entered into the contract with the trustees and paid the money for the stock, and in any subsequent associates or members.

The decisive fact on this appeal is that the trustees were in any event divested of title to the stock. If any question exists as to the good faith of the sale or as to the right to avoid it, it is not now before us. Nor have we deemed it necessary to consider in this case whether the Curtis and Southwestern Telephone Company is entitled to claim the status of a *de jure* corporation.

The trial court properly denied an injunction and dismissed plaintiff's petition.

AFFIRMED.

IN RE ESTATE OF FRED C. KROTTER.
DEAN KROTTER ET AL., APPELLANTS, V. HITCHCOCK COUNTY ET AL., APPELLEES.
287 N. W. 613

FILED SEPTEMBER 22, 1939. No. 30521.

Taxation. In appraising property for inheritance tax purposes, the basis of valuation is the cash value at the date of the death of the decedent, and that is ascertained by determining the amount of money the property would bring if offered and sold for cash upon the open market at that time.

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

Charles M. Bosley, for appellants.

Harry L. Lehman, Victor Westermark and *Carl H. Swanson, contra.*

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

SIMMONS, C. J.

This is an appeal involving the value of property for inheritance tax purposes. The appellants are the heirs of Fred C. Krotter, of Hitchcock county, who died intestate in 1936, owning considerable real estate and common stock in a corporation bearing his name. The county court appointed an appraiser of the estate for inheritance tax pur-

poses. The appraiser made his report, and an order fixing the inheritance tax was made. An appeal was taken by the appellant heirs, and, upon hearing, the county court modified the appraiser's report as to four items of property, and sustained the appraiser's findings as to the balance of the report. An appeal was taken to the district court, praying for a further reduction in the valuation of the property involved.

Involved in the appeal was the value of nine items of property in Hayes county and two items of property in Dundy county belonging to Fred C. Krotter, and thirteen items of property belonging to the F. C. Krotter Company, a corporation. The property of the corporation was appraised to determine the value of the common stock, which passed by inheritance to the appellants. The testimony before the appraiser was offered and received as evidence before the district court. Additional evidence was offered in the district court.

The district court sustained the appraiser on five items and reduced the value fixed by the appraiser on nineteen items. This court is asked to reduce further the values fixed by the district court.

As usual in such cases, there was considerable discrepancy between the estimates of value placed upon the property by the witnesses for the contending parties. There was likewise the usual variations in the witnesses as to qualifications, knowledge of values, and interest in the outcome.

Two county commissioners and one former county commissioner of Hayes county testified as to the value of seven items in Hayes county. The appraiser (except as to the value fixed by one of the commissioners as to one piece of land) in every instance found the value to be less than that fixed by the commissioners, and the district court further reduced the appraiser's estimate on five of the seven items.

In appraising property for inheritance tax purposes, the basis of valuation is the cash value at the date of the death of the decedent, and that is ascertained by determining the amount of money the property would bring if offered and

sold for cash upon the open market at that time. *In re Estate of Woolsey,* 109 Neb. 138, 190 N. W. 215. The rule is easily stated; its practical application is sometimes difficult. The witnesses were, without objection, asked questions that did not confine the answers to a literal interpretation of the rule. It is clear, however, from the record and the decree that the trial court sought fairly to apply the rule in his determination of values. Under the economic conditions existing in this state in 1936, the determination of the cash value of property was more difficult than usual. We find no persuasive reason for holding that the district court erred in fixing the "then cash value" of the various items of property in this estate.

The judgment of the district court is

AFFIRMED.

FOREST D. BENNETT, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.
287 N. W. 609

FILED SEPTEMBER 22, 1939. No. 30591.

Insurance: CONTRACT: CONSTRUCTION. "A policy of insurance providing for the payment of benefits when the insured has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation, does not mean, as its literal construction would require, a state of complete helplessness; but the total disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner." *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850.

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

Beghtol, Foe & Rankin and *Walter E. Nolte,* for appellant.

Arnold J. Van Borkum and *Vasey & Matoon, contra.*

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

SIMMONS, C. J.

This is an action to recover total permanent disability benefits alleged to have accrued under a policy of insurance issued to the plaintiff by the defendant. Trial was had to the court, a jury being waived. Judgment was for the plaintiff, and defendant appeals.

The decision depends upon the construction of a provision in the policy wherein the defendant contracted to make certain monthly payments to the plaintiff in the event he became "totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said policy, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit."

The plaintiff is thirty-three years of age. For sixteen years prior to his disability, his sole occupation, trade, and business was that of a barber. He neither had nor contemplated any other trade, occupation, or business. In October, 1936, he was stricken with infantile paralysis. The disease caused an atrophy of his entire left leg, including the hip girdle, and a loss of function of that leg which makes it impossible for him to continue at his former trade as a barber. The disease has left that permanent disability. He stands and walks with difficulty, suffers pain if he remains in a sitting position for any length of time, and requires relaxation and massage of the afflicted parts of his body at frequent intervals.

He has secured employment at which he earns approximately one-half of his former wages. This employment came to him as the result of friendship with an employer in his home community and of his necessity to earn to care for himself and family. His employment is that of unskilled labor at minor jobs about a factory office. He requires an air cushion when sitting. He is permitted to leave his work for relaxation, at his own option. The nature of the work

which he is doing is not permanent, and the tenure of his employment depends upon the indulgence of a friendly employer. There is no assurance of his ability to continue employment in that or any other line of activity. He did not secure and does not hold his present job as the result of open competitive employment.

This situation calls for a reasonable construction of the insurance policy favorable to the insured and for a common sense application of the liberal rule of construction adopted by this court in *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850, which is:

"A policy of insurance providing for the payment of benefits when the insured has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation, does not mean, as its literal construction would require, a state of complete helplessness; but the total disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner."

It is recognized that a less liberal rule is stated in *Thomas v. Prudential Ins. Co.*, 131 Neb. 274, 267 N. W. 446. However, the question was squarely presented to this court in the later case of *Woods v. Central States Life Ins. Co., supra,* and we adhere to the more liberal rule there announced.

Applying that rule to the facts of this case, plaintiff is totally and permanently disabled and entitled to recover the benefits which the defendant contracted to pay.

Defendant further questions the sufficiency of the proof of disability which was furnished by the plaintiff on forms provided by the defendant. The situation here does not call for a discussion of the answers given by the plaintiff on those forms. The trial court found that the plaintiff had furnished the defendant sufficient proof of such total and permanent disability. We find no reason for disturbing that finding. It is clear from the record that the defend-

ant had notice of plaintiff's illness and resulting disability, and that the defendant refused to meet the obligations of its contract, not because of any defect in the notice, but because of a denial of liability. The defendant did not raise the question of the sufficiency of the proof of loss until its answer was filed herein; it does not now offer to pay any of the instalments due the plaintiff under the contract. Having denied liability under the contract, defendant cannot now interpose this procedural defense. *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397.

The plaintiff is allowed the sum of $100 as an attorney's fee for services in this court to be taxed as part of the costs.

The judgment of the trial court is

AFFIRMED.

MARJORIE TWISS, APPELLEE, V. LINCOLN TELEPHONE & TELEGRAPH COMPANY, APPELLANT.
287 N. W. 620

FILED SEPTEMBER 22, 1939. No. 30546.

1. **Master and Servant: PENSIONS.** Under a plan for the pensioning of employees of a public service corporation, where the entire pension fund is voluntarily and gratuitously contributed by the corporation, where no right to any pension accrues until the employee reaches the age of 55 years and has been in continuous service for 20 years, where there is no right to be retained in the service or any right to a pension after the discharge of an employee unless that right previously accrued, there is no contract between employer and a discharged employee for pension benefits before qualification of the latter therefor on the conditions imposed by the pension plan.
2. **Libel and Slander.** In an action by an employee against a public service corporation, employer, for slander by a corporate officer in connection with the employee's conduct, the communication to plaintiff alone is not a publication.
3. ———. In an action by an employee against a public service corporation for a slander by a corporate officer, the only publication, if caused by plaintiff alone, is insufficient evidence on that issue to support a judgment in favor of plaintiff.

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

Woods, Aitken & Aitken, for appellant.

Waldron & Newkirk, contra.

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

ROSE, J.

Plaintiff, Marjorie Twiss, an employee of the Lincoln Telephone & Telegraph Company, defendant, demanded in her petition pension benefits under the latter's pension plan and recovered in her action therefor a judgment for $1,272.95.

On appeal defendant insists the trial court erred in overruling motions to direct a verdict in its favor.

Plaintiff contends that defendant's pension plan constitutes a binding contract between employer and employee; that the evidence supports the verdict on the issue that plaintiff was wrongfully discharged and that her vested pension rights were then $1,272.95.

Defendant issued a 23-page pamphlet, effective January 1, 1917, entitled "Plan for Employees' Pensions, Disability Benefits and Death Benefits." The plan is described in the pamphlet. Plaintiff makes no claim for disability or death benefits. The redress sought by her in this cause of action is limited to pension benefits which depend on the plan and terms described in the pamphlet. The trust fund for the payment of pensions is created solely by defendant. Plaintiff contributed nothing thereto. Nothing was taken from her compensation to augment the trust fund. She was employed by defendant for telephone service at Louisville, August 1, 1917, and in some capacity was continuously an employee there until she was discharged by defendant July 19, 1935, at the age of 38 years, after approximately 18 years of service. At first she was switch-board telephone operator at $32.50 a month. In 1920, she became manager and chief operator at defendant's Louisville exchange at $70 a month.

Her salary was later increased to $80 a month. In 1930 she was relieved of her duties as manager but continued for a time to received $80 a month as chief operator. In February, 1934, she was demoted to night operator and her salary was reduced to $55 a month. There is no complaint that these monthly salaries were not regularly paid.

When plaintiff was employed in 1917, an officer of defendant explained to her the pension plan described in the pamphlet and she understood the terms on which pensions were to be granted.

Under section 4 of the pension plan plaintiff, after 20 or more years of service, having reached the age of 55 years, would have a right to a pension of $30 a month for life. Her position is that she entered the service of defendant and continued therein, relying on her vested pension rights under her contract of employment, until she was wrongfully discharged July 19, 1935, and that she is entitled to the present worth of her pension benefits for the entire 18-year period of her service, which an actuary figured at $1,272.95, the amount of the verdict on this claim.

The pamphlet states the terms and condition under which an employee of defendant may qualify for a pension. Section 4 thereof, in paragraphs "1 (a) and 1 (b)," provides:

"(1) On and after the effective date of this plan:

"(a) All male employees who have reached the age of sixty years and whose term of employment has been twenty or more years and all female employees who have reached the age of fifty-five years and whose term of employment has been twenty or more years may, at their own request, or at the discretion of the committee, be retired from active service and become eligible to pensions, which pensions are designated 'service pensions.'

"(b) Any employee whose term of employment has been thirty years or more, or any male employee who has reached the age of fifty-five and whose term of employment has been twenty-five or more years, or any female employee who has reached the age of fifty years and whose term of employment has been twenty-five or more years, at the discretion

of the committee and with the approval of the president or of a vice-president designated by the president, be retired from active service and granted a pension, which pension is also designated a 'service pension.' "

Section 8 of the pamphlet, under "General Provisions," referring to section 4, paragraphs "1 (a) and 1 (b)" thereof, is as follows:

"(1) Neither the action of the board of directors in establishing this plan for employees' pensions, disability benefits and death benefits, nor any action hereafter taken by the board or the committee shall be construed as giving to any officer, agent or employee a right to be retained in the service of the company or any right to claim to any pension or other benefit or allowance after discharge from the service of the company, unless the right to such pension or benefit has accrued prior to such discharge. No employee shall have any right to a service pension by reason of service less than that specified in paragraph 1 (a) and 1 (b) of section 4 of these regulations, nor shall any employee have any right in the pension fund unless a service pension authorized by the committee under the plan has not been paid. No employee shall have any right against the company to any benefit under the plan except for the amount to which the employee has theretofore become entitled and which the committee has directed be paid to that employee under the plan."

Under plan and conditions needing no interpretation, plaintiff did not qualify for a pension. Her term of service was not 20 years and she had not reached the age of 55 years. "No employee shall have any right to a service pension by reason of service less than that specified in paragraph 1 (a) and 1 (b) of section 4 of these regulations," says the pamphlet. If plaintiff, as she contends, has a vested right to pension benefits from the time she was employed to the end of her service, those rights would be uneffected by her discharge. There is no right to a pension after the discharge of an employee, unless it previously accrued. Defendant provided the trust fund for pensions voluntarily

and gratuitously and was at liberty to prescribe the conditions on which they are granted. The trust fund contributed alone by defendant for pensions is protected by the provision that an employee can acquire no right to a pension for a term of service shorter than that specified in the plan. The trust fund for pensions is also protected by the provision that the plan confers on an employee no right to remain in the service of defendant or any right to a pension after discharge, unless the right to a pension previously accrued. The allowance of plaintiff's claim for a shorter period than that specified in the plan would, to that extent, divert the trust fund from the purposes for which it was created and impair the rights of employees legally qualified for pensions under the plan adopted by defendant.

Decisions of courts are not in point in cases where employee contributed part of the trust fund for pensions, where the employee had been qualified by service and age, and where bonuses became part of the compensation of employee. On the issue of pension benefits defendant states its position as follows:

"Under a pension plan where the pension fund is accumulated solely through contributions from the employer and the plan provides that no employee shall have any right to a pension for service less than that specifically set out in the plan, and further that the establishment of the plan shall not give any employee a right to be retained in the service of the employer or any right to a pension after discharge, unless the right to a pension has accrued prior to such discharge, an employee who is discharged before having been employed a sufficient length of time to qualify under the plan has no rights or claims in or to the pension fund." Citing: *Wallace v. Northern Ohio Traction & Light Co.*, 57 Ohio App. 203, 13 N. E. (2d) 139; *Magnolia Petroleum Co. v. Butler*, 86 S. W. (2d) (Tex. Civ. App.) 258; *Burgess v. First Nat. Bank*, 219 App. Div. 361, 220 N. Y. Supp. 134; *Dolge v. Dolge*, 70 App. Div. 517, 75 N. Y. Supp. 386; *McNevin v. Solvay Process Co.*, 32 App. Div. 610, 53 N. Y. Supp. 98; *Texas & N. O. R. Co. v. Jones*, 103 S. W. (2d)

(Tex. Civ. App.) 1043; *Fickling v. Pollard,* 51 Ga. App. 54, 179 S. E. 582. Also, dissenting opinion in *Psutka v. Michigan Alkali Co.,* 274 Mich. 318, 264 N. W. 385.

This is the only tenable view of defendant's pension plan considered as a whole. Plaintiff did not make a case for pension benefits in any amount. The trial court erred in overruling the motions to direct a verdict in favor of defendant on that issue. The judgment for pension benefits is therefore reversed and the action therefor dismissed.

Plaintiff in her petition alleged also that defendant slandered her in the telephone exchange at Louisville July 19, 1935, and claimed resulting damages in the sum of $25,000. Upon the trial there was a verdict in her favor for $5,000 and from a judgment therefor defendant appealed.

The alleged slanders were pleaded in the following form:

"That on or about the 19th day of July, 1935, the defendant by and through its officer and servant, one John A. McKinzie, in the city of Louisville, Nebraska, in the hearing of sundry persons, of and concerning the plaintiff, said in substance that plaintiff 'had been having beer parties with men in the office' and that plaintiff 'asked a traveling man from Kansas City to stay all night with her,' thereby meaning and conveying the idea that plaintiff had violated rules of her employer, the defendant, while on duty as a telephone operator, had neglected her duties as such operator and was unfit for such duty, that she was a woman of lewd and immoral character, a prostitute and unfit to remain in the employ of the defendant."

It was further alleged that such statements were false and slanderous and were uttered and published maliciously for the purpose of injuring and damaging plaintiff in her good name and in her business standing and reputation.

Plaintiff's version of what occurred July 19, 1935, in connection with the slanders charged, as disclosed by her testimony on the witness-stand, may be summarized as follows:

As night operator she went off duty on the morning of July 19, 1935, at 7 o'clock and left the exchange for home. When asleep, about 11:00 a. m., her mother called her to

answer the telephone. John A. McKinzie was talking. "He told me that he wanted to see me," she said, "and asked me if I would come down to the telephone exchange and talk with him." One o'clock was fixed as the time for her to appear and she reported at that hour. In the exchange building there were the lobby, the operating room, the rest room and the furnace room. She described the general arrangement of the rooms, the partitions, the doors and the furniture. She entered the lobby, went into the operating room and from there to the rest room, where McKinzie was sitting in a rocking chair, the only person in the room when she entered. He said, "Be seated," and she seated herself on a davenport. He continued: "You have been working about a year of nights now, haven't you?" She answered: "Yes; I have." To this question, "How are you getting along?" she replied, "All right." He then charged: "Miss Twiss, you asked a traveling salesman from Kansas City to stay all night here at the office with you, and he told you that he couldn't, that his wife was with him?" After her denial, he continued: "I know better. You did, and I am releasing you. * * * You have had beer parties also in the office." This, she also denied and testified that McKinzie left the rest room, went into the operating room and in a short time came back with two of the operators—Miriam Carter and Clara Thornton. McKinzie then inquired of Miss Carter: "Were you in the office with Miss Twiss and Don Cramer on a beer party?" She replied: "Yes; I was." This was denounced by plaintiff as a lie. Miss Carter was then asked, "Where did they get the beer?" She answered, "Don Cramer got it." Plaintiff retorted: "That is not the truth." McKinzie said, "That is all then," and the two operators left the rest room and plaintiff went home.

This is a brief outline of the time, place and story of the alleged slanders as told by plaintiff herself.

McKinzie testified in substance that he went to Louisville in the usual course of his corporate duties in the forenoon of July 19, 1935; that R. M. Misner was area manager for defendant; that he had charge of the Louisville office;

that it was the practice to talk with him before discharging an employee; that these two officers of defendant were together in the implement store of C. J. Pankonin, a block north of the exchange, and from him heard what the Kansas City salesman had said about plaintiff; that McKinzie heard this report the same forenoon, July 19, 1935, and also heard at the exchange on that date, before calling plaintiff by telephone, the report that, at the window of the exchange, she had encouraged subscribers to discontinue their telephones. Referring to the meeting in the rest room McKinzie was asked what he said to plaintiff and what she said and he testified as follows:

"I told her that I had called her down because I wanted to talk to her further about the trouble we had been having and I recited some of the things that I had told her before and I said, 'The thing that I heard to-day that I feel is the climax,' and that was the fact that she would stand up to the window and tell subscribers that would come in to pay their bills that if 'I had no more use for a telephone than you have I would have it taken out. In fact, I would have my own taken out if I didn't work here.' And I said, 'Now you realize how hard we have all been working to keep telephones and to have you stand up and tell people those things' was just a little bit more than I was going to stand for and she denied that she had ever said anything like that. And then I told her another matter that had come to my attention after I had reached Louisville, of the rumor that I had received in regard to a conversation that she had had. I asked her, 'Do you recall having a conversation with a salesman a few nights ago, inviting him over to the telephone building to spend the evening with you?' And she denied it. I said, 'You don't recall having such a conversation?' She said, 'No.' I then called in Miss Carter and Miss Thornton and had them relate before her and Mr. Misner what they had previously told about her conversations at the window with subscribers." Plaintiff denied any such conduct on her part.

Defendant is a public service corporation and is conduct-

ing a telephone business at Louisville where telephone communications pass through the exchange night and day. McKinzie and Misner were corporate officers having jurisdiction over the company's employees there. Plaintiff was one of them. In this relation McKinzie and Misner spoke and acted for the corporation which could function only through agents. They had a right to communicate directly with plaintiff in regard to the rumors concerning her conduct as an employee. Their duties required them to do so. Plaintiff and defendant were both interested. Her position as night operator and defendant's management of its own business were involved. Plaintiff's own testimony shows that she and McKinzie were alone in the rest room when he spoke of her rumored invitation to the traveling man. Misner was not then in the rest room. The communication to plaintiff alone was not a publication in the law of slander. 36 C. J. 1223. Each of three employees in the operating room testified she did not hear the charge of immorality until after plaintiff brought this suit.

There is no evidence that defendant published the alleged slander charging immorality. Leona Wallace, a dressmaker employed by plaintiff, testified that she sat in the lobby of the exchange after plaintiff went into the rest room and heard a man's voice and he said: "Miss Twiss, you asked a traveling man from Kansas City to stay all night with you and he wouldn't stay because he said he had his wife with him." McKinzie had taken the precaution to be alone when plaintiff came into the rest room. Her own testimony so shows. He had telephoned for plaintiff, but did not invite Leona Wallace to the exchange. She had no business to transact there or other connection with defendant. She was brought there by plaintiff herself and under the circumstances publication through her was publication by plaintiff, not by defendant. A text-writer states the law as follows:

"If the only publication proved at the trial be one brought about by the plaintiff's own contrivance, this is no sufficient evidence of publication; it is as though the only publication

were to the plaintiff himself, and therefore he must be nonsuited." Newell, Slander and Libel (4th ed.) sec. 427.

As to the accusations of immorality, there was no evidence of publication by defendant, and the trial court erred in submitting that issue to the jury. For the error in that particular the judgment for slander is reversed and the cause remanded for further proceedings.

REVERSED.

MARSH & MARSH, INC., APPELLANTS, V. WILLIAM W. CARMICHAEL ET AL., APPELLEES.
287 N. W. 616

FILED SEPTEMBER 22, 1939. No. 30578.

1. **Constitutional Law: INTOXICATING LIQUORS.** The state, by fixing uniform standards for containers, may take away the right of licensees to sell alcoholic liquors at wholesale in quart bottles, though the effect of such a regulation is to reduce or destroy the value of property formerly used in the traffic therein; nor does such a regulation amount to the taking of private property for a public use or deprive the owners of it without due process of law.
2. ———: ———. Wholesale distributors of beer under a state license have no vested property or contractual right to sell beer in quart bottles, though they have built up a large and lucrative business in such traffic, where reasonable uniform standards of containers established pursuant to law forbid such sales.
3. ———: ———. The statute creating the Nebraska liquor control commission and authorizing that administrative body to make rules and regulations fixing and determining the nature, form and capacity of all containers used for alcoholic liquors and the order of the commission fixing such standards, though forbidding sales in quart bottles, are valid exercises of the police power and do not violate any provision of the federal or state Constitutions.

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

Joseph B. Fradenburg and *Alfred A. Fiedler*, for appellants.

Walter R. Johnson, Attorney General, Robert D. Flory and *John L. Riddell, contra.*

Wright, Wright & Kennedy, amici curiæ.

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

ROSE, J.

This is a suit in equity for a perpetual injunction restraining defendants, the members of the Nebraska liquor control commission, from enforcing an order forbidding the sale of beer in 32-ounce or quart bottles.

Plaintiffs allege they are a corporation licensed as wholesale distributors of beer in Nebraska; that they are distributors for the Premier Pabst Brewing Corporation; that between October 1, 1936, and May 4, 1937, they built up a large and lucrative trade in Pabst beer sold in 32-ounce bottles, a business constituting a valuable property right; that on May 4, 1937, defendants, as the Nebraska liquor control commission, issued an order declaring the sale of beer in 32-ounce bottles illegal and such sales thereafter were forbidden; that plaintiffs complained of the ruling and upon a hearing before the commission May 21, 1937, the order of May 4, 1937, was sustained and the following sizes of packages for beer only authorized as legal: 12-ounce package, 24-ounce package, 64-ounce package, 31-gallon barrel, 15½-gallon barrel, 7¾-gallon barrel, and 3⅞-gallon barrel.

It is further alleged in the petition that the law makes no provision for an appeal from an order of the commission and that plaintiffs are without remedy except by injunction in equity to prevent enforcement of the order; that sales of beer in 32-ounce bottles were interrupted by the order of the commission and valuable property rights of plaintiffs thus damaged; that violation of the order would result in the revocation of the license of plaintiffs as wholesale distributors of beer; that the sale of beer in 32-ounce bottles or quarts is a legal and recognized liquid measure

which does not violate any law of Nebraska; that the order of the commission is capricious and discriminative; that it is unconstitutional and void because it deprives plaintiffs of the protection of the fifth and fourteenth amendments of the Constitution of the United States and of sections 3 and 25 of the Bill of Rights of the Nebraska Constitution.

It is further alleged that the portion of section 53-316, Supplement of the Compiled Statutes of 1935, conferring on the commission power to make "rules and regulations fixing and determining the nature, form and capacity of all containers used for alcoholic liquors," is unconstitutional and void on the grounds which invalidate the order of the commission.

To the petition for an injunction defendants interposed a general demurrer which the trial court sustained. Plaintiffs refused to plead further and elected to stand on their petition. The action was dismissed and plaintiffs appealed.

Among the powers of the Nebraska liquor control commission as an administrative body are the following legislative grants:

"The commission shall have the following powers, functions and duties: (1) To receive applications for, and to issue and revoke licenses to manufacturers, distributors, non-beverage users, retailers, railroads, including owners and lessees of sleeping, dining and café cars, and boats, in accordance with the provisions of this Act. (2) To fix by regulation the standards of manufacture of alcoholic liquors not inconsistent with federal laws in order to insure the use of proper ingredients and methods in the manufacture and distribution thereof; and to establish rules, not inconsistent with federal laws, for the proper labeling of containers or barrels, casks or other bulk containers or bottles of alcoholic liquor manufactured or sold in this state. It is intended by this grant of the power to adopt rules and regulations, that the commission shall be clothed with broad discretionary powers to govern the traffic in alcoholic liquors, and to enforce strictly all the provisions of this Act in the interest of sanitation, purity of products, truthful

representations and honest dealings in such manner as generally will promote the public health and welfare. Such rules and regulations shall include, among such other things as the commission may determine, rules and regulations fixing and determining the nature, form and capacity of all containers used for alcoholic liquors; determining the nature and representations to be shown upon labels attached to containers, and the commission shall require that the labels attached to all original containers or packages of alcoholic liquors sold or offered for sale in this state shall set forth in plain and legible print in the English language the quantity of such liquors in full gallons, quarts, pints, or half-pints exclusive of the package or cask containing it, or in fractions or in multiples thereof: Provided, no original package of alcoholic liquors sold or offered for sale in the original package in this state shall contain less than one-half pint; prescribing the conditions as to the issuance of duplicate licenses in lieu of those lost or destroyed, determining for what violations of the rules and regulations, licenses shall be suspended or revoked; establishing standards of purity, sanitation, honest advertising, and representations; the form of revenue stamps and the method of affixing same to the containers, which stamps shall be of such design, character, color combinations, color changes, sizes and material as the commission may by its rules and regulations determine to afford the best security to the state; and requiring the destruction of stamps upon containers which have been opened, and any and all the other details which are necessary or convenient to the enforcement of the intent, purpose and requirements of this Act, and, in case of manufacturers and distributors of alcoholic liquors, the commission shall require that the labels attached to all containers of such liquors, as are intended for sale in this state, shall set forth among other things in plain legible print in the English language the grade and quality of such liquors, together with their alcoholic content, except in the case of beer, and age, and, if the liquors to be sold in this state be a blended product, then said labels shall also include the

other ingredients contained in such blended product. All such rules and regulations shall be absolutely binding upon all licensees and enforceable by the commission through the power of suspension or cancelation of licenses." Comp. St. Supp. 1935, sec. 53-316.

Plaintiffs argue that the sale of beer in Nebraska has been legalized and that they are engaged in a lawful business as much so as any other wholesale distributor of legal products and are entitled to the same protection.

The act under which plaintiffs procured their license and right to sell beer provides that the license shall be purely a personal privilege and shall not constitute property. The license is not alienable nor transferable nor subject to encumbrance or hypothecation. Comp. St. Supp. 1935, sec. 53-327. In the recent case of *Griffin v. Gass,* 133 Neb. 56, 274 N. W. 193, rules of universal application were recognized as follows:

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

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

Long before the act creating the liquor control commission was passed, the law was announced as follows:

"There is no vested right in a license to sell intoxicating liquors, which the state may not take away at pleasure. * * *

Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful. * * * They are subject to the direction of the government, which may revoke them as it deems fit." *Martin v. State,* 23 Neb. 371, 36 N. W. 554. Followed in *Dinuzzo v. State,* 85 Neb. 351, 123 N. W. 309.

The state may take away the right of licensees to sell alcoholic liquors in quart bottles, though the effect of such a regulation is to reduce or destroy the value of property formerly used in the traffic therein; nor does such a regulation amount to the taking of private property for a public use or deprive the owner of it without due process of law. *Mugler v. Kansas,* 123 U. S. 623, 8 S. Ct. 273.

The fifth amendment of the federal Constitution, providing that no person shall be deprived of life, liberty or property without due process of law, restricts the federal government but not the states. *Bolln v. Nebraska,* 176 U. S. 83, 20 S. Ct. 287; 12 C. J. 1193. A similar provision in the state Constitution does not protect a licensee in the right to sell beer in quart bottles, since that privilege, as already explained, does not constitute property or a vested or contractual right. The Nebraska Constitution provides also that "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property," but this provision does not invalidate the order of the commission for the reason that the restriction imposed by it applies alike to all persons in the same class and is not void as discriminative. Const. art. I, sec. 25. It is not shown to be arbitrary or capricious or unreasonable.

The sale of beer under the license of plaintiffs, however, is not forbidden by the regulation of the commission. Sales in 32-ounce or quart bottles are forbidden under uniform standards of measures established by the commission under the police power of the state. Wholesalers of foods and of other harmless commodities are required to comply with regulations fixing capacities of containers. If not unrea-

sonable, they are sustained by both federal and state courts. The statute does not require the commission to make 32-ounce or quart bottles a standard of measure for beer. The capacities of the containers may be in fractions or multiples of a quart. Uniformity in sizes of containers facilitates inspection and labeling of contents for the protection of the public. In a recent case the supreme court of the United States said:

"The power of a state to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See *Turner v. Maryland,* 107 U. S. 38, 51-54. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended." *Pacific States Box & Basket Co. v. White,* 296 U. S. 176, 56 S. Ct. 159.

The legislative grant authorizing the Nebraska liquor control commission, an administrative body, to make rules and regulations fixing and determining the nature, form and capacity of all containers used for alcoholic liquors and the order of the commission pursuant thereto were valid exercises of police power. *State v. Howard,* 96 Neb. 278, 147 N. W. 689; *Griffin v. Gass,* 133 Neb. 56, 274 N. W. 193; *Petersen Baking Co. v. Bryan,* 124 Neb. 464, 247 N. W. 39; *Id.,* 290 U. S. 570, 54 S. Ct. 277.

Plaintiffs did not plead any fact showing the invalidity of the legislation challenged as unconstitutional nor of the order of the commission. There is no equity in the bill for an injunction and the demurrer to the petition was properly sustained.

AFFIRMED.

ELVA BOOTH SEWARD ET AL., APPELLEES, V. CHURN RANCH COMPANY, APPELLANT.
287 N. W. 610

FILED SEPTEMBER 22, 1939. No. 30641.

Judgment: VACATION. A judgment by default against defendants may be set aside in equity after expiration of the term of court at which it was rendered, where the petition in equity and the evidence in support of it show that they had a valid defense to the original action, that the default was attributable to the negligence, fraud, deceit and betrayal of their attorney and that they themselves were not at fault.

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

William B. Quigley and *Barlow Nye,* for appellant.

Porter, Skaggs & Porter, contra.

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

ROSE, J.

This action was brought in the district court for Cherry county to set aside a judgment therein after expiration of the term of court at which it was rendered.

The parties are owners of adjoining ranches in Cherry county and are rival claimants to strips of meadow lands along the boundary line between their possessions. The title of the case in which the judgment was rendered was the Churn Ranch Company, a corporation, plaintiff, against Elva Booth Seward, John T. Seward and Alva S. Saxton, defendants. Saxton had a mortgage on the lands owned by the Sewards, but disclaimed any interest in other lands or in the controversy between the other parties.

Prior to the entry of the judgment, the meadow lands in dispute were fenced with the ranch of the Sewards, were in their possession and they harvested the hay thereon. Thereafter, as directed by the judgment, the Sewards were dispossessed and the fences changed to inclose the lands in controversy with the lands of the ranch company.

On the first day of the term of court beginning December 2, 1935, the judgment by default was directed against the Sewards.

November 30, 1937, the Sewards, plaintiffs, by other counsel, brought the present suit in equity against the Churn Ranch Company, defendant, praying for a decree vacating the judgment by default and permitting them to defend the action in which it was rendered. In their petition they pleaded, in substance, facts showing that the default was the result of the negligence, deceit and fraud of Lein B. Jacobson, a licensed and practicing attorney whom they had in due time employed, paid and trusted to represent and defend them in the original action; that they promptly informed him of their title and possession; that he promised to act for them as their attorney in the litigation, but, without fault on their part, failed to perform the duties of his employment and, without their consent or knowledge, abandoned the defense and invited and permitted the default; that they had no knowledge or suspicion of any reason to mistrust him as their attorney until long after adjournment of the term of court beginning December 2, 1935. They tendered with their petition an answer in the original action, pleading title and possession prior to the judgment by default.

By answer the ranch company put in issue the facts pleaded as grounds for the relief sought by the Sewards; alleged that it procured the judgment by default in good faith without fraud or misconduct of any kind; that the relief sought by the Sewards was not grantable on any ground enumerated in section 20-2001, Compiled Statutes of 1929, authorizing a district court to set aside a judgment within two years after adjournment of the term of court at which it was rendered; that the Sewards were guilty of such negligence before and after knowledge of the default as to preclude them from obtaining relief in equity; that the action was barred by their own laches. The reply to this answer was a general denial.

Upon a trial of the case at bar, the district court found

the issues in favor of the Sewards, set aside the judgment by default against them and permitted them to defend the original action. The Churn Ranch Company appealed.

On appeal the ranch company argues at length the merits of the defenses pleaded in its answer and insists that the default and resulting judgment could only have been vacated after the term of court at which it was rendered on the statutory ground of "unavoidable casualty or misfortune;" that there was no fraud on the part of the ranch company; that the failure to make a defense to the original action was due solely to the negligence of the Sewards or to their attorneys, negligence which was attributable to them; that such negligence is not an "unavoidable casualty or misfortune" within the meaning of the law; that relief in equity was barred by laches.

The applicability of these propositions to the controlling facts of the case is the important inquiry. The evidence tends to prove the following facts: The Sewards made their home on their ranch in Cherry county. They were not familiar with court procedure and did not themselves know how to protect in court their legal rights. Promptly after the sheriff served the summons upon them, they made the long trip from their home in Cherry county to Gordon, in Sheridan county, and consulted, employed and paid Lein B. Jacobson to represent them and protect their rights in the litigation to deprive them of their property. They had seen his card in a newspaper. He was a regularly licensed attorney who was permitted to practice law in the courts of Nebraska. Unknown to them he was an inebriate. At the expense of Sheridan county he had been committed to the asylum for the insane at Lincoln time and again for treatment as a dipsomaniac. On account of inebriety he had been in other hospitals in Lincoln, Omaha, Council Bluffs, Minneapolis, Hot Springs and elsewhere. He had formerly used morphine daily for about a year and had used it afterward in trying to sober up.

