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ROBERT F. MUNCH ET AL., APPELLEES, V. ANTON J. TUSA ET AL., APPELLANTS.

300 N. W. 385

FILED OCTOBER 17, 1941. No. 31122.

1. **Municipal Corporations.** The police relief and pension fund, as evidenced by article 6, ch. 14, Comp. St. 1929, constitutes a part of the home rule charter of the city of Omaha.
2. ———. The charter of a city, having a population of more than 100,000 inhabitants, may be amended by a proposal therefor, made by the law-making body of such city, and such proposal may be submitted to the electors. Const. art. XI, secs. 4 and 5.
3. ———. Where an ordinance submitted to the electors permits an elector to vote for or against a definite proposition, and where such elector, by voting, decides the plan, so proposed, shall or shall not be adopted, and whether such proposed plan shall or shall not constitute an amendment to the city charter, such proposed ordinance does not contain a dual conception.
4. ———. Where an amendment to a city charter embraces two subjects which are germane to the general subject of the amendment, such amendment is valid and may be submitted to the people as a single proposition.
5. ———. The police relief and pension fund, set forth in article 6, ch. 14, Comp. St. 1929, may be amended by a proposed ordinance adopted by the city council and submitted to the electors, where the proposed ordinance affects merely the form of the relief and pension law and does not destroy the purpose for which such fund was created.
6. ———. The amendment to the municipal charter sought to be submitted by the corporate authorities of the city of Omaha to the electors thereof for adoption, enjoined in this proceeding, was germane to the provisions sought to be amended, and transgressed no constitutional limitations.

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

Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka and *Thomas C. Quinlan,* for appellants.

Kennedy, Holland, DeLacy & Svoboda, contra.

Rosewater, Mecham, Shackelford & Stoehr, Bernard S. Gradwohl, Clarence G. Miles and *Peterson & Devoe,* amici curiæ.

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

PER CURIAM.*

This is an injunction proceeding to enjoin the election commissioner of Douglas county and other defendants from placing upon the ballot at the election held November 5, 1940, a proposal to amend the home rule charter of the city of Omaha.

Plaintiff alleges: Since 1909 the statutes of Nebraska have provided for a police relief and pension fund and have designated the sources of revenue to maintain the fund. Laws 1909, ch. 15. The present law has been in effect since 1921. Laws 1921, ch. 116, art. V, sec. 10 *et seq.* The law is pursuant to statute and is a part of the home rule charter of the city. Comp. St. 1929, secs. 14-610 to 14-619, inclusive. The statute provides for sources of revenue for the pension fund and further provides that the city council shall constitute a board of trustees for the pension fund; that the city treasurer shall be *ex officio* treasurer and custodian of the fund. The members of the police force are authorized by statute to make such rules and regulations, as to disbursements of the fund, as they may deem proper, such rules and regulations to be approved by the city council. They are required to elect annually a board of directors, to whom is entrusted the management of the fund and its disbursements, subject to the approval of the city council.

Section 14-612, Comp. St. 1929, which constitutes a part of the Omaha charter, provides that the directors shall invest the fund from time to time, subject to the approval of the city council, and section 14-611 provides for gifts to the fund; section 14-613 for pensions for retired police officers; section 14-614 for pensions for disabled policemen;

*The portions of the opinion reflected by syllabus points Nos. 1, 2, 3, 4 and 5, prepared by Messmore, J. That portion of the opinion reflected by syllabus point No. 6 prepared by Eberly, J.

and section 14-619, Comp. St. 1929, also a part of the Omaha charter, is pleaded on the theory that all moneys, securities and effects of the relief and pension fund are payable from such fund, and the section exempts the fund from execution. The foregoing sections of the statute will be referred to in the opinion as occasion requires. The petition alleges that the existing police relief and pension fund, amounting to $430,000, belongs to the police department and members thereof, from the contributions made to it as provided by statute.

In September, 1940, there was introduced in the city council a proposal to amend the city charter by ordinance No. 14847, providing for certain changes in the statutory contract, designated "Police Department." Comp. St. 1929, ch. 14, art. 6. The changes proposed will be hereinafter set out. The city council passed the ordinance September 28, 1940, with the intention of having the proposal placed on the general election ballot November 5, 1940. The object was to place the firemen and policemen of the city on the same pension basis.

The petition alleges that the proposed ordinance constitutes a dual proposition, to revise both police and firemen's pensions, and is invalid as an impairment of the rights of the plaintiffs to have their cause submitted separately. Other matters pleaded need not be set out, but will be dealt with as occasion requires. The petition prays for an injunction. The answer alleges that the city council introduced, by ordinance, a proposal to provide a comprehensive and uniform system of pensions for members of the fire and police departments, pursuant to sections 4 and 5, art. XI of the Constitution, relating to home rule charters; that the proper procedure was followed to place the proposal on the ballot; denies that the proposed charter amendment would make the police relief and pension fund a part of the general fund of the city; denies generally other allegations of the petition, and prays dismissal of plaintiffs' action. The action resulted finally in the granting of a permanent injunction by the court on

October 26, 1940. From this judgment, defendants appeal.

The ordinance to amend the Omaha city charter in part reads:

"To amend Section 10 of Article V of said Charter, also known as Section 14-610, Compiled Statutes of Nebraska for 1929. * * *

"Sec. 10. Police relief and Pension fund.—In all cities in the State of Nebraska of the metropolitan class there shall be paid to the treasurer thereof, and by him and the comptroller set apart the following moneys, to constitute a police relief and pension fund * * *." The section then designates the sources from which moneys are to be obtained or contributed, to be placed in this fund. To enumerate them would unnecessarily lengthen this opinion.

The proposed amendment to section 10, art. V, ch. 116, Laws 1921, of the city charter, requires moneys so contributed or received from contributions and other sources, as designated in section 14-610, Comp. St. 1929, to be paid to the city treasurer; makes other and further recommendations not necessary to state; repeals section 18, art. V, ch. 116, Laws 1921, of the city charter, known as section 14-618, Comp. St. 1929, which section provides that when a member of the police department dies, leaving a widow and orphans, they may receive a pension as stated therein; and adds an article to said chapter, to be known as article VIIA, sections numbered 1 to 15. The term "departments," as used in the article, means the regularly constituted fire and police departments of the city, and "department" means either thereof, as the context shall indicate. To summarize: The years of service required for a pension are increased from 20 to 25 years; the age limit before a pension may be obtained is increased from 50 to 55 years; and the amount of pension is changed from one-half pay to $70 a month for all ranks and grades. Previously, as provided by section 14-613, *supra,* a policeman received a pension of not less than $50 a month at age 50, and a pension equal to half of his salary at time of retirement.

Section 14-702, Comp. St. 1929, also a part of the Omaha

charter under article 7, entitled "Fire Department," provides for firemen's pensions on retirement after service of 21 years, and pension granted to be not less than $50 a month and to be 50 per cent. of the amount of salary a retiring fireman shall be receiving at the time he goes on the pension roll.

The proposed amendment fixes and changes the amount to be received by the widow of a deceased member of the department and minor children of such deceased member, in the event the widow dies, dependent upon the number of children; likewise fixes the amount of pension to be paid to the widow of an active member of the department who dies as the result of injuries received in the line of duty, so long as such widow remains unmarried, and provides that she shall not receive more than $70 a month, with a forfeiture of all such rights to pension if she should remarry. The proposed amendment incorporates and applies the workmen's compensation law, excluding medical, hospital or burial expenses, to any member of the department entitled to benefits under such act. This latter provision is not in the present law, and reference is made to lump sum settlements made under the compensation law and their application to the pension toward the amount of pension received.

Section 8, art. VIIA, of the proposed amendment provides: "This Act shall apply to all members of the Department of the City of Omaha who are members at the time this Act becomes effective or who are thereafter appointed, except such members who are eligible to retire, at the time this act becomes effective, under the provisions of section 13 of article V, or section 2 of article VI of the city charter of Omaha, but who have not retired, under either of the foregoing charter provisions." The proposed act applies to all members of the department except those who are eligible to retire and those who have retired, as provided by the former act, and in no way infringes upon or impairs any rights that such persons may have under the former act during the existence of the fund.

Under the proposed amendment, the present fund will be used to pay those entitled to the benefits thereunder, and to pay the relief and pensions, as contemplated by the amendment; thereafter such relief and pensions shall be paid from taxation. The amendment provides that members of the department shall contribute to the city general fund 3 per cent. of their monthly salary, in return for the pension benefits granted by the proposed amendment. The administration of the fund is vested with the city council.

The proposed ordinance, proper in form, submitted to the electorate the amendments contemplated, and submitted the question: Shall the charter of the city of Omaha be so amended; requiring a vote of approval or disapproval of the ordinance? The city followed the procedure to amend its charter, as required by sections 4 and 5, art. XI of the Constitution. Under the circumstances, it is not necessary to discuss this proposition, except to say that ample authority exists to submit the proposal to amend the city charter.

The court found that the proposal to be submitted contains a dual proposition which would vitiate the purpose of the amendment. The proposal includes both the police pension fund (Comp. St. 1929, ch. 14, art. 6) and the firemen's pension fund (Comp. St. 1929, ch. 14, art. 7). The contention is made that the dual proposition consists of the difference in the pensions, in that the firemen received a much higher rate of pension than the policemen. The present law provides that a policeman may retire at age 50 and a fireman after 21 years of service. The ordinary policeman retires on a pension of $70 a month; the ordinary fireman on a pension of $90 a month. The maximum pension for a policeman's widow is $70 a month, while that for a fireman's widow ranges from $90 to $187. The firemen's relief and pensions are paid by taxation; those of the policemen from the fund here under discussion. Figures are cited to show the cost of the fire department's pensions for the past year to be much larger than was paid out from the policemen's fund. The con-

tention is that prejudice would prevail in the exercise of voting on the proposed amendment, in that voters may be satisfied with the policemen's present relief and pension law, while they may not be satisfied with the firemen's pension as it now stands. The voter would, therefore, be compelled to vote against the pension plan he favored in order to defeat the plan that he did not favor.

In 11 Am. Jur. 635, sec. 31, it is said: "The rule has been laid down that a constitutional amendment which embraces several subjects, all of which are germane (near or akin) to the general subject of the amendment, will, under such a requirement, be upheld as valid and may be submitted to the people as a single proposition." See *State v. Alderson,* 49 Mont. 387, 142 Pac. 210; *Lang v. City of Cavalier,* 59 N. Dak. 75, 228 N. W. 819; *State v. Wetz,* 40 N. Dak. 299, 168 N. W. 835, 5 A. L. R. 731; Annotation, 94 A. L. R. 1513. In *State v. Wetz, supra,* it was said that the controlling consideration in determining the singleness of an amendment is its singleness of purpose and the relationship of the details to the general subject. See, also, *People v. Sours,* 31 Colo. 369, 74 Pac. 167, 102 Am. St. 34; Annotation, 94 A. L. R. 1512; *People v. Prevost,* 55 Colo. 199, 134 Pac. 129, cited and quoted from in *Kerby v. Luhrs,* 44 Ariz. 208, 36 Pac. (2d) 549, 94 A. L. R. 1502.

The rule followed by a majority of American jurisdictions is to the effect that where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition.

Reliance is placed by appellees on the case of *Drummond v. City of Columbus,* 136 Neb. 87, 285 N. W. 109. The following constitutes a fair analysis of the holding in that case: The proposal submitted was either or both of two subjects couched in "and/or" language, and could mean that it was a vote on the manner of acquiring an electric light plant, acquiring transmission lines in connection with the existing hydro, or both of these. One who voted in the affirmative would not know whether he

was voting for one or the other or both, and would not be expressing his own preference, but leaving the ultimate choice to the governing authorities of the city. He would not be expressing any preference at all.

The ordinance under consideration permits the elector to vote for or against a definite proposition; that is, a pension fund plan. He delegates authority to no one to express his choice. By his act he alone decides whether the plan so proposed shall or shall not be adopted and whether the plan so proposed shall or shall not constitute an amendment to the city charter.

The contention is made that the fund in question is a private fund and the moneys provided for therein can be paid out only as provided in the statutory contract creating the fund. *Allen v. City of Omaha,* 136 Neb. 620, 286 N. W. 916, is cited as holding the fund to be not, strictly speaking, a public fund, even though the city treasurer is made the custodian thereof; that the fund could be used lawfully for no other purpose, governmental or otherwise, than that for which it was created and is deposited and held in trust by the city treasurer for the protection of those who, under the terms of the act, may become claimants.

In view of the above holding, it is contended, the statutory safeguards with reference to the fund will be abolished, in that the city will have control of the fund; the fund will not be reinvested, but will be exhausted. The proposed amendment to the city charter merely goes to the form of the statutory contract affecting this fund. The purpose for which it is used is in no manner disturbed. In this connection the case of *State v. Allen,* 128 Neb. 675, 260 N. W. 191, is significant. In that case the city council, by ordinance, changed the salaries or compensation of policemen in the city; that is, the charter was amended. A policeman was reinstated from retirement on an increased compensation, granted by ordinance, and thereby retired on an increased pension. The action of the city council constituted an amendment to the city charter. This court said that the city had a right to so amend its charter. The

foregoing case involved the same provisions of the statute here being considered. Comp. St. 1929, sec. 14-610. One of the contentions in the above case was that the board of directors, appointed by the policemen, had enacted a by-law prohibiting an increase in pensions under the circumstances as herein set out. The answer to such contention was that the action of the board of directors of the fund could not bind the city and that the city council had not approved the by-law enacted. This clearly indicates the city's authority with reference to the fund; that is, the board of directors of the fund is not vested with the power to alter or amend the Omaha charter and can make only such rules and regulations as are consistent with the charter. See 14 C. J. 362; *Briggs v. Royal Highlanders*, 84 Neb. 834, 122 N. W. 69; *State v. Allen, supra.*

With reference to the proposed amendment denying the investment of the fund and exhausting it, reason dictates that the fund cannot last indefinitely. The demands made, or to be made, on it will in time deplete it. The city is ultimately liable. All of the accrued rights of the beneficiaries are protected. The fund is protected. The plan calls for a continuation of relief and pensions for firemen and policemen, with the ultimate liability to be assumed by the city for both. See *State v. Allen, supra.* We see no merit to appellees' contention in this respect. The city, by the proposal, is merely endeavoring to augment the fund and to formulate, in the interests of the policemen and firemen, a pension and relief fund that will endure.

While the appellants contend that equity cannot enjoin a matter which has not taken a concrete form and over which no controversy exists, the answer of the appellees is that the proposition to be submitted was dual in character and would, therefore, come under the rule: To enjoin elections, as set forth in *Solomon v. Fleming*, 34 Neb. 40, 51 N. W. 304, and in 18 Am. Jur. 254, sec. 117, which states: "Most of the courts, while conceding that the holding of elections is a political matter, not ordinarily cognizable by a court of equity, hold that where a proposed

election is to be held on a question * * * and the ordinance or statute under which it is to be held is void, or the election is without apparent authority of law, equity will enjoin the holding of such election upon the ground of an unlawful expenditure of public funds."

Having found against the appellees' contention that the proposal here involved contains a dual proposition, this is sufficient to dispose of the question. The question with reference to notice and as to whether or not the ordinance had been passed in time has been purposely eliminated as being ineffective. The election was held, the proposal was not on the ballot, and, therefore, the question need not be determined. There is no occasion to determine the question of vested rights, under the circumstances as here presented.

This court does not determine whether the plan proposed by the amendment is the proper and adequate plan. Many elements arise in a metropolitan city with reference to the police and fire departments that require careful consideration in working out a relief and pension plan that may be comprehensive. This court, by the opinion, does not seek to foreclose the right, but recognizes that either the firemen or the policemen may each present a separate plan, as provided in seeking an amendment to the city charter in section 4, art. XI of the Constitution.

The proposition is not raised in the pleadings that pensions of policemen and firemen are not strictly of municipal concern but involve a matter of state concern; that, therefore, an amendment to a city charter should give way to state legislation on the subject, but this proposition is raised by briefs *amici curiæ*. The trial court did not have the opportunity to pass upon the question.

"It is a rule of universal application in appellate proceedings that the examination of the reviewing court, whether on appeal or writ of error, will be confined to questions determined by the trial court." *Coombs v. MacDonald*, 43 Neb. 632, 62 N. W. 41. See, also, *Horbach v. Butler*, 135 Neb. 394, 281 N. W. 804.

However, on this subject, the contention of certain of

the *amici curiæ* appearing in this litigation is that this court in its opinion should protect the many persons who are being paid pensions, and other persons who are in process of accruing the same, under the controlling provisions of the state firemen's pension law. It will necessarily be conceded that we are limited in this consideration to pension rights of firemen in the city of Omaha, a city of the metropolitan class, operating under a home rule charter. The claim thus made involves two indivisible and fundamental contentions: (1) That there is an existing controlling state firemen's pension law applicable to the firemen of the city of Omaha; (2) that policemen's and firemen's pension and relief laws applicable in the city of Omaha are matters of state concern and are not strictly matters of municipal concern, and therefore that the charter provisions, ordinances passed, and regulations adopted by that municipality must be deemed to be subject and subordinate to, and superseded by, the laws of the state upon the same subject. Of course, if it be determined, either, (1) that there is no "state firemen's law" in existence relating to the subject of relief and pensions of Omaha firemen, save its charter as sought to be amended, or, (2) that firemen's relief and pensions under the circumstances of this case are not to be deemed matters of state concern but are strictly matters of municipal concern, the contention of the *amici curiæ* may not be sustained.

It appears that there is no express constitutional provision that is determinative of the matter, but these questions must be adjudicated upon constitutional provisions, and statutory provisions adopted pursuant thereto, in the light of their historical development. In 1920 there was duly adopted as a constitutional amendment section 5, art. XI of the present Constitution. It provides: "The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the question,

and when so adopted may thereafter be changed or amended as provided in section 4 of this article, subject to the Constitution and laws of the state."

The "charter of any city having a population of more than one hundred thousand inhabitants," as employed in the above amendment, obviously referred to the statutory charter prescribed by the legislature, pursuant to which its government had been previously carried on. When the terms of this constitutional amendment were duly accepted by a municipality, the provisions of the statutory charter thereof as theretofore existing became and thereafter continued, "until amended or changed," as a constitutionally granted home rule charter of its government, supreme, definite and certain. "Certain" in this connection is as expressed by the long accepted maxim, "That is sufficiently certain which can be made certain." Broom's Legal Maxims, p. 418.

The history of the situation discloses that in 1921 a revision of the statutory charter prescribed for the government of metropolitan cities was enacted by the legislature of that year, and was approved "with an emergency" on April 20, 1921. This enactment was duly submitted to the electorate of the city of Omaha, pursuant to the terms of the constitutional amendment above quoted, and by them duly accepted or adopted on the 18th day of July, 1922. Thereby this legislative act of 1921 (prescribed for the government of all cities of the metropolitan class in Nebraska), as to the city of Omaha, lost its qualities as a statutory charter or law imposed by the sovereign power of the state, and in lieu thereof, by virtue of an explicit constitutional grant, its terms then existing became a home rule charter created and to be thereafter continued in force at the will of the grantee municipality lawfully expressed, every section of which was expressly made subject to its own lawful amendments. No other legislative charter, as such, was thereafter applicable to Omaha than the law thus adopted. True, this change was accomplished by and through a general reference to the entire legislative act

of 1921 which comprised the statutory charter of Omaha previously existing, but this was effective. *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412; *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273; *In re Wood's Estate,* 31 Ch. D. (Eng.) 607.

Prior to the action taken under sections 4 and 5 of art. XI of the Constitution, here enjoined, relief and pensions for city firemen of Omaha were authorized and provided for only by sections 2, 2½, 3, and 4, art. VI of the home rule charter. Likewise, police relief and pensions were authorized and provided for by sections 10 to 19, art. V of the Omaha home rule charter. The above sections referred to, pertaining to firemen's relief and pensions, were adopted bodily and verbatim by the 1921 legislature from ch. 60, Laws of 1909, which was carried as article III, ch. 23, Rev. St. 1913, and constituted at the time of their reenactment thus made the only lawful existing statutory provisions pertaining to firemen's pensions and relief by metropolitan cities. All provisions previously existing, including all of article III, ch. 23, Rev. St. 1913, so far as applicable to cities of the metropolitan class, were by it superseded and in effect repealed. *Bartlet v. King,* 12 Mass. 537, 7 Am. Dec. 99; *State v. Michaels,* 103 W. Va. 634, 138 S. E. 199; *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365; *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412; *State v. Omaha Elevator Co.,* 75 Neb. 637, 106 N. W. 979; *In re Estate of Berg,* 139 Neb. 99, 296 N. W. 460; 59 C. J. 919-921; *Attorney General v. Merchants & Mechanics Trust Co.,* 246 Mich. 456, 224 N. W. 624; *State v. Peverly,* 2 W. W. Harr. (Del.) 443, 125 Atl. 421; *Jernigan v. Holden,* 34 Fla. 530, 16 So. 413; *State v. Conkling,* 19 Cal. 501; *Jefferson County v. Rose Township,* 283 Pa. St. 126, 129 Atl. 78; *Chicago, N. S. & M. R. Co. v. City of Chicago,* 331 Ill. 360, 163 N. E. 141; *Village of Atwood v. Cincinnati, I. & W. R. Co.,* 316 Ill. 425, 147 N. E. 449; *Culver v. Third Nat. Bank of Chicago,* 64 Ill. 528; *Andrews v. People,* 75 Ill. 605; *People v. Board of Education,* 166 Ill. 388, 46 N.

E. 1099; 25 R. C. L. 924, sec. 175; 1 Lewis' Sutherland, Statutory Construction (2d ed.) 269-272.

It must be conceded that, so far as substance is concerned, the amendatory ordinance adopted by the corporate authorities of Omaha here in suit, for submission to the electorate, is in all respects strictly germane to the provisions of the home rule charter it purposes to amend. We must then determine the limitations of the power of municipal amendment of its adopted charter from the constitutional provisions creating and vesting that power. Substantially the only limitation so created is expressed by the last clause of section 5, art. XI, by the words, "subject to the Constitution and laws of the state." We assume, but do not determine, that thereby it was intended that such proposed amendment should be subject to and not inconsistent with any law existing at the time of its adoption, or whatever law the state legislature might thereafter think fit to enact relating to the subject of the amendment. *Head v. University,* 19 Wall. (U. S.) 526; *City of Westport v. Kansas City,* 103 Mo. 141, 15 S. W. 68; *Ewing v. Hoblitzelle,* 85 Mo. 64.