When the Sewards employed Jacobson, they informed him of their title and of their possession of the hay land which

the ranch company was seeking to recover. He advised them it would be necessary for them to have a survey by the state surveyor, appointed by the commissioner of public lands and buildings. They gave him $150 for expenses of the survey and afterward paid him an additional $100. Later he informed them he had gone to Lincoln promptly and had arranged for the survey. The application therefor was not filed in the office of the commissioner of public lands and buildings until May 3, 1937. Prior to the term of court beginning December 2, 1935, the Sewards consulted their attorney about the necessity of being present in court at that time and he advised them it would be unnecessary as he would have the case put over until after the making of the survey. Instead of doing so or of otherwise performing the duties of his employment as an attorney, he directed and mailed to an attorney on the other side of the case a post-card stating:

"In Seward case will say that in view of our former conversation we will not appear in the case further. Lein B. Jacobson."

This was not authorized by his clients and was unknown to them. Jacobson had appeared in the case. The post-card was received on the afternoon of December 2, 1935, by counsel for the ranch company, was then presented to the presiding judge and was treated by the court and opposing counsel as the action of Jacobson's clients. It played its part in the default. The Sewards did not know judgment had been pronounced against them until the sheriff came to their ranch to dispossess them in April, 1936. They again importuned their attorney to protect their rights and property and he assured them he would rectify the mistake resulting in the judgment. They did not know he was a drunkard until they found him in a stupor at Gordon in July, 1937. They immediately employed other counsel who brought a suit in equity to set aside the judgment, pleading the facts essential to such relief and tendering an answer stating defenses to the original action. In the trial of the present suit, the evidence contained a survey by the state

surveyor and testimony tending to prove that the judgment by default took from the Sewards approximately 42 acres of their hay land.

The false statement of Jacobson to his clients that, prior to the default, he had arranged for a survey by the state, under the circumstances related, was more than negligence. It amounted to deceit and fraud on his part and misled them to their injury. He did not keep his promise to have the case put over for the survey or inform them of his failure to do so. The mailing of the post-card was more than negligence. It was a betrayal of trust by an attorney in whom his clients confided. It is a proper inference from the evidence that the failure of the Sewards to discover the habits and infirmities of their attorney and to employ instead trustworthy counsel before the default was entered and before adjournment of the term of court was due to Jacobson's deceit and fraud. Both the adverse attorney to whom the post-card was directed and the judge to whom it was presented accepted it in good faith as the deliberate and authorized act of Jacobson for his clients. In view of such credence, it would be casting too great a burden on the Sewards to charge them with negligence, deceit and fraud of their attorney, because they failed to exercise such high degrees of discernment and sagacity as would enable them to determine in advance that he could not be trusted with legal business, though licensed to practice law and permitted by bench and bar to remain in good standing.

The equity power conferred by the Constitution on district courts is ample for the granting of relief in this case, notwithstanding limited powers granted by the statute cited. On the controlling facts the judgment by default was properly set aside. The judge who pronounced it was the judge who annulled it and held it for naught. In doing so he made no mistake.

AFFIRMED.

OVID SUTHERLIN V. STATE OF NEBRASKA.

287 N. W. 614

FILED SEPTEMBER 22, 1939. No. 30651.

1. **Forgery.** In a prosecution for forging the name of another as the maker of a check, the state has the burden of proving that such name was signed without authority.
2. ———. Where the state attempts to prove a forgery by circumstantial evidence, it is the duty of the trial court carefully to weigh the evidence, to see that the circumstances proved do not merely arouse a suspicion of guilt, but that they are of such a nature and relationship as to entitle a jury fairly to hold them inconsistent with any reasonable hypothesis of innocence.
3. ———. The evidence of the state *held* insufficient to entitle a jury to convict defendant of forgery.

ERROR to the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Reversed and dismissed.*

Joseph E. Daly and *Earl T. Knowles,* for plaintiff in error.

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

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

JOHNSEN, J.

Ovid Sutherlin, who will be referred to herein as the defendant, was convicted of forgery and brings error.

The information charges that he forged the name of B. F. Sutherlin, as maker of a $5 check. B. F. Sutherlin was his uncle. The check was drawn on the DeLay National Bank, of Norfolk, Nebraska, in favor of "Coast to Coast Store," of Fremont, Nebraska, which cashed it for defendant. It was returned by the bank, not on the ground of forgery, but with the notation, "Has no account."

Defendant claimed that his uncle had authorized him to draw the check. B. F. Sutherlin admitted the authorization. The state, however, contended that the authority did not exist.

At the close of the state's case, defendant moved for a dismissal, on the ground that the evidence was insufficient to sustain a conviction. The trial court overruled the motion, and this ruling presents the principal question of the appeal.

In order to establish a forgery, the state had the burden of proving that defendant signed B. F. Sutherlin's name without authority. *Brown v. State,* 115 Neb. 325, 212 N. W. 625; *Taylor v. State,* 114 Neb. 257, 207 N. W. 207. Since direct testimony to show the lack of such authority could not be produced, the state was obliged to rely on circumstantial evidence. Such evidence then had to be weighed carefully by the trial court, to see that the circumstances proved would not merely arouse a suspicion of guilt, but that they were of such a nature and relationship as to entitle a jury fairly to hold them inconsistent with any reasonable hypothesis of innocence. *Robino v. State,* 133 Neb. 391, 275 N. W. 463; *Vinciquerra v. State,* 127 Neb. 541, 256 N. W. 78.

The evidence relied upon by the state shows that defendant came to the "Coast to Coast Store," in Fremont, on Saturday afternoon, October 29, 1938, and asked for price quotations on some paint. After comparing these with a pocket memorandum, he told George D. Foote, one of the proprietors, that the prices were favorable and that he would call for fifteen gallons the following Monday morning.

He then asked Foote if he could get a check cashed. He produced an instrument, which Foote thought was a check for $750, and which Foote promptly declared he would be unable to cash. Defendant then inquired if Foote would cash one for $7.50 to $15 in amount. Foote replied that he might consider cashing one for $5 or $6 and filled out a counter check for $5 after defendant gave him the name of the bank on which it was to be drawn. Defendant then signed the name of B. F. Sutherlin as maker. He did not state that he was B. F. Sutherlin, nor did Foote make any inquiry as to his name.

Foote did, however, ask defendant where he lived and

was told Pierce, Nebraska. He inquired also whether defendant had ever lived in Fremont, but defendant was somewhat evasive and merely stated that he had been through Fremont many times on a truck. Defendant, as a matter of fact, was living in Fremont and had been employed a short time previously at the Montgomery Ward & Company store there. Foote admitted on the witness-stand that he had seen defendant working at this store, but stated that he did not remember such fact at the time.

When the check was returned to the Coast to Coast Store by the bank, marked "Has no account," Foote placed it in the hands of the county attorney, who signed and issued a complaint for forgery and had defendant arrested at his home in Fremont. The deputy sheriff who made the arrest testified that, when he asked defendant whether he wrote the check, defendant replied that his uncle had given it to him.

The state proved further that, at the time the check was drawn, B. F. Sutherlin had no active account at the DeLay National Bank. He had carried a small checking account there in March and April, 1937, but it had been inactive from April 27, 1937, to January 9, 1939. The assistant cashier of the bank testified that, if defendant was authorized to draw checks on the account prior to January 9, 1939, such authority ought to appear on the bank's records. The bank, however, could not produce its signature card and it had no other record of the signatures authorized to draw upon the account, nor did the witness purport to have any independent knowledge or recollection.

On January 9, 1939, B. F. Sutherlin reopened the account with a $50 deposit, and the bank at that time required him to execute a new signature card. He did so and had defendant sign the card also, so that by merely writing B. F. Sutherlin's name defendant could draw on the account, up to $20 in amount.

While we are concerned at this point solely with the sufficiency of the foregoing evidence to establish that defendant signed B. F. Sutherlin's name without authority and to

warrant the trial court in allowing the jury to pass on his guilt as a forger, it may be interjected in passing that B. F. Sutherlin never had claimed that the instrument was a forgery, and that he at all times asserted that he had given defendant authority to draw the check. On the witness-stand for defendant, he testified that, some time previously, defendant had loaned him $26, on which he made a payment of $6 about October 1, 1938, at Sioux City, Iowa. He testified further that he told defendant at the same time that he was expecting to move back to Norfolk in two or three weeks and would reopen his account at the DeLay National Bank, and that defendant could draw $5 or $10 a month out of the account, until the indebtedness was cleaned up, by issuing checks in the witness' name. He claimed that he had been delayed in leaving Sioux City and in reopening the account by some injuries which he thereafter sustained.

It may be added also, as a matter of passing interest, that defendant's testimony showed that he had formerly lived in Pierce, Nebraska; that the paint on which he was seeking prices was to have been purchased for another uncle who was then living near Pierce; that he never returned to the Coast to Coast Store for the paint because his father advised him the same evening that other arrangements had already been made. He testified also that the $750 check which he showed Foote represented the down payment on a farm which his father had sold for the John Hancock Life Insurance Company, and which his mother had asked him to deliver to his father.

But, returning to a consideration of the question which the trial court was required to pass upon at the close of the state's case, it is our view that the circumstantial evidence on which the state relied to prove a forgery was insufficient to permit the jury to find that defendant signed B. F. Sutherlin's name without authority, and that defendant's motion to dismiss should have been sustained.

Defendant may have issued and cashed a check which he had reason to believe was worthless. He may have succeeded in getting the instrument cashed by leading Foote

to believe that his name was B. F. Sutherlin. These circumstances, however, would not sustain the present conviction. This is not a prosecution for making or uttering a worthless check or for obtaining money under false pretenses. No matter how worthless defendant may have known or had reason to suppose his uncle's check to be, and no matter how carefully he may have concealed his own name from Foote, he still was not guilty of forgery, if he had authority to sign his uncle's name.

On the evidence produced by the state, we do not feel that the jury were entitled to put the felon stamp of a forger on this twenty-one year old defendant. After all, it must be admitted that there is at least a bit of anomaly in accusing one of forging the name of another where the latter, not as an obviously belated condonation, but from the very start, asserts that the authority to sign his name at all times existed.

The trial court should have sustained defendant's motion to dismiss at the close of the state's evidence.

REVERSED AND DISMISSED.

IN RE ESTATE OF CLARA STERNECKER.
LILLIAN RABOURN, APPELLEE, V. CHARLES STERNECKER, ADMINISTRATOR: CLARA M. STERNECKER, APPELLANT.
287 N. W. 659

FILED SEPTEMBER 29, 1939. No. 30666.

Gifts. "One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory." The person asserting it (a gift) "must prove all the essential elements by clear, direct, positive, express and unambiguous evidence." *Hild v. Hild*, 135 Neb. 896, 284 N. W. 730.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Davis & Vogeltanz and *R. A. Haggart*, for appellant.

T. T. Bell, W. A. Prince and *Frank E. Landis, contra.*

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

SIMMONS, C. J.

This is an action brought to determine the ownership of certain shares of building and loan stock. Clara Sternecker died intestate in January, 1937. Probate proceedings were had in her estate, and her son, Charles, was appointed administrator. He filed his final report and petition for distribution, showing, among other things, that the heirs at law were Charles Sternecker (the administrator) and Joseph Sternecker, sons of the deceased, and Lillian Leth Rabourn, a granddaughter of the deceased, each of whom inherited an undivided one-third interest in the property of the deceased.

Lillian Rabourn, hereinafter referred to as the plaintiff, filed objections to the final report, alleging that the administrator had not reported, nor accounted for, certain building and loan stock belonging to the deceased. To that objection, the administrator answered that the deceased was not the owner of any building and loan stock at the time of her death; that all of the stock in which deceased was interested "was by her direction issued to her and various other persons, or the survivor of them;" that said stock became the property of the survivors, and "that said transactions were made at various times over a period of about ten years, the exact dates of each transaction, *and all other details of which are not known to your administrator.*" (Italics ours.)

The administrator subsequently amended his answer and alleged that when he filed his original answer he did not have complete information regarding the stock; that he had since made an investigation and found that two certificates of stock, totaling $1,400, in a Lincoln company, were issued to "Clara Sternecker, Clara M. Sternecker, or survivor," that eleven certificates in an Ord company, totaling $3,750,

were issued to "Mrs. Clara Sternecker, Clara M. Sternecker, either one or the survivor," and that one certificate for $500 in the Ord company was issued to "Mrs. Clara Sternecker, Chas. Sternecker, either of them or the survivor." This last certificate was issued in 1923, the two Lincoln company certificates were dated in 1927 and 1929, and the remainder of the certificates were issued between September, 1930, and January 1, 1933. He further stated that certain certificates were issued to the deceased and her son, Joseph, or the survivor, "the details of which are not known to your administrator."

The plaintiff then filed additional objections charging that for 35 years Charles was in full charge of his mother's business; that beginning in July, 1935, he was her legal guardian; that it was the intent of the deceased that said stock should pass to the three heirs in equal shares; that Charles took advantage of his control over his mother's property, her age and mental condition; disregarded his mother's wishes and directions and fraudulently had the stock issued and carried in the name of Clara M. Sternecker, the daughter of Charles; that all of the money invested in said stock was the money of deceased; that after his mother's death Charles delivered the stock to the others named in the certificates and that the certificates are assets of the estate and should be accounted for as such.

Clara M. Sternecker was made a party, and, in a joint answer with her father, denied the allegations of the objections except such as had been admitted in the answer of Charles.

The issues as made were tried to the county court, and a decree entered finding that the stock belonged to the estate. The matter was appealed, tried to the district court, and the decree of the county court was affirmed. Clara M. Sternecker appeals to this court.

The record discloses that the deceased's husband died many years ago, that the deceased inherited a life estate in the home farm, and raised her family there. Charles remained at home for some years after the others moved away,

and generally worked for his mother and aided her in her business. He appears to have been her trusted son and agent throughout all the later years of her life.

Some fifteen years before her death, the deceased rented the farm, moved to Elba, and purchased a home. This home was subsequently deeded to Charles, although the deed was not placed of record until after he became the guardian of his mother in 1935. Up until her guardianship, the deceased collected the rents from the farm and accumulated considerable money. The mortgage on the farm was paid off. She loaned some money to people which was not repaid. With minor exceptions, the balance of her moneys was ultimately invested in the building and loan stock now in controversy.

Parts of the testimony of Charles and Clara M. Sternecker, given in county court, was taken down by a stenographer, and their testimony given in county court was testified to in district court.

During the time here involved, the deceased lived in Elba, Charles on a farm near Ord, Joseph in St. Paul, Nebraska, and the plaintiff, for the last ten or eleven years, in Des Moines and Denver.

There is no question but that, so far as the building and loan stock is concerned, the entire matter was handled by Charles. He sent the money to Lincoln and directed how the stock was to be issued and to whom. He took the money to Ord, purchased the stock, and directed how it was to be issued. On one, or possibly two occasions, the deceased accompanied Charles to Ord, and in her presence Charles directed how the stock was to be issued. There is no testimony as to which certificate was issued when she was present. There is no testimony that the deceased ever directed the stock to be issued as it was issued. Clara M. Sternecker did not testify in district court. She was asked in county court: "Did you have any talk with your father about how he was going to have these made out, those he deposited for?" She answered: "The only thing I can say, I never asked him. That instead of making out in his name *he had them made in*

mine. That was the same as it did not make any difference. That was all right. I am his daughter." (Italics ours.)

After issuance, the stock was delivered to the mother, and it appears that it remained in her possession until after her death, including the period of her guardianship. After her death, it was delivered by Charles to the named survivors. At the hearing in the county court, Charles disclaimed definite knowledge of its whereabouts, except as to one certificate. Subsequently, upon orders of the county court, he produced and surrendered the stock in court, including that held by Joseph, who does not claim ownership of the $1,100 which was issued bearing his name as survivor.

There is no testimony that the deceased ever knew that the certificates were made out to others with her. There is testimony by Charles that she "read" not more than three of the certificates, and no testimony that she understood how they were made out or approved such disposition of her funds.

There is testimony that Charles considered the money was his prior to his mother's death, and that his mother was to have the interest upon it during her lifetime. Possibly, this testimony should be limited to the one certificate made payable to him as survivor. Charles testified that it was not his daughter's money until his mother gave it to him for her. Clara M. Sternecker never had the certificates in her possession until after her grandmother's death.

Charles was appointed guardian for his mother in July, 1935. He reported her real estate, no personal property, and in particular did not report the building and loan stock as assets of her estate. In his guardian's report, he shows the collection of interest on this stock, does not report the stock, and certifies that he had "accounted for all of said estate that has come into his possession or knowledge, or the possession of any one for him."

As proof of the fact that the mother did not understand, direct, or approve of the disposition that Charles had made of her property through these certificates, the plaintiff offered the testimony of six disinterested friends and neigh-

bors of the deceased for many years, who testified that on many occasions down to and including the months before her death the deceased told them of her ownership of money and building and loan stock, and that it was to go to Joe, Charles, and Lillian in equal shares.

The plaintiff testified that the deceased told her that she was to have her mother's share, and that Charles had possession of the deceased's money and took care of her affairs.

There is no testimony that the deceased ever told Clara M. Sternecker that she was to be the beneficiary of these funds, or that she ever discussed the matter with her.

This record clearly establishes the fact that the deceased trusted the investment of this money for her to her son Charles, that the disposition of the money invested in these certificates through the device used was Charles' idea, and not that of the deceased; that it was Charles', and not the deceased's disposition of her estate; and that the deceased did not authorize, intend or approve the attempted disposition thereof, and that the deceased did intend that this property, along with her other property, should pass equally to Charles, Lillian, and Joseph, as her heirs at law.

The transfer of the property here involved can only be sustained on the theory that it was a gift from the deceased to her son Charles and her granddaughter, Clara M. Sternecker. The evidence fails to show one of the essential elements necessary—that of a donative intent.

"One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory." *Hild v. Hild*, 135 Neb. 896, 284 N. W. 730.

The person asserting it (a gift) "must prove all the essential elements by clear, direct, positive, express and unambiguous evidence." *Hild v. Hild, supra.* See, also, *Johnson v. Omaha Loan & Bldg. Ass'n*, 128 Neb. 37, 257 N. W. 370; *In re Estate of Johnson*, 116 Neb. 686, 218 N. W. 739; *Henley v. Live Stock Nat. Bank*, 127 Neb. 857, 257 N. W. 244; 28

C. J. 622, 626, 662, 664, 681.

In *Ward v. Geary*, 114 Neb. 50, 205 N. W. 1000, this court considered a case where the evidence was much stronger in behalf of the contention of a gift than is the evidence in the instant case. This court there held that the property involved belonged to the estate of the deceased.

Here, also, the evidence fully justifies and requires a finding that the property involved belonged at all times to the deceased and passed at her death as property of her estate.

This conclusion makes unnecessary the consideration of the other questions discussed in the briefs of the parties to this litigation.

The decree of the trial court is

AFFIRMED.

STATE, EX REL. HENRY M. SCHOONOVER, APPELLANT, V. GEORGE M. CRABILL ET AL., APPELLEES.
287 N. W. 669

FILED SEPTEMBER 29, 1939. No. 30564.

1. **Statutes:** AMENDMENT: CONSTRUCTION. "An act of the legislature, the sole purpose of which is stated in the title to be to amend a specified section of a complete and comprehensive act, makes the section so amended a part of the original act, which must, if possible, be so construed as to give it a meaning consistent with the whole act." *State v. Coupe*, 91 Neb. 463, 136 N. W. 41.
2. ———. "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone*, 92 Neb. 748, 139 N. W. 636.
3. **Mandamus.** Mandamus issues when, and only when, there is a right to decree, and a corresponding duty to perform, the act required; the absence of either of such elements will make its issuance fatal.
4. ———. "Where mandamus is sought, relator must show clearly and conclusively that he is entitled under the law to the particular act or thing desired, and that the respondent is legally obligated to give him what he asks." *State v. City of Lincoln*, 68 Neb. 597, 94 N. W. 719.

5. **Municipal Corporations**: RESIDENTS. "An actual resident within the meaning of the statute in relation to the incorporation of villages is one who is in a place with the intent to establish there his domicile or permanent residence, or has done so." *State v. Mote*, 48 Neb. 683, 67 N. W. 810.
6. **Evidence** in the record examined, and *held* ample to sustain the judgment of the trial court.

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

Mothersead & York, for appellant.

Frank Glebe, Rush C. Clarke and *Robert W. Patterson, contra.*

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

EBERLY, J.

This in an action of mandamus to compel the county commissioners of Scotts Bluff county, Nebraska, to allow the incorporation of the village of Terrytown. Issues were joined by the return or answer to the alternative writ, and a trial thereof resulted in a finding in favor of respondents and a judgment dismissing relator's proceedings. From the order of the trial court overruling the motion for a new trial, relator appeals.

The territory sought to be incorporated as "Terrytown," somewhat irregular in configuration, consists of a tract of cultivated agricultural land. It may be said that the present boundaries of the city of Scottsbluff are coincident with east, west, and north boundaries of the proposed village of Terrytown. All the "taxable inhabitants" and "actual residents" of this proposed corporation are to be found, and live, in a single row of trailer houses and tar-paper shacks, which, together with one or two houses of more substantial construction, extend from north to south along and adjacent to the north and south public road, which extends over and across the premises and forms in part one of the boundaries thereof. These "improvements" are situated upon "lots"

which are said to be 25 feet in width, which face, are contiguous, and communicate with the public road. No plat as required by our statutes is shown to exist, either recorded or otherwise. Comp. St. 1929, secs. 17-415, 17-426. Though the record is entirely barren of evidence as to the exact dimensions of these lots thus occupied, photographs of the *locus in quo* clearly disclose that the depth of the occupied lots is relatively short, and that the entire tract thus occupied by petitioners constitutes but a small portion, comparatively, of the entire tract described in the petition for incorporation. The testimony of the relator Schoonover, in substance, includes, viz.: That he is one of the petitioners; that he is single and has lived on the land involved "close to three years," and lives in the house on lot number 1; that through Terry Carpenter he was in charge of placing people who came there on the land sought to be incorporated; that people who desired to locate in Terrytown would see Schoonover, and register in a book kept by him; that they were then assigned to lots which they would occupy with their respective shelters, without any further lease or agreement, and wholly without rent or compensation or any obligation to pay the same, either present or in the future; that they remained, however, subject to the will of Terry Carpenter; that if they failed to keep the place assigned to them clean, or failed to get along peaceably with others of the community, they were required to leave; that otherwise the members of this community go where and when they please and without obligation to advise any one of their departure.

It appears that the population is largely transient; that some brought their shelters with them to Terrytown and removed them when they left, and that others arriving purchased their shacks from squatters who had preceded them and were leaving. It also appears that the turnover in the constitutent elements of the population was so great that, between the time of the filing of the petition and the trial of the case, the identity of more than half of the community had changed, and had been replaced by new arrivals; that none of the improvements made was per-

manent, at least to the extent of attaining the classification of real estate; and that numerous of the trailers which were located on these lots when the petition for incorporation was filed were gone when the trial was had, having been removed by their owners at various times in the interim.

While we are not advised as to the nature of the title involved, Terry Carpenter appears in this record as exercising ownership over the premises as an entirety. He is not a party of record to these proceedings. He did not sign or execute the petition for incorporation filed with the board of county commissioners, which furnishes the basis of this lawsuit. His consent in writing or written approval thereof was not submitted to the county board. It appears that the object originally sought to be accomplished in the creation of this community was to provide a refuge for those whom "the city and county sought to eliminate from the places where they were living," and for "people who were being pushed around through fear of the law and fear of what they thought was the power to move them around." It fairly appears that the actual relation sustained to the owners of this land by these so-called "taxable inhabitants" and "actual residents" was not that of landlord and tenant, but rather that of licensor and licensees. The licensees received merely a privilege to occupy under the owner. 35 C. J. 954. Nevertheless, the relator further contends that, under the facts recited, they were entitled to have an order of incorporation entered by the board of county commissioners on their records, as required by section 17-201, Comp. St. 1929, which is, in part, as follows: "Whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated under any laws of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village, and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable

inhabitants of the proposed village have signed such petition, and that inhabitants to the number of one hundred or more are actual residents of the territory described in the petition, the board shall declare the proposed village incorporated, entering the order of incorporation upon their records," etc.

Mandamus issues when, and only when, there is a right to decree, and a corresponding duty to perform, the act required; the absence of either of such elements will make its issuance fatal. *State v. Wenzel,* 55 Neb. 210, 75 N. W. 579.

We regard it as elementary that, "Where mandamus is sought, relator must show clearly and conclusively that he is entitled under the law to the particular act or thing desired, and that the respondent is legally obligated to give him what he asks. *State v. Kendall,* 15 Neb. 262; *State v. Wenzel,* 55 Neb. 210; *Laflin v. State,* 49 Neb. 614." *State v. City of Lincoln,* 68 Neb. 597, 94 N. W. 719.

Our original act providing for the organization, government and powers of cities and villages was enacted in 1879. See Laws 1879, p. 191. The legislature of 1881, by the adoption of chapter 22 of the Session Laws of that year, under the title, "An act to amend section forty of an act entitled 'An act to provide for the organization, government and powers of cities and villages,' approved March 1, 1879," added, as an amendment of the act of 1879, the language hereinbefore set forth upon which relator relies. The rule of construction applicable, established by precedent, is, viz.: "An act of the legislature, the sole purpose of which is stated in the title to be to amend a specified section of a complete and comprehensive act, makes the section so amended a part of the original act, which must, if possible, be so construed as to give it a meaning consistent with the whole act." *State v. Coupe,* 91 Neb. 463, 136 N. W. 41.

Further, "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone,* 92 Neb. 748, 139 N. W. 636.

It follows that the language upon which relator relies must be construed in connection with other provisions of the act of 1879, as since amended, in order that it may be given proper force and effect. Thus, we have repeatedly held that strictly agricultural lands are not properly subject to this process of incorporation. Ordinarily, mandamus will not be employed to secure a vain thing.

In the instant case the record establishes that, prior to the denial of the prayer of the petition for incorporation, the members of the board of county commissioners made three separate trips of investigation to Terrytown. They fully examined into the situation. The action of the board thereafter was unanimous in the denial of the prayer of the petition. The statement claimed to have been made by one of the members of the board which, it is insisted, evidenced prejudice or caprice, if made, was wholly unknown to the other two who constituted a majority of such board. Therefore, the fact, if it was a fact, that a single member of the board made it, would not adversely affect the validity of the unanimous action of such board. But this claimed statement is fairly denied by the member of the board who is charged with having made it. Circumstances tend to corroborate him, and the clear preponderance of the evidence is against this claim of relator.

It is equally obvious that the relator has failed to establish his contention by requisite proof, "that inhabitants to the number of one hundred or more are actual residents of the territory described in the petition."

"An actual resident within the meaning of the statute in relation to the incorporation of villages is one who is in a place with the intent to establish there his domicile or permanent residence, or has done so." *State v. Mote*, 48 Neb. 683, 67 N. W. 810.

It thus necessarily involves the idea of permanency, and this, every physical fact in the proof tends to negative. All the facts and circumstances set forth in the record tend to disclose a mere temporary presence by a transient people, who are licensees only. It fails to establish Terry-

town as the place of their actual or permanent residence or domicile. The burden of proving this fact was, by the form of the issues, imposed on relator. He has failed to carry it.

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

AFFIRMED.

HULDA HACKBART, EXECUTRIX, APPELLEE, V. EDWARD H. ROHRIG ET AL.: RICHARD ROHRIG ET AL., APPELLANTS.
287 N. W. 665

FILED SEPTEMBER 29, 1939. No. 30601.

1. **Appeal.** When the answer in an automobile damage case sets out as a defense that plaintiff's decedent had been engaged in drinking intoxicating liquor just prior to the accident, and was not in a condition to, and did not, exercise due, ordinary, and reasonable care, and evidence in support thereof is produced on the trial, it is reversible error for the court to fail to instruct on such defense.
2. **Trial.** It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not.
3. **Appeal.** If the court fails to give instructions substantially covering the issues supported by the evidence, it is prejudicial error.

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

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

Matschullat & Matschullat and *Erwin A. Jones, contra.*

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

PAINE, J.

This is an appeal by the defendants from a judgment entered against them as the result of an automobile accident. Plaintiff brought the action as the executrix of the

estate of her late husband, Albert Hackbart. In the petition one cause of action was for wrongful death, one for pain and suffering, and another for medical and hospital bills. Plaintiff in open court dismissed the cause of action for wrongful death. On the remaining first cause of action, the jury returned a verdict for $1,900, and on the last cause of action, $674.20; total verdict, $2,574.20. The trial court required a remittitur of $900 on the first cause of action as a condition to overruling the motion for new trial. Judgment for $1,674.20.

At the close of the evidence the plaintiff dismissed the action as to John Rohrig, Edward H. Rohrig, Jacob E. Rohrig, and Robert Rohrig, individually and as doing business as the Shogo Lithia Springs Company and the Rohrig Distributing Company, leaving as defendants herein only Richard Rohrig, who testified that he was sole owner of Rohrig Distributing Company, and Conrad Knopp, who was the driver of the truck which was in the collision.

The Rohrig Distributing Company is the wholesale distributor for Budweiser beer in the general territory between Ashland on the east and Exeter on the west, but not including Lancaster county.

The defendants insist in their brief that "this accident never could have occurred, except by the driver of the Ford coupé turning out of his way and plunging into the front of the truck." Defendants charge that this was the result of intoxication, and that the judgment should be reversed because the trial court entirely failed to instruct the jury on this phase of the case.

The defendants set out as their first proposition of law for reversal: "Where all the occupants of an auto engage in a drinking bout, none can recover for injuries caused by the negligent driving, if the jury find the drinking to be a contributory negligent act, which, even, if not amounting to drunkenness has rendered the parties incapable of exercising the care of a reasonably prudent person;" and as their second proposition of law: "It is reversible error for the trial court not to submit to the jury proper instructions

setting forth the defendants' theory of the case, it being the positive duty of the trial court to submit all the issues to the jury."

As to the place of the accident, we can best describe it by saying that, about 18 miles west of Lincoln on O street, that street divides, and two paved federal highways turn from it at this point, No. 34 turning to the north and going to Seward, while No. 6 turns to the south and goes to Milford, and across the top of the "Y" made by the separation of these two roads is No. 15, which runs north and south straight through on the section line, thereby closing the top of the "Y". The accident occurred at the upper right-hand corner of the "Y", where No. 15, running straight north, connects with No. 34, coming from Seward, and occurred in that part of the intersection just as No. 34 was starting to turn off from No. 15 to join No. 6 at the lower point of the "Y".

The first vehicle involved in the crash was a very old light coupé, being a 1929 Model A Ford, in which three men were riding on the seat; the plaintiff's decedent was riding as a guest, the Ford being driven by Peter Gerken, and Alonzo Weber was also a guest, these three men being all killed as a result of the accident. The other vehicle was a 1937 Dodge truck, loaded with a ton and a half to two tons of Budweiser beer, and being driven by Conrad Knopp, 35 years of age, who was riding alone, and was the regular driver for the Rohrig Distributing Company, of Lincoln.

The accident occurred about 5:30 p. m. on December 1, 1937, after dusk, when the lights were burning on both cars, and was a head-on collision between the truck coming from Seward on No. 34 and starting to make the turn at the intersection with No. 15, while the Ford was driving directly north on No. 15, and the driver turned the same to the right without giving any warning thereof, and failed to give the right of way in the intersection to Conrad Knopp, who was in the intersection first, and Knopp testified that the Ford turned to the east across the intersection and ran directly into his truck.

The particular errors which the defendants rely upon for reversal are based upon the fact that the court, in giving its instructions to the jury, failed to set out the defense of intoxication in reference to the plaintiff's decedent, or the driver of the car in which he was a guest, as charged in the answer.

The court in instruction No. 1, in setting out the allegations of the defendants' answer, used this language: "Defendants specifically deny any negligence in connection with the accident on the part of their driver Conrad Knopp and allege that the accident and resulting damages and injuries to plaintiff's husband, if any, were directly, solely and proximately caused by the negligence of the driver of the car in which Albert Hackbart was riding. Defendants allege that Peter Gerken, the driver of the car in which plaintiff's husband was riding, was negligent, and that such negligence was the proximate cause of the accident in the following particulars: That Peter Gerken turned his car to the right immediately prior to the accident so as to run it directly into the truck driven by Conrad Knopp, and failed to keep a proper lookout and have his car under reasonable control; failed to apply his brakes, stop, or slacken the speed of his automobile before striking the truck; and failed to turn his automobile away from the path of the truck driven by Conrad Knopp, driving the same at an excessive rate of speed greater than reasonable and proper, having regard for the conditions of the roadway and the traffic thereon, and turned the same to the right without giving any warning of his approach, and failed to give the right of way in the intersection to Conrad Knopp who was in the intersection first and turning to the east across the intersection."

In the answer, of which this instruction purported to be an abstract, we find the following allegations:

"7. Allege that if the said Albert Hackbart sustained the injuries and damages in the collision described in plaintiff's amended petition which caused the death of the said Albert Hackbart, that the same were proximately caused

or contributed to by his careless and negligent acts of omission and commission in the following respects: * * *

"c. In that the said Albert Hackbart at the time and place of the said accident and prior thereto was engaged knowingly and voluntarily in riding in an automobile being operated by Peter Gerken who had been drinking intoxicating liquor and who was at said time and place under the influence of intoxicating liquor. * * *

"h. In that Albert Hackbart himself had been, prior to the said accident, engaged in drinking intoxicating liquor and was not in the condition physically and mentally to exercise due and ordinary care and did not at said time and place exercise due, ordinary and reasonable care."

It therefore appears that the trial court omitted any reference whatever to drinking or intoxication in setting out the allegations of the answer, and the question at once arises whether the defendants produced evidence in support of these allegations.

Part of the evidence in regard to drinking and intoxication is to be found in two depositions. The first is the deposition of Ben Schuknect, who testified that he ran a beer tavern, called Pines Café, in Milford, and on December 1, 1937, he had just moved from an uptown place of business down to highway No. 6; that he had been acquainted with the plaintiff's decedent, Albert Hackbart, for about 25 years, as he had lived neighbor to him while they were both farming, and that he had only quit farming in February, 1937; that he had been acquainted with Peter Gerken, who drove the Ford on the afternoon of the accident, for about 15 years; that Peter had worked for him as a harvest hand during threshing time, and that he had known the third man in the Ford, Alonzo Weber, for about 25 years; that he had played cards with him; that these three men were in his place of business on December 1, 1937; that they came in his old place of business uptown in Milford at about 4 o'clock that afternoon and said they wanted some beer, and he told them he was sorry but he had moved down to the new place on the highway; that

about 4:30 to 4:45 they came into his place on the highway called Pines Café, and ordered some beer; that Pete drank three bottles of beer, Lon (meaning Alonzo Weber) drank three, and Albert drank two bottles of beer, all of them being pint bottles; that they were served by the lady, Mrs. Ficke; that all of the bottles of beer were alcoholic beer; that they might have been drinking beer before they came there for all he knew; that about the time they left Pete said he told "the Mrs." he would have Albert home at 5 o'clock, and it was a little after five when they left; that at 6 o'clock he first heard of the accident, when he was in the butcher shop.