Obviously, the intended municipal action in the instant case is not within the proscription of the constitutional clause quoted above. There are no applicable limitations of the state Constitution. There is no legislation on the subject so far as the firemen of Omaha are concerned, save and except the provisions of the Omaha home rule charter which the amendatory ordinance purports to amend. Clearly, that to which a complete power of amendment has been constitutionally given cannot operate as a limitation on the constitutional exercise of the power to amend. Outside of the provisions contained in the Omaha charter, there is no statutory provision whatever relating to the subject-matter of the proposed amendment, the adoption of which is enjoined in this proceeding. To construe the terms of the Omaha home rule charter as precluding amendment because of its existence in statutory form is to invalidate the constitutional amendment so providing. The

conclusion is that "laws" which are to be deemed superior to the power of amendment here considered must be limited to such laws to which section 5, art. XI of the Constitution, is inapplicable. In other words, after its due enactment the charter amendment in the instant case becomes, so far as the city of Omaha is concerned, the law covering the subjects to which it relates, and there being no other inconsistent or conflicting applicable statutes, it becomes the clear expression of sovereign intent made, not through express constitutional grant, but by a constitutional agency duly authorized so to do. And furthermore, the sovereignty of the state having refrained from directly expressing its will by applicable statute on the subject here involved in this litigation, we may not, until such expression actually occurs, consider the matter of firemen's relief and pensions defined and regulated by the Omaha charter as "a matter of exclusively state concern."

The injunction granted by the district court for Douglas county is dissolved, and plaintiff's petition is dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, ET AL., APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.

300 N. W. 379

FILED OCTOBER 17, 1941. No. 31157.

Venue. Where a landowner brings an action in mandamus to compel an irrigation district to build a bridge across one of its canals, the venue of the action is properly laid in the county where the land is, even though the irrigation district is situated and has its principal office or place of business in another county.

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

Walter R. Johnson, Attorney General, Robert A. Nelson and *Halligan, McIntosh & Halligan,* for appellants.

R. O. Canaday, P. E. Boslaugh, M. M. Maupin and *R. H. Beatty, contra.*

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

SIMMONS, C. J.

The plaintiffs filed their petition in the district court for Lincoln county, alleging that the state is the owner and the plaintiff Martin, a resident of Lincoln county, the lessee of certain lands in Lincoln county; that the defendant is a corporation organized under the laws of the state and engaged in the construction and operation of power and irrigation works; that the defendant unlawfully entered upon the land and constructed an irrigation canal across the same; that defendant commenced eminent domain proceedings in Lincoln county to condemn the interest of Martin in the premises without making the state a party to said proceedings; that as a result of the construction of said canal the land has been separated into two parts not accessible to each other unless a bridge is constructed across the canal thereby connecting the two tracts, and that the construction of the bridge is necessary for the free and convenient use of the lands; that it is the legal duty of the defendant to construct the bridge; that it has refused to do so and that plaintiff has no adequate remedy at law. Plaintiffs pray for a writ of mandamus to compel the construction of the bridge.

An alternative writ was issued and served upon the defendant by leaving the same with its president in Adams county.

Defendant filed a special appearance, supported by an affidavit setting out that it is a public power and irrigation district organized under the provisions of article 7, ch. 70, Comp. St. Supp. 1939, with its office and principal place of business in Adams county; that it comprises Gosper, Phelps, Kearney and Adams counties, and is not located within and has never been within Lincoln county; that it can perform official duties and acts only in Adams

county and cannot perform official acts in Lincoln county; that no summons was served upon it; and that the alternative writ was served upon it in Adams county.

The trial court sustained the special appearance and plaintiffs appeal.

The question directly presented is: Was the venue of the action properly laid in Lincoln county?

Plaintiffs base their action upon the provisions of section 46-611, Comp. St. 1929, which is as follows: "Any person, constructing a ditch or canal through the lands of another, having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land. In all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any inclosed field."

Plaintiffs, to support their contention that the venue of the action is in Lincoln county, rely upon the following two provisions of the statutes. Section 20-401, Comp. St. 1929, is as follows: "All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate or some part thereof is situated, but such actions may be brought against corporations owning or operating any line of railroad in the state in any county where service of summons can be had, and all actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in the next following section: First. For the recovery of real property or of an estate or interest therein; Second. For the partition of real property; Third. For the sale of real property under a mortgage, lien or other incumbrance or charge." Section 20-404, Comp. St. 1929, is as follows: "Actions for the following causes must be brought in the county where the

cause or some part thereof arose: First. An action for the recovery of a fine, forfeiture, or penalty, imposed by a statute, except that when it is imposed for an offense committed on a river, or other stream of water, or road, which is the boundary of two or more counties, the action may be brought in any county bordering on such river, watercourse or road and opposite to where the offense was committed; Second. An action against a public officer, * * * or for any neglect of his official duty; Third. An action on the official bond or undertaking of a public officer."

Defendant, contending that an action for mandamus against it must be brought in the county where it is situated or has its principal office or place of business, relies upon section 20-405, Comp. St. 1929, which is as follows: "Actions against corporations created by the laws of this state may be brought as follows: First. Any action other than those mentioned in the first three sections of this chapter (20-401 to 20-403) may be brought in the county in which the corporation is situated or has its principal office or place of business; * * *"

Defendant further contends that it is a public or municipal corporation, and that as such it can act only at its principal place of business, which is fixed by its articles as in Adams county, and cites decisions of courts as sustaining its contention.

What provision of the statute controls the venue of this action? It is clear from the above quoted provisions of the statutes, and others to which reference will be made, that the legislative intent is generally that the venue of actions involving the determination of the title to land, rights and interests therein and damages thereto, shall be in the county wherein the land lies, and that the location of the land is a superior consideration to the location of the parties in determining the proper venue for such actions. In the absence of clear and specific statutory provisions as to the venue of an action, the substantial nature of the issues involved in an action and the statutory pro-

visions as to analogous situations may be followed to determine the proper venue. 67 C. J. 20.

Plaintiff's land is in Lincoln county; the defendant constructed its ditch across this land; its act in so doing made necessary the construction of the bridge, and the obligation to construct the bridge results from the construction of the ditch; the bridge, if constructed, must be built upon land in Lincoln county. The statutory requirement that the bridge be constructed is to restore in part the "free and convenient use of the lands" which the owner formerly had. The purpose is to compensate, in part, for the damage caused to the land by the construction of the ditch. Clearly, under the provisions of section 20-401, *supra,* an action for damages to real estate must be brought in the county where the real estate is situated. It appears reasonable to hold that an action to compel the construction of a bridge which compensates in part for damages caused to real estate be likewise brought in the county where the land is situated. In the absence of any showing to the contrary, the bridge, if built, becomes a part of the real estate. The failure of defendant to build the bridge is "an injury to the real estate." The substantial nature of the issue here is one of recovery for damages, even though the form of the action is in mandamus.

Section 20-404, *supra,* is relied upon by the plaintiffs, and defendant contends that it is not applicable. Clearly, plaintiffs have not brought an action against a public officer for neglect of his official duty, but just as clearly plaintiffs seek to compel defendant to perform a duty enjoined by law and likewise an action which the defendant can perform only through its officers. Defendant, while denying the merit of plaintiffs' contention that this is in effect an action against public officers for the failure to perform an official duty, argues that, in any event, no part of the cause of action arose in Lincoln county. This contention is bottomed on the proposition that it can act and perform its corporate functions only in Adams county. Defendant's contention that plaintiffs' cause of action did not arise in

Lincoln county cannot be sustained. In *State v. Cochran,* 138 Neb. 163, 292 N. W. 239, section 20-404, *supra,* was before this court for construction. We there stated: "Generally speaking, a cause of action consists of a wrong and a resulting damage. A wrong which does not result in a damage is not ordinarily actionable." We there held that the resulting damage, from the wrong done, occurred in the county where the action was brought; that without the damage no cause of action existed, and that the "cause or some part thereof" occurred in the county where the subsequent damage was inflicted. So here, while it may be true that the decision of the defendant to build the bridge must be made in Adams county, the decision to build the bridge is not a full compliance with the statute. The bridge also has to be built, and that can only be done in Lincoln county where the land is situated. See, also, *Board of Trustees v. Board of Supervisors,* 228 Ia. 1095, 291 N. W. 141.

There is a similarity in the statute here involved with that requiring a railroad to provide at least one adequate crossing where lands on both sides of a right of way are in one ownership. Comp. St. 1929 sec. 75-513; *State v. Farmers Irrigation District,* 98 Neb. 239, 152 N. W. 372. The statute provides for written complaint to be filed with the railway commission, for an investigation and a hearing before that body and, upon proper showing, the issuance of an order in the premises. Section 75-509, Comp. St. 1929, provides that, when orders of the commission finally established are not obeyed, any person interested may apply "to the district court of the county in which the violation or disobedience of such order or orders shall happen" and there, upon proper showing, secure an order for its enforcement, "mandatory or otherwise."

Section 20-406, Comp. St. 1929, provides that certain actions against designated carriers "may be brought in any county through or into which the road or line passes." The same applies to turnpike road companies. Comp. St. 1929, sec. 20-407.

While it is alleged that the defendant was a trespasser in the construction of the ditch, yet under the provisions of section 70-707, Comp. St. Supp. 1939, defendant was given the power of condemnation (section 46-602, Comp. St. 1929) by procedure *in the county where the lands are situated* if the owners of lands object to the construction. Comp. St. 1929, sec. 46-603.

All of these statutory provisions clearly establish a legislative intent to place the venue of an action, involving an issue substantially of the nature here presented, in the courts of the county where the land lies.

We accept, for the purpose of this opinion, the contention that defendant comes within the broad classification of a municipal corporation. While there is a general rule that an action against a municipal corporation must be brought in the county of its domicile or where it is situated, yet there is an established exception to this rule in actions which pertain to real estate and which generally must be brought in the county where the lands lie. See 44 C. J. 1471; 6 McQuillin, Municipal Corporations (2d ed.) Revised, sec. 2655; *Mayor & City Council of Baltimore v. Sackett,* 135 Md. 56, 107 Atl. 557, 5 A. L. R. 915; *City of Dallas v. Hopkins,* 16 S. W. (2d) (Tex. Civ. App.) 852; *Oklahoma City v. District Court,* 168 Okla. 235, 32 Pac. (2d) 318, 93 A. L. R. 489, and note page 503; *Oklahoma City v. Rose,* 176 Okla. 607, 56 Pac. (2d) 775; *North Sterling Irrigation District v. Dickman,* 66 Colo. 8, 178 Pac. 559; *Hjelm v. City of St. Cloud,* 129 Minn. 240, 152 N. W. 408; *Swanson v. City of Sioux Falls,* 64 S. Dak. 175, 266 N. W. 115.

We conclude that the venue of this action is properly laid in Lincoln county under the provisions of section 20-401, *supra,* when construed in the light of the substantial nature of the issues involved, and the analogous statutes showing the legislative intent as to the venue of actions of this nature.

In as much as section 20-405, *supra,* refers to actions other than those mentioned in section 20-401, *supra,* it follows that it is not controlling in the case before us.

We are not here presented with the merits of this controversy. Accordingly, the statements made in this opinion, regarding the facts, the rights of the plaintiff and the duties of the defendant, are predicated upon a solution of the problem here presented and are not determinative of any issues that may subsequently arise in this litigation. They are limited solely to the question of venue presented.

The special appearance should have been overruled. The order of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM R. LINCH, APPELLANT, V. ROY H. THORPE, APPELLEE.

300 N. W. 383

FILED OCTOBER 17, 1941. No. 31162.

1. **Appeal.** The finding of facts made by the court has the same force and effect as the verdict of a jury, and if there is competent evidence to support it such finding will not be disturbed on appeal.
2. ———. The findings of facts made by the trial judge will not be set aside on the ground of want of sufficient evidence to support them, unless the want is so great as to show that such findings are clearly wrong.
3. **Bills and Notes.** In determining whether the purchaser of a promissory note has acted in good faith or not, the amount of the consideration becomes a matter of material inquiry.

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

Burkett, Wilson & Van Kirk and *Bruce Fullerton,* for appellant.

George I. Craven, contra.

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

YEAGER, J.

This is an action by William R. Linch, plaintiff and appellant, to recover on a promissory note against Roy H. Thorpe, defendant and appellee. It is the claim of plaintiff that on April 5, 1933, the defendant executed and delivered to the order of G. A. Manifold the note in question, which was for the principal sum of $3,500, with interest at the rate of 6 per cent. per annum with 10 per cent. after maturity, with its maturity date December 31, 1933. On April 12, 1933, a credit of $1,750 was indorsed on the note which is admitted as a proper credit. It is the further claim of plaintiff that the note as credited was, on December 26, 1933, indorsed without recourse, and for value sold by G. A. Manifold to the plaintiff who is owner and holder, and that the defendant has refused and neglected to pay the amount due on the note.

The defendant in his amended answer admitted that he signed and delivered the note, but generally denied the other allegations of the petition, and then pleaded affirmatively that the plaintiff was not a holder in due course; that the note and a contemporaneous contract were canceled, and another contract was substituted therefor on May 6, 1933; and that on September 19, 1933, there was a settlement and accord and satisfaction between G. A. Manifold and the defendant by reason of which the note in question should have been delivered back to the defendant.

A jury was impaneled and all of the evidence was adduced. At the conclusion of the evidence both parties moved for a directed verdict, whereupon the jury was discharged, and thereafter the court made a finding generally against the plaintiff and in favor of defendant and entered judgment accordingly. From this judgment the plaintiff has appealed.

This joinder of motion was a consent of the parties that the court should find the facts. The finding of facts so made by the court has the same force and effect as the verdict of a jury, and if there was competent evidence to support the finding it will not be disturbed on appeal.

Dorsey v. Wellman, 85 Neb. 262, 122 N. W. 989; *Knies v. Lang,* 116 Neb. 387, 217 N. W. 615; *First Nat. Bank v. Newton,* 119 Neb. 394, 229 N. W. 334; *Fidelity & Deposit Co. v. B. Grunwald, Inc.,* 129 Neb. 749, 262 N. W. 831; *Bonacorso v. Camden Fire Ins. Ass'n,* 130 Neb. 203, 264 N. W. 442.

This court has held uniformly to the rule that questions of fact are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. *Sycamore Co. v. Grundrad,* 16 Neb. 529, 20 N. W. 832; *Warrick v. Rounds,* 17 Neb. 411, 23 N. W. 785; *American Bldg. & Loan Ass'n v. Mordock,* 39 Neb. 413, 58 N. W. 107; *Ryan v. Continental Casualty Co.,* 94 Neb. 35, 142 N. W. 288; *Dore v. Omaha & C. B. Street R. Co.,* 97 Neb. 250, 149 N. W. 792; *Norman v. Kusel,* 97 Neb. 400, 150 N. W. 201; *Wenquist v. Omaha & C. B. Street R. Co.,* 97 Neb. 554, 150 N. W. 637; *Live Stock Nat. Bank v. Bragonier,* 98 Neb. 506, 153 N. W. 504; *Sippel v. Missouri P. R. Co.,* 102 Neb. 597, 168 N. W. 356; *Curran v. Union Stock Yards Co.,* 111 Neb. 251, 196 N. W. 135; *Stewart v. Weiner,* 111 Neb. 797, 198 N. W. 159.

In the light of these rules, was there such a lack of evidence in support of the contentions of the defendant as would require this court to hold that the finding of the trial court was manifestly wrong?

The first defense, in the language of appellee's brief, is "that plaintiff, William R. Linch, is not a holder of said note in due course."

In section 62-402, Comp. St. 1929, a holder in due course is defined as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: First. That it is complete and regular upon its face; Second. That he became the holder of it before it was over-due and without notice that it had been previously dishonored if such was the fact; Third. That he took it in good faith and for value; Fourth. That at the time

it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The note in question is complete and regular upon its face. On this question there is no controversy. The defendant, however, in his pleadings and evidence questions the other three essentials of the holding of a note in due course. The burden is his to overcome the statutory presumption (section 62-409, Comp. St. 1929) that the plaintiff was the holder of the note in question in due course. The effect of the finding and judgment of the trial court was that the evidence was sufficient to overcome this presumption, and further that the evidence on this proposition preponderated in favor of the defendant.

On this question the evidence is fragmentary, scattered through the bill of exceptions, and relates to facts directly bearing upon the controversy and other facts from which pertinent inferences may be legitimately and properly drawn. In full detail it will not be set out here, but certain portions will be referred to.

In March, 1934, which was after the note became due, Manifold, the original payee and the indorser, tried to sell the note to H. E. Worrell, of Omaha. Manifold's explanation was that he expected to get it back from Linch. The inference drawn by defendant was that at that time Manifold still held the note. At the trial the plaintiff admitted that Manifold told him that he hoped that he (Linch) would have better luck collecting the note than he (Manifold) did. In this connection defendant urges that it is a proper inference that at the time of the transfer of the note it was past due, otherwise collection would not have been attempted, and further that this conversation was notice of dishonor of the note to plaintiff. Further, Manifold told Linch that he did not think he could collect ten cents on the dollar.

The evidence is clear that the note, the face value of which was $1,750, was purchased for $175. The defendant insists that this disparity between face and sale price

was sufficient to put the plaintiff on inquiry as to the good faith of the transaction. In *Smith v. Jansen,* 12 Neb. 125, 10 N. W. 537, this court sustained a dismissal by the trial court based on the proposition that a purchaser who purchased five negotiable promissory notes of the aggregate face value of $100, secured by a real estate mortgage, for $30 was not a *bona fide* purchaser. In the opinion it is stated: "The rights of a holder of negotiable paper purchased before due are to be determined by the simple test of honesty and good faith on his part in making the purchase. In determining whether the purchaser has acted in good faith or not the amount of the consideration may become a material inquiry." A large number of cases from various jurisdictions supporting this view are collected in notes in 91 A. L. R. 1154 *et seq.*

From the evidence it is clear that defendant had an absolute defense to the promissory note in question in the hands of Manifold, the named payee. Therefore, from an examination of all of the evidence we are unable to conclude that there is a want of sufficient evidence to support the finding and judgment of the district court or that the finding and judgment are manifestly wrong. There were sufficient facts on the issues tendered by the answer to submit to a jury, had not the motions for directed verdict been made, and likewise, under the circumstances, there were facts determinable by the court on these issues.

The judgment of the district court is

AFFIRMED.

ETHEL MILLER, APPELLEE, V. ABEL CONSTRUCTION COMPANY, APPELLANT.

300 N. W. 405

FILED OCTOBER 17, 1941. No. 31029.

1. **Negligence.** In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.

2. ———. Where the plaintiff has failed to sustain this burden, it is the duty of the trial court to sustain a motion to direct a verdict for the defendant at the conclusion of all the evidence.
3. **Highways.** Where a highway undergoing construction has not been completed by the contractor or accepted by proper authorities and is being used permissively in a limited manner by local residents, it is only required that the highway be kept and maintained in a reasonably safe condition for the use of those traveling thereon who are at the time exercising reasonable care, under the peculiar circumstances and conditions by which they are at the time confronted, by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work.
4. ———. A highway contractor is not required in the exercise of reasonable care to place signals or flares at intermediate places on a highway under construction in order to give notice that machinery is being used thereon, where warning signals and barricades at the termini thereof give notice that the highway is under construction and the condition of the highway itself shows that it is under various stages of completion.
5. **Evidence.** TRIAL. Where there is positive and affirmative testimony of a number of witnesses that a red light was displayed on a road roller, the fact that there is testimony by one or more witnesses that they did not see the red light does not make a disputable issue of fact to be submitted to the jury, where it is not shown that the attention of the witnesses was directed toward the red light at the time it is said to have been displayed, and where their position, mental condition and surroundings were not such as would raise a presumption that they would have seen it if it had been displayed.

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

Stewart, Stewart & Whitworth and *Robins & Yost,* for appellant.

Sidner, Lee & Gunderson, contra.

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

POLK, District Judge.

This is an action for personal injuries arising out of a collision between an automobile in which the plaintiff was

riding with her husband and a road roller being used at night by the defendant in the construction of a highway in Dodge county, Nebraska, between Winslow and Uehling. From a verdict and judgment in favor of the plaintiff for $3,000 the defendant appeals.

The record shows that in the forenoon of July 23, 1939, plaintiff and her husband left their home in Fremont by automobile for a trip to the home of the plaintiff's sister living east of Oakland. Plaintiff rode in the front seat of the car, which was owned and being driven by her husband. They had made the trip many times that summer prior to the accident and knew that the road was under construction. On previous trips they turned east near Winslow to avoid going from Winslow to Uehling on account of the highway being under construction. On this day they drove from Fremont on highway 77 to the first barrier and signs south of Winslow, drove around the barrier and signs, and continued on north driving around a barricade at the intersection of the highway with the railroad tracks near Winslow and continued on the highway, turning east south of Uehling. On the return trip the plaintiff and her husband left the home of her sister about 9 o'clock p. m., going to Oakland and then turning south on highway 77. They drove south on the highway until they reached the barriers near Uehling. At this point they left the highway, went through a portion of Uehling, and back onto the highway south of the barriers, and continued south thereon to the place where the accident occurred, which was about six miles south of Uehling and three miles north of Winslow. Immediately prior to the accident one of the defendant's employees was driving a tractor pulling a road roller south on the west half of the highway at about five or six miles an hour, preparing it for a coat of oil. As the automobile in which the plaintiff and her husband were riding approached the scene of the accident, another car came from the south. Each driver dimmed his lights, and as they passed both cars were going between 30 and 35 miles an hour. Immediately on passing, the plaintiff and

her husband saw for the first time the road roller about 10 to 15 feet away. Their car crashed into it before plaintiff's husband could apply the brakes or turn to the side.