The deposition of Reinhard Bluhm was offered by the defendants, and the direct examination read by Mr. Doyle. He said he had been in the beer business at Milford for a little more than ten months; that he was acquainted with Peter Gerken, Albert Hackbart, and Alonzo Weber; that he had known Peter Gerken 15 or 20 years, had business dealings with him once or twice, and had been neighbors with him; that Peter Gerken lived around Ruby, and that he had a speaking acquaintance with him; that he had been a farmer all his life except the last four years; that he had known Albert Hackbart for 15 years, and Alonzo Weber 25 years; that he had sold grain to Weber when he was in the elevator in Ruby years ago; that these three men came to his place of business in Milford on December 1, 1937, around 3 o'clock in the afternoon of that day, or a little later; that they had been to a sale before that, and they were talking about the sale; that they stayed in his place of business from half to three-quarters of an hour, drinking beer; that they took two bottles apiece, or one time had a bottle of beer apiece and one time a glass of beer apiece. The beer was served in 14-ounce glasses, and there were 12 ounces in the bottles. He said that the tap beer that he sold them in the glasses was Storz beer. He testified that he was pretty busy that afternoon, and did not have much time to talk with them, or pay much attention to them, and that he did not notice when they went out

of his place of business; that they appeared normal to him; that he did not observe how they walked when they came in or when they went out.

The evidence discloses that there were three eyewitnesses close to the accident. Alfred Chantry, a lineman for the Iowa-Nebraska Light & Power Company since 1924, who lives in Seward, was riding in the truck, going straight north on No. 15. Frank Barney was driving the truck. They were driving from Crete to Seward, and the Ford coupé passed around them about three-quarters of a mile from where the collision occurred. They were driving about 25 or 30 miles an hour. He testified that the truck of the defendants had turned east on No. 34 prior to the accident, and was clear to the east edge of the highway, and that the Ford *swerved* to the east about the length or width of the car towards the truck. Frank Barney testified that the lights of all the cars concerned were lighted, and that the Ford had passed them to the south of the intersection of No. 6 and No. 15, and that he was driving his truck from 20 to 28 miles an hour, and that he would estimate the speed of the Ford when it passed him at 30 to 32 miles an hour. He looked immediately after the impact, and said that the Ford caught fire immediately after the collision.

Conrad Knopp, the driver of the Dodge truck belonging to the defendants, was the third eyewitness to the accident, and he testified that all of his nine lights were on at the time of the collision, and had been burning for about half an hour before the collision; that the lights would show better than any arm signal. He further testified that, if the Ford had continued straight north in its lane of travel, there would have been no accident, but that the Ford first started to turn to the northwest, and when the cars were about 30 feet apart the Ford driver suddenly turned straight east and drove directly into his truck.

One or two of the men who were picking up the bodies and putting them in the ambulance testified that they smelled no liquor on them. However, the question of in-

toxication as a contributing cause was emphatically alleged in the answer as a defense, and the two tavern-keepers' testimony showed that Gerken and Weber had had at least four 12-ounce bottles and one 14-ounce glass of beer apiece, and Hackbart one bottle less, in the two hours they had been in the two taverns, from which they left in a hurry, as they were late getting one of the parties home.

The word "intoxication" does not mean a drunken stupor, or drunkenness, but means any degree of intoxication which, under all the circumstances, proximately causes the doing, or refraining from doing, of any act which is classified as a negligent act.

In our opinion, the allegations in the answer, supported by the evidence of Chantry and Knopp, that just before the collision the driver of the Ford suddenly changed his course and drove directly into the front of the truck, required the court to set out this defense of intoxication in his summary of the allegations of the answer to the jury. Beer is included under the term "intoxicating liquor."

In 14 R. C. L. 727, sec. 3, it is said: "It is a familiar rule that the court is required to state to the jury all the issues joined by the pleadings upon which *any* testimony has been offered."

Our court has said many times: "It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues that are raised by the pleadings and that are supported by the proof." *Kimball v. Lanning*, 102 Neb. 63, 165 N. W. 890. See, also, *Carlson v. Roberts*, 133 Neb. 166, 274 N. W. 473; *Mackechnie v. Lyders*, 134 Neb. 682, 279 N. W. 328; *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677.

In *McGrath v. Nugent*, 133 Neb. 237, 274 N. W. 549, it was held to be error for the trial court to fail to instruct on the issue of contributory negligence when raised by the pleadings and supported by the evidence. In that case there was no question but what the driver of the car and others had been drinking whisky, and that the effects of the liquor were evident.

In the opinion of the court, the trial court erred in omitting any reference to intoxication in setting out the defenses as pleaded in the defendants' answer, and that this error was in no way cured by requiring the plaintiff to file a remittitur of $900 as a condition for the overruling of the motion for new trial. Judgment reversed and new trial ordered.

REVERSED AND REMANDED.

STATE, EX REL. CHARLES SMRHA, V. COSMOPOLITAN OLD LINE LIFE INSURANCE COMPANY: HERMAN F. GARTNER, INTERVENER, APPELLANT: GEORGE J. WAGNER, INTERVENER, APPELLEE.

287 N. W. 654

FILED SEPTEMBER 29, 1939. No. 30626.

Insurance. A court of equity cannot grant relief against the clearly expressed condition contained in a valid "benefit thrift certificate" issued by an insurance company, which provides that reinstatement of a lapsed certificate can only be had by the payment of past-due monthly instalments, with interest, within two years from the date the last payment became due.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL and JEFFERSON H. BROADY, JUDGES. *Affirmed.*

Frank A. Peterson, for appellant.

John S. Logan, Perry, Van Pelt & Marti, C. J. Campbell and *Max Kier, contra.*

Heard before ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and LIGHTNER and LANDIS, District Judges.

PAINE, J.

This is an action in equity, by which Herman F. Gartner, who held a lapsed certificate, seeks to have the same reinstated in the Cosmopolitan Old Line Life Insurance Company. Trial was had to two district judges. It was held

that Gartner, and all those certificate-holders similarly situated, had failed to reinstate as provided by the terms of the certificate itself, and that his petition was without equity, and should be dismissed. Motion for new trial overruled. Gartner appeals.

On December 12, 1936, the district court ordered the Department of Insurance of the state of Nebraska to take possession of the Cosmopolitan Old Line Life Insurance Company, and to conduct its business until further order of the court. On February 15, 1938, the district court ordered said department to proceed to liquidate the assets of said company. The court further authorized said department to enter into a reinsurance contract with the Lincoln Liberty Life Insurance Company, which contract became effective March 30, 1938, and the next day all records and effects, except $10,000 reserved for legal expenses, were turned over to the Lincoln Liberty Life Insurance Company.

From 1926 to 1929 its business had been conducted under the name of Cosmopolitan Thrift Association. During the years of its existence, from 1926 to December 12, 1936, it had issued large numbers of thrift certificates, upon which $1 per month per unit was to be paid in regularly over a ten-year period.

Said certificates provided that, if payments were not made, the holder should have 30 days' grace, but if he failed to pay within said grace period, the certificate automatically lapsed, but gave the holder two years from the date of the last payment to reinstate the same by paying all over-due payments, with 6 per cent. interest. At the end of said two-year period, the holder of such certificate lost all rights thereunder.

Large numbers of certificate-holders claim they failed to reinstate their certificates, after the Department of Insurance took over said company, because they were unable to procure the cash surrender value of any of their certificates, or to procure the loan value thereof, and therefore lost these valuable rights through no fault of their own. Such certificate-holders demanded the right within a reasonable

time to reinstate such lapsed certificates by payments of all premiums thereon, with interest.

The Lincoln Liberty Life Insurance Company, having succeeded to the rights and position of the Cosmopolitan Old Line Life Insurance Company, filed an application with the district court for Lancaster county on April 19, 1938, asking that the court consider the rights of certificate-holders, and to make specific findings, and determine whether such certificate-holders should have the right and privilege to reinstate their certificates and, if so, upon what terms and conditions.

On April 30, 1938, Herman F. Gartner, appellant herein, filed his petition of intervention, which set out all of the facts at length in reference to said matter. He further alleges in substance that on December 12, 1932, the Cosmopolitan Old Line Life Insurance Company issued to him its thrift certificate for 12 thrift units, providing for a payment of $120 on each unit, in instalments over a period of 10 years; that he made payments for two years and eight months, up until August 12, 1935, in the total sum of $384, and that, under the strict terms of his certificate, he forfeited all that he had paid and all rights under said certificate on August 12, 1937. As a justification for his failure to make any further payments subsequent to August 12, 1935, intervener sets out the taking over of said company, and the order of liquidation, and the contract for reinsurance, all as hereinbefore set out. He alleged that he could not borrow on said certificates, nor could he, or others in the same position, obtain the cash surrender values thereof, and the company utterly failed to carry out its obligations under its certificates, and conditions were such as to create great uncertainty and confusion as to the legal right and status of the certificate-holders; that the failure of intervener to make his payments was due not to his fault, but to circumstances over which he had no control. The petition was brought on behalf of the intervener and others similarly situated.

The prayer of the intervener, Dr. Gartner, was for the

court to find that such certificate-holders had not forfeited their rights under said certificates; that the court grant a reinstatement period equal to the time that was left to them for reinstatement subsequent to December 12, 1936, the date the said company was taken over by the Department of Insurance, or such other reasonable period as may be just and equitable, during which period they shall have full rights of loan and cash surrender values.

Dr. George J. Wagner, the appellee herein, intervened and filed an answer, in which he alleged that on April 31 (30), 1932, there was issued to him a thrift certificate of five units; that his certificate and the certificate of intervener Gartner, and all others similarly situated, provided in paragraph 5 thereof that the company agreed to pay to the holder at the terminal age of the certificate a proportional share of money left in the fund by reason of lapsation of other holders of said certificates, together with interest accumulations; that said provision created a contractual obligation with each and every certificate-holder, and is for the benefit of such members as shall keep their certificates in full force and effect and prevent their lapsation; that having made all payments of premiums and kept his certificate in full force and effect, he is entitled to participate, along with others who have kept their certificates in good standing, in the money left by the lapsation of the certificates of the intervener Gartner and others; that said intervener Gartner has failed to set out any legal or equitable reason or excuse to pay premiums on his certificate and for his failure to keep said certificate in force and effect; wherefore, the intervener Wagner asked that the petition of intervener Gartner be dismissed, and relief thereunder be denied.

The Department of Insurance filed its answer, alleging that it was authorized by the court and did receive all payments made by certificate-holders, and receipt therefor, and examined, adjusted, and paid all proper claims for death benefits and annuities.

The evidence in the bill of exceptions discloses that there were 1,876 certificates, representing 6,709 units, upon which

the two-year period of reinstatement expired and they had lapsed; also that, as of December 31, 1937, there were 7,824 certificates in force and effect, representing 40,708 units outstanding.

No new business was written while the company was in the hands of the Department of Insurance, nor were any loans made to certificate-holders, but applications for loans were received and filed. The cash value of intervener Gartner's certificate was $103.58 just before his two-year reinstatement period expired on August 11, 1937.

However, Dr. Gartner could not have made any application for a loan for the reason that his contract was not in full force and effect, so it had no loan value until it was reinstated. At the time the company was taken over by the Department of Insurance, Dr. Gartner's contract was delinquent, but he made three payments as of December 12, 1936, which paid his contract up to August 12, 1935. At any time for two years from that date he could have paid up his back payments, with 6 per cent. interest, and been reinstated.

Otto Gross testified that the intervener, Dr. Gartner, never made any application for a loan while it was being run by the Department of Insurance.

As to the legal questions involved, we find that the same form of contract involved in the case at bar was before this court in *Howie v. Cosmopolitan Old Line Life Ins. Co.*, 132 Neb. 367, 272 N. W. 207. It was held there that forfeitures are not favored, and will be enforced only when the contract requires. The careful discussion in the text of that opinion is in point in the case at bar. This court said in that case, in discussing this same kind of certificate: "It is not like the ordinary old line insurance policy where, by regular payments through a long course of years, the insured is building up a reserve and surplus in which he has a continued property right for a considerable time, but, as the original name under which this policy was written indicates, it was called a thrift policy, wherein the investor engaged to make his payments promptly for a definite num-

ber of years and the contract contemplated and provided that, if he so continued to make his payments, he would profit by the lapses of others. He himself, like all others, had thirty days of grace and if the current premium was paid within that time the contract was kept in force. * * * While in some respects it may seem harsh, it is in no way illegal or against public policy. It seems very evident that the contract sued upon is one in which the holder expected and had contracted to profit by the lapsations of the contracts of others who would be unable to complete their contracts to their maturities."

In this case we held that, if the certificate-holder allowed his certificate to lapse, he was not entitled to recover the cash values until he reinstated the policy.

The appellant in his argument called attention to his reply brief, in which he cites the case of *People v. Empire Mutual Life Ins. Co.*, 92 N. Y. 105, where the following rule is laid down in the syllabus: "One holding a policy of life insurance does not forfeit his policy by omitting to pay annual premiums thereon after the company issuing the policy has ceased to do business, transferred all of its assets and become insolvent."

In *Jensen v. Grand Lodge, A. O. U. W.*, 106 Neb. 66, 182 N. W. 599, this court said that the laws of the benefit association provided for automatic suspension without notice. He made his last payment in May and died in September. There was nothing to distinguish his attitude from that of a member who had made up his mind to drop his insurance. Evidence was held to establish that insured abandoned his insurance and his rights as a member.

The decree entered in this case by the trial judges set out that the failure of the Department of Insurance to make loans, or to pay the cash surrender values, did not prevent the period of reinstatement of two years from running; that the intervener Gartner and all other certificate-holders similarly situated who permitted said period to expire, without exercising their rights, lost all their rights thereunder, and finds that the petition of intervener is without

equity, and should be dismissed. Finding no prejudicial error in the record, the decree of the trial court is hereby

AFFIRMED.

JOHNSEN, J., dissenting.

The effect of the majority opinion, as I view it, is to permit a life insurance company to escape the provisions of the statutes and the rules of construction applicable to insurance contracts generally, by entangling other activities and obligations in its contracts. That to me is unsound as a matter both of legal principle and public policy. An insurance company should no more be able to dodge the insurance laws of the state, by wrapping its life insurance obligations in "thrift certificates" or savings contracts, than a liquor dealer to escape the liquor laws, by burying and distributing his products in bags of beet sugar.

The first page of Gartner's certificate binds the company, "for and in consideration of the warranties * * * in the application * * * and of the * * * premium specified in the margin," to pay his wife as beneficiary, upon satisfactory proof of death while the certificate is in effect, "twelve times the amount shown by column four (4) of the table of values herein to be insured on the date of * * * death." There is attached to the certificate a copy of an application executed by Gartner, which sets forth his age, place of birth, occupation, nationality, sex, marital status, and beneficiary designation, and which contains the following condition: "I agree that the certificate issued hereon shall not take effect until the first payment has been received by the company during my good health."

That this definitely constitutes a life insurance contract, there can be no possible doubt. The fact that a thrift or savings scheme is incorporated in the instrument does not alter its status as a life insurance obligation or exempt it from amenableness to the insurance laws of the state. My concept is that a life insurance company's business is to write life insurance. The statute (Comp. St. 1929, sec. 44-401) specifically defines life insurance as insurance upon or pertaining to the lives of persons, including endowments

and annuities, and disability benefits. Nothing else, except convenient and appropriate incidents and provisions in connection with such business, can be regarded as falling within its field. I do not recognize the right of a company to subvert its activities into other fields, nor its ability to escape the dictates of the insurance statutes by hybridizing its contracts.

I shall not here attempt to discuss whether the thrift or savings business is such a reasonable incident of the life insurance business that a company ought to be permitted to engage in it and to include provisions therefor in its insurance contracts. Assuming that it is, it is clear to my mind that, as a matter of public policy, the contract into which such a scheme is integrated must still conform to the requirements of the laws applicable to life insurance contracts.

Section 44-602, Comp. St. 1929, requires that every policy of life insurance ("except policies of industrial insurance or where the premiums are payable monthly or oftener") shall contain among other things, provisions for nonforfeitable loan and surrender values and for extended insurance. Subdivision 11 of such section requires a provision in the policy "that if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurance, and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest."

Gartner's certificate sets up a table of cash or loan values, but, if any premium is not paid within thirty days after it is due, these rights are automatically forfeited. The only privilege of reinstatement is for a period of two years from the default, by paying an amount equal to all overdue payments plus 6 per cent. compound annual interest thereon. There is no provision in the contract for extended insurance.

Gartner paid his premiums to August 12, 1935. According to the table of values in the certificate, the cash or loan

value of his contract was at that time approximately $325. This money was derived from premiums which the company had collected under a life insurance contract. The contract made no attempt to apportion the premium between its insurance obligation and its thrift feature. Gartner paid a single premium under the contract for its integrated benefits. The insurance obligation, by the very language of the contract, was predicated upon the consideration of payment of the entire premium. The fund which these premium payments created was liable for all of the company's obligations,—death losses, surrender values and thrift terminal settlements.

In this situation, whatever right, if any, the company had to disintegrate and separate the thrift benefits and the insurance provisions of the contract, and to set up different standards and scopes of contract obligation and allocate premium charges for each, it is clear that, not having done so, the insurance obligation impregnated the entire contract and left it subject to the conditions which the statute imposed upon such contracts. More specifically, when the company attempted to set up policy rights and benefits out of the premiums which it had collected on its integrated obligation, the terms and conditions of such rights and benefits had to be in accord with the provisions of section 44-602, Comp. St. 1929. Thus, for example, it could not set up loan and surrender values, derived from such premiums, which were subject to forfeiture. So, too, it was required to make any cash value, which the policy might have, convertible into extended insurance.

The majority opinion, as well as the previous case of *Howie v. Cosmopolitan Old Line Life Ins. Co.*, 132 Neb. 367, 272 N. W. 207, which it follows, seem to me to have fallen into the error of making the tail wag the dog. To me, the thrift feature of Gartner's contract, as I have already indicated, could never become more than a subordinate incident in the conduct of the company's life insurance business, and the insurance obligation, therefore, necessarily dominated any contract into which the two had been inseparably fused.

Such obviously must have been the intent of the legislature when it provided, in section 44-101, Comp. St. 1929, that the insurance business "is public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business."

Perhaps the court was somewhat confused in the *Howie* case by the fact that the insurance involved was term insurance. Gartner's contract too was a term policy for ten years. But, even as to policies of term insurance, section 44-602, Comp. St. 1929, provides for the setting up of the benefits and conditions therein prescribed which are applicable to such a contract. Under the statute, in such a policy, the provisions may be made "more favorable to the policyholder than hereinbefore required," but they cannot, in any event, be set up with limitations or conditions not in conformity with the statutory requirements. Thus,—to repeat,—loan and surrender values cannot be set up with a forfeiture provision. So, too, any cash value which a policy may have must be permitted to be used for extended insurance, "and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest." These requirements governed the duty and obligation of the company, even though the provisions of the policy did not comply with them. Comp. St. 1929, sec. 44-608.

As I view it, therefore, Gartner was entitled to have any cash value which the company had created, as of August 12, 1935, out of the premiums of his contract, applied to the purchase of other insurance, in the amount then in force under the policy. I do not know what the cost of such insurance would have been, but it probably is a reasonable assumption that $325 would more than have paid the

premium to April 30, 1938, when Gartner sought to compel the company's assignee to permit reinstatement of the original contract. If I am right in assuming that the surrender value would have purchased extended insurance to April 30, 1938, then, since three years had not elapsed from the date of default and the certificate had not been surrendered to the company, Gartner was entitled, under section 44-602, Comp. St. 1929, to have his original contract reinstated "upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest." If the surrender value would not have purchased extended insurance to April 30, 1938, or if Gartner was no longer an insurable risk, the company should, of course, have the opportunity to show these facts.

The reinstatement of the original certificate necessarily would include both the insurance and thrift benefit rights, because of their contract integration.

For the reasons stated, I respectfully dissent from the opinion of the majority.

CARTER, J., concurs in the foregoing dissent.

THOMAS A. MICEK, APPELLEE, V. OMAHA STEEL WORKS, APPELLANT.
287 N. W. 645

FILED SEPTEMBER 29, 1939. No. 30479.

1. **Workmen's Compensation.** An employee is not necessarily precluded from recovering compensation, under the workmen's compensation law, by the mere fact that after the injury he receives a larger sum, as wages, than his former remuneration.
2. ———: "TOTAL DISABILITY." Total disability, under subdivision 1 of section 48-121, Comp. St. 1929, of the workmen's compensation law, can only be held to exist where a workman is unable to get, hold or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he is fitted.
3. ———: "PARTIAL DISABILITY." "For disability partial in character (except the particular cases mentioned in subdivision 3

of this section), the compensation shall be sixty-six and two-thirds *per centum* of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but * * * not * * * more than fifteen dollars per week * * * paid during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing disability." Comp. St. 1929, sec. 48-121, subd. 2.

4. ———: "EARNING POWER." "Earning power," as used in subdivision 2, sec. 48-121, Comp. St. 1929, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.
5. ———. If any element of a workman's earning power is affected and only partially impaired as the result of an accident arising out of and in the course of employment, and the disability is not one covered by subdivision 3, sec. 48-121, Comp. St. 1929, the workman is entitled to compensation under subdivision 2 of such section to the extent of 66 2/3 per cent. of the amount of the fraction or percentage of impairment in general earning capacity, applied to the wages received by him at the time of the injury, for a period not exceeding 300 weeks from the date of the accident, and in a sum of not more than $15 a week.
6. ———. A workman who, following an accident while he was engaged in common labor on bridge construction work at $9 a week, was able to obtain and perform the work of a bartender at $15 a week, which employment he had continuously followed for more than three years thereafter, *held*, under the evidence in the record, not entitled to compensation for total disability under subdivision 1, sec. 48-121, Comp. St. 1929, but only to compensation for disability partial in character under subdivision 2 of such section.

APPEAL from the district court for Platte county: FREDERICK L. SPEAR, JUDGE. Opinion on motion for rehearing of case reported in 135 Neb. 449. *Former opinion vacated and judgment of district court reversed.*

Clarence T. Spier and *Arthur C. Bailey*, for appellant.

Reeder & Reeder, contra.

Kennedy, Holland, DeLacy & Svoboda, Edwin Cassem, Hall, Cline & Williams and *Flavel A. Wright, amici curiæ.*

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

JOHNSEN, J.

The previous opinion in this case is reported in 135 Neb. 449, 282 N. W. 262. Argument was allowed on the motion for rehearing, and various members of the bar have filed briefs as *amici curiæ.*

Criticism is made of our decision, on the ground that it awards compensation for total permanent disability to a workman who has demonstrated that he is still possessed of a substantial and continuing earning power in other employment.

Without repeating all the facts, it will be recalled that plaintiff suffered a fracture of his first lumbar vertebra, with accompanying nerve injuries. In consequence, his strength has been affected and he tires somewhat easily, is chronically constipated, and has to exert effort in urination. At the time of the accident, he was employed as a laborer on bridge construction work, receiving 30 cents an hour for a 30 hour work-week, or a weekly wage of $9. Subsequently, he obtained a job as a bartender and liquor store clerk, working 72 hours a week, at a weekly wage of $15. When the district court made its compensation award herein, he had been holding the latter job for more than three years.

The first paragraph of the syllabus of our previous opinion declares that an employee is not necessarily precluded from recovering compensation, under the workmen's compensation law, by the mere fact that after the injury he receives a larger sum, as wages, than his former remuneration. With this general principle there can be no sound disagreement. It is in accord with our previous expression (*Epsten v. Hancock-Epsten Co.*, 101 Neb. 442, 163 N. W. 767), and is amply supported by other decisions. 17 A. L. R. 205, annotation; 118 A. L. R. 731, annotation.

The opinion, however, goes further and (except as to the specific disabilities covered by subdivision 3 of section 48-121, Comp. St. 1929) holds, in effect, that unless a workman is able to do the same work as, or similar to, that in which he was engaged at the time of the accident, he is entitled to compensation for total disability, even though he is able to obtain, hold and perform work at substantial wages, in another established field of employment for which he is fitted. This is contrary to our previous declaration in *Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635, and the several cases which have followed it. In these cases we recognized that total disability, under subdivision 1 of section 48-121, Comp. St. 1929, can only be held to exist where a workman is unable to get, hold or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he is fitted. The same view was expressed in the earlier case of *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, 192 N. W. 127.

Plaintiff argues that *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254, and *Ludwickson v. Central States Electric Co.*, 135 Neb. 371, 281 N. W. 603, support our previous opinion in this case. It will be noted, however, that both these cases cite and purport to follow the rule of *Wingate v. Evans Model Laundry, supra*, and their facts are within the definition of total disability there recognized. In the *Wilson* case, hideous disfiguration prevented plaintiff from obtaining sustained employment in any field for which he was fitted. In the *Ludwickson* case, likewise, plaintiff had not procured or performed work in any established field of employment. The fact that he was able temporarily to earn $40 a month as a "graduate assistant," while attempting to rehabilitate himself at the state university, did not cause him to be any the less totally disabled, since the tasks which he did, to help defray his educational expenses, could hardly be said to constitute a sustained occupation or an established field of employment.

The rule recognized in the *Wingate* case, *supra*, that disability cannot be termed total, under the workmen's compensation law, if the claimant's earning power is not wholly destroyed and he is still capable of obtaining and performing remunerative employment, is sound and should be adhered to. 28 R. C. L. 820, sec. 106; 67 A. L. R. 790, annotation; 98 A. L. R. 732, annotation. If we are to hold a workman totally disabled who, for more than three years, following an accident, has proved an existing earning power, by getting, holding and doing remunerative work in an established and recognized field of employment, we shall be ignoring a common sense reality and bowing to medical or legal fiction. If, as plaintiff contends, disability is to be measured solely by the occupation in which the injury occurs, then there is nothing in the statute to prevent a workman from recovering compensation for total disability in any number of other occupations also in which he may subsequently engage and become injured. For example, if plaintiff were to be allowed compensation for total disability in this case and should thereafter sustain another accident disabling him from performing the duties of a bartender, the logic of plaintiff's rule, in the absence of any legislative limitation, would compel the allowance of compensation to him for total disability in both occupations.

Under the statute, on the evidence before us, we are obliged to hold that plaintiff's disability, as it now exists, is only partial and not total in character. The compensation to which he is entitled is accordingly governed by the provisions of subdivision 2 of section 48-121, Comp. St. 1929. Subdivision 2 provides: "For disability partial in character (except the particular cases mentioned in subdivision 3 of this section), the compensation shall be sixty-six and two-thirds *per centum* of the difference between the wages received at the time of the injury and the earning power of the employee thereafter * * * paid during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing disability."

Under the rule laid down in *Drum v. Omaha Steel Works*,

129 Neb. 273, 261 N. W. 351, plaintiff's wages, for compensation purposes, must be taken as $9 a week. His wages as a bartender have been $15 a week. The fact that he is earning higher wages than at the time of the accident does not, however, as we have indicated above, necessarily preclude him from recovering compensation. *Epsten v. Hancock-Epsten Co., supra.* The test, under subdivision 2 of section 48-121, *supra,* is whether any element of plaintiff's earning power has been impaired. The term wages is not a complete synonym for earning power. The ability to earn wages in one's employment is, obviously, a primary base in the admeasurement of earning power, but several other component factors are also involved. These include eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work in which engaged. If any one or more of these four elements of earning power are affected and only partially impaired, as the result of an accident arising out of and in the course of employment, and the disability is not one covered by subdivision 3 of section 48-121, Comp. St. 1929, the right to compensation is governed by subdivision 2 of such section. The right in such cases rests, as we have indicated, upon the fact that some preexisting element of earning capacity has been impaired. The extent of the compensation allowed for the impairment, however, depends upon the amount of the wages received at the time of the injury. The statute limits it to 66 2/3 per cent. of the difference between such wages and the earning power of the employee thereafter. Stating it in different terms, the measure of compensation in such a case is 66 2/3 per cent. of the amount of the fraction or percentage of impairment in general earning capacity, applied to the wages received by the workman at the time of the injury, for a period not exceeding 300 weeks from the date of the accident, and in a sum of not more than $15 a week.

In this case, plaintiff should be allowed compensation for total disability at the rate of 66 2/3 per cent. of his weekly wages of $9, or the sum of $6 a week, from February 14,

1933, the date of the accident, to March 1, 1935, when it appears that he was able to obtain employment and to engage in the occupation of a bartender. From March 1, 1935, on, his earning power, from the evidence before us, appears to be impaired 66 2/3 per cent., and he should be allowed compensation for this disability at the rate of 66 2/3 per cent. of 2/3 of $9, or the sum of $4 a week for the period prescribed by statute. Our estimate of disability is not based on the mathematics of any medical witness, but has been arrived at by taking into account all of the factors entering into plaintiff's earning capacity, reflected in the record, such as his age of 33 years, the nature of the work in which he was engaged at the time of the accident, his present occupation, the extent of his physical limitations, etc. Plaintiff is entitled also to the allowances made by the district court for medical and hospital services and for medical supplies, except that the last item should be reduced by the sum of $36 which plaintiff admits here is excessive.

Should plaintiff's injuries cause total permanent disability at some future date, provision for this situation has been made in section 48-142, Comp. St. 1929.

The previous opinion in 135 Neb. 449, 282 N. W. 262, is hereby vacated and the judgment of the district court is reversed and the cause remanded with directions to enter an award in accordance herewith.

REVERSED.

EBERLY, J., dissenting.

I respectfully dissent from the reversal of the judgment of the district court for the following reasons, viz.: That the remuneration actually received by the claimant in his present employment is made without reference to the actual value of the services for which payments are made, and partakes of the nature of a charity; that the application of the rule announced in *Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635, under the facts in this case, is unjustified; that the determination of the actual earning power of claimant, as made by the majority opinion, is wholly unsupported by the facts, and contrary to the man-

date of the controlling statutes; that claimant's employment as a bartender, under the particular facts in this case, is not an "established field of employment for which he is fitted," but an employment not only wholly unrecognized and unestablished, but interdicted by the express provisions of statute as well as by public policy.

In support of these contentions, the following is submitted:

Micek, the plaintiff, on February 14, 1933, while in the employment of defendant, in the construction of a bridge near Columbus, Nebraska, and in the course of such employment, moving acetyline tanks thereon, fell through the bridge to the ice below. As a result of this fall he suffered a compound fracture of the first lumbar vertebra and a serious impairment of the nerves leading to the bowels and to the sphincter muscles of the rectum and bladder, causing a partial loss of the functions of those organs. The medical evidence in the record is that there is no question that Micek has a traumatic spinal cord lesion; that the portion of a spinal cord subject to lesion does not regenerate; that the condition will continue and disabilities will increase with passing time; that the effect of the injuries will be to shorten his life and progressively decrease his ability to work; and that a comparison of his ability to perform hard work, which he possessed prior to the accident, with his present physical condition, discloses a 100 per cent. disability.

Micek was a married man, about 33 years of age, with a wife dependent upon him, at the time of the accident in suit. He had lived in Columbus, Nebraska, all his life. This court will take judicial notice of the fact that Columbus is situated on the main line of the Union Pacific Railway at a point from which four branch lines radiate, and is what is commonly referred to as a railroad town. He was, and is, a railway bridge carpenter, a skillful workman, and had been in the employ of the Union Pacific Railway, in that capacity, since 1925. In this employment he rated as a bridge carpenter, with regular compensation fixed at 68

cents an hour. He had been temporarily "laid off" by the Union Pacific, "but was subject to call" when this company needed his services. This lay-off did not interfere with or affect his rights of seniority with the Union Pacific. It may be said in passing that this lay-off took place but two or three weeks prior to his employment by the Omaha Steel works. He was employed by the latter for three days each week for a ten-hour day, with wages of 30 cents an hour, and was so employed at the time of the injury in suit. The result of these injuries received was to deprive plaintiff of his ability to lift objects of weight, to disbar him from following his trade, and prevent his performance of hard work of any kind whatsoever. All gainful occupations for which he had formerly possessed ability, and for which his acquired faculties and native abilities fitted him, and which constituted his natural career, were, after this accident, necessarily denied him.

However, in March, 1935, he secured employment in a "liquor store" at Columbus, Nebraska. This is not a beer tavern. His compensation is fixed by the bill of exceptions at $15 a week. He works 12 hours a day for each weekday, with one hour out for meals. He serves drinks and sells bottled goods. He performs no hard work. As to Sundays, he testifies: "Well, one Sunday we work from 12 o'clock until 6 at night and then the next Sunday I work from 6 until closing time, that is around 11 or 12 o'clock on Sundays." Thus, whether this statement is to be interpreted as six hours Sunday work or as alternately six hours and eighteen hours Sunday work, it becomes a matter of but little importance in any view of the evidence. Sunday work in the sale of alcoholic liquors constitutes an inseparable part of the contract of employment, was contemplated by the parties when the engagement was entered into, and constitutes an essential element of its due performance. It is to be noted that Micek is unable to perform this work without opportunity for resting, and a chair is provided for that purpose, in which his disabilities require him to sit and rest so that he may complete the duties of

each day, which also is not without pain and discomfort. For, without this repeated opportunity of resting, he "couldn't work at all." It is also to be noted that the undisputed evidence of the record is that Micek does not drink intoxicating liquors, and there is no evidence of any previous participation by him in the occupation of bartender he now follows. It is also to be remembered that the Omaha Steel Works is the moving party in this litigation.

Statutory proceedings to determine the compensation were commenced by way of appeal in the district court for Platte county on July 17, 1934, and the final judgment and decree was not entered therein until June 6, 1938. Plaintiff testified in person to the entire transaction involved at length at a session of the court held on September 13, 1934, and the case appears to have been opened up on June 5, 1936, and Micek again testified as to the results of the accident. During the interim other proceedings were had which necessarily challenged the attention of the trial judge to the situation presented; and such judge's personal observation of Micek, of his physical condition, his demeanor when testifying, and the progress of his disabilities, were, in all respects, extended and exceptional. The final decree was entered by the district court on June 6, 1938, in which, after referring to and enumerating the injuries suffered by plaintiff, it is stated, viz.: "As a result of said injuries plaintiff has suffered total and permanent disability within the meaning of the Nebraska workmen's compensation law, and is entitled to compensation therefor as provided in subsection (1) of section 48-121, Compiled Statutes of Nebraska, as amended," and the decree fixes the amount of the weekly payment at the sum of $6 a week.

With reference to the force and effect of this determination, Good, J., in *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N. W. 797, in discussing a similar situation, well observed, viz.:

"Under the statute, workmen's compensation cases are heard in the district court as in equity, and on appeal to this court are to be tried *de novo*. In this class of cases it

has been frequently held that, in reaching findings of fact, we will take into consideration that the trial court saw and observed the demeanor of the witnesses while testifying and was better able to judge of their fairness and credibility than is this court from the record. *Shafer v. Beatrice State Bank*, 99 Neb. 317; *Enterprise Planing Mill Co. v. Methodist Episcopal Church*, 100 Neb. 29; *State v. Leflang*, 108 Neb. 138; *Southern Surety Co. v. Parmely*, 121 Neb. 146. This rule has peculiar force and applicability in the instant case. The trial court saw and observed the physical condition of defendant (Geary), the character and extent of his injuries, as he appeared in court. * * * It clearly appears that the trial court was in a vastly better position, than is this court, to determine the weight to be given to the testimony of the medical witnesses, and to ascertain the true condition of defendant's (Geary's) injuries."

See, also, *Great Western Sugar Co. v. Hewitt*, 127 Neb. 790, 257 N. W. 61.

It is obvious that the supporters of the majority opinion, who have not seen and do not know the physical condition of this claimant, have accorded no weight whatever to the opinion and personal observations of the district judge who actually saw and observed the demeanor of this man for a prolonged period of time, and thus possessed personal knowledge thereof.

If, under the circumstances of this case, total inability to perform the work in which claimant was engaged when his injury was received, or any work similar thereto, constitutes total disability, it is obvious that the judgment of the trial court must be sustained. However, the majority opinion contends that the applicable rule is that total disability under subdivision 1 of section 48-121, Comp. St. 1929, of the workmen's compensation law, can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he is fitted; that under the facts in this case Micek is working in an established field of employ-

ment and the wages so earned and received by him prevent his being claimed as totally disabled and entitle the employer or insurance carrier, upon the basis of the wages so earned and received, to a deduction of the award made by the trial court from $6 to $4 a week. In support of this claim *Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635, and cases based thereon subsequently decided in this jurisdiction are cited. The questions so presented, even if the applicability of the rule be conceded in the instant case, must, however, be considered in the light of the further principle that, it is not sufficient, to entitle an employer to have a reduction in the weekly compensation ordered by the court, that it appear that the workman has the physical capacity to do some kind of work different from the general work he was engaged in at the time of the accident; but it must be shown that the workman, either by his own efforts or that of his employer, can actually get such work in an established and lawful field of employment and the burden of so showing (the technical burden of proof) is on the employer. *Lupoli v. Atlantic Tubing Co.*, 43 R. I. 299, 111 Atl. 766. See, also, *Cardiff Corporation v. Hall* (1911) 1 K.B. 1009; *Ball v. Coulthard & Co., Ltd.*, 12 B.W.C.C.312; *Hood v. Wyandotte Oil & Fat Co.*, 272 Mich. 190, 261 N. W. 295; *Sullivan's Case*, 218 Mass. 141, 105 N. E. 463.

It may be conceded that the occupation of a bartender, properly followed, may be considered as an established field of lawful employment. But the occupation involves experience, skill, and professional technique in the preparation, concoction and service of alcoholic liquors. In the instant case the affirmative evidence is ample that Micek did not possess the physical power necessary to discharge the duties incident to this established field of employment. There is no evidence that at the time of his first employment he had had any previous experience in the line of work he was entering upon or had any skill in the discharge of the new duties. Every fact in the record is consistent with the view that this employment had no relation to his then earning power, and that in fact it was wholly charitable,

or as a result of a feeling of sympathy in a community in which he had spent his entire life and which largely engaged in the same kindred occupation of railroading. What a workman receives as an actual charity or without reference to the real value of the services performed may not operate to the benefit of an insurance carrier. The controlling features of the evidence bring it within the principle of the case wherein we held that, where a man, the victim of an industrial accident, though confined to his bed and continuously suffering from pain, was enabled to operate a telephone and, thereby aided by the sympathy his situation engendered, maintained a successful magazine agency, his recovery for disabilities suffered should not be reduced by the earnings thus obtained. See, also, *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850; *Bennett v. Metropolitan Life Ins. Co., ante*, p. 785, 287 N. W. 609; *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254; *Ludwickson v. Central States Electric Co.*, 135 Neb. 371, 281 N. W. 603; *Nebraska National Guard v. Morgan*, 112 Neb. 432, 199 N. W. 557.

In this case it can make no difference as to the form or method by which the $15 a week was turned over to claimant as "wages paid," or whether it evidences a contribution made for the plaintiff's benefit, either directly or indirectly. If such payments were actually made upon or because of charitable motives, if really a gratuity, if the amount thereof was determined without relation to the actual earning power of Micek, or in consideration of matters and elements not involved in the work actually done and performed, such amounts thus paid may not be used as a basis for reduction of the compensation which Micek is otherwise entitled to. *Rio Grande Motor Way v. De Merschman*, 100 Colo. 421, 68 Pac. (2d) 446. This conclusion is quite in conformity with the public policy evidenced by the Nebraska workmen's compensation act. Comp. St. 1929, secs. 48-130, 48-148.

But, even if the payments made be not considered as charities, the majority opinion grievously errs in its appli-

cation of the principles announced in the *Wingate* case to the facts before us in the instant case. It must be conceded that the doctrine as there announced is not to be found in the words of our statute, but is a deduction therefrom, announced by this court in reference to the facts of the case then before it, and which necessarily constitutes a limitation in the application thereof. Indeed, in the *Wingate* case, we notice the citation, with evident approval, of the *Duprey* case in the following language, viz.: "It has been held that, when one might have found some work which he could do sitting down, it will not render his disability partial." *Duprey's Case*, 219 Mass. 189, 106 N. E. 686. Duprey was a carpenter, and the necessary use of a chair by the claimant in the instant case is indeed suggestive. But it would seem that the facts in the instant case differentiate it from the *Wingate* case and render the rule there announced wholly inapplicable.

The controlling legislative intent clearly expressed in the enactment of the workmen's compensation law of Nebraska is: "When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer." Comp. St. 1929, sec. 48-101. And where the parties in interest have by agreement, express or implied, or otherwise, accepted the provisions of Part II of the Nebraska workmen's compensation act, compensation for such personal injuries shall be determined in the manner and pursuant to the formula in such Part II prescribed, ever keeping in view the ultimate end to be achieved.

This word "compensation" we find repeatedly employed throughout this enactment in connection with every injury sought to be redressed thereby. "Compensation," as defined by the lexicographers, includes, "that which constitutes, or is regarded as, an equivalent or recompense; * * * that which compensates for loss or privation; amends, remuneration; recompense." Webster's New International Dictionary (2d Ed.).

A more technical definition, equally of universal acceptance, is: "An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury." 12 C. J. 229.

"Compensation," as thus defined, is the purpose of this law that the workman shall receive, and it shall be determined within the limitations of the actual injury suffered.

This court is committed to the doctrine that the workmen's compensation act "is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it." *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445, 225 N. W. 117. See, also, *Parson v. Murphy*, 101 Neb. 542, 163 N. W. 847; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615; *Speas v. Boone County*, 119 Neb. 58, 227 N. W. 87; *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.

The majority opinion is based entirely upon the following statutory language which they seek to apply to the facts of the present controversy, in the light of the alleged controlling "*Wingate* rule," viz.: "The following schedule of compensation is hereby established for injuries resulting in disability: * * * (2) For disability partial in character * * * the compensation shall be sixty-six and two-thirds *per centum* of the difference between the wages received at the time of the injury and the earning power of the employee thereafter." Comp. St. 1929, sec. 48-121.

This language must be construed with all other provisions of this statute to accomplish its expressed purpose, viz., that the injured may receive as "compensation" equal value for his loss or made whole with respect to his injury. To determine the actual loss of earning power necessitates the establishment of the actual earning power existing prior to the accident. You cannot determine a loss until you know what is lost. In the present case the earning power

of Micek prior to the accident, as indisputably established, was 68 cents an hour in his permanent employment, only temporarily suspended, with additional consideration given to hours of employment, time and a half where extended hours of labor were required, and relative ability to get and hold substantial amounts of remunerative work, in view of his admitted priorities. He is now totally disabled from performing the work he had prior to receiving his injury. This conclusion is equally true as to his temporary vocation in which he was employed when the disabling accident occurred, as well as to all occupations of a similar kind and character. As to employment in a new or different occupation, not only must the relative ability of the employee to get and hold substantial amounts of remunerative work therein be considered, but age, education, training, general physical and mental capacity and adaptability may, and often should, be taken into consideration in arriving at a just conclusion as to the percentage of impairment of the earning capacity. Here the burden of proof must be carried by the Omaha Steel Works. It is obvious that no attention is given by the majority opinion to the real earning power of Micek, as existing prior to the accident or subsequent thereto. All these necessary elements in the situation have been wholly ignored in the majority opinion, and it proceeds wholly on the basis of an obviously improper application of the rule in the "*Wingate* case," which results in a denial to Micek of compensation, the equivalent "value for his loss." This result conceded, the conclusion is established that the application of the *Wingate* rule, under the facts in the instant case, was in violation of the clear intent of the workmen's compensation act, and is erroneous. On the other hand, only by the principles announced in the first opinion is Micek given what the law contemplates that he should have—actual compensation within the limitations of the act for loss of earning power actually suffered. This case arises out of the economic depression which exists. Under these circumstances, men of outstanding ability in their respective lines of work accept temporary employ-

ment as common laborers. But they do not lose "earning power" in so doing. While the maximum amount of compensation to be paid is limited by the remuneration actually received when injured, their "earning power" is a fact to be determined by all elements and circumstances of the situation, and is not limited to or by the wages then received. In fact, wages received are not conclusive as to earning power. A case quite similar in its main features was presented to the supreme court of Colorado in *Globe Indemnity Co. v. Industrial Commission,* 67 Colo. 526, 186 Pac. 522. The question before the court, under the facts in that case, was the proper applicability of Rule (1) which substantially includes the elements embraced in our *Wingate* case, for which one party contended, and of Rule (2) which, in part, includes the elements considered in the original opinion in this instant case, and which was relied upon by the claimant. The Colorado court, in its discussion of this question, says:

"Both of these contentions may be wrong, as a simple illustration will demonstrate.

"An expert engraver, past middle life, engaged for years in that business, commanding high wages thereat, and having no other special skill, and no other regular occupation, is temporarily employed at very low wages carrying brick and mortar in a wheelbarrow in building construction. While so employed he sustains an injury to his right hand, trivial in its effect to incapacitate him from general work, but making it wholly impossible for him ever again to secure employment as an engraver. Both the language and spirit of the act would be violated in his case by the application of Rule No. 1.

"The same man, under the same circumstances, engaged in the same occupation, sustains an injury to his foot of such a character as to permanently incapacitate him from running a wheelbarrow, but having no effect whatever upon his earning capacity as an engraver. Both the language and spirit of the act would be violated in his case by the application of Rule No. 2.

"We are of the opinion that the widest possible discretion is vested in the commission to determine whether, under a given set of circumstances and a particular state of the evidence, the first or second rule, or a combination of both, should be applied. Age, education, training, general physical and mental capacity, and adaptability, may, and often should, be taken into consideration in arriving at a just conclusion as to the percentage of impairment of earning capacity."

Two conclusions are supported by the foregoing, viz.: (1) That the application of the *Wingate* rule is erroneous, and (2) that the amount of the allowance made is wholly insufficient because of the obvious omission to consider all the elements of the damage to, and loss of, the earning power of Micek.

It is obvious that to secure for Micek appropriate relief, his original earning power as it existed prior to the accident must be considered in order that earning power thereafter existing may be determined. If diminished, by what per cent. determines the actual loss to him as the result of the accident. This is not accomplished by the application of Rule (1). It is accomplished by the application of Rule (2), because only in that way may the claimant receive compensation for the loss of actual earning power within the limitations of our compensation act.

But, even if the rule announced in the *Wingate* case is applicable and controlling, the court erred in directing a reduction of the compensation allowed because of the alleged receipt by the claimant, Micek, of $15 a week. The only proof offered by the moving party was the performance of certain work which included services by Micek as a bartender on the Sabbath Day in the sale of alcoholic liquors. The record does not disclose the value of the services performed, save and except that $15 a week was actually paid and received. In this connection, it will be remembered that mere proof of wages received from time to time is not conclusive on the question of earning power. *Krock v. Ballard Sprague & Co.*, 104 Pa. Super. Ct. 389, 159 Atl. 191; *Keifer v. Phila-*

delphia & Reading Coal & Iron Co., 102 Pa. Super. Ct. 235, 156 Atl. 722; *Burbage v. Lee*, 87 N. J. Law, 36, 93 Atl. 859.

The evidence discloses that the performance of Sunday labor in a liquor store was contemplated by the parties to the contract, was an inseparable part thereof, was duly performed by Micek, and was an inseparable part of his employment. There is no proof that employment as a bartender was open to him save with the requirement that Sunday labor should be performed. It was not a work of necessity. On the contrary, the sale of alcoholic liquors at retail on the first day of the week, called Sunday, is expressly forbidden. Comp. St. Supp. 1937, sec. 53-337.

Now, a liquor store or liquor shop is a place where spirituous liquors are sold. 37 C. J. 1266.

Not only is the burden imposed on the employer of showing that the injured workman can get a job, but this job must involve and be limited to legal labor lawfully performed. Public policy and the dignity of labor alike will not, under the terms of the workmen's compensation act, permit or condemn labor to resort to crime to secure sustenance when overtaken by accident or misfortune arising out of and in the course of his employment in his master's service.

Now Sunday employment is prohibited by the law of this state. Comp. St. 1929, sec. 28-938. See, also, *State v. Somberg*, 113 Neb. 761, 204 N. W. 788. And, as we have already seen, the sale of alcoholic or spirituous liquors at retail on the Sabbath Day is expressly inhibited by section 53-337, Comp. St. Supp. 1937. See, also, sections 53-375, 53-376, Comp. St. Supp. 1937.

In the instant case the services involving sales by retail of alcoholic liquors, it is evident, are essential to Micek's contract of employment and he is thus required to perform them. There is no evidence that his present employment would continue if the Sunday work were not performed. Also, there is no evidence that Micek could obtain any other employment than this he now has, nor is there any evidence as to the actual value of lawful services actually

performed. His present employment may therefore not be said to be within the limitation of legal labor lawfully employed within an established field of employment. It must be remembered that what this court permits in this case will, by implication, be required of the injured workman in future cases. The employer, therefore, has not carried the burden essential to secure a reduction of the weekly compensation from the basis of permanent total disability to partial disability.

For the reasons set forth, the majority opinion is challenged as erroneous, both as to fact and as to law.

PAINE and MESSMORE, JJ., concur in this dissent.

ALMEDA STIEBER, APPELLEE, V. ETTA MAY VANDERLIP ET AL., APPELLANTS: CHRISTIAN O. SCHLYTERN, ADMINISTRATOR, ET AL., APPELLEES.
287 N. W. 773

FILED SEPTEMBER 29, 1939. No. 30525.

Contracts: CANCELATION. Plaintiff, an 80-year old woman, with some physical infirmity and mental instability, though not generally mentally incompetent, *held* entitled to cancelation of a contract for her support and the conveyances executed to her daughter pursuant thereto, where the relationship between the daughter and herself was one of confidence, as was that between her and the attorneys who drew the instruments and who undertook to represent both parties in the transaction, and where it clearly appeared that she did not have a full understanding of the nature of the transaction or the purpose of the conveyances, and that if she had had such understanding she would not have executed the instruments.

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

George I. Craven and *Bryan Littrell,* for appellants.

Clark Jeary and *Loren H. Laughlin, contra.*

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

JOHNSEN, J.

This is a suit to cancel a contract for support and the conveyances executed in connection therewith and to require an accounting.

The term defendants is used in this opinion to refer to Etta May Vanderlip, plaintiff's daughter, and to Bryan Littrell and Louis J. Patz, who were the attorneys for both parties in the transaction. The real estate conveyed consisted of an undivided interest in the property which constituted the estate of plaintiff's second husband, Fred Stieber, deceased. The administrator with will annexed of the Fred Stieber estate and the referee in a proceeding to partition the property also were named as defendants in the petition, but they have no real interest in the result of this litigation and will not be referred to further herein.

The petition alleges in substance that defendants had conspired to defraud plaintiff of all her property; that they secured her signature to conveyances of the real estate involved, in favor of defendant, Mrs. Vanderlip, while plaintiff, by reason of age and illness was unable to understand or transact business; and that they were able to obtain possession of the property from her because of her condition and the confidence which she reposed in them by virtue of the trust, professional and confidential relationships which they had previously borne to her.

The contract for support and the conveyances involved were executed on June 2, 1936. Plaintiff claimed that she had no knowledge that she had executed the contract or made unconditional conveyances of title to her daughter. She was at the time approximately eighty years old. The trial court made the following finding with respect to her condition: "During the trial of this cause, and while the plaintiff was upon the witness-stand, the court gave careful consideration and scrutiny to her testimony, her appearance and her demeanor. A portion of the time while she was on the stand she appeared to have her full mental faculties, while at other times she was confused and bewildered. From a full consideration of all the evidence in

the case, the court is of the opinion that because of her age and the general debility with which she suffered at the time of the happening of the transactions involved herein, she did not have her full mental faculties, and was a person who was easily persuaded, and was lacking in stability."

As to the previous relationships of the parties, defendant Mrs. Vanderlip had been making her home with plaintiff since the death of Fred Stieber in 1930, and, according to the recitation in the contract for support, she had, for two years, "nursed, administered to the needs, and cared for" plaintiff. Littrell and Patz had been Mrs. Vanderlip's attorneys in some preceding litigation and had then been engaged by plaintiff to look after her interests in the Fred Stieber estate. Patz made social visits at plaintiff's home, took her to "movie" shows, and on occasion brought out refreshments. Littrell used to chauffeur plaintiff downtown in his automobile, and, at times when he was busy, had his father do so.

On February 3, 1936, while plaintiff was ill in bed, Patz, on his own initiative, went to her home and had her execute, what he intended as, and thought at the time was, an irrevocable power of attorney, giving him the right, for a three-year period, to take possession of all her property, collect the income therefrom, and "buy, sell, exchange, trade, mortgage, and to deal in any and every way with said property, both real and personal, as he may determine to be for my best interest." The excuse which he gave on the witness-stand for having taken the power of attorney was that he wanted to make certain that plaintiff could not fire him as her attorney. On the same occasion, he had plaintiff execute a note and mortgage for a $1,500 loan from Mrs. Vanderlip, took charge of the loan proceeds, and, within a few days, issued a check for $500 to Littrell and Patz, for legal services previously rendered to plaintiff. A short time later, on June 1, 1936, he issued another check to himself, in the sum of $150, for further legal and trustee services rendered plaintiff. Plaintiff claimed to have no knowledge that Mrs. Vanderlip had ever made her a loan or that she had ever executed any note or mortgage in her favor.

On June 2, 1936, according to plaintiff, Mrs. Vanderlip told her that Patz wanted her to come to his office to execute some papers. She had had some previous conversation with Patz about a suit against her by the Citizens State Bank of Bennett, Nebraska. It appeared that one of Mrs. Vanderlip's sons at one time had induced plaintiff to sign a blank note, which he had fraudulently used to obtain a loan at the Bennett bank. Patz had suggested to her, so she said, that she ought to execute deeds to her property, so that, if judgment was recovered against her, it could not be collected on execution. It seems to have been her impression that it was on this matter she was being called to Patz's office. What she actually executed, however, was a contract between herself and Mrs. Vanderlip, which Patz had previously prepared, and in which she agreed to convey all her property to Mrs. Vanderlip, in consideration of an obligation on the part of the daughter to provide her with a home and support. At the same time she executed, in favor of Mrs. Vanderlip, nine deeds of conveyance to her property, which Patz had prepared also. No copy of the contract for support appears to have been given to her. Concurrently with the execution of all these instruments, Patz had Mrs. Vanderlip execute a power of attorney, giving him the power to control and dispose of all of the property, and containing a provision that sought to make it irrevocable except by mutual consent.

Defendants contended and endeavored to show that the contract for support had been prepared at plaintiff's previous request and that it was fully read and explained to her at the time. The notary public testified to the care exercised by him in taking the acknowledgment, and to that also of a witness to the execution of the contract. After a careful consideration of all the evidence contained in the one thousand page bill of exceptions, however, the conviction is clear that plaintiff did not know or understand that she had executed a contract for support and had given her daughter her property as a consideration therefor. She thought she had merely executed some deeds which were to

be held by Patz, as a protection to her, until the claim of the Bennett bank had been disposed of. This is apparent, not merely from her words, but also from her actions, and when we consider that there is involved an eighty-year old woman, past the age of guile and calculation, her simple actions are demonstratively significant. When she subsequently learned that Mrs. Vanderlip had made a settlement of her son's obligation to the Bennett bank and that there was accordingly no outstanding liability against her, plaintiff went to Patz's office and requested back her deeds, insisting that there was now no necessity for him to hold them longer for her. In this incident there is no self-serving calculation, but a manifestation of simple, honest understanding. Incidentally, Patz up to that time had kept the deeds in his file unrecorded, except as to one piece of property in Kansas. After plaintiff's request for their return, he promptly had all of them recorded.

During the period from June 2, 1936, to the bringing of this suit, plaintiff's life had gone on much as before. Mrs. Vanderlip and she continued to live together. When she failed to receive spending money, she went to Patz's office to see about the matter, indicating that she still thought he was looking after the property for her, as before. Mrs. Vanderlip seems to have become somewhat less tolerant toward her after the conveyances, and on one occasion, when some irritation developed, she shoved her mother against a bed and injured her and then refused to speak to her for a period of several weeks. We refer to these incidents merely to show that there is nothing in them to indicate that plaintiff comprehended or was knowingly accepting the status which the contract for support had created.

It is, of course, impossible to detail all the evidence contained in the record. Defendants Littrell and Patz strove vigorously to show their good faith and to prove plaintiff's mental competency to enter into the transaction. It is unnecessary for us here to comment upon defendants' motives. They may have been intended to be in plaintiff's best interest, although some of the things which were done through-

out their relationship with plaintiff can hardly merit professional acclaim. Many of the circumstances which occurred have already been set forth. Plaintiff attacks the good faith of Littrell and Patz on the further ground of their failure to make the obligation for support a lien on the property conveyed, especially since Mrs. Vanderlip had virtually no resources against which the obligation could be enforced other than the property conveyed to her by plaintiff. This may have been mere professional oversight, perhaps.

The trial court rightly held that Littrell and Patz occupied a confidential relationship to plaintiff, whose responsibility was not lessened because they were also representing Mrs. Vanderlip in the transaction. Mrs. Vanderlip, too, bore a confidential relationship to her mother, in view of the latter's age, physical infirmity, mental instability, and the situation arising out of the fact that she was making her home with plaintiff and exercising daily care and supervision over her. Defendants knew that plaintiff reposed trust and confidence in them. They knew she was old and unstable. Patz, as previously indicated, had tried to protect himself against her instability by insisting that she give him a purportedly irrevocable power of attorney.

By virtue of their past relationships to plaintiff, and her age, physical infirmity and mental instability, it was the duty of all the defendants to see that no possible advantage was taken of her. Neither Mrs. Vanderlip nor Littrell and Patz in her behalf could deal at arm's length with plaintiff. Nor could they enter into a transaction with her of personal benefit to any of them, where, as here, she was without independent advice, unless it was convincingly clear that she knew just what she was doing and, with a full understanding of the transaction, was willing to enter into it. It is not a question of whether plaintiff was lacking in general mental competence or whether defendants can be said to have perpetrated a deliberate fraud upon her. In the confidential relationship in which both Patz and Mrs. Vanderlip stood to plaintiff, and in Patz's attempt to act

as attorney for Mrs. Vanderlip, if he failed to make the transaction clear to plaintiff, and by reason of that fact induced her to execute instruments which she otherwise would not have done, she was imposed on, whether it was intentional or not, and such imposition would constitute in equity a constructive fraud.

The principles involved in the foregoing statements are fundamental and well established. 2 Pomeroy, Equity Jurisprudence (4th ed.) sec. 956; 12 C. J. S. 975, sec. 26; 9 Am. Jur. 363, sec. 17. The rule as to confidential or fiduciary relations applies to any transaction or situation of advantage, in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other. In any such case where confidence is known, or may reasonably be expected, to exist as a fact, whether it is of a legal, moral, social, domestic or personal character, equity will scrutinize the transaction critically—and especially so where age, infirmity and instability are involved—to see that no inequitable action has been taken and no injustice has occurred. Its purpose is not merely to satisfy itself of absence of pressure or influence, but to be certain that the fullest and fairest explanation possible has been made, and that complete knowledge, understanding, intention, consent and freedom of action duly existed.

The preponderance of the evidence clearly brings the facts of this case within the foregoing rules. Defendants point out the weight that should ordinarily be given instruments that have been duly witnessed and acknowledged, but, when the whole situation in this case is focused, the principles of equity point to only one path and one duty.

In addition to canceling the contract for support and the deeds of conveyance, the trial court entered judgment against Louis J. Patz and Etta May Vanderlip for $1,277.85, which was the amount of cash assets belonging to plaintiff that had come into Patz's hands, under his several powers of attorney, after crediting the sums actually paid to plaintiff. The decree refused to allow any credit for the $650

which Patz had turned over to Littrell and Patz for attorneys' and trustee's fees, because of the manner in which they had been collected and appropriated, and made no finding as to any amount that might be due for legal services rendered plaintiff prior to the transaction of June 2, 1936, but left the parties to such other remedy as might be available to them.

Equity, once having taken jurisdiction of an accounting, should, if possible, dispose of and terminate the entire controversy between the parties. The record shows that there was a considerable amount of legal services rendered plaintiff in other preceding matters. While we cannot commend the manner in which the fees involved were apparently purposely allowed to drift, with no effort at collection or even acquainting plaintiff with their amount, Littrell and Patz will nevertheless, as a matter of fairness, be allowed the sum of $400 for all services of every nature which they have rendered to plaintiff. To this extent the decree of the trial court should be modified. We would be disposed, also, in view of the past relationship and mode of life of plaintiff and her daughter, to allow Mrs. Vanderlip credit for any sums paid to her by Patz which were actually used for the living and household expenses of her mother and herself. The record, however, does not enable us to determine this amount with any degree of certainty, and we are unable therefore to allow the credit. Under the circumstances, the judgment against Patz and Mrs. Vanderlip should be reduced to the sum of $877.85, with interest from the date of the decree of the trial court, but with leave to the parties to show any sums that may have been paid to plaintiff during the course of this litigation and which ought to be credited thereon, and with leave also to plaintiff to require a further accounting of any sums that may since have come into the hands of Patz or Mrs. Vanderlip out of plaintiff's property. Out of the $877.85, plaintiff was entitled to have had judgment entered against Bryan Littrell for the $250 appropriated by Littrell and Patz, for which credit has not been allowed herein, but plaintiff has taken no cross-appeal from the failure of the trial court to enter such judgment.

Defendants complain because part of the money for which they are required to account represented the balance of the proceeds of the loan made by Mrs. Vanderlip. They say it would be inequitable to enter judgment for this money, if the note and mortgage are to be canceled. The note and mortgage executed by plaintiff in favor of Mrs. Vanderlip prior to the transaction of June 3, 1936, are not in issue in this suit and are not affected by the trial court's decree.

The decree of the trial court as herein modified is affirmed, with the costs of this appeal taxed against defendants.

AFFIRMED AS MODIFIED.

MARY RHODES ET AL., APPELLEES, V. HARRY D. LEWIS ET AL., APPELLANTS.
287 N. W. 662

FILED SEPTEMBER 29, 1939. No. 30606.

1. **Evidence.** The parol evidence rule is a salutary rule to achieve its main object, the preservation of the sanctity of contracts.
2. ———. On question whether instrument settling will contest whereby testator's sons, desiring to make more ample provision for their sisters, bound themselves and land to pay certain sums to sisters was protected by parol evidence rule, recital of desire to make more ample provision for sisters was not a statement of consideration for sons' promise, but rather one of motive and result desired to be accomplished.
3. ———. Where no consideration is stated in a formal written contract, facts showing that there was a consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative. Comp. St. 1929, sec. 36-407.
4. ———. In foreclosure suit based on instrument settling will contest whereby testator's sons, desiring to make more ample provision for their sisters, bound themselves and land to pay certain sums to sisters, parol evidence was admissible to show that consideration for instrument was sisters' waiver and withdrawal of objections to will, since showing actual consideration did not vary or contradict terms of instrument. Comp. St. 1929, sec. 36-407.

5. **Compromise and Settlement.** The compromise of a doubtful right may be sufficient consideration for an agreement.
6. ———. Where testator's daughter in good faith exercised her legal right to contest his will, and settlement was made whereby she, for herself and her sister, waived, relinquished and withdrew objections to will, in consideration of instrument whereby brothers bound themselves and land to pay certain sums to sisters, consideration for instrument was valid and enforceable.

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

Fred S. Berry, for appellants.

Ross Amspoker and *William M. Ely, contra.*

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

LANDIS, District Judge.

This is an appeal from a decree of foreclosure based upon the following instrument:

"Know all men by these presents:

"That we, Stillman O. Lewis, Frank A. Lewis, Harry D. Lewis, and Guy W. Lewis, sons of Ralph Lewis, deceased, and devisees under the will of said Lewis, and who are the devisees under the said will whereby they take title to the following described real estate situate in the county of Keya Paha and state of Nebraska (subject to the life estate of Emma A. Lewis) (description of land).

"And whereas the above named parties desire to make more ample provision for Mary Rhodes and Ernestine Runyan, sisters of the above named parties and devisees under the will of Ralph Lewis, deceased, and have agreed and do hereby agree and do hereby bind themselves and the above described land to pay to the said Mary Rhodes the sum of Fifteen Hundred and No/100 ($1,500) Dollars and to pay to the said Ernestine Runyan the sum of Fifteen Hundred and No/100 ($1,500) Dollars, at the time and in the manner hereinafter set forth, viz.: Within one year after the death of Emma A. Lewis, the life tenant under the will of said Ralph Lewis, Provided, however, five years have

elapsed from the date hereof. This provision made for said Mary Rhodes and Ernestine Runyan is in addition to the provision of the will of said Ralph Lewis, deceased.

"Dated April 15th, 1921."

The four grantors signed the instrument in the presence of witnesses, acknowledged the same before a notary public, and it was filed for record with the county clerk of Keya Paha county by the grantees.

Considering the conflicting testimony, admissions, exhibits and all the competent evidence, we find the record reflects that Ralph Lewis died testate March 7, 1921, leaving surviving his widow, two daughters, the plaintiffs and appellees, four sons, the grantors of the instrument in suit, as his heirs and devisees. March 22, 1921, Stillman O. Lewis filed a petition for probate of the will. April 15, 1921, Mary Rhodes, in good faith, filed objections to the will on the grounds of incompetency of her father to make a will, undue influence exerted by her brothers Stillman O. Lewis and Harry D. Lewis on their father, and that the will was not properly executed and attested.

The date for the hearing on the probate of the will was April 15, 1921, and on this date before the hearing the four brothers, the mother, the sister objecting to her father's will, the attorney for the estate and the attorney for the contestant met in the office of the attorney for the estate and discussed a settlement of their matters. Settlement was finally made, and in consideration of the withdrawal of the objections to probate of the will the instrument in suit was executed. The objections to the will were withdrawn from the files of the county court and the will admitted to probate. On July 1, 1921, the widow, as executrix, filed an inventory showing the real property to be 1,534.48 acres, valued at $29,089.60, and personal property at $15,971.26.

On December 8, 1922, decree of distribution and final settlement in accordance with the will was entered by the county court. August 8, 1924, Stillman O. Lewis deeded to his three brothers his interest in the land. August 17, 1931,

Frank A. Lewis deeded his interest in the land to the two brothers Harry D. and Guy W. Lewis. This deed has included the recitation: "My undivided interest in and to the above described land, subject to contract of record in favor of Mary Rhodes and Ernestine Runyan."

Emma A. Lewis, the widow, died September 12, 1936, and the indebtedness evidenced and secured by the instrument in suit became due and payable September 12, 1937. Harry D. Lewis and Guy W. Lewis, the present owners of the real estate, defaulted in the payments provided for their sisters. No proceedings at law have been brought for the recovery of the debt and none of the same has been paid. From the decree of foreclosure in favor of the two sisters, plaintiffs, the two brothers, defendants, present owners, appeal.

All other defendants are eliminated by the decree below and have made no appeal. The real contentions of the appellants against the decree of foreclosure may be summed up in the following: First, the instrument sued upon is protected by the parol evidence rule, that it cannot be changed or varied by an oral agreement and made into an entirely new, inconsistent and contradictory instrument; second, even though not protected by the parol evidence rule, then the oral agreement leaves the instrument still without sufficient, valid, legal or enforceable consideration, and unenforceable.

The parol evidence rule is a salutary one for achieving its main object, namely, the preservation of the sanctity of contracts. It is a well-established rule of the common law, but through the years it has become rather limited in its effect, so much so that in fact it almost seems the presumption favors the admission of extrinsic evidence, under one of the numerous exceptions, rather than its exclusion.

The instrument in suit does not express any consideration. The recital therein of a desire to make more ample provision for the sisters is not a statement of consideration for the promise of the defendants, but rather one of motive and the result desired to be accomplished.

22 C. J. 1169, expressed the exception where consideration is not stated in the instrument, supported by many authorities: "Even though the instrument does not state any consideration or set forth what the consideration is, parol evidence may be admitted to show that there was a consideration, and of what it consisted, unless the instrument is of such a nature that the failure to express a consideration renders it void under the statute of frauds."

As part of chapter 36, Statute of Frauds, under article 4, "Conveyances to Defraud Creditors," is section 36-407, Comp. St. 1929, which seems by its terms to apply to the whole chapter.

"The consideration of any contract or agreement, required by the provisions of this chapter to be in writing, need not be set forth in the contract or agreement, or in the note or memorandum thereof, but may be proved by any other legal evidence."

Section 240, Restatement, Contracts, states: "(2) Where no consideration is stated in an integration (formal written contract), facts showing that there was a consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative." Cited in *Elvidge v. Brant,* 131 Neb. 1, 267 N. W. 169.

Here we are dealing with an instrument which is silent in so far as consideration is concerned. To show the actual consideration in this case does not vary or contradict the terms of a written document, and the instant instrument is not within the parol evidence rule, but is within the exception so far as showing the actual consideration of the same.

With the second contention of the appellants that the consideration for the contract shown by parol evidence leaves the instrument still without sufficient, valid, legal or enforceable consideration, we cannot agree. Mary Rhodes as daughter, heir of her father, had a legal right to contest his will. This right she exercised in good faith, and a settlement was made with the other heirs whereby she, for herself and her sister, waived, relinquished and withdrew the

objections to the will, in consideration of the instrument in suit.

By executing the settlement agreement, the appellants acknowledged that there might be reason for the contest, or at least that there was color for the objections to the will. The compromise of a doubtful right may be sufficient consideration for an agreement. That the consideration for the instrument in suit, as shown by parol evidence, is valid and enforceable finds support in *In re Estate of Shierman*, 129 Neb. 230, 261 N. W. 155, *Darling v. Darling*, 122 Neb. 153, 239 N. W. 727, *Lipps v. Panko*, 93 Neb. 469, 140 N. W. 761, and *Grochowski v. Grochowski*, 77 Neb. 506, 510, 109 N. W. 742, 112 N. W. 335.

It should be noted that the appellants accepted title to an undivided interest in the land herein subject to the instrument in suit. Appellants also waited until the will was probated and the estate finally distributed under the terms of the will, thereby accepting the benefits of the contract which they now seek to deny the validity of.

The decree of the trial court is correct, and is

AFFIRMED.

IN RE ESTATE OF HENRIETE KAROLINE MISCHKE.
R. C. PETERS, EXECUTOR, APPELLEE, V. WALTER A. KNICELY ET AL., APPELLANTS.
287 N. W. 760

FILED OCTOBER 6, 1939. No. 30637.

Life Estates. Where a tenant for life of farm land leases the land, with the rent payable in a share of the crop, and dies while the crop is growing, title to the share of the crop reserved as rent passes to the executor of the tenant for life as assets of that estate.

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

Bruckman & Dunmire, for appellants.

Carrico & Carrico, contra.

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

SIMMONS, C. J.