The alleged acts of negligence of the defendant consist of the following: (1) That the defendant operated the road roller at night on a public highway without having it painted a distinguishing color from the road; (2) without having lights on said roller; (3) without displaying any warning signals; and (4) without providing suitable reflectors on said roller.

The uncontradicted evidence shows that the rear of the roller was painted yellow; that there were no flares or warning signals placed in the highway, and that there were no reflectors on the rear of the roller.

The evidence, then, is without conflict on all of the alleged acts of negligence except the failure to have a red light displayed on the rear of the roller. In this connection the plaintiff contends that it was not only the duty of the defendant to have a red light displayed on the rear of the road roller, but that the defendant violated this duty. If there was a duty here imposed on the defendant, it was by reason of the common law and not by statute, since section 39-1174, Comp. St. Supp. 1939, specifically exempts road rollers and road machinery from displaying red lights. Assuming, for the sake of argument, that defendant had a common-law duty to keep a red light on the rear of the road roller, we think that the evidence is conclusive that it was so equipped. While it is true that the plaintiff and her husband and the witness Heller testified that they did not see a red light, they did not testify that a red light was not displayed. Plaintiff and her husband place the distance the roller was from them at the time they first observed it at 10 to 15 feet, having just emerged from the lights of the Heller car. The testimony of these witnesses that they did not see a red light is purely negative in character and of no probative force on the question of whether a red light was displayed. The defendant's witnesses Rabe, McMurtry, Brokaw, Doncski and Johnson

testified positively that the red lantern on the roller was lighted prior to the collision. In the face of this positive testimony that the red light was displayed, the fact that there is testimony of one or more witnesses that they did not see it will not prevail against the positive testimony of several witnesses in making an issuable fact for the jury, where the attention of the witnesses was not directed toward the red light at the time it is said to have been displayed, and where their position, mental condition and the surroundings were not such as would raise a presumption that they would have seen it if it had been displayed. *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, 178 N. W. 258; *Oliver v. Union P. R. Co.*, 105 Neb. 243, 179 N. W. 1017; *Hook v. Payne*, 109 Neb. 252, 190 N. W. 581; *De Griselles v. Gans*, 116 Neb. 835, 219 N. W. 235; *Fischer v. Megan*, 138 Neb. 420, 293 N. W. 287. We hold that the evidence was without contradiction that a red light was displayed and that this part of the evidence did not present an issuable fact for the jury.

The record showing that the rear of the road roller was painted yellow, that there were no flares or warning signals placed on the highway, and that there were no reflectors on the roller, and having concluded that the evidence shows that there was a red light displayed thereon, we shall turn our attention to the duty of the defendant toward the plaintiff under the circumstances.

In determining the duty of the defendant company, we should bear in mind that it did not owe the plaintiff a greater duty because she was a guest rather than the driver of the car. The defendant was bound to exercise one standard of care toward all persons lawfully on this particular highway whether guest or driver. However, this standard of care is not the same as that required had the accident occurred on an open highway, not under construction and open to the general public. A traveler on a public highway open to the general public may assume that the highway is reasonably safe for one exercising ordinary care for his safety, but this rule is subject

to some qualification. When a part of a highway is undergoing construction and this portion is barricaded off from the general public by appropriate signs, a traveler thereon having knowledge that the highway is undergoing construction has a duty to exercise a greater care for his own safety than if he were traveling on an open highway open to the general public. He must keep a constant lookout and vigilant caution for his safety.

While it has been said that the law requires only one degree of care, and that is ordinary care under the circumstances, yet unusual and peculiar circumstances, creating a greater risk, require a greater degree of care for one's safety. This distinction is recognized in the case of *Hall v. Incorporated Town of Manson,* 90 Ia. 585, 58 N. W. 881, wherein the court said:

"What will constitute ordinary care, however, will depend upon circumstances, and these may well include a consideration of the fact as to whether the accident occurred in the daytime or nighttime; and, if at night, it might be that more caution and watchfulness would be required to be shown in order to establish the fact that the plaintiff was, in fact, at the time of the injury, in the exercise of ordinary care. In either case the degree is the same—ordinary care—but the facts establishing such a degree of care may be different."

The rule is stated in *McClelland v. Scroggin,* 48 Neb. 141, 66 N. W. 1123, as follows:

"The care which may be termed ordinary is such a degree of care as a prudent and reasonable man would exercise under the existing circumstances and conditions. Where the known risks are enhanced the degree of care should correspondingly increase."

In the case of *Grosz v. Bone,* 48 S. Dak. 65, 201 N. W. 871, the court held that the driver of an automobile, knowing that the highway was being resurfaced, should have anticipated the torn-up condition of the road, and that a greater degree of care in the operation of his car would be necessary to avoid accident.

The duty of a driver going around a barricade in a highway is set forth in the following language in the case of *Shawano County v. Froemming Bros.*, 186 Wis. 491, 202 N. W. 186:

"When Glawe went by the barrier as he did he was bound to know that it was a warning of possible danger ahead on the highway, and it was his duty, for his own protection in the exercise of reasonable and ordinary care, to ascertain what such danger was before proceeding, or, if proceeding, to so have his vehicle under control that dangers might be averted. Such warning did away with the presumption that would otherwise apply that the highway was, in accordance with law, reasonably safe for public use."

In holding that a traveler on the highway in question was required to exercise a higher degree of care than on an open highway not under construction we are not unmindful of the holding of this court in the cases of *Frickel v. Lancaster County*, 115 Neb. 506, 213 N. W. 826, and *Boomer v. Lancaster County*, 116 Neb. 718, 218 N. W. 751, wherein the duty of a county in repairing a highway is defined as requiring the county "to use reasonable and ordinary care to maintain the highways reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care." We are merely holding that the duty to use reasonable and ordinary care on the part of a traveler on a highway under construction requires the exercise of a greater degree of caution than on an open highway open to the general public.

In view of this duty of a traveler on an uncompleted highway, the correct rule prescribing the duty of the defendant contractor is that, where a highway undergoing construction has not been completed by the contractor or accepted by proper authorities and is being used permissively in a limited manner by local residents, it is only required that the highway be kept and maintained in a reasonably safe condition for the use of those traveling thereon who are at the time exercising reasonable care,

under the peculiar circumstances and conditions by which they are at the time confronted, by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work. *Graves v. Johnson,* 179 Miss. 465, 176 So. 256; *Graves v. Hamilton,* 184 Miss. 239, 184 So. 56; *Myers v. Sanders,* 189 Miss. 198, 194 So. 300; *Gordon v. Illinois Central R. Co.,* 190 Miss. 789, 1 So. (2d) 772.

In the case of *Myers v. Sanders, supra,* we find a case very similar to the instant one. The deceased, Sanders, was riding as a guest in a truck upon a highway under construction. The accident occurred when the rear wheels of the truck ran across the edge of a pile of sand which had been unloaded on a portion of the highway for use in building head walls to a culvert. The accident occurred immediately following the passing of two cars, the driver of the car in which plaintiff's decedent was riding as a guest failing to see the pile of sand because of dust from the oncoming car. The highway was undergoing construction and was properly barricaded with signs, "Caution," "Road Under Construction," and "Detour." The deceased was thrown from the truck and was killed. The load of sand had been hauled the afternoon of the day of the accident after the deceased and other members of the party in the truck had previously passed over the highway. The occupants of the truck, including the deceased, knew that the road was under construction at the time of the accident. The contract required that the highway be left open while the construction was in progress in such a manner as to permit local traffic thereon, and the road at the place of the accident was being used by a greater proportion of the traveling public notwithstanding the detour and warning signs. The court held that the wife and children of the deceased could not maintain the action, and that the defendant should have been entitled to a peremptory instruction in its favor. The court, in announcing the rule heretofore set forth, said:

"The construction not having been completed by the

contractor or accepted by the proper public authorities as a completed highway under the terms of the contract, it was only required that the same be kept and maintained in a reasonably safe condition for the use of those traveling thereon and exercising a vigilant caution to keep a constant lookout for obstructions incident to the progress and completion of the work remaining to be done. *Graves v. Johnson,* 179 Miss. 465, 176 So. 256. Also in the companion case of *Graves v. Hamilton,* 184 Miss. 239, 184 So. 56, 57, the principle is recognized that a completed highway should be kept and maintained in a reasonably safe condition for those exercising ordinary care in traveling thereon, but when there are sufficient facts and circumstances to put a motorist on notice that a highway is under construction, the duty of the contractor in regard thereto only requires that it be kept and maintained in a reasonably safe condition for use 'by those exercising vigilant caution and keeping a constant lookout.' It cannot be questioned that this pile of sand could have been readily and easily seen by a motorist in the daytime if he were exercising a vigilant caution and keeping a constant lookout for obstacles, the presence of which he should have anticipated on a road under construction, except for the fact that in this instance his vision was obscured by the dust raised by another car or truck and for which the contractor was not responsible.

"We are of the opinion that the failure of the driver of the truck, from which Mr. Sanders fell, to anticipate that his vision might be obscured by the dust from a passing car or truck, and his failure to have his own truck under such control as a vigilant caution and constant lookout would have occasioned, and so as to be able to stop his truck in such an emergency instead of proceeding on through the dust, was the sole proximate cause of the accident and injury complained of; and that therefore there could be no recovery against the appellant contractor under such circumstances. The proof discloses that the contractor had done everything that he could to keep the through

traffic off the portion of the highway then under construction that would have been consistent with his obligation to permit local traffic thereon; and in our opinion the placing of the load of sand in the edge of the gravel portion of the highway for use in building the head walls of the culvert underneath the same at that place was not a negligent but a reasonable exercise of his right to carry on the work to completion, since he left a sufficient clearance for the local traffic and for others to pass in safety when exercising the vigilant caution and constant lookout required of them in traveling over a highway known to be under construction."

In the case of *Graves v. Johnson,* 179 Miss. 465, 176 So. 256, the court states the rule in the following language:

"As to a completed highway, actually or impliedly accepted by the proper public authorities as such and which has been put into general and unrestricted use as a highway, complete in all the respects for which all the public has a right to use such a thoroughfare, a traveler thereon has the right to assume that the highway is in a reasonably safe condition for travel and is free from obstructions and he need not keep his eyes constantly fixed on the path of the highway or look far ahead for defects which should not exist, nor shall he be absolutely required to exercise such an extreme vigilance as to see in any and all events such obstructions as bumpers in the road, or a chain stretched across it; nevertheless as to completed and accepted highways, the traveler must use ordinary care. * * *

"But the highway here was under construction. It was not an accepted, completed highway, open to all the public for unrestricted use in all respects as is a completed and accepted thoroughfare; but its condition was such that any member of the public who used it, when he had knowledge or notice sufficient in the eyes of the law to amount to knowledge that the highway was under construction, was bound to anticipate that at some near point in his progress the usable portion would end and the portion

actually under construction and unfit for use would begin, and that he could not go forward under the assumption that the way was open and clear throughout, but is put upon guard and under the obligation of vigilant caution to keep a constant lookout for the end of the used portion and the beginning of the portion unfit for use and not open for travel."