This is an action brought for the purpose of determining who is entitled to the landlord's share of the proceeds of a wheat crop. The case was tried in the county court and in the district court for Adams county upon a stipulation of the following facts: Henriete Karoline Mischke held a life estate in a farm in Adams county. Her children were remaindermen. A few months prior to March 1, 1935, "the said Henriete Karoline Mischke, the widow, leased said described farm to her son Robert John Mischke for a term of five years for a small cash rental for some hay land and one-third (1/3) of all the crops harvested on said land delivered on the market. That the said lessee of said life tenant continued to farm said land, without objections of any of the remaindermen, under the terms and conditions of said lease. That in the fall of 1937 said lessee planted or sowed the cultivated land to wheat." The life tenant died January 29, 1938. The wheat was harvested in July, 1938, delivered, and sold to an elevator in Pauline, Nebraska. The "estate, represented by said executor, claims to be the owner of one-third (1/3) of said grain so delivered on said market and is demanding from Peter Gartner, manager of the elevator, the proceeds therefrom, while, on the other hand, the remaindermen, or their grantees, claim to be the owner of said grain and the proceeds therefrom and demanding the same from the said Peter Gartner." The "only issue in this case presented to the court for decision is, the ownership of said wheat so harvested and delivered at said elevator, and who is entitled to the proceeds therefrom, the estate of Henriete Karoline Mischke, or the remaindermen, and their grantees."

Parties to this action are the executor of the Mischke estate and Walter A. Knicely, grantee of certain of the remaindermen.

The manager of the elevator filed no pleading herein except a voluntary appearance. He appeared and testified that he was holding the proceeds of one-third of the crop until it was determined to whom it should be paid. He offered to pay it to whomever was entitled to it. While no order is shown, it appears from the court's decree that the money was paid to the clerk of the district court. The trial court found for the executor and against the remaindermen and decreed "that J. Fred Ernstmeyer, clerk of the district court of Adams county, Nebraska, pay and turn over to R. C. Peters, executor of the estate of Henriete Karoline Mischke, deceased, said amount of money $336.78 deposited with him by the Pauline Grain Company, and in his possession."

The matter comes to us upon appeal by Mr. Knicely, submitting the same question that was submitted to the trial court in the stipulation.

If the lease was in writing, it is not in evidence. We have no means of determining what its provisions were, or what the rights of the parties created thereby may have been save and except the statement made in the stipulation with reference to the division of the crops.

Appellant contends that a landlord and tenant relationship was created by the lease. In the absence of anything to the contrary in the stipulation and the bill of exceptions, we assume that appellant's contention is correct and that the relationship of landlord and tenant was created by the lease.

A landlord and tenant are tenants in common of growing crops where rent is reserved in a share of the crops. *Sims v. Jones,* 54 Neb. 769, 75 N. W. 150.

This court has repeatedly held that growing crops are personal property. See *Johnson v. Walker,* 23 Neb. 736, 37 N. W. 639; *Aldrich v. Bank of Ohiowa,* 64 Neb. 276, 89 N. W. 772; *Sims v. Jones, supra*; *Cooper v. Kennedy,* 86 Neb. 119, 124 N. W. 1131.

It necessarily follows that the life tenant at the time of her death was the owner of an undivided interest in the

wheat then growing on the land, and that such interest was a personal property interest, and title thereto passed to her estate.

The interest of the life tenant in the real estate was extinguished by her death. Her title did not pass to the remaindermen. It ceased to exist. Obviously, the interest of the life tenant in this crop, as personal property, was not extinguished upon her death. To hold that her title to the growing crop was extinguished, and that the remaindermen owned the crop, would require us to hold that the crop was a part of the land, and that, as such, title to the crop followed title to the land. To so hold would require us to overrule our holdings that growing crops are personal property. That rule is now a rule of property in this state.

Appellant contends that to hold that the landlord's share of the growing crop goes to the executor of the life tenant, and not to the remaindermen, is to deprive the remaindermen of the rents of the land, to which they are entitled after their vested estate is freed from the burden of the life interest.

Such a result necessarily follows where lands, devoted to the growing of annual crops, are held, as here, burdened by a life estate and a right of possession in that estate, terminable at an uncertain date in the future. "This, however, cannot be said to impair the next estate; for it is an incident, created by law, of every estate in reversion or remainder—a burthen, if it be one, imposed, as we have said, in the interest of agriculture; for, when the termination of an estate is uncertain, it would greatly discourage the cultivation of the land, if every such tenant must sow at his peril. Hence, it is that the right to harvest growing crops, sown and cultivated before the termination of the particular estate, in no legal sense infringes upon the next estate in possession." *Noble v. Tyler*, 61 Ohio St. 432, 56 N. E. 191.

By the common law, "Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent

and uncertain. Therefore if a tenant for his own life sows the lands and dies before harvest, his executors shall have the *emblements* or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam* (the act of God injures no man). The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it." 1 Cooley's Blackstone (4th ed.) book 2, ch. 8, p. *122. See, also, 15 Am. Jur. 219, sec. 26; 21 C. J. 944.

"Emblements are corn and other crops of the earth which are produced annually, not spontaneously but by labor and industry. * * * The doctrine or right of emblements entitles one who holds land for a period subject to termination at a time which he cannot ascertain beforehand to remove from the land after the termination of his tenancy the annual crops or emblements which he has planted thereon prior to such termination, if the termination is brought about without any fault on his part or without any act of his intended to bring about such a result." 15 Am. Jur. 216, sec. 24.

"1. It is clear that the lessee of a tenant for life is charged with notice of the extent of his landlord's title, and that on the termination of the life estate, his estate also ends. * * *

"2. It is equally clear that, if the sublessee of a life tenant plants a crop before the death of his landlord, he is entitled, under the doctrine of emblements, to reap the same." *Edghill v. Mankey*, 79 Neb. 347, 112 N. W. 570. See, also, 2 Taylor, Landlord & Tenant (9th ed.) secs. 534, 535; 2 Underhill, Landlord & Tenant, sec. 776; 2 Tiffany, Landlord & Tenant, sec. 251 (C) (2).

It is clear that the rule of emblements applies where the life tenant sows the land for himself. It applies also to the

lessee of the life tenant. The reason upon which the doctrine of emblements is based requires that it be applied likewise to that share of the crop which was reserved to the life tenant as rent.

The judgment of the trial court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF OMAHA, E. H. LUIKART, RECEIVER, APPELLANT. E. H. LUIKART, RECEIVER OF VERDIGRE STATE BANK, APPELLANT, V. NATIONAL SURETY COMPANY, APPELLEE.
287 N. W. 762

FILED OCTOBER 6, 1939. No. 30607.

Garnishment. The public policy of Nebraska does not permit a judgment creditor to seize by process of garnishment dividends on deposits of an insolvent New York insurance company in an insolvent Nebraska state bank, after title thereto had vested in the liquidator of the insurance company by virtue of the insurance laws of New York and the judgment of a court of that state, in disregard of his prior demand for such funds for the benefit of all creditors and a previous order of a Nebraska court to turn them over to him. *Kinsler v. Casualty Co. of America*, 103 Neb. 382, 172 N. W. 33.

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

Howard Saxton and *F. C. Radke*, for appellants.

Smith & Schall and *Gerald M. Vasak, contra.*

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

ROSE, J.

This is a controversy between E. H. Luikart, receiver of the insolvent Verdigre State Bank of Verdigre, Nebraska, and Louis H. Pink, statutory liquidator of the National Surety Company, a dissolved insolvent insurance corporation formerly existing under a charter from the state of

New York and licensed to transact business in Nebraska, over garnishment of dividends on the latter's deposits in the State Bank of Omaha, an insolvent Nebraska corporation in the hands of E. H. Luikart, receiver.

In the district court for Knox county, Nebraska, E. H. Luikart, receiver of the Verdigre State Bank, recovered in his favor two judgments against the National Surety Company, one for $5,612.50, June 5, 1933, and the other for $5,950, May 24, 1934.

In a proceeding by the state of Nebraska in the district court for Douglas county to wind up the affairs of the insolvent State Bank of Omaha, there were adjudicated in favor of the National Surety Company, January 2, 1935, claims for unpaid deposits aggregating $2,577.23, payable to the latter from bank assets on a par with all other valid general unsecured deposits, and the decree of the district court directed E. H. Luikart, receiver of the State Bank of Omaha, to pay the National Surety Company the dividends due and to become due on its claims, the amount of the unpaid declared dividends being $1,932.91.

Later, January 8, 1935, E. H. Luikart, receiver of the Verdigre State Bank, filed in the district court for Douglas county in the proceeding to wind up the affairs of the State Bank of Omaha an application in the form of a bill of equity, praying for the garnishment of the dividends payable to the National Surety Company on its deposits and for the application thereof to partial payment of the judgments in favor of E. H. Luikart, receiver of the Verdigre State Bank.

The superintendent of insurance of the state of New York intervened in the district court for Douglas county, Nebraska, resisted garnishment of the dividends which Luikart, receiver of the State Bank of Omaha, had been ordered to pay to the National Surety Company, pleaded that, by virtue of article XI, ch. 191 of the laws of the state of New York (Laws 1932) and a decree of the supreme court of the state of New York for the first judicial district, dissolving the National Surety Company,

and ordering liquidation thereof by the statutory liquidator, who is the superintendent of insurance, the title to all its assets and credits vested in the liquidator June 1, 1934, under an order directing him to take possession thereof. In the petition in intervention the liquidator pleaded at length the New York statute and decree.

Luikart, receiver of both Nebraska banks named, admitted the existence of the New York statute and the decree of the supreme court of New York, but nevertheless took the position that it is the public policy of Nebraska to retain therein for the benefit of Nebraska creditors funds of insolvent foreign corporations, when attached in Nebraska by order of Nebraska courts.

The pleadings and the evidence show that the title to the dividends in controversy vested in the New York liquidator June 1, 1934, and that the application for garnishment was not made until January 8, 1935.

The district court for Douglas county, Nebraska, found that title to the dividends on the deposits vested in the New York liquidator, June 1, 1934, by virtue of the insurance laws of New York, on the making of the judicial order for liquidation, and were not subject to garnishment in Nebraska, denied the application therefor and ordered Luikart, receiver of the State Bank of Omaha, to pay the liquidator $1,932.91.

Luikart, receiver of both Nebraska state banks, appealed from the judgment of the district court for Douglas county to the supreme court.

The appeal presents the question: Does the public policy of Nebraska permit a judgment creditor to seize by process of garnishment dividends on deposits of an insolvent New York insurance company in an insolvent Nebraska state bank after title thereto had vested in the liquidator of the insurance company by virtue of the insurance laws of New York and the judgment of a court of that state, in disregard of his prior demand for the fund for the benefit of all creditors and a previous order of a Nebraska court to turn it over to him? This question was not involved in the liti-

gation wherein Luikart, receiver of the Verdigre State Bank, recovered the judgments against the National Surety Company. The judgments in the district court for Knox county were not liens on the deposits or dividends which the district court for Douglas county ordered the receiver of the State Bank of Omaha to pay to the liquidator of the National Surety Company. The receiver's plea of former adjudication in other litigation between the same parties is not well founded. The question for determination was decided in favor of the liquidator in *Kinsler v. Casualty Co. of America*, 103 Neb. 382, 172 N. W. 33. That case has not been overruled, but it is argued at great length by the receiver of both Nebraska banks that its force as a precedent on the public policy of Nebraska has been destroyed by subsequent adjudications and statutes. An examination of the cases and statutes to which reference has been made in the elaborate argument on this question fails to disclose a substantial reason for a departure from the doctrine of the *Kinsler* case. It was followed by the district court for Douglas county on issues and evidence essential to a proper decision.

The judgment from which the appeal was taken is

AFFIRMED.

JACOB BRENNING, APPELLANT, V. E. B. REMINGTON, APPELLEE.

287 N. W. 776

FILED OCTOBER 6, 1939. No. 30602.

1. **Appeal.** "In reviewing the discharge of the jury and the entry of a nonsuit at the close of plaintiff's evidence in an action for negligence well pleaded, the appellate court will consider as established every pertinent fact which the admissible evidence adduced proves or tends to prove and give plaintiff the benefit of proper inferences therefrom." *Andrews v. Clapper*, 133 Neb. 110, 274 N. W. 209.
2. **Automobiles.** Evidence set forth herein examined, and *held* insufficient to establish that the plaintiff was guilty of contribu-

tory negligence as a matter of law, and wholly insufficient to justify or sustain the peremptory direction of the trial court granting defendant's motion, made at close of plaintiff's evidence in chief, for a finding for defendant, and the dismissal of the jury and of plaintiff's cause of action.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Fred T. Hanson and *Cordeal, Colfer & Russell,* for appellant.

Butler, James & McCarl, Donald E. Kelley and *Kern & Faville, contra.*

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

EBERLY, J.

This is an action to recover damages for personal injuries sustained by plaintiff when he was struck by defendant's automobile on October 7, 1936. At the close of plaintiff's evidence in chief, the trial court sustained defendant's motion for a judgment in his behalf, "the court being of the opinion that the evidence shows, as a matter of law, there was negligence on the part of the plaintiff that was more than slight as compared to the negligence of the defendant." From the order of the trial court, plaintiff appeals.

Under the circumstances presented by this record we are committed to the principle, viz.: "In reviewing the discharge of the jury and the entry of a nonsuit at the close of plaintiff's evidence in an action for negligence well pleaded, the appellate court will consider as established every pertinent fact which the admissible evidence adduced proves or tends to prove and give plaintiff the benefit of proper inferences therefrom." *Andrews v. Clapper,* 133 Neb. 110, 274 N. W. 209.

The sole question is whether plaintiff is chargeable with contributory negligence sufficient to defeat his action. Apart from the defense of contributory negligence, actionable negligence on part of defendant is unquestioned.

The accident occurred on Third Street West in the city of McCook, Nebraska, at a point opposite the German Congregational Church, and on the west side of that street. It appears that U. S. Highway No. 183 is located thereon. This is a straight, paved street, 80 feet in width between lot line and lot line. The paved portion thereof is 33 feet, 6 inches between east and west curb lines, with a slope from north to south. There is nothing in the record which would support the inference that this paving was wet, slippery, or icy on the night in question. There was a street light in the north intersection of this street approximately 150 feet from plaintiff's car. There were electric lights over the basement door of the church, and there were electric porch lights on residences facing this street on the west side thereof, and these lights "shined out on the road." There is no affirmative evidence in the record indicating the presence of mist, sleet, fog, ice, or snow which might adversely affect the automobile lights or impair the visibility created thereby. On the night of the accident, plaintiff, a married man, 51 years of age, who was then, and had been, employed by the Chicago, B. & Q. shops as a machinist, was going to the church to attend prayer meeting. About 7:30 p. m. he drove down Third Street West from the north and parked his car opposite the church, parallel to and "about six inches from the west curb" thereof. This car was five feet, eight inches in width. The following excerpts from plaintiff's direct examination, cross-examination, and redirect examination, mirror the facts of the transaction, viz.:

"Q. It is true, is it not, Mr. Brenning, that the members of that church are accustomed to park their cars at the curb on both the east and west sides of Third Street West near the curb? A. Yes. Q. And you have seen that done many times? A. Yes. * * * Q. Now, you parked your car, as I understood your testimony, about six inches from the curb, or close to it? A. Yes, sir. Q. Then you switched off the motor? A. Yes, sir. Q. Then you got out of your car? A. Turned off the lights. Q. You turned off your lights after switching off your motor? A. Yes. Q. Then

you got out of the car, did you not? A. Yes, sir. Q. Then you reached in for two hymn books? A. I did. Q. After you got your hymn books out of your car you shut the door? A. Yes, sir. Q. And then you turned around and looked north? A. Yes, sir. Q. You saw a car approaching from the north with its lights on? A. Yes, sir. Q. The car was in approximately the middle of the street? A. Yes, sir."

(From direct examination) "Q. How far away was the car, if you know? A. Oh, I should judge about a block."

(From cross-examination) "Q. When was it, Mr. Brenning, that you observed the cars parked across the street on the opposite side? A. When I drove out there. Q. Was there any other car parked on the west side of the street where you parked your car? A. No. * * * Q. And I believe you said, did you not, Mr. Brenning, that this second car, the one farthest south, was just opposite you in the street; wasn't it just south of this cement platform? A. Pretty close. Q. So that they were just opposite each other across the street? A. A little bit down below the church, that other fellow was. Q. You saw that when you drove up and parked your car, did you not? A. Yes, sir. * * * Q. After you got out of the car, did you observe the two cars parked across the street? A. Yes, sir. Q. After you saw this car approaching from the north you turned around and looked south? A. Yes, sir."

(From direct examination) "Q. At that time and place were you able to observe or do you know the speed of that approaching car (from the north)? A. No."

(From cross-examination) "Q. And I believe you said that you saw a car approaching from the south just entering the block, is that right? A. Yes, sir. Q. And its lights were burning? A. Yes, sir. Q. Now, I believe you told Mr. Colfer that you thought it was going about twenty-five miles an hour? A. That is my thought. * * * Q. Where was that car from the south moving; on what side of the street? A. On the east and right-hand side of the street. Q. On the east and right-hand side of the street? A. Yes, sir. Q. Now, I want to call your attention to this plat—

Just a minute, Mr. Brenning,—the German Congregational Church is shown on this plat as being located on three feet of lot nine and about forty-seven feet of lot ten of block six, Original Town, which is 505 and 507; is that about the correct location? A. Yes; about the center. Q. Just about the center of the block, is it not? A. Yes. * * * Q. And there was a car directly across the street from you to the east? A. Yes, sir. * * * Q. As you turned around and faced south and saw this car approaching from the south, you stood beside your car with your hand on the handle of the car, did you not? A. I did; yes, sir. Q. And you continued to stand with your hand on the handle of the door of that car until you were struck? A. Yes, sir. Q. Now, you were facing directly south or southeast, were you? A. Yes, sir. Q. Did you at any time turn around again and look north? A. No, sir. Q. Now, Mr. Brenning, when you got out of your car on the left-hand side of the street did you intend to walk across the street to the church? A. After the streets were cleared; yes. Q. You intended to go directly across the street to the church? A. Sure. * * * Q. Was there anything to prevent you from alighting from your car at the—from the car on the right, instead of getting out in the street? A. No. * * * Q. And you continued to stand facing south with your hand on the handle of the door until you were struck? A. I did."

(From redirect examination) "Q. One more minute—About what length of time elapsed between the time you saw the south-bound car and the time you were hit? A. Just about four or five seconds."

(From direct examination) "Q. Did you hear a warning of any horn given by the south-bound car? A. Not a thing. Q. Do you remember whether the lights shone on you or any—(interrupted). A. Yes, the lights were shining. Q. Did you hear any sound—any sort of sound at or before he struck you? A. Not a thing."

Another witness testified that the defendant's automobile, then coming from the north, was coming pretty fast, about 40 miles an hour.

Also, relating to the question of speed is the following evidence (from testimony of witness Weber), viz.:

"Q. Did you make any measurements of those tracks with reference to the west curb of Third Street West? A. I did. Q. And at what point did you start to make these measurements? A. I would like to remark there were two different kinds of tracks; I only measured the dark, black tracks. I measured them at their extremities, the north point and the south point. Q. What did you find those measurements to be? A. At the north point, I found them to be six feet, six inches from the base of the curb; at the southern point, I found them to be six feet and four inches from the bottom of the curb. Q. Are you now referring to the west, or right-hand track? A. The track nearest to the curb. Q. Did you make any examination of these tracks in a lineal distance? A. Yes, sir. Q. And what measurements did you find with reference to those? A. I found them to be forty-one and a half feet long. Q. What was the character of the tracks which you observed and measured? A. They were a dark black track, where no tread of any kind of the tire was visible. Q. Did you make any further examination as to any other tracks north of where you found the black tracks? A. I observed that in direct line with those black tracks these lighter tracks extended farther north. Q. How far north? A. I made no measurements of them, but I would say at least twenty or thirty feet. Q. North of the black tracks? A. Of the black tracks. Q. Was there any indication of a tire smear on the pavement beyond the darker tracks, which were forty-one feet long? A. Certainly."

Also (from testimony of witness Reinek): "Q. Tell the court and jury what you did there, what you found. A. Well, when I come out of the house in the morning, I see that black stripe where the wheels slid; I study it strong, look that way; I figure how long is that and how wide; I put my long rule out and measure forty-one feet long way; I take my rule this way, I measure just about in the middle, just about seven feet. Q. from the west curb? A. Yes;

on the first black mark about seven feet; I just measured in the middle. Q. Then the tracks were forty-one feet long? A. Yes. Q. And the west track was about seven feet from the curb, is that correct? A. Yes. Q. What kind of tracks were these, Henry? A. Real black ones, real black ones. Q. Could you see any traces of rubber on the—(interrupted). A. Yes; real black; must have had awful good brakes, set them so hard."

In addition, there seems to be no contention but that the car from the north and the one from the south passed each other at a point substantially opposite the place where plaintiff's car was parked.

In consideration of the testimony quoted, it is to be remembered that "the primary and paramount object in establishing and maintaining streets and highways is for the purpose of public travel, and the public and individuals cannot be rightfully deprived of such use." 13 R. C. L. 251, sec. 208.

And also, as an incident to such lawful use, travelers, within reason, may stop temporarily upon such highways. 29 C. J. 648.

The introduction and general use of the automobile did not *ipso facto* deprive the traveler of his ancient rights upon the public highways. The characteristics of the newer methods of transportation may have indeed suggested the adoption of reasonable regulations for the benefit of all who travel or are transported. But the ancient rights of those who travel were modified by legislation only to the extent that the language employed by the legislature expressly directed or necessarily implied. The characteristics of the modern automobile clearly manifested the necessity of regulation of traffic where there was an intersection or crossing of lanes of travel, such as are found at road and street intersections. To meet this situation we find a general adoption of ordinances, such as the McCook ordinance here presented, and the statutory provisions referred to in the briefs herein filed.

Our section 39-1148, Comp. St. Supp. 1937, provides, in part:

"(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk or intersection shall yield the right of way to vehicles upon the highway."

It will be noted that neither ordinance nor statute has application to a pedestrian except when in the act of crossing the highway. It is equally obvious that the many cases cited by counsel pertaining to accidents occurring while crossing highways afford no help in view of the issues in the present case.

Thus in *Doan v. Hoppe*, 133 Neb. 767, 277 N. W. 64, the defendant's car struck and injured plaintiff while the latter was in the act of crossing the city street of Lincoln between intersections, in direct violation of the city ordinance involved. In the instant case the act of crossing the street by Brenning had not yet commenced at the time he was struck by defendant's car, and no violation of the city ordinance or the statute had then occurred. This constitutes the essential difference between the two cases, and renders the principle of law announced in the *Hoppe* case inapplicable to the present one.

But, even if the terms of the statute were applicable to the present situation, it will be noted that the statute does not forbid pedestrians from crossing between intersections, but only gives a superior right of way to the vehicle drivers, and a pedestrian is not necessarily negligent in attempting the crossing. Such statute bears only on the degree of care to be taken by the pedestrian.

These statutes and ordinances, limited by the language in which enacted, apply only to the act of the pedestrian in

crossing the streets of the city or the public highways of the state. They in no manner and in no degree otherwise affect the traveler's traditional right to use the public way and all parts thereof including his right of longitudinal travel thereon.

Thus, "A pedestrian, in walking along the traveled part of the highway, may assume that automobiles approaching from the rear will exercise ordinary care in keeping a lookout for him, especially if walking along the extreme right-hand edge of the paved roadway, and it is not as a matter of law his duty to turn about constantly and repeatedly or at any stated intervals of either time or space to observe the approach of vehicles from the rear. So his failure to turn and look back while walking in the street of itself is not sufficient to convict him of negligence contributing to his injuries when struck." 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 1414.

Nebraska has fully adopted the principles just set forth as to the right of longitudinal travel. *Cotten v. Stolley,* 124 Neb. 855, 248 N. W. 384. In the *Cotten* case, in an opinion by Day, J., there is this statement, viz.:

"It was immaterial whether Alta Cotten was walking on the graveled shoulder of the highway or upon the pavement (when she was struck and injured by an automobile coming from behind), as a pedestrian had a right to walk in a street or highway, and, in so doing, was not as a matter of law guilty of contributory negligence."

The controlling principles of this *Cotten* case, as announced in the opinion, are, viz.:

"Pedestrian has right to walk longitudinally in highway, unless forbidden by statute, and is not, as a matter of law, guilty of contributory negligence in so doing.

"Pedestrian lawfully on highway may rely on reasonable care of automobile drivers, and is not negligent, as a matter of law, in failing to anticipate driver's negligence."

See, also, *Carlson v. Roberts,* 133 Neb. 166, 274 N. W. 473.

It being conceded that a person may be lawfully upon the

highway, walking upon the right side thereof in longitudinally passing over it, without being chargeable with contributory negligence, does that immunity cease when he momentarily halts and stands still?

"The mere fact that a person was standing momentarily in the street or highway does not of itself necessarily show contributory negligence as a matter of law, as he may assume that the motorist will not without warning run him down; and the fact that a person in the street is not in motion does not relieve motorists of all duty to use due care under the circumstances.

"Thus a pedestrian struck by an automobile is not guilty of contributory negligence because at the time of the accident he was standing in the roadway, conversing with one who had there stopped his team to talk with him, or was standing on a safety zone platform, or was standing for a few minutes on the pavement with one foot on the curb, or was awaiting the passage of a car, or was standing in the gutter, or a store owner standing on the pavement, or one stopping in a public way near the sidewalk to speak to one who is standing on the sidewalk." 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 1395.

See, also, 1 Berry, Automobiles (6th ed.) 363.

"One is not necessarily guilty of contributory negligence because he is standing in the street when he is struck by a motor vehicle. When one is lawfully standing in the street, and no obstacle intervenes between such person and the driver of an approaching automobile, the duty is imposed on the driver to avoid a collision and not run down the foot traveler. While such a person cannot be entirely oblivious to his surroundings, he is not necessarily guilty of negligence because he does not look or see or hear the approaching machine." 5-6 Huddy, Automobile Law (9th ed.) sec. 101.

"Where a person is standing still in the street and does not observe the approach of an automobile, it is the duty of the driver to turn out so as to avoid striking him. Especially is this so, where there is ample room for the auto driver to

pass the pedestrian in safety, or where the car turns toward the pedestrian. He is not permitted to run him down and then claim that such pedestrian was guilty of contributory negligence in not seeing and avoiding the automobile. The same obligation is upon the driver, although the pedestrian is aware of the approach of the car." 5-6 Huddy, Automobile Law (9th ed.) sec. 4.

It is obvious that when the plaintiff traveling longitudinally in his car parked the same, opened the left-side door, got out of the car and stood beside it with one hand upon the handle of the door, his legal position was no worse than if he had walked longitudinally down the street and momentarily paused in the place he was then standing. He had not commenced the crossing of the street, and had no present intention of so doing until it was "cleared." Allowing a frontage of 24 inches for plaintiff as he then stood, 5 feet, 8 inches for the width of his automobile, beside which he was standing, and six inches for the distance from his automobile to the curb line, we find the space occupied to be 8 feet, 2 inches. This allowed an unobstructed clearance of 8 feet, 7 inches between plaintiff and the center street line, and deducting 6 feet 2 inches for the cars parked on the east side of the street, afforded a free, open, unoccupied space of at least 19 feet, 2 inches for the two cars to pass simultaneously in the center of the street. This was an ample clearance had the driver of the offending car driven with due care.

Truly, the plaintiff was fairly within the scope of this doctrine, viz.: "Certainly he had no reason to suppose that, merely because he was standing in the roadway, he would be run down by the recklessness of the driver of an automobile. He was lawfully there, and any person using the highway was bound to take notice of him, and to use care not to injure him, and the plaintiff had a right to assume that this would be done." 5-6 Huddy, Automobile Law (9th ed.) note under section 101 at page 174.

See, also, *Mezzi v. Taylor,* 99 Conn. 1, 120 Atl. 871; *Wellington v. Reynolds,* 177 Ind. 49, 97 N. E. 155; *Fong Lin v.*

Probert, 50 Cal. App. 339, 195 Pac. 437; *Martin v. Zatarain*, 7 La. App. 629; *Hershkowitz v. Moton Realty Co.*, 194 N. Y. Supp. 806; *Arnaz v. Forbes*, 51 Cal. 665, 197 Pac. 364; *Melville v. Rollwage*, 171 Ky. 607, 188 S. W. 638; *Smith v. Spirek*, 196 Ia. 1328, 195 N. W. 736; *White v. Edwards*, 222 Mich. 321, 192 N. W. 560; *Millay v. Town Taxi, Inc.*, 242 Mass. 314, 136 N. E. 127.

In Babbitt, Motor Vehicle Law (4th ed.), secs. 1814 and 1816, the principles applicable to the issues in the present case are stated as follows:

(Section 1814) "The driver of an automobile is bound to keep a watch for and avoid persons standing near standing vehicles, and it is not negligence for the pedestrian to stand thus on the street side of a standing vehicle. Where there is ample room for the driver to pass, it is negligence for him to run over such a pedestrian, even though the latter heard the automobile approaching. So, the driver of a vehicle who attempts to pass such a person standing beside a standing vehicle, without slowing down and without considering how he can pass, is negligent."

See, also, *Shea v. Hemming*, 97 Conn. 149, 115 Atl. 686; *Williams v. Schmidt*, 213 Ky. 122, 280 S. W. 494; *Myers v. Kennedy*, 306 Mo. 268, 267 S. W. 810; *Cooper v. Agee*, 222 Ala. 334, 132 So. 173; *Walden v. Stone*, 223 S. W. (Mo. App.) 136; *Strachan & Son v. Illinois Brick Teaming Co.*, 263 Ill. App. 481; *Coffman v. Singh*, 49 Cal. App. 342, 193 Pac. 259.

(Section 1816) "The fact that a pedestrian stops momentarily and stands still in the highway does not render him *per se* guilty of contributory negligence, and the driver is not thereby exonerated from all duty and liability by the fact that he is not in motion. Such a pedestrian has the same rights in the highway as a driver injuring him, and a driver having ample time and opportunity to avoid a collision with a pedestrian standing on the highway is negligent, if he fails to do so."

See, *Murphy v. Adams*, 99 Conn. 632, 122 Atl. 398; *Millay v. Town Taxi, Inc., supra; White v. Edwards, supra; Lustik*

v. Walters, 169 Minn. 313, 211 N. W. 311; *Green v. Bohm,* 65 Mont. 399, 211 Pac. 320; *Martin v. Zatarain, supra; Henkel & Sullivan v. Robinson,* 27 Ohio App. 341, 161 N. E. 342; *Stotts v. Taylor,* 130 Kan. 158, 285 Pac. 571.

Due consideration of all the facts reflected by the evidence in this case, in the light of the principles established by the authorities cited, leads to the inevitable conclusion that at the time of the accident the plaintiff was lawfully on the pavement where he was standing, and his position and presence were clearly open to the view of the approaching cars. He had a right to rely on reasonable care on part of automobile drivers thereof. Any person using the highway was bound to take notice of him and to use care not to injure him, and plaintiff had a right to assume that this would be done. When in that position, after alighting from his automobile, he looked to the northward and observed an approaching car apparently traveling in the center of the street but so far away that he could not judge its speed, and then turned to the south and, for a brief period of four or five seconds, observed an approaching car from that direction but nearer at hand, when he was struck by the automobile he had first seen, which in the meantime rapidly and silently had bore down upon him without sounding horn or giving other alarm, it cannot be said that the injured party was guilty of contributory negligence as a matter of law.

It follows that in sustaining the defendant's motion for judgment, made at the close of plaintiff's evidence in chief, the district court erred. Its judgment is, therefore, reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

RUDOLPH BLUM, APPELLANT, V. CLARENCE W. TRUELSEN ET AL., APPELLEES.
287 N. W. 782

FILED OCTOBER 6, 1939. No. 30623.

Banks and Banking. If a cashier purchases a note of his bank, paying full value therefor, and the transaction is entirely free of fraud, bad faith, or undue advantage, such transaction cannot be attacked collaterally by the maker of the note when suit is brought thereon by the owner.

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

Paul I. Manhart and *M. J. Buckley*, for appellant.

William R. Patrick, contra.

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

PAINE, J.

Plaintiff brought action on a promissory note in the amount of $1,150, dated March 15, 1931, made payable six months after date to the German-American State Bank of Chalco, Nebraska, and signed by Clarence W. Truelsen, defendant, and his father, Henry T. Truelsen. After 20 hours of deliberation, the jury returned a verdict against Clarence W. Truelsen only for $874, on which verdict the trial judge entered judgment and dismissed the action as to the father, Henry T. Truelsen.

The pleadings in this case are very voluminous, the plaintiff having filed an original petition and four amended petitions. The defendants filed separate answers.

It is alleged as a defense by Clarence W. Truelsen that the plaintiff, the cashier of said bank, with knowledge of its impending failure, and to avoid personal loss as a depositor therein, resorted to the "fraudulent scheme" of selling the note to himself, without the knowledge or consent of the directors, and that he did not disclose his claim of ownership of said note for some years after he purchased it and until the commencement of this action; that the board of

directors never authorized, consented to, or knew of the transaction.

The evidence discloses that this was a renewal note of Clarence W. Truelsen, and that it was given for six months at 8 per cent. interest. After the father's signature had been placed thereon, and on July 13, 1931, the plaintiff, being the cashier of the bank, figured up the interest due on the note and purchased the note of his own bank, charging his personal checking account in said bank, and entering a credit to the bank of $1,180.42, being in full payment of the note, and indorsing on the back of the note the following: "Without recourse pay to the order of Rudolph Blum German-American State Bank By Rudolph Blum Cashier," and making the records of the bank indicate that the note had been paid by the makers on that day.

In exhibit No. 5 is a supplemental report to the chief examiner, signed by the board of directors, in which it is stated that the Clarence W. Truelsen note has been paid. The evidence thus discloses that the bank received full payment for the note on the day the cashier purchased it, and therefore did not lose anything by the transaction.

"A director or officer may engage in business transactions with or through his bank if such transactions are entirely free of fraud, bad faith, or undue advantage and are not forbidden by by-law or statute." 9 C. J. S. 241, sec. 121.

This action is not a direct action by the bank, nor by the receiver of the bank, attacking the purchase of the note by its cashier, but it is brought in here as a collateral issue by the maker of the note when he is attempting to avoid payment thereon.

In the opinion of the court, so far as the maker of the note is concerned, the cashier owned the note, having paid full value therefor, and he had a right to bring the action thereon.

Henry T. Truelsen, the father, alleged that, subsequent to the execution and delivery of the note to the bank by his son, the plaintiff, being cashier of said bank at that

time, induced the defendant, without the knowledge of his son, and without any consideration therefor, to sign said note.

Henry T. Truelsen testified that he had been induced to sign the note after its delivery to the bank, and that he received no consideration, and therefore had incurred no liability whatever by signing the note long after his son had delivered it to the bank.

In the instructions to the jury, the court properly instructed the jury in instruction No. 6, which reads as follows: "You are instructed that the defendant Henry T. Truelsen alleges in his amended answer that he signed said note after it was executed and delivered to the said bank by defendant Clarence W. Truelsen, without the knowledge of Clarence W. Truelsen, and without any consideration therefor, not as an accommodation party but as surety. The burden of proof is upon the defendant Henry T. Truelsen to establish said defense by a preponderance of the evidence and if you find he has established such defense then he would not be liable on said note and you should return a verdict in his favor."

The jury had one side light on the ability of the father to protect himself in banking matters, for the evidence disclosed that Henry T. Truelsen had $700 on deposit in the bank, and just before the bank failed he came in and borrowed $2,000, so that he could get his deposit in full by paying the difference between his deposit and the $2,000 he owed the bank, so he lost nothing as a depositor.

Upon the sharply conflicting testimony given by the plaintiff and Henry T. Truelsen and his son, the jury must have decided from this evidence that, when the son renewed his note, which had been running for many years, it was a completed transaction; that some time afterward, without the knowledge of the son, the father was induced by the cashier to put his name on it, without any consideration whatever. It was an open question whether the father signed that note without consideration, and it was submitted to the jury on the evidence, under proper instruc-

tions, and the jury found that the son alone was liable on the note. We think we are bound by that verdict.

The evidence discloses that the bank failed on October 30, 1931, and the only possible explanation for the action of the jury in returning a verdict for so much less than the face of the note was that the jury knew that other depositors lost approximately 24 per cent. of their deposits in the final liquidation of this bank. It was suggested in the argument that perhaps the jury deducted from the face of the note the amount which the plaintiff would have lost if, instead of purchasing the note of the bank, he had left this money on deposit in his bank until it failed. There appears no other possible explanation for the size of the verdict returned.

This court has held that, when the jury fail to add interest in the verdict returned, the court may make the proper computation and include the amount of the interest in the judgment, without any amendment of the verdict whatsoever. *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, 206 N. W. 765; *Swygert v. Platte Valley Public Power and Irrigation District*, 133 Neb. 194, 274 N. W. 492.

The verdict and judgment cannot be sustained on the evidence in the case, and are therefore reversed and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

CHARLES P. BRATT, APPELLEE, V. JOSEPH S. WISHART, ADMINISTRATOR, ET AL., APPELLANTS.

287 N. W. 769

FILED OCTOBER 6, 1939. No. 30691.

1. **Liens.** The district court has original jurisdiction of an action to declare a lien upon real estate.
2. **Election of Remedies.** A futile attempt to assert a nonexistent remedy does not, under the doctrine of election of remedies, preclude a resort to the proper equitable remedy.

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

Herbert W. Baird and *William M. Holt,* for appellants.

Perry, Van Pelt & Marti and *John H. Comstock, contra.*

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

PAINE, J.

Defendants appeal from a decree in which an equitable lien was impressed upon certain real estate and a sale was ordered if a judgment in favor of the plaintiff for $8,565.71, with 6 per cent. interest from January 20, 1939, was not paid within 30 days.

This is the second appearance of this litigation in this court. In November, 1934, an opinion was released, written by Chief Justice Goss, 127 Neb. 836, 257 N. W. 258, in which a refusal on the part of the district court to declare a trust against this same farm property was reversed and a new trial ordered. Many of the facts involved will be found set out in such former opinion.

The evidence discloses that for many years John P. Bratt had owned 240 acres of unimproved land lying about one mile west of Bennet in Lancaster county. The plaintiff, who was a nephew of John P. Bratt, was born near Bennet over 50 years ago, and lived with his uncle in Lincoln while attending the Lincoln high school, from which he graduated. The plaintiff then worked for many years in the Citizens Bank of Bennet, of which his uncle was vice-president and principal stockholder. While an employee in this bank, an oral agreement was made at the Bratt home in Lincoln in August, 1919, by which the plaintiff was to build a good set of improvements upon this 240 acres and move onto the place and try farming, and if he was successful in this it was agreed that a written contract should be drawn between them, in which the plaintiff could buy the land from his uncle for $175 an acre, and it was agreed that, if the plaintiff did not make a "go" of it, he would not lose anything from having erected these improvements, in which he spent over $10,000. This conversation was had in the

presence of the plaintiff, his wife, and John P. Bratt, and his wife, Elizabeth Bratt, was present during part of the conversation.

The plaintiff and his family lived on this farm from about March 1, 1920, until the summer of 1922, when John P. Bratt desired him to go to Albion and take charge of the telephone line owned there by John P. Bratt and "Hal" Bratt, another uncle; and John P. Bratt stated that he thought the plaintiff would be better off if he gave up farming and went into the telephone business, and that he needed him at Albion and wanted him to go, which he did, and later worked for them at Newman Grove on another telephone line.

John P. Bratt died intestate on April 25, 1930, leaving as his heirs his widow, now deceased, and his daughter, Lourene Bratt Wishart. In his safety deposit box was found a small slip of paper, which was proved to be in his handwriting, which was marked exhibit No. 5, and reads as follows:

"The 240 acres in sec 9-8-8 should never be sold for less than $150 per acre plus $5,000 or 6,000 for the improvements, and should bring $200 or more per acre before many years.

"When this land is sold I want it sold plus the improvements and the amt the improvements bring to be paid to Charles P Bratt who built them.

"May 8 - 26. John P Bratt
"1501 C St."

John P. Bratt raised the price of this farm $50 an acre to a real estate agent, saying that he must get the value of improvements out of it for the plaintiff. He refused at one time to lease it for longer than a year, because he was trying to sell it so the plaintiff could get his money out of the improvements, and on several other occasions, to men with whom he had dealings, he stated that the plaintiff should have the value of the improvements when the property was sold.

The plaintiff filed a claim on January 21, 1931, against

the estate of his uncle for the value of these improvements, and this claim was rejected by the county court, perhaps because John P. Bratt had never promised the plaintiff that he would repay him the cost of the improvements in cash, but always agreed to settle for them on a fair basis out of the proceeds when the farm was sold.

After the adverse ruling on the claim had been appealed to the district court, the plaintiff began this independent action in equity on January 19, 1932, to have a trust declared in the farm and a lien placed thereon for the value of his improvements. This equity case was tried in the district court, and defendants prevailed, and upon appeal it was reversed in the opinion written by Chief Justice Goss. It was tried in the district court a second time, and the trial judge resigned before deciding it, and the appeal now before us is from the third trial of the equity case in the district court.

On February 20, 1932, defendant filed a motion to require plaintiff to elect whether he would proceed with his petition in equity for a lien on the land, or whether he would prosecute his appeal pending in the district court from the order of the county court rejecting his claim against the estate. This motion was sustained. Thereupon, plaintiff filed an election to proceed with the action in equity, and after trial a decree was entered in the district court for the defendants on May 19, 1933, and on December 29, 1933, the appeal from the ruling of the county court was dismissed for want of prosecution.

The defendants contend that the judgment of the county court rejecting the claim against the estate was supported by the same evidence that had been produced in the equity case, and that section 30-609, Comp. St. 1929, provides that every person is forever barred from recovering on such claim or demand, and that all questions were disposed of when the county court rejected the claim against the estate; that such ruling was *res judicata*, and the question is forever settled, and cite a large number of authorities in support of their contention; that county courts are courts of

general jurisdiction, and their settlement of all matters relating to the distribution of estates, made upon due and proper notice, is final and cannot be attacked, citing *In re Heirship of Robinson,* 119 Neb. 285, 228 N. W. 852.

In our opinion, the county court, in dismissing plaintiff's claim for a money judgment, did not in any way adjudicate the plaintiff's right to proceed in the district court for an equitable lien; in fact, that would have been beyond the power of the county court, for section 16, art. V of the Constitution of Nebraska, provides that the county court shall not have jurisdiction in civil matters in which the title to real estate is in question.

In *Klug v. Seegabarth,* 98 Neb. 272, 152 N. W. 385, it is held that the district court has original jurisdiction of an action to declare a lien upon real estate in the hands of a residuary legatee. See *Burton v. Defenbaugh,* 132 Neb. 851, 273 N. W. 489; *Abbott v. Wagner,* 108 Neb. 359, 188 N. W. 113; *State v. Bank of Commerce,* 61 Neb. 22, 84 N. W. 406.

It has been held by this court that "A futile attempt to assert a nonexistent remedy does not, under the doctrine of election of remedies, preclude a resort to a legal remedy or operate as an estoppel to assert it." *Live Stock Nat. Bank v. Marshall,* 131 Neb. 185, 267 N. W. 414. See *Henley v. Live Stock Nat. Bank,* 127 Neb. 857, 257 N. W. 244; 18 Am. Jur. 146, sec. 24.

No Nebraska case directly in point having been cited to the contrary, it is our holding that the dismissal of the appeal from the rejection of the claim filed in the county court did not bar the action in equity in the district court.

While it thus appears that the plaintiff attempted to avail himself of a claim against the estate in the county court to which he was not entitled, the defendants, while forcing the plaintiff to elect which of two remedies he would pursue, did not, in their pleadings filed immediately thereafter, or for several years thereafter, make any claim that such conclusive election constituted a defense. It has generally been held that such an election of remedies, being

an affirmative defense, must be seasonably pleaded to be available. 18 Am. Jur. 168, secs. 52, 53.

In the election of remedies, "A mere manifestation of intention to pursue one remedy rather than the other is not an irrevocable election; but it becomes such as soon as the other party has materially changed his position in reasonable reliance thereon. The bringing of a suit for one remedy is a manifestation of choice of that remedy; but it does not preclude the plaintiff from seeking the other remedy instead, if he has a reasonable ground for so doing, so long as the defendant has not so altered his position as to make it unjust to permit the change." Restatement, Contracts, 712, sec. 381. See 15 Neb. Law Bulletin, 255.

The court feels that it should be stated that there have been changes in the attorneys engaged on both sides of this litigation since it was brought to this court the first time.

The defense of the statute of limitations has been continually pressed by defendants, and such a claim was considered in our former opinion. If this court had believed that question disposed of the case, the opinion entered on its first appearance before us would not have said that the evidence wrongly rejected at the first trial "should be considered in order to give fair recompense to plaintiff for his expenditures upon the land."

It is clear from the statement Colonel Bratt placed with his valuable papers in his safety box that he considered that the plaintiff had a trust in the land for the fair value of the improvements. He allowed the plaintiff to keep up the insurance thereon in his own name; then, very shortly before the death of Colonel Bratt, such insurance was canceled, and written in the name of Colonel Bratt.

The trial court made the following finding: "The court further finds that in April, 1930, said John P. Bratt converted the improvements to his own use and repudiated the aforesaid trust; that ever since said date said John P. Bratt and his successors, the defendants herein, have been in possession of said improvements, have moved them, altered them and exercised complete dominion over them and

have enjoyed the benefits therefrom, to the exclusion of plaintiff; that plaintiff did not discover said repudiation until on or about January 8, 1931."

In our opinion, this finding is entirely supported by the evidence, and we see no merit in the contention that this action is barred by the statute of limitations.

In the brief of 240 pages filed on behalf of the defendants, 41 propositions of law are set out, and nearly all of them are argued to a greater or lesser extent. However, we cannot extend this opinion by undertaking a discussion of each of the questions argued at length in the excellent briefs submitted.

There is no question but that the plaintiff erected the buildings on this farm to which he testified, and that he paid out, according to his exhibit No. 3, p. 590, the sum of $10, 541.19 in their construction, and these improvements are still on the premises, but every one knows that improvements erected more than 15 years ago have depreciated in value year after year.

Joseph S. Wishart married the heir to this land, and was the administrator of the estates of both her father and mother. He testified at length as to the very extensive repairs necessary to these buildings: The foundations were defective, roofs worn out, the buildings had to be painted, etc. He states that the house was too large for such a farm, and thereby limited the purchasers to those who desire such extensive improvements. Mr. Wishart is rather pessimistic when it comes to the value of the improvements placed thereon by the plaintiff, and testifies that, when these buildings were practically new at the time plaintiff moved from the farm to Albion at the request of Colonel Bratt, all of these improvements had not added more than $4,500 to the value of the farm; that by the year 1926 the improvements were worth perhaps $3,500, and by 1930 these improvements, for which the plaintiff paid over $10,000, were worth only $2,500.

Several witnesses testified to the value of these improvements. George Christian, who has lived in Lincoln 27 years

and been in the real estate business all of that time, handling improved and unimproved city and farm property, placed the value of the improvements as $8,400 in 1930 when they were taken over by the defendants. It was brought out in the evidence that the average of the estimate of five witnesses placed the value of the improvements in 1922 at about $6,000. Considerable evidence was also taken as to the rental value of the improvements, and a fair rental value of the improvements from 1922 to 1930 would be $240 a year, and to the fair value of the improvements as of the date 1930 the trial court doubtless added something for rent, and then interest at 6 per cent. since that time. These improvements, as repaired, are still on the premises; they were erected at the sole cost of the plaintiff. In 1930 Colonel Bratt converted these improvements to his own use, and since that time he and his successors have exercised complete dominion over them.

The defendants in their brief say: "Colonel Bratt in his memorandum assumed more obligation than law or equity could have charged him with. His successors have honored that obligation, reverently, regardless of any mere legal liability. They offered the plaintiff leave to remove the buildings, offered to deed the plaintiff the land upon which the buildings stood, tendered the 'improved' lands in exchange for unimproved lands in Charles' control and made a fair cash offer for what value the buildings actually added to the value of the lands subsequent to 1930."

However, these relatives have failed in all attempts to settle the questions involved, and have had three sharply contested trials in the district court, and the matter has been in litigation for some seven years, and should be settled. There is much more that might be said on both sides, but the court has reached the conclusion that there is evidence to support the judgment rendered in the trial court of $8,565.71, and, seeing no prejudicial error in the record submitted, the decree and judgment of the trial court are hereby

AFFIRMED.

SIMMONS, C. J., concurs in the result.

MARY HUFF, APPELLEE, V. OMAHA COLD STORAGE COMPANY, APPELLANT.

287 N. W. 764

FILED OCTOBER 6, 1939. No. 30717.

1. **Workmen's Compensation.** Upon application to modify an award, within the meaning of subdivision (b), sec. 48-142, Comp. St. 1929, as amended (Laws 1935, ch. 57, sec. 27), on the ground of increase of incapacity due solely to the injury, the burden of proof is upon the petitioner to establish by a preponderance of the evidence that the disability has increased.
2. ———. Before recovery may be had for an increase of incapacity due solely to the injury, within the meaning of subdivision (b), sec. 48-142, Comp. St. 1929, as amended, the plaintiff must prove by a preponderance of the evidence that there now exists a material and substantial change for the worse in plaintiff's condition, a change in circumstances that justifies a modification, distinct and different from that for which an adjudication has been previously made.
3. ———. Evidence examined and *held* insufficient to prove by a preponderance thereof that the plaintiff is entitled to an increase of incapacity due solely to the injury, within the contemplation of subdivision (b), sec. 48-142, Comp. St. 1929, as amended.
4. ———. Subdivision (b), sec. 48-142, Comp. St. 1929, as amended, providing for modification of an award or judgment of record, grounded upon an increase or decrease of incapacity, does not authorize a modification because of judicial error, if any, in determining the amount of the award, where it is not appealed from.
5. ———. The disability and the permanent injury from which the plaintiff is suffering, her general physical condition being otherwise normal, are governed by subdivision 3, sec. 48-121, Comp. St. 1929, and the provisions of said subdivision and section are exclusive.

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

Edwin W. Cahow, Hamer, Worlock, Randall & Tye and *Hall, Cline & Williams*, for appellant.

Hobert L. Blackledge, contra.

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

MESSMORE, J.

This is a compensation case, involving section 48-142, Comp. St. 1929, as amended (Laws 1935, ch. 57, sec. 27), which reads in part as follows: "(b) If the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury." The question to be determined is whether or not the plaintiff suffered an increase of incapacity due solely to the injury.

It is not disputed that the plaintiff, on February 21, 1934, sustained an accident arising out of and in the course of her employment as a chicken-picker, receiving an injury to the right brachial plexus. The wage which she was receiving at that time, and upon which the original award of compensation was based, is likewise not in dispute.

A brief history of the proceedings had discloses that plaintiff filed a petition originally with the compensation commissioner May 8, 1934, dismissed by her May 31, 1934, in which she alleged the nature and extent of her injury as follows: "Muscles and ligaments right shoulder torn. Lungs and kidneys injured. Atrophy of right hand." February 20, 1935, plaintiff filed a petition with the compensation commissioner, alleging the nature and extent of the injury as muscles and ligaments right shoulder torn, atrophy of right hand and nerve injury. Hearing was had on this petition March 19, 1935, and an award was made March 28, 1935, the award finding the plaintiff temporarily totally disabled from the date of the accident up to and including March 18, 1935, a period of 55 and 5/7 weeks, and that thereafter all temporary total disability ceased and was followed immediately by permanent total loss of use of plaintiff's right hand, fixing compensation in the amount of $7.94 a week for 175 weeks, as provided in subdivision 3, sec. 48-121, Comp. St. 1929, for the loss of a hand. All of the amounts of compensation were paid with the exception of $31.76, which amount was tendered but not accepted. July 27, 1938, plaintiff filed a petition in the compensation

court, reciting the history of the previous hearing and pleadings, alleging that the nature and extent of her injuries were "injury to the muscles and ligaments of her right shoulder," "atrophy of the right hand and nerve injury;" that plaintiff "suffers extreme and excruciating pains in and about the right hand, shoulder, neck and one side of the face and head;" that she suffers total and permanent disability. Hearing was had on this petition September 23, 1938. November 30, 1938, an order of dismissal was entered by the compensation commissioner, stating that "the medical evidence was not sufficient to allow further or additional compensation." Plaintiff waived rehearing and appealed to the district court, filed a petition therein, reciting the history of the case, and, in addition, alleged that solely as the result of the injuries which she sustained her incapacity has increased, and that she has suffered and sustained total and permanent loss of her right hand, all of the right arm and right shoulder, including injury to her neck and the side of her face and head, and to her entire nervous system. The defendant answered, alleging that the award of March 28, 1935, by the compensation commissioner is binding, final and conclusive upon the parties, and that all of the issues between the parties have been adjudicated. The plaintiff's reply alleged material increase in the disability as fixed by the award of March 28, 1935, and that at this time the plaintiff is totally and permanently disabled.

The district court modified the award by finding the plaintiff totally and permanently disabled and unable to perform any substantial amount of labor either in her particular line of work or in any other work for which she would be fitted except for the injury (*Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635), and fixed her compensation recovery under subdivision 1 of section 48-121, Comp. St. 1929. Defendant appealed from this judgment and here contends that the finding and judgment of the district court are contrary to the law and the evidence and not sustained thereby.

Upon an application to modify an award under the workmen's compensation act, proceeding under subdivision (b), sec. 48-142, Comp. St. 1929, as amended in 1935, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased or terminated as alleged. *Metropolitan Dining Room v. Jensen,* 126 Neb. 765, 254 N. W. 405.

The medical testimony in the instant case discloses that plaintiff was examined and treated during 1934 and 1935 by Doctors L. E. Dickinson and A. E. Bennett. She was examined once in 1935 by Dr. L. M. Stearns and once in 1935 by Dr. C. K. Gibbons. She was reexamined by the four doctors in 1939, shortly before the trial of this cause. Without dispute the medical testimony agreed that the injury to the brachial plexus causes the pain in the plaintiff's right shoulder, arm and hand, which leads to her disability; that the brachial plexus is made up of bundles of nerves which emerge from the vertebral foramina in the lower cervical and upper thoracic region and extend downward and outward to the axilla back of the collar bone and above the apex of the lung; that the plaintiff suffered considerable injury to the median and ulnar nerves; that the ulnar nerve controls the muscles of the little and ring fingers; that the muscles are partially paralyzed due to a nerve injury.

Doctor Gibbons testified that the plaintiff was suffering from the same injury that she complained of when he previously examined her in 1935, and made the same general complaints,—the pain in the arm, shoulder and hand; that she is not able to perform the work in which she was employed at the time of the injury because of the disability in her hand and shoulder.

Doctor Bennett examined the plaintiff for the first time on June 1, 1934; found a very marked nervous state; that the plaintiff was developing a traumatic neuritis from an injury which she had received to her shoulder region, affecting the brachial plexus. He testified that he saw her several times in October, 1934; her complaints were the same,—pains through the shoulder and the arm, difficulty

in moving the muscles of the fingers; that she also had a herpetic skin eruption, becoming pronounced. He treated the plaintiff in November, 1934, in January, 1935, and examined her before the present trial, and found that she had difficulty in gripping with her right hand, except the thumb and forefinger, in lifting the right arm, because of pain; that when she attempts to work she has a rapid fatigue of the muscles in the right hand and arm. The doctor testified that the condition is essentially the same, unchanged except that the skin manifestation is much less; that the character of the pain is the same type of disability complained of by plaintiff in 1935, and her disability is definitely related to the brachial plexus injury; that the general physical condition of the plaintiff is good, outside of the right shoulder, arm and hand, where she has "tenderness over the clavicle, the supraclavicle space high up in the neck, tenderness in front of the shoulder and in the axilla;" that her disability at that time was "in the lower cord of the brachial plexus." The doctor stated that, "so far as the weakness of muscles, pain, contracture of the fingers, the amount of pain she has, and all that, it seems to me it is just the same;" that she cannot use her right arm or elbow or her right shoulder because of pain.

Doctor Dickinson found no evidence of any disability in his examination before the present trial, except in the right hand, right arm and right shoulder, and he testified that plaintiff made the same complaint of pain in the shoulder, in the arm and hand upon movement in 1935 that she made in the later examination; that the statement that plaintiff has a total loss of use of the right hand does not, in itself, affect and describe the plaintiff's present disability, for the reason that she does have a disability of the right shoulder and elbow.

Doctor Stearns testified to an examination he made prior to the present trial, that the condition of the plaintiff was essentially the same as he found it on the first occasion,—"continued pain over the clavicle. Movements of the arm aggravated the pain. There was no atrophy. There was

slightly greater contracture, a little more contracture of the ring and little fingers. The joints could be used, but only with considerable effort and self-control," due to the pain produced. He testified that no new members were influenced or anything in addition than shown in the examination made in 1935, and when questioned by the court the doctor stated that he found the same condition in his first that he found in his second examination.

The plaintiff's testimony, corroborated by others, was to the effect that she was not able to perform the work in which she had been previously employed; that she did her housework assisted by her 16-year-old daughter, but did not have the use of her right hand and arm; that after the first award she was able to indorse compensation checks and write a little with her right hand, but that she cannot at this time write at all, except with her left hand, due to the contractural effect of the injury by disabling her hand. We can conclude from all the testimony that plaintiff does not have, and has not had, the use of her right arm or right hand in any manner since she was injured in 1935.

The increased incapacity claimed by the plaintiff, as disclosed by the evidence, may be summarized briefly as follows: The disability of not being able to write at the present; the increased pain in the region of the shoulder, an aggravation of pain by cold weather, which is incident to the injury suffered by plaintiff, or by the use of the right hand or arm or shoulder, or by violent exercise of any part of her body, the condition being more pronounced than formerly; that her present condition for operative purposes is less favorable than it was within six months of the accident; that the plaintiff's case is hopeless, as far as improvement is concerned, due to the delay in time. As to whether or not improvement in plaintiff's condition may be had is not clear. Doctor Gibbons testified that "after so long a time the prognosis looks bad." However, the doctor did not know whether medical treatment would relieve the plaintiff and stated that after a period of five years partial paralysis is liable to be permanent, which would necessarily

mean the disability now existing, and as had existed in 1935, in the right arm and the right hand.

The similarity in nature and extent of the plaintiff's injuries, as alleged in her petitions before the compensation commissioner on three occasions and in the district court, is significant. The testimony of the doctors is conclusive that there is no difference in the complaints and injuries received by the plaintiff from the time of the award made in 1935 and the time of the examination by the doctors in 1939. The plaintiff contends that the testimony of the doctors, in using the word "essential," which is tantamount to "substantial," is not a statement that the condition of the plaintiff was essentially the same as testified to by the doctors in the compensation hearing.

The plaintiff makes the further objection that the evidence introduced before the compensation commissioner in 1935 is not before this court. We believe, however, that the evidence introduced in the instant case is sufficient to disclose the plaintiff's incapacity at the time of the compensation hearing in 1935, compared with her incapacity at the time of the present trial. The examinations of the doctors, as herein set out, are conclusive as to the incapacity suffered by plaintiff from 1935 to the present time. In addition thereto, the testimony of the plaintiff is sufficient to disclose a comparison of her present incapacity with the incapacity suffered by her in 1935.

The Minnesota compensation act provides for the modification of a judgment as follows: "(b) If the parties cannot agree, then at any time after six (6) months from the date of the award an application may be made to the court by either party on the ground of increase or decrease of incapacity due solely to the injury." Gen. St. Minn. 1913, sec. 8222. It will at once be noted that this statutory provision is analogous to subdivision (b), sec. 48-142, Comp. St. 1929, as amended.

While it would appear that the section of the Minnesota statute, quoted above, is repealed by the Laws of Minnesota for 1921, such repeal would not be effective as to

the comparison made herein, for the reason that subdivision (b), sec. 48-142, Comp. St. 1929, as amended, is the law in Nebraska.

In the case of *Connelly v. Carnegie Dock & Fuel Co.*, 148 Minn. 333, 181 N. W. 857, quoting from *State v. District Court of Hennepin County*, 136 Minn. 147, 161 N. W. 391, the court said: "Justice Bunn, in referring to this statute said: 'It is quite manifest that this section was not intended as a method of correcting errors in fixing the amount of compensation, as the remedy is not available until after six months from the award, and then only where there has been an "increase or decrease of incapacity." This clearly means an increase or decrease of capacity since the award was made, a change in circumstances that justifies a modification.' "

Before recovery may be had for an increase of incapacity due solely to the injury, within the meaning of subdivision (b), sec. 48-142, *supra*, the plaintiff must prove by a preponderance of the evidence that her incapacity has been increased (meaning amplified, enlarged, expanded, extended or intensified. Webster's New International Dictionary); that is, that there now exists a material and substantial change for the worse in the plaintiff's condition,—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication has been previously made. Plaintiff has failed to meet the burden of proof placed upon her. We fail to find, from an examination of the record, wherein the plaintiff has suffered an increase of incapacity, as compared with the incapacity suffered by her at the time of the injury and of the hearing before the compensation commissioner.

Referring to plaintiff's inability to use her right hand for the purpose of writing, she recovered, under subdivision 3, sec. 48-121, Comp. St. 1929, for the loss of the use of her hand in its entirety. The compensation commissioner may have erred in his adjudication of the rights of the plaintiff in the original hearing, and, perhaps, should have given the plaintiff compensation for the loss of use of her

right arm. No appeal was taken by plaintiff from the award. Mistake is not a ground provided by the Nebraska compensation statutes to modify a final award of compensation. A judgment is final except that after six months it may be modified by application of either party for increase or decrease of disability. *Metropolitan Dining Room v. Jensen, supra.*

The plaintiff sought to obtain compensation for an increase in her disability, as provided by subdivision (b), sec. 48-142, *supra.* In *Metropolitan Dining Room v. Jensen, supra,* it was said: "The judgment awarding compensation is final and cannot be modified or vacated except as provided either by the compensation statutes or statutes relating to civil procedure. In fine, all matters are excluded from the consideration of the court upon an application to modify the decree except to determine the increase or decrease of the disability due solely to the injury."

The plaintiff's injury is clearly within subdivision 3 of section 48-121, Comp St. 1929. The legislature separated the specific injuries,—loss, or loss of the use, of a hand, arm, etc.,—from other partial disabilities, and by the use of the language,—for all disability resulting from the loss of a hand, etc., compensation shall be as provided in subdivision 3. Subdivision 3, sec. 48-121, *supra,* conclusively determines that for the loss of a specific member compensation will be paid for a designated period of time, definitely fixing the liability. The language is plain and unambiguous and is not susceptible of other construction.

The rule announced in *Hull v. United States Fidelity & Guaranty Co.,* 102 Neb. 246, 166 N. W. 628, *Schroeder v. Holt County,* 113 Neb. 736, 204 N. W. 815, and *Carlson v. Condon-Kiewit Co.,* 135 Neb. 587, 283 N. W. 220, governs. In the *Carlson* case the court said in the opinion: "It was clearly the intention of the legislature in establishing a schedule of benefits for the listed specific injuries to fix such benefits without regard to the extent of the subsequent disability of the injured employee." In commenting upon the

same section of the statute this court said: "Perhaps it was thought that the period during which compensation was allowed would be sufficient to allow the injured workman to fit himself for some other kind of occupation, or that if a man lose the use of an * * * arm," etc., "and is otherwise competent and in good health, this should not compel an employer, who perhaps has been guilty of no negligence, to bear the burden of his support indefinitely. The law seems intended to help the injured workman to help himself. Whatever the legislative motive or intent may have been, we cannot disregard the plain words of the statute." *Hull v. United States Fidelity & Guaranty Co., supra; Carlson v. Condon-Kiewit Co., supra.*

The judgment of the trial court is reversed, and plaintiff's action dismissed.

REVERSED AND DISMISSED.

EGBERT GEMBLER V. CITY OF SEWARD.
288 N. W. 545

FILED NOVEMBER 24, 1939. No. 30471.

ERROR to the district court for Seward county: HARRY D. LANDIS, JUDGE. Opinion on motion for rehearing of case reported *ante*, p. 196. *Judgment adhered to as herein modified.*

McKillip & Barth and *Ivan A. Blevens*, for plaintiff in error.

Paul H. Bek, contra.

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

PER CURIAM.

The opinion in this case appears herein, *ante*, p. 196, 285 N. W. 542.

On motion for rehearing we are asked to review our holding that the enactment of the Uniform Motor Vehicle

Act (Laws 1931, ch. 110) did not preclude the city of Seward from providing a penalty by ordinance for drunken driving. On further consideration, we are satisfied with the correctness of the conclusion that, under the powers conferred upon the city of Seward by general statute, it had the right to adopt such an ordinance, not inconsistent with the regulations and prohibitions prescribed by the legislature, and that the enactment of the Uniform Motor Vehicle Act did not supersede this right.

We are asked also to review the validity of the portion of the trial court's order that defendant shall not drive a motor vehicle within the state of Nebraska for a period of one year from the date of his conviction. This prohibition is based upon the following provision of the ordinance: "Any person found guilty of such offense (drunken driving), in addition to the general penalty provided hereafter for the violation of the provisions hereof, shall be adjudged and ordered by the court not to drive a motor vehicle within the state of Nebraska for a period of one year from the date of such conviction." The right to operate a motor vehicle within the state of Nebraska is dependent solely upon the issuance of a driver's license by the state. It is a field over which the state has reserved exclusive control. No power has been conferred upon the city of Seward to suspend or regulate, by ordinance, any such license privilege which the state has granted. That, however, is the purpose and effect of the ordinance provision quoted, and it is therefore invalid, but without affecting the other provisions of the ordinance. It may be added that, even if no driver's license statute existed, the city of Seward could not exercise general police powers to prohibit the operation of a motor vehicle throughout the rest of the state for violation of one of its ordinances. The question here discussed was not presented or considered in our previous opinion.

The opinion is accordingly modified to the extent of vacating the portion of the trial court's order forbidding defendant to drive a motor vehicle within the state of Nebraska for a period of one year, and, as thus modified, the

sentence of the trial court is affirmed and the motion for rehearing is denied. This modification, however, is without prejudice to the exercise of any powers which the trial judge may have under the general statutes of the state over defendant's driver's license, after issuance of the mandate herein.

AFFIRMED AS MODIFIED.

INDEX

Action.

In a suit in equity, relief will be administered as the nature of the case and the facts, as they exist at the close of litigation, demand. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521

Adoption.

Legally adopted children have all the rights and privileges which, by the laws of property and descent, have been conferred on children born in lawful wedlock, unless precluded therefrom by the terms of adoption. *In re Estate of Taylor* 227

Agriculture.

At election on question of whether an appropriation of county funds shall be made for support of agricultural extension work, there can be no appropriation unless a majority of all votes cast at the election are in favor thereof. *Thurston County Farm Bureau v. Thurston County* 575

Appeal. SEE CRIMINAL LAW. TRIAL.

1. Jurors should not make private inspection of the *locus in quo* during trial, and it is prejudicial if such visit improperly influenced the verdict. *Merritt v. Ash Grove Lime & Portland Cement Co.* 52
2. Casual inspection of premises by jurors who were compelled to pass that location was not reversible error, where such inspection did not improperly influence the verdict. *Merritt v. Ash Grove Lime & Portland Cement Co.* 52
3. A juror's visit to the *locus in quo* during trial was not prejudicial where he did not discuss his observations with other jurors, who thereafter, at their request and without objection, visited the place with the trial judge and the sheriff. *Merritt v. Ash Grove Lime & Portland Cement Co.* 52
4. Where a jury is waived and no prejudicial error appears, judgment will be affirmed. *Tullis v. Blixt* 142
5. In equity suits involving questions of fact, where there is irreconcilable conflict in evidence, a reviewing court will consider the fact that the trial court observed the demeanor of witnesses. *Robinson v. Williams* 253

6. Where the jury has disregarded material testimony which, if considered and given due weight, would require a different verdict from that returned, a new trial will be granted. *Cuva v. Glens Falls Ins. Co.* 359
7. A verdict so clearly wrong as to induce the belief that it must have been found through passion, prejudice, or mistake will be set aside. *Cuva v. Glens Falls Ins. Co.* 359
8. A verdict based on conflicting testimony will not be disturbed unless clearly wrong. *Hahn v. Doyle* 469
9. The trial court's action in viewing premises without the parties' consent may be reviewed on appeal for prejudicial abuse of discretion. *Carter v. Parsons* 515
10. The fact that the trial court viewed the premises is entitled to consideration and weight on appeal, although the record must contain competent evidence to support the trial court's findings. *Carter v. Parsons* 515
11. In a law action tried to the court, its findings of fact have the same effect as findings of a jury, and cannot be set aside unless clearly wrong. *Carter v. Parsons* 515
12. On appeal in equity, where the evidence on material issues is irreconcilable, the supreme court will consider the fact that the trial court observed the witnesses and their testimony. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
13. Where one defendant perfected an appeal and attempted in the præcipe to designate as appellant another defendant who had not filed motion for new trial, nor appeal undertaking, the error will be treated as an error in designation only, and the correct status of the second defendant as an appellee will be recognized. *Village of Hampton v. Gausman* 550
14. In absence of a bill of exceptions, the supreme court will presume that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined. *Prokop v. Mlady* .. 644
15. A written stipulation of facts forms no part of a record for review unless made so by bill of exceptions. *Prokop v. Mlady* 644
16. A verdict based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Burry v. Interstate Transit Lines* 695
17. Failure of the court to give instructions substantially covering issues supported by evidence is prejudicial error. *Hackbart v. Rohrig* 825

18. In action for death in an automobile collision where defendant alleged that deceased did not exercise due care by reason of having drank beer, and evidence in support thereof is produced on the trial, it is reversible error for the court to fail to instruct on such defense. *Hackbart v. Rohrig* 825
19. In reviewing discharge of jury and entry of nonsuit at close of plaintiff's evidence in action for negligence well pleaded, the appellate court will consider as established every pertinent fact which admissible evidence adduced proves or tends to prove and give plaintiff benefit of proper inferences therefrom. *Brenning v. Remington* 883

Arrest.

1. It is the duty of courts and peace officers to give proper assistance to arresting officers in performance of duty. *State, ex rel. Johnson, v. Goble* 242
2. Where a person charged with a felony is at liberty on bail pending trial, and is legally charged before a court of competent jurisdiction in another county with a separate felony on which warrant commanding his arrest is issued, he is not immune from arrest on the warrant issued on the second charge. *State, ex rel. Johnson, v. Goble* 242
3. Where a person charged with a felony is at liberty on bail, and is charged with a separate felony in another county, the officer to whom the warrant for arrest is issued has the duty to go at once into any county where accused may be found to there arrest accused and forthwith remove him to the county where the alleged crime is said to have been committed. *State, ex rel. Johnson, v. Goble* 242

Assignments.