We have examined the entire record and do not find any actionable negligence on the part of the defendant. The entire rear portion of the roller that could be painted was painted yellow. The record is silent as to any other color or combination of colors that would have rendered the roller more visible. While plaintiff complains that the roller was without reflectors, the record is silent as to the type, color or size that should have been used. It seems reasonable to presume that, inasmuch as plaintiff's husband did not see the red lantern on the roller, he would not have seen a reflector, a less effective signal. Nor is the want of flares evidence of the lack of due care. A definite portion of the highway was under construction and barricaded off and closed to the general public by appropriate signs and signals. The plaintiff and her husband had actual knowledge that the highway was under construction, having passed over it several times previous to the accident, and the highway itself on the evening of the accident showed it was under various stages of completion. Due care did not require that the defendant place flares at intermediate points during the progress of the work. *Gordon v. Illinois Central R. Co., supra.*

We have not considered any alleged negligence on the part of the plaintiff's husband as negligence of the plaintiff, since negligence on his part under the circumstances would not be attributable to her. We have discussed the duty of the driver of the car as it related to the standard of care required of the defendant and as it had a bearing on the proximate cause of the accident. The burden was on the plaintiff to show that there was a negligent act or omission of the defendant and that it was the proximate

cause of the plaintiff's injury or a cause which proximately contributed thereto. *Sailors v. Lowden, ante,* p. 206, 299 N. W. 510. Our conclusion is that the plaintiff has not sustained this burden and has failed to make a case of actionable negligence against the defendant, and that the sole proximate cause of plaintiff's injuries was the negligence of her husband in driving his car in the nighttime on the highway, knowing it was under construction, at a rate of speed and under such control that he could not stop and avoid such machinery thereon as was necessary to the progress of the work, and which he should reasonably expect to encounter on an uncompleted highway. *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572; *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340; *Redwelski v. Omaha & C. B. Street R. Co.,* 137 Neb. 681, 290 N. W. 904; *Fischer v. Megan,* 138 Neb. 420, 293 N. W. 287; *Sailors v Lowden, ante,* p. 206, 299 N. W. 510.

Having arrived at this conclusion, it is unnecessary to consider other assigned errors. The trial court should have sustained defendant's motion to direct a verdict in its favor at the conclusion of all the evidence. The judgment of the district court is accordingly reversed and the cause dismissed.

REVERSED AND DISMISSED.

FRANK E. EDGERTON, APPELLEE, V. BOARD OF EQUALIZATION OF HAMILTON COUNTY ET AL., APPELLANTS.

300 N. W. 413

FILED OCTOBER 24, 1941. No. 31199.

1. **Evidence.** Under the provisions of section 77-201, Comp. St. Supp. 1939, the legislature has set out certain elements to be considered in determining the actual value of property, as well as requiring that every other element affecting the actual value be considered.
2. ———. The statute does not require that each witness must expressly state that he has taken each and every one of said elements into consideration before being permitted to express

his opinion as to the actual value, or before that opinion may be considered in determining the actual value.

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

Dallas S. Gibson and *Kirkpatrick & Dougherty,* for appellants.

Craft, Edgerton & Fraizer, contra.

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

SIMMONS, C. J.

The question here presented involves the assessed value for the year 1940 of garage property in the city of Aurora. The assessor fixed the value of the property at $2,850. The board of equalization reviewed and affirmed the assessment. Plaintiff appealed to the district court where the value was fixed at $1,850. Defendants appeal to this court.

The plaintiff offered six witnesses who qualified as experts and in varying ways described the property, its location, condition of improvements, gross income, expenses for repairs, taxes, insurance and depreciation. All of these witnesses fixed the actual value at $1,500 or less. The defendants examined plaintiff's witnesses as to their qualifications, knowledge of values and condition of the property, and other elements which they considered in arriving at their opinion of the value of the property. The defendants offered no evidence.

Defendants' first contention is that the evidence is insufficient to sustain the judgment of the trial court. This is based upon the rules last announced by this court in *Kennedy v. Buffalo County,* 134 Neb. 744, 279 N. W. 464, that the burden of proof is upon the appealing taxpayer to show that the value as fixed by the board of equalization is erroneous; and that the assessment as fixed by the board is final and should not be disturbed on appeal unless it appears from clear and convincing proof that it is erroneous.

The evidence of plaintiff's witnesses has been reviewed. There is no evidence to the contrary. Only one conclusion can be drawn from this testimony, and that is that plaintiff has established by the requisite proof that the value as fixed by the board of equalization is excessive and erroneous. Defendants are not in a position to complain because the trial court fixed the value at $350 more than that testified to by any witness. There is no evidence in the record to sustain a higher value.

Defendants next contend that the trial court erred in permitting certain witnesses to testify as to the total value of the property because their cross-examination revealed that they had not taken into consideration a small sheet metal building situated on the rear of the property, used for storage and other purposes. Certain of plaintiff's witnesses testified that it did not add to the value of the property. Defendants offered no evidence as to its value. This contention is without merit.

Defendants' next contention is that, in an appeal from an order of a board of equalization in the matter of assessment of property for taxation, the cause must be tried on the questions raised by the complainant before that tribunal (citing *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, 106 N. W. 471), and that on the trial in the district court there was no segregation of the value of the land from the value of the improvements. An examination of the petition filed in the district court reveals that plaintiff alleged ownership of the real estate, describing it; that the assessed valuation was $2,850, "being $1,050 on the lots and $1,800 on the building;" that he had filed an application with the board of equalization asking that the valuation "be reduced to $1,500;" and that the board had refused to reduce the assessment. These allegations are admitted by the answer. The sole issue tendered was whether or not the assessment was in excess of the actual value of the real estate. Plaintiff prayed for an order fixing the valuation of the property at $1,500 or less. Defendants prayed that the findings and orders

of the board remain undisturbed. This refinement of the issue does not seem to have been presented to the trial court by appropriate pleading, in objections to evidence during the trial, or in the motion for a new trial. It seems to have been presented for the first time in the printed argument to this court. Consistent with the established rule of this court, defendants cannot now inject that issue into the case. *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484.

Finally, defendants argue that "none of the witnesses have taken into consideration those items which go to fix the values as defined by section 77-201, Comp. St. Supp. 1939." This statute is as follows:

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. In arriving at the 'actual value' of property, as used in this Act, there shall be taken into consideration its value in the market in the ordinary course of trade and in arriving at the 'actual value' of real property there shall also be taken into consideration the proximity of such property to markets, the school facilities and other advantages and other facilities afforded by the governmental subdivision or subdivisions in which the real property is situated, the tax burden upon the real property, and every other element or factor affecting the actual value of said real property."

Under the statute the actual value determines the assessed value of property. To assist the governmental agency charged with that duty in the determination of that actual value, the legislature has defined certain elements that are to be considered, as well as requiring that "every other element or factor affecting the actual value of said real property" shall be considered in arriving at the ultimate fact of "actual value." The statute does not require, as defendants appear to contend, that each witness must expressly state that he has taken each and every one of said elements into consideration before being permitted to express his opinion as to the actual value of a

piece of property, or before that opinion may be considered in determining the actual value. He may be examined, if a party so desires, as to the elements that he has considered in arriving at his conclusion. The objection raised by the defendants here goes, not to the competency of the evidence, but to the weight to be given to it by the fact determining body.

The judgment of the trial court is

AFFIRMED.

MAX FEENEY, APPELLANT, V. CITY OF OMAHA, APPELLEE.
300 N. W. 571

FILED OCTOBER 24, 1941. No. 31269.

1. **Workmen's Compensation.** To sustain a claim for compensation under the workmen's compensation act, the employee has the burden of establishing by a preponderance of the evidence that he has incurred a disability arising out of and in the course of his employment.
2. ———. This proof must be made by evidence leading either to the direct conclusion or to a legitimate inference that such is the fact.
3. ———. An award cannot be sustained if based upon possibilities, probabilities, conjectural or speculative evidence.

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

Richard E. O'Brien and *William H. Mecham,* for appellant.

Harold C. Linahan, W. W. Wenstrand and *Edward Sklenicka, contra.*

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

SIMMONS, C. J.

Plaintiff sued to recover benefits under the workmen's compensation law. He prevailed in the compensation court. On appeal the district court denied an award. Plaintiff appeals here.

Plaintiff became an employee of the defendant city, in the fire department, in 1923, and continued in such employment until August 1, 1938, when, at his request, he was retired on a disability pension. At the time of his retirement and at the time of the trial below he was suffering from myocarditis and hypertrophy of the left ventricle of the heart.

Plaintiff seeks to recover compensation, claiming that his physical condition is the result, not of one, but of a series of injuries and exposures while he was in the defendant's employment. Several injuries to which he testified are removed by medical testimony as factors contributing to his disability and will not be recited here.

In January, 1930, while at a fire he was drenched with water, and ice froze on him. He was treated by a physician with a salve rubbed on the affected parts. Thereafter he felt cold temperatures more readily than before. He was not sick and lost no time as the result of the exposure. Shortly thereafter he had pains in the region of his heart, tired easily, contracted colds more easily, and did not have his former energy.

January 12, 1934, at a fire, in below zero temperature, he got wet, felt chilled and cold, went to bed, worked off and on, feeling "bum" until January 18, when he went home sick and remained on sick leave until February 19, 1934. His illness was described as pneumonia. March 15, 1934, he again got wet at a fire, suffered a recurrence of the pneumonia and was off duty from March 17 until April 24, 1934. The type, seriousness, duration and the extent of the involvement are not shown. Those facts can only be surmised from the length of his absence from duty. In May, 1934, an X-ray of his heart revealed the existence of his present ailment to a disabling extent. About this time plaintiff had his teeth pulled and his tonsils removed.

It is quite apparent that plaintiff's disability began as early as 1930 and became progressively worse through the following years. Plaintiff's expert witness indicates that

the myocarditis may have existed prior to 1930. The theory is that the pneumonia further weakened a diseased heart. Yet the medical testimony does not point with any certainty to that result. Plaintiff's doctor, who cared for him during his illness, testified that the hypertrophy which he found in May, 1934, could have been there to the same extent prior to the pneumonia; that "most any type of infective germ which is capable of attacking the respiratory system" may cause myocarditis. It may be caused by a strain or an exposure. The evidence of other physicians is to the same effect. It is also established by the record that plaintiff was advised of his condition in 1934 and considered it disabling at that time. Yet he made no claim for compensation; neither did he advise his employer of his condition, nor claim that it was caused by his pneumonia, nor that the pneumonia was caused by the exposure. In his history, when examined by the city physician in July, 1938, he made no mention of an illness with pneumonia. These contentions appear to have been first advanced with the inception of this litigation.

The form resolution of the city council, retiring plaintiff on a disability pension, recited that he had become permanently and totally disabled "as the result of injuries sustained at various times while in the line of duty." This resolution was not based upon any medical report that connects plaintiff's disability with his service injuries or exposures. The resolution is of no assistance in solving the problem here presented.