An assignment vests in the assignee all title possessed by assignor. *Amy v. Mann* 677

Attorney and Client. SEE MASTER AND SERVANT, 17-21.

1. The supreme court is vested with the sole power to admit persons to the practice of law and to fix the qualifications for admission to the bar. *State, ex rel. Hunter, v. Daugherty* 490
2. Giving advice in a tax foreclosure suit *held* practice of law. *State, ex rel. Hunter, v. Daugherty* 490
3. The practice of law by one not duly licensed may be prosecuted as for contempt of court. *State, ex rel. Hunter, v. Daugherty* 490

4. Factors to be considered in determining value of legal services, stated. *Allen v. City of Omaha* 620

Automobiles.

1. A garageman who receives an automobile to repair it becomes a bailee, and as such occupies a position as an independent contractor. *Curry v. Bruns* 74
2. A repairman who receives an automobile to repair is, in absence of custom or contract, under no obligation to deliver it to the owner on completion of repairs. *Curry v. Bruns* 74
3. Failure of a motorist to negotiate a turn onto a bridge constructed on an angle and to the right of the general line of the highway does not constitute gross negligence within the purview of the automobile guest statute. *Johnk v. Scanlon* 187
4. Where evidence in an automobile guest case is resolved most favorably to the existence of gross negligence, and a fixed state of facts is thus obtained, whether such facts constitute gross negligence is a question of law. *Johnk v. Scanlon* 187
5. The district court has jurisdiction to forfeit or suspend the license of a person convicted of operating a motor vehicle while intoxicated. *Gembler v. City of Seward* 196
6. In action for death of motorist in an automobile collision, evidence that motorist's automobile was insured was harmless. *Jones v. McCully* 206
7. "Gross negligence," within the automobile guest statute, means negligence in a very high degree, or the absence of even slight care in performance of a duty. *Munsell v. Gardner* 214
8. "Public service property," as used in the Lincoln home rule charter, includes taxicabs. *Richter v. City of Lincoln* 289
9. Taxicabs are common carriers, and subject to an occupation tax under provisions of the Lincoln home rule charter. *Richter v. City of Lincoln* 289
10. Whether plaintiff in action for damages was, at time of automobile collision in which he was injured, the employee or the guest of the driver of the car in which he was riding was a question for the jury. *Svitak v. Sun Indemnity Co* 303
11. A motorist who had swung his automobile from pavement onto dirt shoulder of highway to avoid collision with approaching automobile and who skidded into path of another automobile was not guilty of "gross neg-

ligence" rendering him liable to guest who was injured. *Amerine v. O'Neal* 642
12. In action by pedestrian against motorist for injuries, evidence *held* insufficient to establish that plaintiff was guilty of contributory negligence as a matter of law, and wholly insufficient to sustain peremptory instruction for defendant. *Brenning v. Remington* 883
13. City of Seward had no power to deprive motorist of right to drive automobile under license privilege granted by the state. *Gembler v. City of Seward* 916

Bankruptcy.

A trustee in bankruptcy succeeds to rights which any creditor of the bankrupt had prior to his adjudication, for the benefit of the bankrupt estate. *Slosburg v. Hunter* 324

Banks and Banking.

1. One seeking to recover a trust fund from the receiver of an insolvent state bank has the burden to establish title to the fund. *Jorgenson v. Department of Banking* 1
2. A certain sum in hands of receiver of insolvent state bank *held* to be an asset of the bank and not a trust fund. *Jorgenson v. Department of Banking* 1
3. The assets of an insolvent state bank are impressed with a first lien in favor of depositors and holders of exchange. *Jorgenson v. Department of Banking* 1
4. Where it is determined in a suit to recover an alleged trust fund in hands of receiver of insolvent state bank that the fund belongs to the bank, equity will follow the banking law specifically dealing with it as such. *Jorgenson v. Department of Banking* 1
5. The department of banking, as receiver of an insolvent bank, has authority to prosecute an action to collect constitutional stockholders' liability. *Department of Banking v. Hedges* 382
6. The term "adjudged," in constitutional provision imposing liability upon bank stockholders immediately after bank shall be adjudged insolvent, does not require a judicial adjudication of insolvency, but includes right of superintendent of banks to declare a bank insolvent. *Department of Banking v. Hedges* 382
7. The term "receiver," as used in constitutional provision authorizing receiver of insolvent bank to collect constitutional stockholders' liability, does not necessarily mean a judicial receiver, but includes the department of banking as receiver and liquidating agent of an insolvent bank. *Department of Banking v. Hedges* 382

8. The constitutional and statutory provisions relating to bank stockholders' liability are remedial, not affecting substantial rights of the parties. *Department of Banking v. Hedges* 382
9. The repeal of a constitutional provision imposing double liability on stockholders of insolvent bank did not affect obligation of such stockholders as to liabilities incurred by the bank prior to such repeal, notwithstanding repeal was without a saving clause. *Department of Banking v. Foe* 422
10. Repeal of the constitutional provision imposing double liability on stockholders of state banks did not affect obligations respecting judgments for debts to creditors entered prior to repeal. *Luikart v. Heelan* 492
11. One who was a stockholder in a bank at the time of issuance of an original certificate of deposit, but who in good faith disposed of his bank stock prior to renewal of the certificate, was not liable to holder of renewal certificate, under the constitutional double liability. *Luikart v. Schmidt* 497
12. Where cashier of bank purchased note of bank in good faith, paying full value therefor, maker could not collaterally attack the purchase in suit by cashier on note. *Blum v. Truelsen* 896

Bonds.

Courts incline strongly to construe bonds as contracts of indemnity only, and will attach more importance to the general purpose of a bond, as shown by its provisions and the parties' interests, than to the precise form of words employed. *First Trust Co. v. Airedale Ranch & Cattle Co* 521

Compromise and Settlement.

1. The compromise of a doubtful right may be sufficient consideration for an agreement. *Rhodes v. Lewis* 870
2. Where one of testator's daughters in good faith contested his will, and settlement was made whereby she, for herself and her sister, waived and withdrew objections to will, in consideration of instrument whereby brothers bound themselves and land to pay certain sums to the sisters, there was a valid and enforceable consideration for the instrument. *Rhodes v. Lewis* 870

Constitutional Law.

1. Ordinance of city of Lincoln imposing an occupation tax on taxicabs *held* constitutional. *Richter v. City of Lincoln* 289

2. The constitutional provision relating to bank stockholders' liability *held* merely remedial. *Department of Banking v. Hedges* 382
3. No vested rights are impaired by statutory provision which creates a remedy for an existing right. *Department of Banking v. Hedges* 382
4. The statute creating the department of banking and granting to it supervision and control of banking is not unconstitutional as an attempt to delegate judicial power. *Department of Banking v. Hedges* 382
5. Statutes conferring upon the department of banking and superintendent thereof quasi-judicial powers and duties are not unconstitutional as an encroachment upon the judicial branch of the government, where such powers and duties relate to matters which are peculiarly affected with public interest, or are subject to regulation under police powers, and where provision is made for appeal from the decisions of such agencies to the courts. *Department of Banking v. Hedges* 382
6. Provisions of banking act *held* not to constitute a delegation of judicial power to the executive department. *Department of Banking v. Hedges* 382
7. The creation of administrative receiverships of insolvent banks by legislative enactment does not interfere with the courts' supervision of administration of trusts or exercise of equity powers. *Department of Banking v. Hedges* 382
8. The terms of a constitutional provision are to be interpreted in their most natural and obvious meaning, and courts may not supply what they deem unwise omissions, nor add words which make substantial change. *Department of Banking v. Hedges* 382
In re Estate of Hall 417
Department of Banking v. Adams 420
Department of Banking v. Foe 422
9. Where private rights of parties have vested by judgment of a court, they cannot be taken away by subsequent legislation. *Department of Banking v. Foe* 422
10. The statute subjecting salaries of officers and employees of the state and subdivisions thereof to garnishee process does not violate the Fourteenth Amendment to the federal Constitution. *Department of Banking v. Foe* 422
11. The state, by fixing uniform standards for containers, may take away the right of licensees to sell alcoholic liquors at wholesale in quart bottles, though the effect of such regulation is to reduce or destroy the value of

property formerly used in the traffic, and such regulation does not amount to taking of private property for public use, nor does it deprive licensees of property without due process of law. *Marsh & Marsh v. Carmichael*.... 797
12. Wholesale distributor of beer under state license has no vested property or contractual right to sell beer in quart bottles, where sales in other than the reasonable uniform standards of containers established pursuant to law are forbidden. *Marsh & Marsh v. Carmichael*..... 797
13. The statute authorizing the liquor control commission to make rules and regulations fixing the nature, form, and capacity of containers used for alcoholic liquors, and an order of the commission fixing such standards and forbidding sales of beer in quart bottles, are valid exercises of police power and are constitutional. *Marsh & Marsh v. Carmichael*..... 797

Contracts.

1. The practical interpretation given a contract by the parties to it while engaged in its performance is a good indication of its true intent, and courts will ordinarily enforce such construction. *Dakota County v. Central Bridge & Construction Co*..... 118
2. Where parties expressly contract under what circumstances an obligation may arise with reference to a certain subject-matter, the possibility of an implied covenant of a different nature is excluded. *Crete Mills v. Smith Baking Co*..... 448
3. Where words added to a contract are merely descriptive of the consideration, the alteration is immaterial. *First Trust Co. v. Airedale Ranch & Cattle Co*..... 521
4. An alteration of a written instrument by one party thereto after its execution will not invalidate it, where the alteration neither varies its meaning nor changes its legal effect. *First Trust Co. v. Airedale Ranch & Cattle Co*..... 521
5. Equity will not refuse to set aside a contract, where it plainly appears that one party overreached the other and gained an unjust and undeserved advantage, though the victim owes his predicament largely to his own stupidity and carelessness. *Sic v. Loup River Power District*..... 506
6. Where a person's simplicity and credulity are taken advantage of by overreaching and misrepresentation of those with whom he is dealing, and he is thereby induced to do something, the effect of which he does not intend, equity will grant relief. *Sic v. Loup River Power District* 506

7. An aged woman, with some physical infirmity and mental instability, though not generally mentally incompetent, *held* entitled to cancelation of a contract for her support and the conveyances executed to her daughter pursuant thereto. *Stieber v. Vanderlip* 862

Corporations.

1. A corporation may carry on the business of an insurance agency through natural persons duly licensed as soliciting agents. *Pierce Co. v. Century Indemnity Co* 78
2. Dealings by a director of a corporation with respect to corporate property will be given most careful scrutiny. *Beaumont v. Folsom* 235
3. A director of a corporation is not prohibited from purchasing, in good faith, an outstanding lien on corporate property, with the knowledge of the other stockholders, to protect his own investment, where the corporation is without financial ability to take up the lien and the other stockholders have refused to join in a contribution for that purpose. *Beaumont v. Folsom* 235
4. A director of a corporation is permitted, in protecting his interest in a lien on corporate property, fairly to purchase the property at judicial sale. *Beaumont v. Folsom* 235
5. Where each stockholder in a corporation has had notice of foreclosure of lien on corporate property, and there is no fraud in connection with the sale, confirmation of the sale may ordinarily be accepted as sufficiently establishing that the property was purchased for its full value. *Beaumont v. Folsom* 235
6. Purchase of corporate property by stockholders at foreclosure sale approved. *Beaumont v. Folsom* 235
7. A stockholder in a corporation by subscribing to stock enters into a contractual relation with the corporation. *Luikart v. Heelan* 492
8. A corporation is not chargeable with knowledge of one of its officers in a transaction where he is in no way representing the corporation. *York Livestock Com. Co. v. Northwestern Livestock Com. Co* 716
9. Where the president of a corporation is indebted to it and indorses over and delivers a check to the bookkeeper as a payment on his account, the corporation is not chargeable with the president's knowledge that the check represented proceeds of a sales transaction handled by him as agent for another to whom he owes a duty to account, nor does his knowledge constitute notice to the corporation under the negotiable instruments law. *York Livestock Com. Co. v. Northwestern Livestock Com. Co.* 716

10. Subscription for capital stock pursuant to the provisions of articles of incorporation is a condition precedent to corporate existence under the statute. *Elson v. Schmidt* 778
11. Where articles of incorporation, adopted by officers of old corporation, whose charter has expired, to enable stockholders to continue its business, provide that all stockholders shall automatically be issued the same amount of stock as in old corporation, this is sufficient provision for stock disposition, and stockholders' assent is all that is necessary to give the new corporation existence. *Elson v. Schmidt*..... 778

Costs.

1. Where services of a litigant's attorney result in preserving a large fund, not only for the benefit of the particular litigant, but for the benefit of all in the same class, and by means of these services the fund is conserved for the benefit of all, the expense thereof, including attorney's fees, should be borne by those benefited and paid out of the fund. *Allen v. City of Omaha*.. 620
2. While the amount claimed in the petition determines whether a justice of the peace has jurisdiction, jurisdiction must not be confused with the statutory right to recover costs. *Stake v. Western Assurance Co*..... 735
3. Attorney's fees are generally taxed as costs, and are no part of the judgment. *Stake v. Western Assurance Co.* 735
4. The statute which provides that, if a justice of the peace has jurisdiction of an action brought in the district court, the plaintiff shall not recover costs, prohibits taxing of an attorney's fee as costs. *Stake v. Western Assurance Co*..... 735
5. Where plaintiff is required to file a remittitur in the supreme court, he will not be allowed attorney's fee. *Stake v. Western Assurance Co*..... 735

Counties.

In absence of statute granting special protection to those who furnish materials and labor to contractors doing construction work with agencies of the state, furnishers of labor and materials are general creditors of the contractor. *Fremont Foundry & Machine Co. v. Saunders County* 101

Courts.

1. Where constitutionality of legislative act has been passed on by the supreme court, and has for years been

accepted as valid, its validity is not open to question. *Taxpayers League v. Benthack* 277
2. A county court has equity powers as to subjects within its exclusive original jurisdiction. *In re Estate of McLean* 353
3. Courts of general jurisdiction have inherent power to stay temporarily execution on judgments rendered by them, where necessary to prevent injustice. *Wassung v. Wassung* 440

Creditors' Suit.

A creditors' suit lies without some independent ground of chancery jurisdiction, such as fraud or trust, to reach assets of judgment creditor's debtor not immediately subject to execution or garnishment. *Fremont Farmers Union Cooperative Ass'n v. Markussen* 567

Criminal Law.

1. The objection that accused did not have a preliminary examination is waived unless raised before he enters plea of not guilty. *Greenough v. State* 20
2. The venue of a crime may be established by circumstantial evidence. *Greenough v. State* 20
3. Imposition of an indeterminate sentence is discretionary with the trial court. *Greenough v. State* 20
4. Identification of visual evidence as the stolen property is one of the elements that must be shown in laying a foundation for the admission of exhibits of property found in possession of accused, the identifying evidence required depending on the circumstances of each case. *Reehle v. State* 128
5. Testimony tending to dispute testimony of accused as to a material fact is proper rebuttal testimony. *Gembler v. City of Seward* 196
6. Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate crimes committed by accused is not admissible. *Henry v. State* 454
7. In a prosecution for incest, it was reversible error to admit evidence, over objection, of separate crimes committed by accused against a female other than the prosecutrix. *Henry v. State* 454
8. The time for executing a sentence of imprisonment, or for commencement of its execution, is not an essential element of the sentence; the essential part being the punishment. *Ulrich v. O'Grady* 684
9. A sentence setting commencement of imprisonment for

a second offense prior to completion of a prior sentence, under which the convict was paroled, is merely erroneous. *Ulrich v. O'Grady* 684
10. A paroled prisoner, whose parole has been revoked, will not be relieved from serving the unexpired term of sentence because, during the parole, he was convicted of a second felony and served sentence therefor. *Ulrich v. O'Grady* 684
11. Where evidence in prosecution for larceny was sufficient to justify the court in submitting it to the jury, the verdict will not be disturbed on appeal. *Brownrigg v. State* 729

Deeds.

1. Courts should not set aside the disposition of property by deed without good reasons, based upon clear and satisfactory proof. *Woodring v. Seibold* 647
2. In an action by executors to set aside a deed by deceased testatrix to defendant, evidence was insufficient to warrant cancelation of deed on ground of undue influence. *Woodring v. Seibold* 647
3. The delivery of a deed is a question of intent, to be determined from the facts and circumstances. *Ehlers v. Seip* 722
4. The burden of proof rests on the one asserting delivery of a deed. *Ehlers v. Seip* 722
5. One of the essentials to the validity of a deed is the acceptance thereof by the grantee with the mutual intention of the parties to pass the title. *Ehlers v. Seip* 722
6. If a grantor keeps a deed in his possession, there is no delivery, particularly if he keeps possession of the realty. *Ehlers v. Seip* 722
7. Where grantor has a deed recorded, the recording is *prima facie* evidence of delivery. *Ehlers v. Seip* 722
8. Intent to deliver a deed does not appear from its recording, if the recorder of deeds was instructed to redeliver the deed to grantor, or if the deed was executed and recorded without the grantee's knowledge. *Ehlers v. Seip* 722

Descent and Distribution.

A creditors' suit lies to impress a lien on the distributive share of a judgment debtor in a decedent's estate in process of administration, and to require the administrator to account for it, after order of distribution, to the clerk of the district court or to a receiver appointed for that purpose. *Fremont Farmers Union Cooperative Ass'n v. Markussen* 567

Divorce.

1. Provision for maintenance of a child in a divorce case is for the benefit of the child. *Wassung v. Wassung*..... 440
2. Where a divorce decree provided for payment of stipulated sums monthly for support of a minor child, such payments became vested as they accrued and could not be reduced by the court. *Wassung v. Wassung*..... 440
3. Where a certificate of 200 shares of stock was indorsed to mother and daughter, and the mother in a divorce suit alleged ownership of the entire 200 shares, but subsequently testified that, had she succeeded in obtaining judgment, the daughter would have been entitled to one-half of the stock, the daughter, who was not a party to the divorce suit, was not subsequently estopped from bringing suit to procure her interest in the stock. *Schurman v. Pegau*..... 628

Election of Remedies.

A futile attempt to assert a nonexistent remedy does not, under the doctrine of election of remedies, preclude resort to proper equitable remedy. *Bratt v. Wishart*..... 899

Elections.

The use of the symbol "and/or," on ballots in a special election on the question of city acquiring an electric power plant, was so confusing as to render the election void. *Drummond v. City of Columbus*..... 87

Electricity. SEE ELECTIONS.

Eminent Domain.

1. Where a perpetual easement is taken for erection of an electric power line across farm land far from any buildings, the condemnor is not required to pay for the entire fee of the land over which the line runs, but simply for damage caused by construction. *Dunlap v. Loup River Public Power District*..... 11
2. Instruction that, in determining damage to farm from construction of a transmission line over the farm, the jury could consider every element of annoyance, inconvenience, danger, and disadvantage resulting from construction and maintenance of the line which would affect the market value of the farm, *held* proper. *Dunlap v. Loup River Public Power District*..... 11
3. Mere general fears from the presence of electricity transmission line should not be made the basis on which to predicate any depreciation in market value for which landowner should be permitted to recover. *Dunlap v. Loup River Public Power District*..... 11

4. A perpetual easement across a farm for electricity transmission line is an infringement of previous rights of the owner, and as one of the elements of damage, he is entitled to recover to the extent that his former methods of farming the land have been interfered with. *Dunlap v. Loup River Public Power District* 11
5. In condemnation proceedings by lessee for damages because of construction of a viaduct, evidence of past profits, if shown with reasonable certainty, may, within the court's discretion, be admitted, not as a separate element of damage, but as an element in fixing the leasehold's value. *James Poultry Co. v. City of Nebraska City* 456
6. 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. *Asche v. Loup River Public Power District* 601
7. In fixing damages to a landowner in consequence of the appropriation, or injury, of property taken for public use, the jury may consider every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of its market value. *Asche v. Loup River Public Power District* 601
8. Fear of danger from electric current is not an independent item of damage from easement for an electric transmission line across a farm, but may be considered in estimating depreciation in the fair market value of the farm. *Asche v. Loup River Public Power District* 601

Equity.

1. Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin. *Schurman v. Pegau* 628
2. The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position. *Schurman v. Pegau* 628

Estoppel.

1. Where one of two innocent persons must suffer a loss from acts of a third party, the loss must be borne by the one whose conduct renders the injury possible. *Bauer v. Bauer* 329
2. The fact that a village board certified to the village treasurer's surety that the treasurer had duly ac-

counted for all village funds did not estop the village in a suit on the treasurer's bond from showing that no accounting had been made. *Village of Hampton v. Gausman* 550

3. Where county commissioners gave an insufficient reason for refusal to approve a nominee for deputy register of deeds, they were not estopped, in mandamus proceedings, to set up other reasons for their action, where relator did not rely or act on such insufficient reason to his prejudice. *State, ex rel. Truax, v. Burrows* 691

Evidence.

1. When, by the unlawful acts of a tort-feasor, one is prevented from taking up a profitable option, it is not error to admit in evidence competent proof that the holder of the option was ready, willing, and able to exercise his option. *Merritt v. Ash Grove Lime & Portland Cement Co.* 52
2. Courts are supposed to know and take cognizance of the general social, political, and economic conditions, and of the due enactment of federal statutes and executive proclamations made pursuant thereto. *In re Estate of Bose* 156
3. The trial judge in a compensation case will take judicial notice of pleadings and proceedings, and of his own acts in the progress of the case. *Solomon v. A. W. Farney, Inc.* 338
4. Judicial notice is taken of diseases to which men are subject, and, in a general way, of the causes or sources of such diseases and the nature and effect of injuries, diseases, and physical defects, so far as they are matters of common knowledge, as evidenced by standard dictionaries, encyclopedias, and standard, accepted medical authority. *Russo v. Swift & Co* 406
5. A provision in a contract expressly binding a married woman's separate estate is conclusive proof of such intention and cannot be contradicted by parol evidence. *Fidelity & Deposit Co. v. Lapidus* 473
6. The parol evidence rule is a salutary rule for preservation of the sanctity of contracts. *Rhodes v. Lewis* 870
7. On question whether parol evidence was admissible to show consideration for instrument settling will contest whereby testator's sons, desiring to make more ample provision for their sisters, bound themselves and land to pay certain sums to the sisters, recital of desire to make more ample provision for the sisters was not a

statement of consideration for sons' promise, but rather one of motive. *Rhodes v. Lewis* 870
8. Where no consideration is stated in a written contract, facts showing a consideration and its nature are admissible in evidence. *Rhodes v. Lewis* 870
9. In foreclosure suit based on instrument settling will contest whereby testator's sons, desiring to make more ample provision for their sisters, bound themselves and land to pay certain sums to the sisters, parol evidence was admissible to show that consideration for instrument was sisters' waiver and withdrawal of objections to will. *Rhodes v. Lewis* 870

Execution.

On motion to confirm a sheriff's sale under execution, proceedings antecedent to the sale will not be disturbed. *Wallace v. Peterson* 39

Executors and Administrators.

1. A county court may require an administrator to apply to the district court for a license to sell realty. *In re Estate of McLean* 353
2. An allowance may not be made out of an estate for services of an attorney not employed by the personal representative of the estate, unless the services were beneficial to all interested parties and to the estate. *In re Estate of Love* 458

Forgery.

1. In prosecution for forging name of another as maker of a check, the state has burden of proving that such name was signed without authority. *Sutherlin v. State* 809
2. Where the state attempts to prove a forgery by circumstantial evidence, it is the duty of the trial court to carefully weigh the evidence to see that the circumstances proved are of such a nature and relationship as to entitle a jury fairly to hold them inconsistent with any reasonable hypothesis of innocence. *Sutherlin v. State* 809

Fraud.

1. Fraud, in equity, includes all acts, omissions and concealments which involve a breach of either legal or equitable duty, trust or confidence. *Sic v. Loup River Power District* 506
2. One is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be

required to discover the truth. *Sic v. Loup River Power District* 506

Fraudulent Conveyances.

1. Fraudulent intent may be established by proof of facts and circumstances from which such inference may reasonably be drawn. *Robinson v. Williams* 253
2. A conveyance of realty by husband to wife is presumptively fraudulent as to existing creditors and will be set aside unless the good faith of the transaction be established by a preponderance of evidence. *Slosburg v. Hunter* 324
3. A creditor is not entitled to receive in settlement of his debt against an insolvent debtor property materially greater in value than the debt paid thereby, but if he does so without intending to defraud other creditors, equity will require him to account to other creditors only for the value of the excess. *Slosburg v. Hunter* 324

Garnishment.

1. The salary of a constitutional officer may be garnished under a statute subjecting his salary to garnishee process. *Department of Banking v. Foe* 422
2. The legislature has power to determine public policy in respect to subjecting salaries of public officers and employees to garnishee process. *Department of Banking v. Foe* 422
3. A judgment creditor cannot seize by process of garnishment dividends on deposits of insolvent New York insurance company in insolvent Nebraska state bank, after title thereto had vested in liquidator of insurance company, in disregard of prior demand for such funds, and previous order of Nebraska court to turn funds over to liquidator. *State, ex rel. Sorensen, v. State Bank of Omaha* 880

Gifts.

1. A clear and unmistakable intention on the part of a donor to make a gift is an essential element of the gift. *In re Estate of Sternecker* 813
2. The person asserting a gift must prove all essential elements thereof by express and unambiguous evidence. *In re Estate of Sternecker* 813

Guaranty.

1. Obligors in contract against ultimate loss were not released from liability because of extension of time of

payment of indebtedness to which it related. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
2. "Agreement against ultimate loss" construed as one of indemnity. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
3. The promise in an indemnity contract differs from a contract of guaranty in that it is an original undertaking. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
4. An indemnity contract is a contract to indemnify the promisee from loss owing to his contractual liability. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
5. In suit to foreclose mortgage and to enforce "agreement against ultimate loss," contemporaneous contracts between the parties pertaining to the same subject-matter, nature of transactions between them, and attendant circumstances may be considered in interpreting the "agreement against ultimate loss." *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
6. Where bonds, mortgage securing them, and "agreement against ultimate loss" are executed substantially contemporaneously as one transaction, they are to be construed together. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
7. The assignment of bonds secured by first mortgage carried with it, by necessary implication, to the assignee thereof the mortgage and "agreement against ultimate loss" insuring payment of the indebtedness in full. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521

Guardian and Ward.

1. An order of a county court approving a final settlement between a guardian and his ward can only be vacated on such proof of fraud as would justify setting aside of any other judgment. *In re Guardianship of Protsman.* ... 192
2. Evidence that a guardian reported certain securities of ward "in foreclosure" when they were deeded to a trustee for the benefit of bondholders is not sufficient evidence of fraud to warrant vacation of an order approving the guardian's final account. *In re Guardianship of Protsman* 192
3. On petition to vacate order approving final account of guardian, spendthrift must show that facts on which petition was based were unknown to him until after decree approving guardian's final settlement. *In re Guardianship of Protsman* 192

4. Where a ward makes settlement with his guardian which is approved by the court, and retains assets received, with knowledge of their insecure character, for more than three years without objection, he is guilty of laches barring relief. *In re Guardianship of Protsman* 192

Homestead.

1. A controversy between judgment creditor and debtor over debtor's claim to undivided exempt homestead estate in land on which sheriff has levied under execution on the judgment is not an issue for the sheriff's determination, though the sheriff is notified of claim and objections thereto. *Wallace v. Peterson* 39
2. In proceeding to confirm sheriff's sale of land under execution, a contested claim of defendant to an undivided exempt homestead estate in the land is not a proper subject for consideration. *Wallace v. Peterson* 39

Homicide.

1. In a prosecution for murder, admissibility of deceased's dying declarations was a question of law for the trial court. *Nanfito v. State* 658
2. A statement by the victim of a homicide that he was shot by accused may be admitted in evidence, if made under a sense of impending death. *Nanfito v. State* 658
3. The foundation for the admission of a dying declaration may be shown by circumstances. *Nanfito v. State* 658
4. Dying declarations may be made in the language familiar to declarant. *Nanfito v. State* 658
5. Dying declarations were admissible in a prosecution for murder, though expressed in a foreign language through an interpreter to a stenographer who reduced them to writing. *Nanfito v. State* 658
6. Dying declarations made under a sense of impending death, in the form of questions and answers, were not inadmissible because also made under oath. *Nanfito v. State* 658
7. Evidence *held* to sustain conviction of murder in the second degree. *Nanfito v. State* 658

Husband and Wife.

1. Where a married woman's contract is that of a surety only, coverture is a complete defense, unless it be established that she signed the contract with intention of binding her separate estate. *Falstaff Brewing Corporation v. Smith* 49
2. The intent with which a married woman signs a con-

tract is usually a question for the jury. *Falstaff Brewing Corporation v. Smith* 49
3. Want of legal capacity of a married woman to contract cannot be supplied by estoppel. *Falstaff Brewing Corporation v. Smith* 49
4. Where a contract does not refer to a married woman's separate property, trade or business, and does not in express terms bind her separate estate, the question of intent is one of fact to be determined from all the circumstances, and her testimony that she did not intend to bind her separate estate is competent. *Fidelity & Deposit Co. v. Lapidus* 473
5. Where a wife joins in executing a contract with her husband, which does not have reference to her separate property, trade or business, the fact that part of her separate estate is listed in a financial statement furnished in connection with the contract does not estop her, as a matter of law, to deny the intent to bind her separate estate. *Fidelity & Deposit Co. v. Lapidus* 473
6. The common-law disability of a married woman is in force in Nebraska, except in so far as abrogated by statute. *Fidelity & Deposit Co. v. Lapidus* 473
7. A married woman is without capacity to contract, except in reference to her separate property, trade, or business, or on the faith and credit of her separate estate and with intent to bind it. *Fidelity & Deposit Co. v. Lapidus* 473
8. Where a contract does not refer to a married woman's separate property, trade, or business, proof that she intended to bind her separate property, trade, or business is necessary. *Fidelity & Deposit Co. v. Lapidus* 473
9. The burden of establishing that a married woman intended to bind her separate estate rests on the one seeking to bind the separate estate. *Fidelity & Deposit Co. v. Lapidus* 473

Indemnity.

1. General rules governing construction of contracts apply in construing contracts of indemnity. *First Trust Co. v. Airedale Ranch & Cattle Co* 521
2. Generally, a covenant of indemnity cannot be restricted by a recital. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
3. If recitals in indemnity contract are clear and the operative part is ambiguous, the recitals govern the construction, and if recitals are ambiguous and the operative

part is clear, the operative part governs; but if both recitals and operative part are clear, but are inconsistent with each other, the operative part governs. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521

Injunction.

1. Injunction will issue to restrain repeated acts of trespass. *Hagadone v. Dawson County Irrigation Co.* 258
2. In a suit to enjoin violation of a restrictive covenant in a contract whereby defendant agreed not to sell gasoline for five years within a certain area, and for damages, evidence sustained decree for plaintiff. *Gable v. Carpenter* 669
3. Equity will not issue an injunction where the act sought to be enjoined has already been committed and the injury has been done. *Elson v. Schmidt* 778

Insurance.

1. The statute requiring insurance-soliciting agents or brokers to annually procure a license, and providing that only a natural person shall be so licensed, is restricted to a soliciting agent or broker of insurance. *Pierce Co. v. Century Indemnity Co.* 78
2. Where automobile liability policy requires insured to cooperate with insurer, insured is under no obligation to permit a sham defense to be set up in his name, but he cannot unreasonably decline to assist in making a legitimate defense. *Svitak v. Sun Indemnity Co.* 303
3. Where the jury's finding in an action on a fire insurance policy on an issue of fraud was against the insurer on the merits, the question whether the answer stated a defense became moot. *Getty v. North River Ins. Co.* 369
4. In construing a contract of insurance, words used therein will be considered as used in their ordinary and popular sense. *Wilson v. Capital Fire Ins. Co.* 435
5. Clause in insurance contract limiting insurer's liability to $5,000 for loss resulting from bodily injuries to one person includes consequential as well as direct damages. *Wilson v. Capital Fire Ins Co.* 435
6. Where automobile liability policy limits insurer's liability to $5,000 for loss resulting from injuries to one person, and to $10,000 for any one accident, and two or more persons are injured, insurer is liable for only $5,000 for loss resulting from injuries to one person, notwithstanding the total damages suffered were less than $10,000. *Wilson v. Capital Fire Ins. Co.* 435

7. Where an insured, who becomes a coinsurer by failing to carry amount of insurance he has contracted to carry in order to receive reduction in premium, suffers a loss, the jury, in action on policy, should be instructed to make proper deduction from the total loss as ascertained. *Stake v. Western Assurance Co*..... 735
8. Provision of disability policy entitling insured to total disability benefits because of bodily injury or disease if wholly prevented from performing any work for compensation or from following any gainful occupation means inability to do all material acts necessary to prosecution of insured's business in his customary and usual manner. *Bennett v. Metropolitan Life Ins. Co*..... 785
9. A court of equity cannot grant relief against a condition in a "benefit thrift certificate" providing that reinstatement of a lapsed certificate can only be had by payment of past-due monthly instalments with interest, within two years from date last payment became due. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co.* 833

Judges.

1. The constitutional provision for establishment by law of courts inferior to the supreme court authorizes creation of municipal courts. *State, ex rel. Hunter, v. Maguire*.... 365
2. A vacancy in the office of judge of the municipal court is to be filled by election, where the unexpired term exceeds two years. *State, ex rel. Hunter, v. Maguire*.... 365
3. In case of a vacancy in the office of judge of a municipal court, section 22-102, Comp. St. 1929, designates who shall exercise its appointive power, but does not fix the term of appointment. *State, ex rel. Hunter, v. Maguire* 365

Judgment.