The plaintiff has the burden of establishing by a preponderance of the evidence that he has incurred a disability arising out of and in the course of his employment. This proof must be made by evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. An award cannot be sustained if based upon possibilities, probabilities, conjectural or speculative evidence. *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Saxton v. Sinclair Refining Co.,* 125 Neb. 468, 250 N. W. 655; *Dennehy v. Lincoln Steel Works,* 136 Neb. 269, 285 N. W.

590; *Wayne County v. Lessman*, 136 Neb. 311, 285 N. W. 579; *Lowder v. Standard Auto Parts Co.*, 136 Neb. 747, 287 N. W. 211. See, also, *Townsend v. Loeffelbein*, 123 Neb. 791, 244 N. W. 418.

Plaintiff has failed to meet the burden which the law places upon him as a condition to a recovery of compensation payments.

The judgment of the district court is

AFFIRMED.

ALICE H. BROWN, APPELLEE, V. THOMAS MULREADY, APPELLANT.

300 N. W. 421

FILED OCTOBER 24, 1941. No. 31180.

1. **Witnesses.** The plaintiff may be impeached by evidence tending to prove that she made statements out of court contrary to those made by her at the trial in respect to matters material to the issues.
2. **Evidence.** The declarations of a party to an action against interest are admissible as substantive evidence.
3. ———. A notary public and shorthand reporter, who had taken plaintiff's deposition some months before the trial, should be allowed to testify from his original shorthand notes as to different answers made upon material matters.
4. **Witnesses.** Defendant is entitled to reasonable scope and latitude on cross-examination of plaintiff when attempting to show inconsistent statements made some months before.
5. **Automobiles.** "When evidence in a guest case is resolved most favorably toward the existence of gross negligence, and a fixed state of facts thus obtained, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law." *Johnk v. Scanlon*, 136 Neb. 187, 285 N. W. 488.

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

Frederick M. Deutsch, for appellant.

Moyer & Moyer, contra.

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

PAINE, J.

This was an action by a married woman, living with her husband, against the owner of an automobile, to recover damages for personal injuries sustained while she was riding as a guest of the wife of the owner of the car. The jury returned a verdict for plaintiff for $4,458, and defendant appeals.

Plaintiff filed an amended petition, alleging that she was a married woman, 48 years of age, and living with her husband, and was a resident of Norfolk, and alleged that the defendant, also a resident of Norfolk, owned a Chevrolet sedan, and maintained the same as a family automobile, and among the members of the family who had habitually used it was his wife, Helen Mulready.

Plaintiff further alleges that on July 24, 1939, she was a guest without hire at the invitation and request of defendant's wife; that they left the city of Fremont at 7:00 p. m. on their return trip to Norfolk on Highway No. 275; that for several miles east of the city of Norfolk this concrete highway traverses a very hilly country, with high fills and deep cuts; that the soil is clay, which after a rain washes across the highway, rendering it slippery and dangerous for motor vehicles; that there had been a heavy rain earlier in this locality, and it was dark and still drizzling, and there had been several miles where the highway in spots was slippery, all of which was known to the defendant's wife, who did not observe reasonable care and caution, but instead drove the automobile in a grossly negligent manner, driving it at a high and dangerous rate of speed of approximately 40 miles an hour, downhill, over roads wet and coated with muddy clay; that at a point southeast of Norfolk, and in Stanton county, while going downhill, defendant's wife, without taking proper precautions, lost control of the automobile, which plunged off the road and over an embankment, and turned over,

coming to rest some ten feet below the top of the embankment, and causing severe injuries to the plaintiff; that among the injuries the plaintiff suffered were a dislocation of the fifth and a partial fracture of the body of the sixth cervical vertebra in her neck, a compression of the nerve root between these vertebræ, bruises about the body, and a nervous shock, causing her to suffer excruciating pain, for which she claims damages in the sum of $10,000.

For an answer to this amended petition, the defendant admits that he owned the car, which was being used for family purposes, and that his wife invited plaintiff to ride to Fremont and back as a guest, over U. S. Highway No. 275, and that the accident occurred three miles east of Norfolk.

Defendant further alleges that, while his wife was driving said automobile on the return trip in a careful and prudent manner, and at a reasonable rate of speed, at no time in excess of 40 miles an hour, she suddenly, without any knowledge of or warning, encountered a strip of mud, which was wet and slippery, and before she could bring her car to a stop the automobile skidded over the bank of the highway and came to rest 200 feet east of the low point of said pavement; that the spillway on the north side of said pavement had become dammed up so that a strip of mud about ten feet wide and several inches deep extended entirely across the pavement, but that the pavement was free from mud on either side of this strip; that none of the occupants of said automobile made any protest about the manner in which it was being operated at the time; that plaintiff rode in the front seat and had equal opportunity with defendant's wife to see the mud across said highway, but gave no warning thereof, and was by reason thereof guilty of negligence directly and proximately causing said accident; that plaintiff knew the road and the ability of the driver, and assumed all risk incident to said highway and incident to the incompetency, if any, of defendant's wife in driving an automobile.

For a reply to this answer, the plaintiff admits that the

accident occurred at the location described in the answer, but denies all other allegations which do not admit the truth of the allegations of the amended petition.

In the oral argument in this court, counsel devoted most of his time to objections of plaintiff which had been sustained by the court, thus preventing the defendant from introducing important and material evidence tending to impeach the plaintiff in her testimony.

The defendant, at the time of impaneling the jury, requested the court to call eighteen men to the jury box for *voir dire* examination, so that peremptory challenges might be intelligently exercised. To this the plaintiff objected. The court stated: "Whereas it has been common practice to call twelve jurors for examination, and eighteen have only been called by agreement of both parties, the objection will be sustained and the request for eighteen jurors will be denied." To which the defendant excepted. In civil cases it is usual for the court on its own motion to order eighteen jurors to be examined and passed for cause before the counsel are required to exercise any of their peremptory challenges. In our opinion, this request of the defendant should have been granted, although its refusal was not prejudicial error under the circumstances.

In the opening statement to the jury the defendant, over a vigorous objection which was overruled, referred to a deposition of the plaintiff which had been taken, and to statements she had made therein that the road through these hills was a solid mass of mud, and that she was constantly protesting to the driver. This deposition of the plaintiff was used continually by defendant in the cross-examination, and referred to many times.

The attention of the plaintiff was called to this deposition which she had given in February, 1940, at which attorneys Koenigstein and Shurtleff were present, and the evidence was taken by Mr. Powers. The trial began on December 18, 1940. Plaintiff was asked whether she had not testified in the deposition that the highway from the beginning of the hill to Pilger was one continuous ribbon

of mud, uphill and downhill, to the place of the accident. The objection as improper cross-examination, incompetent, irrelevant and immaterial, was sustained, to which defendant excepted.

"Q. I will ask you if you did not testify at that time as follows: 'Q. So far as you know the worst spot you hit so far as the mud on the pavement was concerned, was at the place of the accident, is that true? A. I don't know that. Q. I said as far as you know? A. As far as I know.' Q. Did you so testify when your deposition was taken last February? Mr. Moyer: That is objected to as incompetent, irrelevant and immaterial, improper impeachment, the questions on which the answers are predicated being leading and suggestive, calling for a conclusion of the witness and not a statement of fact. Sustained. Defendant excepts."

In following up this same line of inquiry, R. M. Powers was called as a witness for the defendant, and testified that he had been an official court reporter, and was a notary public; that on February 24, 1940, he went to the home of the plaintiff to take her testimony, at which time Mr. Shurtleff and Mr. Koenigstein appeared as her attorneys, the deposition being taken in the dining-room; the witness, having been duly sworn to tell the truth, was examined by Mr. Deutsch. Mr. Powers then testified that he had before him the shorthand notes taken on this occasion. "Mr. Deutsch: Defendant offers to show by the witness, and if permitted to testify he will testify that the following questions were propounded to Mrs. Brown in the same deposition and she gave the following answers: 'Q. The fact is you never slipped around at all until you had hit this bad place and went for the ditch? A. We skidded once in awhile, the back end of the car would kind of twist. Q. Did it turn around at right angles? A. No. Q. Did you stop your car at those times? A. No. Q. The car was able to proceed on west? A. Yes. Q. No instance in which she turned around on the pavement or slipped over on the opposite side of the pavement until you came

to the place of the accident, is that true? A. No. Q. The car acted up to the point of the accident like a car on a slippery road? A. Yes. Q. But was going along all right? A. Yes, until she lost control. Q. The time she lost control was at the place it was extra muddy? A. Yes, sir. Q. And when she hit it the car skidded and went over in the ditch? A. Yes, sir. Q. That was the worst muddy spot you saw all the way? A. I don't remember. Q. So far as you know that was the worst of all? A. I don't remember that.' Mr. Moyer: Plaintiff objects to the offer for the reason it is incompetent, irrelevant and immaterial, the deposition itself being the best evidence. Sustained. Defendant excepts."

This question was also asked Mr. Powers and the following record then made: "Q. Will you refresh your memory and state whether or not at the time her deposition was taken in this case the following question was propounded to Mrs. Brown—

"Mr. Moyer: I am going to object to the reading of any portion of this deposition at this juncture of the trial as an effort to impeach the testimony of the plaintiff collaterally, incompetent, irrelevant and immaterial, the deposition itself being the best evidence. It is an attempt to collaterally impeach this woman whom he had on the stand yesterday and while there he had full opportunity to examine her with reference to her deposition.

"Mr. Deutsch: I would like to be heard on that, Your Honor, I have been through this a lot of times.

"The Court: The deposition is merely for impeachment. The foundation was laid and it may now be offered for that purpose and that purpose only.

"Mr. Deutsch: We are not offering the deposition. It is not admissible where she is in the courtroom.

"The Court: It would not be admitted for the purpose of admissions."

And, again: "Mr. Moyer: Plaintiff objects to the reading of any portion of this deposition at this juncture as incompetent, irrelevant and immaterial, the deposition itself being the best evidence.

"The Court: The Court sustains the objection for the reason that such questions and answers are statements that appear in the deposition and may be used as impeachment of the witness; they are not admissible as declarations against interest, voluntarily made; that such statements were made at a time when the witness was under compulsion in the form of taking of a deposition and not being voluntary statements made by herself. Defendant excepts."

In the case of *Megason v. Boleyn Lumber Co.*, 140 La. 431, 73 So. 257, defendant propounded interrogatories to plaintiff, who answered that he and his brother had derived title to land by inheritance from their father, and had not purchased it, and had not paid a cent for it, and did not at that time have any money with which to have purchased it. Later he testified that when so answering he was under the impression that the questions had been asked by his own lawyer instead of the opposing lawyer, and said that his testimony was all wrong, and that they paid $1,000 for the property. He sought to mend his hold by saying that his former testimony had been given thoughtlessly, and the court held: "The admission on the part of James C. Megason that he did not purchase the property, and did not pay anything for it, but acquired it by inheritance, makes out defendant's case fully, and is binding upon him, we think, and cannot be withdrawn to the prejudice of defendant."