1. Where a county court record showed on its face a petition stating a cause of action, waiver of summons and voluntary appearance by defendant, and a recital that evidence was heard and judgment against defendant, it was sufficient to show jurisdictional facts. *Wallace v. Peterson* 39
2. County courts have exclusive original jurisdiction of guardianship proceedings, and in matters within such jurisdiction their judgments are as conclusive as those of other courts of record. *In re Guardianship of Protsman* 192
3. The district court has discretionary power in further-

ance of justice to vacate a decree at the same term in order to allow additional evidence to be introduced. *Bartels v. Meyer* 274

4. A default decree in a suit to quiet title against all persons having or claiming any interest in designated lands, real names unknown, is conclusive against all persons not in possession of the lands and who are not the record holders thereof. *State, ex rel. Conkey, v. Ryan* 334
5. The lien of a judgment which has attached to the realty of a judgment debtor in his lifetime may be enforced in equity without reviving the judgment. *Rich v. Cooper* 463
6. A petition to foreclose a judgment lien is properly entertained where it appears that the judgment creditor has no adequate remedy at law. *Rich v. Cooper* 463
7. The commencement of a suit to foreclose a judgment lien before the judgment becomes dormant and the pendency thereof afterwards do not operate to continue the judgment in force beyond the statutory period. *Rich v. Cooper* 463
8. A decree of foreclosure of a judgment lien must be rendered before the judgment becomes dormant, to be effectual. *Rich v. Cooper* 463
9. If execution is not sued out within five years from date of judgment, or if five years intervene between date of last execution and time of suing out another, such judgment becomes dormant and ceases to be a lien on the judgment debtor's estate. *Rich v. Cooper* 463
10. The statute requiring revivor of actions within one year is not exclusive, and a revivor may be had thereafter by bill or supplemental petition. *Rich v. Cooper* 463
11. The limitation of one year for revivor of actions has no application to revivor of a dormant judgment. *Rich v. Cooper* 463
12. A judgment notwithstanding the verdict can be rendered only where the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment. *Wolfinger v. Shaw* 604
13. Privity depends on relation of parties to subject-matter, rather than their activity in a suit relating to it after the event. *Schurman v. Pegau* 628
14. Under the statute authorizing rendition of judgment against one or several parties, a court may determine the ultimate rights of all parties to the controversy. *Whaley v. Matthews* 767
15. To ascertain the meaning of a judgment entry, it is

always permissible to read it in the light of the entire record. *Whaley v. Matthews* 767
16. Effect should be given to every word and clause contained in a judgment. *Whaley v. Matthews* 767
17. A judgment should be so construed as to give effect to each part and harmonize the different parts, in so far as can be done by fair interpretation. *Whaley v. Matthews* 767
18. Judgment entry *held* not to be a joint judgment. *Whaley v. Matthews* 767
19. A judgment should be construed as a whole to determine its meaning. *Whaley v. Matthews* 767
20. A judgment by default against defendants may be set aside in equity after the term of court at which it was rendered, where the petition and evidence in support thereof show that they had a valid defense to the action, that the default was attributable to the negligence, fraud, and betrayal of their attorney, and that they were not at fault. *Seward v. Churn Ranch Co* 804

Jury.

1. A juror's personal knowledge of facts of a case does not always preclude him from serving as a juror, but while deliberating he must not make known any fact which was not brought out in the evidence. *Merritt v. Ash Grove Lime & Portland Cement Co* 52
2. Where evidence relating to mental capacity to make a will is conflicting, the issues of fact are questions for the jury under the Constitution. *In re Estate of Bose* 156

Larceny.

1. The force and effect to be given the fact of possession of stolen property recently after a theft and the sufficiency of such evidence are solely for the jury, to be considered in connection with all evidence adduced at the trial. *Greenough v. State* 20
2. Where accused, by his own testimony, connects himself with another who actually committed a larceny, question whether he was present as an honest dupe, or a criminal accessory, is for the jury. *Brownrigg v. State* 729

Libel and Slander.

1. In action by employee against telephone company for slander by officer of company, in connection with employee's conduct, the communication of alleged slander to plaintiff alone was not a publication. *Twiss v. Lincoln Telephone & Telegraph Co* 788

2. In action by employee against a telephone company for slander by officer of company, evidence of publication caused by plaintiff alone was insufficient to sustain judgment for plaintiff. *Twiss v. Lincoln Telephone & Telegraph Co* 788

Licenses.

1. The word "or" is construed as "and" in provision of Lincoln home rule charter authorizing levy of a license *or* occupation tax. *Richter v. City of Lincoln* 289
2. "Public service" defined. *Richter v. City of Lincoln* 289
3. Provision of Lincoln home rule charter empowering the city to levy an occupation tax on public service property or corporations is a remedial act and to be applied as such. *Richter v. City of Lincoln* 289

Liens.

The district court has original jurisdiction of a suit to declare a lien on realty. *Bratt v. Wishart* 899

Life Estates.

Where a tenant for life of farm land leased the land, with rent payable in a share of the crop, and died while the crop was growing, title to the share of the crop reserved as rent passed to the executor of the tenant for life as assets of that estate, and not to the remaindermen. *In re Estate of Mischke* 875

Limitation of Actions.

In absence of an agreement between a debtor and creditor or directions by the debtor as to application of a credit, a credit in favor of a debtor for work and labor, if applied as a part payment on the creditor's claim, will interrupt running of limitations. *Heineman v. Thimgan* 357

Mandamus.

1. Where a litigant is entitled to possession of realty under a final judgment of a court having jurisdiction of the subject-matter, but such court refuses to make the judgment effective, a peremptory writ of mandamus will issue. *State, ex rel. Conkey, v. Ryan* 334
2. Mandamus does not lie to compel performance of a discretionary power of a public officer, unless his action is arbitrary and capricious. *State, ex rel. Truax, v. Burrows* 691
3. Mandamus will issue only when there is a right to decree, and a corresponding duty to perform, the act required. *State, ex rel. Schoonover, v. Crabill* 819

4. Where mandamus is sought, relator must show conclusively that he is entitled under the law to the particular act or thing desired, and that respondent is legally obligated to give him what he asks. *State, ex rel. Schoonover, v. Crabill* 819

Master and Servant.

1. A claimant for workmen's compensation has burden of establishing that he suffered injury from an accident arising out of and in the course of his employment. *Bell v. Denton* 23
2. An injury to be compensable under the workmen's compensation law must arise out of and in the course of employment. *Bell v. Denton* 23
3. There must be a causal connection between the employment and the injury before recovery can be allowed under the workmen's compensation law. *Bell v. Denton* 23
4. Where an employee deviates from his employment and is injured while engaged in his own business or enjoyment, the injury is not compensable under the workmen's compensation law. *Bell v. Denton* 23
5. No transcript of pleadings and orders of the compensation court need be filed in district court to give it jurisdiction of an appeal, where a rehearing or retrial has been waived before the compensation court. *Bell v. Denton* 23
6. Procedure pointed out to give the district court jurisdiction in a compensation case in which a rehearing or retrial is waived before the compensation court. *Bell v. Denton* 23
7. That compensation claimants had actually received contributions for their support from wages of their deceased son while living strongly tended to establish dependency, within the workmen's compensation law. *Kral v. Lincoln Steel Works* 31
8. The right of control, or the want of it, determines whether the relationship of master and servant or that of an independent contractor exists, and the question is ordinarily one of fact for the jury, to be determined from the terms of the contract, character of employment, and all other facts and circumstances. *Curry v. Bruns* 74
9. Awards for compensation cannot be based on speculative or conjectural evidence, but must be based on sufficient evidence to show that disability was result of an accident arising out of and in the course of the employment. *Dennehy v. Lincoln Steel Works* 269

10. A compensation award for temporary partial disability is authorized by subdivision 2, sec. 48-121, Comp. St. 1929, though the case be one where permanent partial disability must be computed under subdivision 3 of said section. *Dennehy v. Lincoln Steel Works* 269
11. An employee who suffers temporary partial disability to his arm is entitled to an award of 66⅔ *per centum* of the difference between wages received at time of injury and his earning power thereafter. *Dennehy v. Lincoln Steel Works* 269
12. A compensation claimant has the burden of establishing a right to compensation. *Wayne County v. Lessman* 311
13. The fact that an accidental injury may possibly be the cause of a compensation claimant's ailment does not justify the court in finding that it was. *Wayne County v. Lessman* 311
14. A compensation claimant, in order to recover, must show with reasonable certainty that the alleged injury occurred, and that it was caused by an accident. *Wayne County v. Lessman* 311
15. Claim of an employee, first made six months thereafter, that a fall from a tractor produced a cancer *held* not proved. *Wayne County v. Lessman* 311
16. Though, in determining the effect of substantive provisions of the compensation act, it should be construed as it was at the time of the injury, amendments which affect procedure only are retroactive in their operation. *Solomon v. A. W. Farney, Inc.* 338
17. In cases arising under the compensation act, attorney's fees, when allowed, are to be taxed as costs, and as in addition to the amount of the recovery. *Solomon v. A. W. Farney, Inc.* 338
18. Attorney's fees allowed in a compensation case are in addition to compensation provided for by the terms of their contract of employment. *Solomon v. A. W. Farney, Inc.* 338
19. An attorney may recover disbursements made by him if they were usual and reasonably necessary to carry out his employment. *Solomon v. A. W. Farney, Inc.* 338
20. Claim of attorney for services and disbursements in a compensation action, where approved in writing by the trial judge, is a lien against the recovery in such action. *Solomon v. A. W. Farney, Inc.* 338
21. Notice to claimant in compensation action of hearing on claim for attorney's fees is not required. *Solomon v. A. W. Farney, Inc.* 338

22. An occupational disease is one which is a natural incident of a particular occupation. *Russo v. Swift & Co.* 406
23. The disease of echinococcosis is not an occupational disease incident to the employment of a beef washer in packing plant. *Russo v. Swift & Co.* 406
24. The duty of an employer to warn an employee of the dangers of his employment is limited to dangers of which the employer knows, or ought to know, or which he has reason to believe that the employee does not know and will not discover in time to protect himself. *Russo v. Swift & Co.* 406
25. An employer is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen. *Russo v. Swift & Co.* 406
26. Where a city employee suffered an accidental head injury, so that his resistance to infection was lowered, and he died two weeks later from lobar pneumonia, his death was compensable. *Hendershot v. City of Lincoln* 606
27. The definition of a public employee under the workmen's compensation act should be more liberally construed than that of a private employee. *Hendershot v. City of Lincoln* 606
28. The mere fact that wages of a city employee are paid from federal relief funds does not negative his status as an employee of the city, where it directs and controls his work. *Hendershot v. City of Lincoln* 606
29. The fact that a city had the power to accept or reject services of an employee established the relation of employee and employer. *Hendershot v. City of Lincoln* 606
30. Under the workmen's compensation law, compensation for accidents is made almost inseparable from the relation of employee and employer. *Hendershot v. City of Lincoln* 606
31. The relation of employee and employer, within the workmen's compensation law, is not defeated by the fact that the employee receives work under the federal government relief plan. *Hendershot v. City of Lincoln* 606
32. Mere negligence of an employee is not sufficient under the compensation statute to preclude recovery, but such conduct must be shown as manifests a reckless disregard of consequences coupled with a consciousness that injury will naturally or probably result. *Richards v. Abts* 741
33. An employer attempting to avoid liability on the ground that employee was wilfully negligent must prove a deliberate act knowingly done, or such conduct as evi-

dences a reckless indifference to safety. *Richards v. Abts* 741
34. Evidence showed that employee's death was accidental and arose out of his employment. *Richards v. Abts*..... 741
35. A compensation claimant has the burden to show by substantial evidence leading either to direct conclusion or to legitimate inference that his ailment was caused by injury sustained. *Lowder v. Standard Auto Parts Co.* 747
36. Under pension plan of telephone company, where the entire pension fund was voluntarily contributed by the company, a discharged employee who had not complied with the conditions imposed by the pension plan was not entitled to participate in the fund. *Twiss v. Lincoln Telephone & Telegraph Co*..... 788
37. An employee is not necessarily precluded from recovering compensation by the mere fact that after injury he receives as wages a larger sum than his former remuneration. *Micek v. Omaha Steel Works*..... 843
38. "Total disability," within the compensation act, exists only where a workman is unable to get, hold, or do any substantial amount of remunerative work. *Micek v. Omaha Steel Works*..... 843
39. Compensation for partial disability under subdivision 2, sec. 48-121, Comp. St. 1929 (and excepting cases mentioned in subdivision 3) is 66⅔ per cent. of difference between wages received at time of injury and earning power thereafter, but not more than $15 a week, nor beyond 300 weeks after date of accident. *Micek v. Omaha Steel Works* 843
40. "Earning power," within subdivision 2, sec. 48-121, Comp. St. 1929, includes eligibility to procure employment, ability to hold a job, and capacity to work, as well as ability to earn wages in employment in which engaged or for which fitted. *Micek v. Omaha Steel Works* 843
41. Compensation for partial disability not covered by subdivision 3, sec. 48-121, Comp. St. 1929, is computed under subdivision 2 of such section. *Micek v. Omaha Steel Works* 843
42. Employee who earned $9 a week at time of accident, but received $15 a week as a bartender thereafter, *held* entitled to compensation for partial disability under subdivision 2, sec. 48-121, Comp. St. 1929. *Micek v. Omaha Steel Works*..... 843
43. In proceeding for increase of compensation award on ground of incapacity, due to the injury, claimant must

prove that there now exists a substantial change for the worse in her condition. *Huff v. Omaha Cold Storage Co.* 907
44. The statute providing for modification of compensation award on ground of increase or decrease of incapacity does not authorize a modification because of judicial error in determining amount of award. *Huff v. Omaha Cold Storage Co.* 907
45. Claimant's compensation *held* governed exclusively by subdivision 3, sec. 48-121, Comp. St. 1929. *Huff v. Omaha Cold Storage Co.* 907
46. In proceeding to modify compensation award on ground of increase of incapacity due to the injury, the burden is on claimant to establish that disability has increased. *Huff v. Omaha Cold Storage Co.* 907

Mechanics' Liens.

1. The purpose of the mechanics' lien statute is to protect the diligent contractor, subcontractor, or laborer if he acts within a specified time. *Disbrow & Co. v. Peterson* 719
2. A subcontractor *held* not entitled to a mechanics' lien, for failure to file his lien in time. *Disbrow & Co. v. Peterson* 719

Monopolies.

1. The section of the unlawful restraint of trade article requiring that prices be uniform and fair contemplates a cause of action by a corporation against another corporation or person or persons who shall enter into any contract, combination, or conspiracy, or shall give any direction or authority to do any act to drive out of business any other corporation engaged therein. *Pierce Co. v. Century Indemnity Co.* 78
2. The word "person" as used in the unlawful restraint of trade act includes corporations. *Pierce Co. v. Century Indemnity Co.* 78
3. The section of the unlawful restraint of trade act providing for damages to any person injured by reason of anything forbidden or declared to be unlawful by the act applies to corporations. *Pierce Co. v. Century Indemnity Co.* 78

Mortgages.

1. Annual crops growing on land are treated as personalty, and hence do not pass to purchaser of land at judicial sale. *Miles v. Prudential Ins. Co.* 46

2. The landlord's share of annual crops growing after termination of moratory stay and at time sale of mortgaged land is confirmed is property of the mortgagor, in absence of agreement to contrary. *Miles v. Prudential Ins. Co.* 46
3. A judicial mortgage foreclosure sale will not be reversed on appeal for inadequacy of price, in absence of showing of fraud or shocking discrepancy between value and sale price, or prospect of a higher bid in event of resale. *Federal Farm Mtg. Corporation v. Bostrom* 180
4. An assignee of a mortgage, who releases the mortgage to a grantee of the mortgagor without the mortgagor's consent, cannot hold the mortgagor liable for the debt, where the value of the land released exceeds the indebtedness secured by the mortgage. *Tukey Mtg. Co. v. Parkins* 182
5. The general saving statute preserved a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due at time the legislature repealed the law permitting deficiency judgment. *Vlazny v. Dittrich* 266
6. The statute depriving an equity court of jurisdiction to render a deficiency judgment in a mortgage foreclosure suit has no application to mortgage obligations created prior to its enactment. *Bartels v. Meyer* 274
7. A deficiency judgment may be entered on motion at any time within five years from confirmation of sale. *Bartels v. Meyer* 274
8. An agreement to release the right to a deficiency judgment if the mortgagor would perform certain conditions by a fixed date did not bar the right to make application for a deficiency judgment after that date, where the conditions were not performed. *Bartels v. Meyer* 274
9. An order confirming a foreclosure sale will not be set aside for inadequacy of price, unless so low as to evidence fraud, and where the evidence does not show that a resale would produce a better price. *Reichman v. Reichman* 488
10. Undue influence which will avoid written assignment of a mortgage is an unlawful and fraudulent influence which controls the will of the assignor. *Amy v. Mann* 677

Municipal Corporations.

1. A ballot for a special election on public utilities should clearly state the substance of the proposition submitted,

since, if it is stated in equivocal terms, the purpose of the election is vitiated. *Drummond v. City of Columbus* 87

2. The voters at an election on public utilities are entitled to definite information to enable them to vote on the merits of the submitted proposition. *Drummond v. City of Columbus* 87

3. The only special protection afforded by statute to those who furnish material and labor to contractors doing construction work under contract with agencies of the state is that provided by the bond required by statute. *Fremont Foundry & Machine Co. v. Saunders County* 101

4. Where injuries were occasioned by defects in a public sidewalk created by misfeasance on part of the city of Lincoln, service of notice prescribed by city charter was not a prerequisite to maintaining an action therefor. *Enyeart v. City of Lincoln* 146

5. The city of Lincoln, by annexation of the city of University Place, as to rights, obligations, liabilities, and duties imposed on or possessed by the latter, whether actual or contingent, tortious or on contract, whether accrued or thereafter to accrue, became the successor of the city of University Place and subject to the conditions that were binding on it. *Enyeart v. City of Lincoln* 146

6. Contributory negligence is not imputable to one as a matter of law from the mere fact that he attempts to pass over a walk that is obstructed or otherwise out of repair, where the defect is such that a person of ordinary intelligence would reasonably believe that, with proper care, he could pass with safety notwithstanding the defect. *Enyeart v. City of Lincoln* 146

7. The statute requires that ordinances shall contain only matters germane to the general subject expressed in their titles. *Gembler v. City of Seward* 196

8. A title which indicates the subject of a proposed ordinance is sufficient. *Gembler v. City of Seward* 196

9. Provision in ordinance relating to unlawful operation of a motor vehicle by a driver while intoxicated *held* within the title, and not inhibited by statute. *Gembler v. City of Seward* 196

10. The bond of a public officer, joint and several in form, was not rendered void in favor of the surety because of failure of principal to sign it. *Village of Hampton v. Gausman* 550

11. The statute providing that official bonds shall be obligatory upon the principal and sureties for faithful

discharge of duties required by law of principal constitutes part of the bond, and scope of the statutory obligation cannot be limited by any provision in the bond. *Village of Hampton v. Gausman* 550

12. A village treasurer who is the managing officer of its depository bank could not relieve himself and his surety from liability to village on his official bond by accepting and taking over, as his own successor, a deposit of village funds when the bank was in a failing condition. *Village of Hampton v. Gausman* 550

13. Where the condition of depository bank, of which village treasurer was managing officer, was such that a reasonably prudent depositor would have withdrawn the deposit, failure to communicate facts to village board rendered treasurer and his surety liable to village for resulting loss. *Village of Hampton v. Gausman* 550

14. The surety on a village treasurer's official bond *held* not relieved of responsibility by a provision in the bond that surety should not be liable for loss of funds as result of failure of depository bank. *Village of Hampton v. Gausman* 550

15. Where the statute does not expressly relieve a treasurer from responsibility for public funds placed in a legal depository, the fact that it requires the bank to furnish a depository bond does not operate to release the treasurer from exercising reasonable prudence and good faith to protect the funds. *Village of Hampton v. Gausman* 550

16. An audit of receipts and disbursements of a village treasurer and approval of his records did not exonerate his surety for loss of funds in an insolvent bank. *Village of Hampton v. Gausman* 550

17. Where a police relief fund is made up from moneys received from certain operations of a city's police department and not by general taxation, the fund is not, strictly speaking, a public fund, even though the city treasurer is made custodian thereof. *Allen v. City of Omaha* 620

18. Where the board of trustees of the police relief and pension fund created under statute failed on demand to enforce payment by the city of amounts therein described, beneficiaries under the fund were proper parties to maintain an action against the city to recover the amount due for the use of such fund. *Allen v. City of Omaha* 620

19. An "actual resident," within the statute relating to incorporation of villages, is one who is in a place with intent to establish there his domicile or permanent residence, or has done so. *State, ex rel. Schoonover, v. Crabill* 819

Negligence.

1. One who drives an automobile as a mere accommodation to the owner is the owner's servant. *Curry v. Bruns*..... 74
2. In actions for personal injuries, issues of negligence and contributory negligence are questions for the jury, where the evidence is conflicting. *Burry v. Interstate Transit Lines* 695

New Trial.

1. A motion for a new trial on the ground of surprise was properly overruled, where a request for a continuance for that reason was not made at the trial. *Hahn v. Doyle* 469
2. A motion for a new trial on the ground of newly discovered evidence is properly overruled, where the new evidence is merely cumulative or impeaching in character. *Hahn v. Doyle*..... 469
3. Newly discovered evidence is not ground for a new trial, where exercise of due diligence before the trial would have produced it. *Hahn v. Doyle*..... 469

Nuisance.

Generally, if a nuisance is permanent in character, is intended to remain in the condition in which it was erected until destroyed by the elements, and the damage is to the land itself, especially where the erection is for a public or semipublic purpose, the damage is treated as original, to be recovered in one action. *Applegate v. Platte Valley Public Power and Irrigation District*..... 280

Officers.

1. The statute providing for garnishment of salaries of officers and employees of the state and subdivisions thereof does not violate the constitutional provision prohibiting increase or diminution of compensation of public officers during their terms of office. *Department of Banking v. Foe*..... 422
2. A treasurer of public funds is not relieved of all responsibility for funds placed in a legal depository unless the statute expressly exonerates him from liability, but his status is that of a bailee, and he must exercise reasonable prudence in protecting the funds and is liable

on his official bond for loss resulting from failure to do so. *Village of Hampton v. Gausman* 550
3. A village treasurer acquiring information indicating that the depository bank in which funds are deposited is unsafe may be responsible for a consequent loss, if he fails to communicate the facts to the authority charged with designating the depository, or to take other steps to protect the funds. *Village of Hampton v. Gausman* 550
4. A village treasurer who is managing officer of the village's depository bank is chargeable with knowledge of the bank's insolvency, and if he fails to protect village funds, in order to avoid injuring the bank, he is guilty of a breach of duty equivalent to fraud. *Village of Hampton v. Gausman* 550

Parties.

One having an interest in the result of pending litigation may intervene as a matter of right. *Allen v. City of Omaha* 620

Partnership.

Where articles of incorporation were adopted, but corporation sought to be created never acquired a legal existence, those associated under the articles, or subsequently becoming members, occupied the status of partners, and title to personalty would vest in them as partners. *Elson v. Schmidt* 778

Pleading.

1. A general demurrer admits the truth of well-pleaded allegations of the petition. *Pierce Co. v. Century Indemnity Co.* 78
2. A general demurrer admits material allegations of pleading, but not conclusions of the pleader not supported by facts pleaded. *Richter v. City of Lincoln* 289
3. A demurrer does not admit inferences, expressions of opinion, theories, allegations as to what will happen in the future, arguments, nor allegations contrary to facts of which judicial notice is taken, or which are contrary to law. *Richter v. City of Lincoln* 289
4. Allegations of plaintiff's petition *held* not to state a a cause of action under the common law sufficient to charge defendant with negligence for failure to comply with statutory health regulations. *Russo v. Swift & Co.* 406
5. New matter in a reply to an answer is treated as denied. *Prokop v. Mlady* 644

Principal and Surety.

Where a surety company, by terms of a bond given for faithful performance of a public contract, assumes obligations to make certain payments under certain conditions, its obligations and rights, when called on to perform, relate back to date of giving the bond. *Dakota County v. Central Bridge & Construction Co.* 118

Process.

A tort action may be commenced in the county in which the cause of action arose, and process may issue to the county of defendant's residence. *Grosc v. Bredthauer* 43

Quieting Title.

One entitled to possession under a decree quieting title to accreted lands against those in possession and those having or claiming any interest therein, real names unknown, has a superior right until divested of such right by decree of a court having jurisdiction of the subject-matter. *State, ex rel. Conkey, v. Ryan* 334

Railroads.

Motorist injured in collision at railroad crossing *held* guilty of negligence precluding recovery. *Mundt v. Chicago, R. I. & P. R. Co.* 478

Sales.

1. A processor of wheat flour, under the agricultural adjustment act, was charged with the duty of paying the processing tax, but not with the duty of collection of the tax from its buyers. *Crete Mills v. Smith Baking Co.* 448
2. A processor of wheat products, on whom was imposed a processing tax, which was due and payable before any sale of the products took place, was under no legal obligation, after the law imposing the tax was declared unconstitutional, to repay to the buyer an amount equal to the processing tax, though the amount of the tax was added to the contract price. *Crete Mills v. Smith Baking Co.* 448
3. The provisions in contracts between processors and buyers of flour that the contract price should decrease or abate in the event the processing tax imposed by the agricultural adjustment act was decreased or abated applied only to contingencies specified in the act, and not to contingencies resulting when the act was declared unconstitutional. *Crete Mills v. Smith Baking Co.* 448

4. A milling company, which filed its return under the windfall tax act and paid the tax levied against processors who had not paid the full amount of processing tax levied under the agricultural adjustment act prior to the date it was declared unconstitutional, was not liable to a buyer of flour for such taxes paid by him. *Crete Mills v. Smith Baking Co* 448

Schools and School Districts.

1. Offer by federal government to contribute part of cost of repairing and enlarging schoolhouse did not void an election on bond issue by school district, within constitutional provision that elections are to be free. *Taxpayers League v. Benthack* 277
2. In taxpayers' suit to enjoin execution and sale of bond issue by school district, record contained no evidence of bribery or fraud. *Taxpayers League v. Benthack* 277

Specific Performance.

1. Specific performance of a written contract should, generally, be granted as a matter of course, where the contract has been made in good faith, its terms are certain, its provisions are fair, and it can be enforced without hardship, and the ends of justice will be subserved thereby. *Bauer v. Bauer* 329
2. Where a lessor or his grantee repudiates and endeavors to prevent enforcement of a lease by enjoining the lessee from trespassing on the premises, the court may on cross-petition confirm the lease, establish the tenure, and decree the lessee's right to possession. *Bauer v. Bauer* 329

Statutes.

1. In determining the legislative intent, all provisions of a statute bearing upon the point in dispute should be considered. *Pierce Co. v. Century Indemnity Co* 78
2. All statutes *in pari materia* must be construed together. *Pierce Co. v. Century Indemnity Co* 78
3. Effect must be given, if possible, to all parts of a statute. *Pierce Co. v. Century Indemnity Co* 78
4. In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and to give effect thereto. *Pierce Co. v. Century Indemnity Co* 78
5. In codifying or revising statutes, a rearrangement of sections, or divisions of sections, does not change the

purpose, operation and effect thereof. *Gembler v. City of Seward* 196
6. A statute neither gains nor loses force by the place it occupies in a collection of laws. *Gembler v. City of Seward* 196
7. An amended act should be construed as though originally enacted in its amended form. *Gembler v. City of Seward* 196
State, ex rel. Schoonover, v. Crabill 819
8. Where the general intent of the legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful, courts may have recourse to historical facts or general information, as an aid in interpreting its provisions. *Richter v. City of Lincoln* 289
9. A special legislative act controls a later general enactment. *Richter v. City of Lincoln* 289
10. Where a legislative act refers to another for procedure, the latter, *pro tanto*, becomes part of the former. *Department of Banking v. Foe* 422
11. An act amendatory of a section of a complete act makes the section amended part of the original act, and it will be construed so as to give it a meaning consistent with the whole act. *State, ex rel. Schoonover, v. Crabill* 819

Taxation.
1. Taxes voluntarily paid cannot be recovered back. *Crete Mills v. Smith Baking Co* 448
2. In appraising property for inheritance tax purposes, the basis of valuation is the cash value at date of death of decedent, ascertained by determining amount property would bring if sold for cash upon the open market. *In re Estate of Krotter* 783

Trial. SEE APPEAL. CRIMINAL LAW.
1. Instruction presenting a synopsis of the pleadings *held* not prejudicially erroneous. *Merritt v. Ash Grove Lime & Portland Cement Co* 52
2. Refusal of proffered instruction, and embodying statements therefrom in one of the court's instructions, did not violate the statute and was not prejudicial. *Merritt v. Ash Grove Lime & Portland Cement Co* 52
3. Where the facts pertaining to the relationship of persons involved in an action are in dispute, or more than one inference can be drawn therefrom, the question is for the jury. *Curry v. Bruns* 74
4. A constitutional trial by jury may be waived by motion

for directed verdict, or for judgment. *In re Estate of Bose* 156
5. In a personal injury action, an instruction that verbal testimony in conflict with undisputed physical facts irreconcilable therewith should be rejected was not erroneous. *Hahn v. Doyle* 469
6. As a matter of judicial propriety, a trial judge should inspect the premises in the presence of the parties or with an opportunity to them to be present, but his failure to do so does not necessarily constitute an abuse of discretion. *Carter v. Parsons* 515
7. A view of the premises by a judge, on a trial without a jury, is evidence and may be made a factor in his determination of the case. *Carter v. Parsons* 515
8. A trial judge has the same power to view the premises, on a trial without a jury, as exists in him to permit inspection on a jury trial, and such inspection is entitled to the same effect in both cases. *Carter v. Parsons* 515
9. On a trial without a jury, the judge may view the premises without the parties' consent. *Carter v. Parsons* 515
10. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism. *Nanfito v. State* 658
11. The credibility of witnesses and the weight to be given their testimony are questions for the jury. *Burry v. Interstate Transit Lines* 695
12. It is the court's duty to instruct the jury on issues presented by the pleadings and evidence, whether requested so to do or not. *Hackbart v. Rohrig* 825

Trusts.

1. The statute providing that, if no declaration of the terms of a trust has been recorded and the name of the beneficiary does not appear of record, a trustee holding title to realty will be conclusively presumed to have authority to dispose of the trust estate, is applicable to a lease made by a trustee. *Bauer v. Bauer* 329
2. Where a trust company's legal capacity to discharge its duties terminated through its bankruptcy, a successor trust company legally succeeded to powers originally vested in the original trust company, including the right to sue. *First Trust Co. v. Airedale Ranch & Cattle Co.* 521
3. A trust is a fiduciary relationship with respect to property, subjecting the holder to equitable duties to deal with it for the benefit of another, as a result of a

manifestation of an intention to create a trust. *Schurman v. Pegau* 628
4. The statute requires a trustee to make and return to the county court a true inventory of all property coming into his possession, to faithfully execute the trust under the court's direction, and to settle his account with the court at the expiration of his trust. *In re Estate of Linch* 705
5. Evidence required that trustee's account be approved in accordance with findings of county court and district court. *In re Estate of Linch* 705
6. A trustee, in the management of a trust estate, is required to use that degree of care and diligence that an ordinarily reasonable and prudent man would use in his own business under similar circumstances. *In re Estate of Linch* 705
7. Objection by part of heirs to trustee's failure to obtain court's orders to make repairs to building *held* barred by laches. *In re Estate of Linch* 705
8. Trustees possess general power to lease trust property on such terms, conditions and rentals as are reasonable and customary for that class of property in the particular vicinity. *In re Estate of Linch* 705
9. Where evidence shows that rents collected by a trustee are the fair and reasonable rental value of the property, the trustee has properly performed his duty in such respect. *In re Estate of Linch* 705
10. Claim of credit by trustee for installation of a cooling system in a building belonging to the trust estate, which was primarily for his own benefit, was properly disallowed. *In re Estate of Linch* 705
11. Every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. *In re Estate of Linch* 705
12. Evidence showed that trustee was guilty of negligence in failing to exercise the degree of care and diligence in protecting the trust property required of him by law. *In re Estate of Linch* 705
13. In fixing trustee's compensation, it is the duty of a court of equity to exercise a just discretion and make or withhold allowances as the circumstances require. *In re Estate of Linch* 705

Vendor and Purchaser.

An option, based upon a sufficient consideration, for the

purchase of real estate, and which cannot be withdrawn before the expiration date, vests in the legal holder thereof a property right which courts will protect. *Merritt v. Ash Grove Lime & Portland Cement Co*..... 52

Waters.

1. A natural stream may be used to conduct irrigation water, but where water so conducted contributes to an overflow causing damage, liability attaches. *Hagadone v. Dawson County Irrigation Co*..... 258
2. Where all defendants are materially interested, although concert is lacking, and separate and independent acts of negligence combine to produce injury, each defendant so involved is responsible therefor. *Hagadone v. Dawson County Irrigation Co*..... 258
3. An easement for drainage of waste waters from an irrigation ditch into a creek flowing through the land of another so as to raise the natural level of the creek cannot be acquired until it has been freely exercised without material change under a claim of right for ten years. *Hagadone v. Dawson County Irrigation Co*..... 258
4. The measure of damages for injury to land caused by seepage from reservoir of irrigation ditch is the difference in value before and after the dam was erected, taking into consideration the uses to which the land was put and for which it was reasonably suitable; and the present condition of the soil proximately caused by damming the water and all effects up to the present time are relevant to determine its value. *Applegate v. Platte Valley Public Power and Irrigation District*..... 280

Wills.

1. Realty devised subject to payment of a specific legacy, and further subject to payment of a designated amount to the personal representative, is charged with such legacy and payment to the personal representative. *Lehman v. Wagner*..... 131
2. Refusal of devisee to accept the devise will not affect charge of a legacy on realty devised or charge on realty of payment of designated sum to decedent's personal representative. *Lehman v. Wagner*..... 131
3. Where realty is devised subject to two charges without designation as to which is prior, testatrix will be presumed to have intended that the charges be of equal priority. *Lehman v. Wagner*..... 131
4. In construing a will, the court is required to ascertain

testator's intent as collected from the whole instrument in the light of related circumstances. *Lehman v. Wagner* 131
5. Proceeds of realty devised subject to two charges of equal priority will be prorated between the two beneficiaries. *Lehman v. Wagner* 131
6. Legacy *held* to draw interest after one year from date of appointment of executor. *Lehman v. Wagner* 131
7. The burden is on proponent to prove execution of will and capacity of testator. *In re Estate of Bose* 156
8. There is no statutory requirement that a will be read to the testator or to the witnesses thereto prior to its execution, but it is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by the testator. *In re Estate of Bose* 156
9. A will correctly written in testator's presence, according to his dictation, and executed by him according to statute, is valid though not read to or by him. *In re Estate of Bose* 156
10. In respect to capacity to make a will, it is not medical soundness of mind that governs, but testamentary capacity as defined in law, and a high degree of mentality is not required. *In re Estate of Bose* 156
11. Senile dementia resulting from old age does not necessarily result in mental incapacity to make a will. *In re Estate of Bose* 156
12. A person possessing the requisites of testamentary capacity is not incapacitated from making a will by old age, though his advanced years be accompanied by infirmity of mind and body. *In re Estate of Bose* 156
13. In determining whether testator was of sound mind and had sufficient capacity to make a will, the court may consider the terms and provisions of the will, whether they are just and reasonable, or unreasonable, in connection with contemporaneous circumstances, and events leading up to execution thereof. *In re Estate of Bose* 156
14. In determining question of testamentary capacity, prior uncontested will may be considered. *In re Estate of Bose* 156
15. Where one has sufficient memory to make a will, and such instrument is not the result of undue influence, it will not be set aside without sufficient evidence or on sentimental notions of equality. *In re Estate of Bose* 156
16. The control which an aged person has over disposal of his property is one of the most efficient means of com-

manding attentions due to infirmities and preventing neglect. *In re Estate of Bose* 156
17. A testator may dispose of his property as he pleases, and is not required to recognize his relatives. *In re Estate of Bose* 156
18. Any one who at the time of the execution of his will understands the nature of the act, extent of his property, proposed disposition of it, and the natural objects of his bounty is competent to make a will. *In re Estate of Bose* 156
19. Insane delusions which do not influence action do not render a person incompetent to make a will. *In re Estate of Bose* 156
20. A devise, with limitation over of what remains at taker's marriage, and an express power of disposition restricted as to its exercise, *held* to pass a life estate only. *Graff v. Graff* 543
21. A power given in a will to sell realty and invest the proceeds for the best interests of testator's children does not authorize a gift of the realty, and such a transfer is void. *Graff v. Graff* 543