In 22 C. J. 342, it is said: "A deposition is competent, although it was made in a personal capacity and is offered against the party in a representative capacity; although it was taken *in perpetuam* or *de bene esse;* although it was taken on insufficient notice, or without the statutory formalities; although it was not filed as required by statute; although the cause for taking it no longer exists; or even though the deposition itself has been suppressed. * * * The party making the statement or admission is entitled to have the entire deposition read, or at least as much of it as has any bearing on the matter."

"A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue. * * * Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record. * * * To lay the foundation for such testimony the attention of the witness should be directed, with reasonable certainty, to the time, place and circumstances of making the declarations, so that he may refresh his recollection and reconcile, if he can, his declarations with his evidence." *Zimmerman v. Kearney County Bank,* 59 Neb. 23, 80 N. W. 54.

In *Sindelar v. Hord Grain Co.,* 116 Neb. 776, 219 N. W. 145, it was held that a witness may be impeached by evidence tending to prove that he made statements out of court contrary to those made by him at the trial in respect to matters material to the issues. It is stated that such impeaching declarations are not substantive evidence when made by one *not a party* to the action.

In *Luikart v. Korbmaker,* 128 Neb. 199, 258 N. W. 263, an action founded upon a creditor's bill, the plaintiff offered as part of his case in chief questions and answers taken in proceedings in aid of execution. Objections to this evidence were sustained, and this ruling was assigned as error.

"Plaintiff contends that the admissions are primary evidence, and that it is immaterial that the party who made them is present in court and can be called as a witness. The rule in reference to this has been well stated by this court to be: 'The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay a foundation for the admission of such evidence by cross-examination.' *Young v. Kinney,* 79 Neb. 421.

"We are of the opinion that, in sustaining the objections to the introduction of this evidence, the trial court committed prejudicial error. *Merrill v. Leisenring,* 166 Mich.

219; *Berggren v. Hannan, O'Dell & Van Brunt,* 116 Neb. 18; 22 C. J. 297; 22 C. J. 343, which hold clearly that it is immaterial that the party who made the admission is present in court."

In *Falkinburg v. Inter-State Business Men's Accident Co.,* 132 Neb. 670, 272 N. W. 924, it was held by this court that "A statement made by a party to an action as to any fact in issue unfavorable to the conclusion contended for by such party is relevant, and may be introduced in evidence as an admission against interest," and that such an admission upon a material matter is admissible against the plaintiff as original evidence, and held that it was proper to permit the notary public and shorthand reporter, who had his original notes in court, to testify as to the questions and answers made by the plaintiff in the deposition which he had taken. See, also, *German Nat. Bank of Hastings v. Leonard,* 40 Neb. 676, 59 N. W. 107; *Lowe v. Vaughan,* 48 Neb. 651, 67 N. W. 464; *Carlson & Hanson v. Holm,* 2 Neb. (Unof.) 38, 95 N. W. 1125; *Young v. Kinney,* 79 Neb. 421, 112 N. W. 558; *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854.

In an action for personal injuries in an automobile accident, it was held that the trial court erred in excluding testimony of a witness that plaintiff had testified a few days after the accident that he was not much hurt but thought he ought to have a little settlement, and the court held that "declarations and admissions of a party to an action, against his own interest, upon a material matter, are admissible against him as original evidence." *Havlik v. Anderson,* 130 Neb. 94, 264 N. W. 146.

In the case at bar, the defendant was entitled to reasonable scope in showing that plaintiff's answers in the trial are inconsistent with those given months previously in her deposition, when the evidence relates to material matters.

The defendant had a right to introduce the evidence of the shorthand reporter who took the deposition, to show the jury the exact difference between plaintiff's answers on the two occasions as substantive evidence in his own

behalf. In several of the rulings the court was clearly wrong, and this was prejudicial to the rights of the defendant, for it is reversible error to unduly restrict the right of cross-examination. *Larson v. Hafer,* 105 Neb. 257, 179 N. W. 1013; *Goldman v. State,* 128 Neb. 684, 260 N. W. 373. It has also been held that no offer of proof is necessary in order to review a ruling upon cross-examination. *Laux v. Batterman,* 135 Neb. 386, 281 N. W. 799; *Powell v. Morrill,* 83 Neb. 119, 119 N. W. 9.

When the plaintiff had rested her case, the defendant moved the court for a directed verdict, for the following reasons: (1) The evidence of plaintiff wholly fails to show that the defendant, or defendant's wife, was guilty of gross negligence as defined by the decisions in this state in the operation of the automobile at the time of the accident; (2) that the evidence fails to show even ordinary negligence in the operation of this car, but merely presents a case of a sudden emergency that arose; (3) the evidence shows that plaintiff had her eyes upon the road, that it was a dark night, that she was unable to see the condition within sufficient time to make an outcry, and hence there was no greater duty upon the driver of the car to observe this unusual condition of the hillside; (4) the evidence of plaintiff is wholly insufficient to sustain a verdict for plaintiff and against the defendant; which motion was overruled, to which the defendant duly excepted.

In 1931 the legislature enacted a new law, section 39-1129, Comp. St. Supp. 1939, the first sentence of which reads as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle." The first requirement, that the driver was under the influence of intoxicating liquor or the guest cannot recover, does not apply to this case. The only other

condition under which the car owner can be held liable in an action by a guest is because of gross negligence.

We will now consider some Nebraska cases involving gross negligence. In *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, this court said in the text: "We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature." See, also, *Heesacker v. Bosted,* 131 Neb. 42, 267 N. W. 177; *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689; 15 Neb. Law Bulletin, 318; *Thurston v. Carrigan,* 127 Neb. 625, 256 N. W. 39; *Munsell v. Gardner,* 136 Neb. 214, 285 N. W. 555; *Mierendorf v. Saalfeld,* 138 Neb. 876, 295 N. W. 901.

In the case at bar, mature women made a trip to Fremont. The car was in good condition. A heavy rain took place in the afternoon, and the concrete highway was wet, and a little rain was still falling on a dark night. They safely reached a point within three miles of home, and were proceeding downhill at perhaps 40 miles an hour when they suddenly struck a windrow of mud, which reached across the pavement, and the car skidded and upset. The plaintiff was looking ahead carefully, but admits she did not see this mud until it was too late to warn the driver. It has been said: "Such skidding is not an occurrence of such uncommon or unusual character that, unexplained, it furnishes evidence of the driver's negligence." 5 Am. Jur. 654, sec. 273. See *Oakes v. Gregory,* 133 Neb. 407, 275 N. W. 607.

The failure of the driver of the car to anticipate, with her knowledge of the conditions, that there might possibly be sufficient slippery mud to cause the car to skid off the pavement cannot be said to have been such indifference to safety as amounted to a higher degree of negligence than

want of ordinary care. *Amerine v. O'Neal,* 136 Neb. 642, 287 N. W. 56; *Lemon v. Hoffmark,* 132 Neb. 421, 272 N. W. 214.

In *Johnk v. Scanlon,* 136 Neb. 187, 285 N. W. 488, it was said: "When evidence in a guest case is resolved most favorably toward the existence of gross negligence, and a fixed state of facts thus obtained, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law."

After a careful study of the facts, and an examination of many cases cited, we have reached the conclusion that under the law the plaintiff has not proved a case of gross negligence, and that the motion of the defendant for a directed verdict should have been sustained. It is therefore the order of this court that the judgment of the district court be set aside and reversed and the action dismissed.

REVERSED AND DISMISSED.

AURORA HOTEL, INC., APPELLEE, V. BOARD OF EQUALIZATION OF HAMILTON COUNTY ET AL., APPELLANTS.
300 N. W. 419

FILED OCTOBER 24, 1941. No. 31200.

1. **Taxation.** The assessment of real estate for the purposes of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed unless it appears from clear and convincing proof that it is erroneous.
2. **Appeal.** The competency of a witness to testify as an expert rests largely in the sound discretion of the trial court, whose rulings will not be reversed unless clearly erroneous.
3. ———. The extent, course and scope of cross-examination is a matter resting within the discretion of the trial court, and it will not be reviewed unless there has been an abuse of such discretion.
4. ———. A violation of the strict rules of cross-examination will not be ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.

5. **Taxation.** The burden is upon a party appealing from the action of a county board of equalization in fixing the value of real estate to establish *prima facie* the value of such real estate.
6. ———. In an appeal from the action of a county board of equalization, where the appellee therefrom adduces no proof as to value, all the facts which the evidence on behalf of the appellant tends to prove will be treated as established for the purpose of a *prima facie* case in favor of the appellant.

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

Dallas S. Gibson and *Kirkpatrick & Dougherty,* for appellants.

Charles F. Adams, contra.

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

YEAGER, J.

This is an appeal from the judgment of the district court for Hamilton county, Nebraska, wherein the action of the board of equalization of Hamilton county in fixing the valuation of lots 13, 14, 15 and 16, block 24 of the original town, now a part of the city of Aurora, and the improvements thereon, was reviewed. The real estate in question is the property of Aurora Hotel, Inc., a corporation, appellee herein.

The real estate was assessed by the county assessor for the year 1940 at, land $3,750, improvements $5,250, total $9,000. Appellee herein appeared before the board of equalization and obtained a reduction from $9,000 to $8,750. From this action appellee appealed to the district court, where it alleged that the value of the entire real estate was $1,500. The case was duly tried and the value fixed at $4,375. From this judgment of the district court the board of equalization of Hamilton county, Nebraska, and Hamilton county have appealed. They will be hereinafter referred to as appellants.

As grounds for reversal the appellants urge that (1) the evidence is insufficient to sustain the judgment, (2) the

court erred in its limitation placed on certain cross-examination, (3) the court erred in permitting certain witnesses to express opinions as to value of the real estate, and (4) the court erred in the assessment of the value of the real estate.

To all intents and purposes the case was tried entirely on the evidence adduced by appellee. It furnished the only information as to the value of the real estate. The appellee called J. A. Isaman, a licensed real estate broker and dealer in real estate, who had lived in Hamilton county for 67 years, and who was familiar with this property. He gave his opinion that the property was of the value of $3,000. Frank E. Edgerton, a lawyer, resident of the county for 25 years, a licensed real estate broker, owner and dealer in real estate, fixed its value at from $3,000 to $3,300. L. T. Johnson, licensed dealer in real estate and insurance, fixed the value at from $3,500 to $4,000. George Young, a licensed real estate broker who had lived in Aurora for 7 years, fixed the value at $3,000. J. H. Grosvenor, resident of Aurora for 42 years, lawyer and licensed real estate broker, fixed the value at approximately $3,200, not to exceed $3,300. P. J. Refshauge, a resident of Aurora for 22 years, a licensed real estate broker and engaged in real estate, insurance, abstract and loan business, fixed the value at $4,000. After the introduction of this evidence of the witnesses and a view by the trial judge, a judgment fixing the value at $4,375 was rendered. The judgment was $375 in excess of the highest value placed on it by any witness.

The effect of the contention of appellants is that this evidence is insufficient to sustain the judgment of the district court for the reason that the witnesses were incompetent to express opinions as to value, thus making necessary the acceptance of the valuation fixed by the board of equalization under the rule of law that the assessment for the purposes of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless

it appears from clear and convincing proof that it is erroneous. *First Nat. Bank of Blue Hill v. Webster County,* 77 Neb. 815, 113 N. W. 190; *Kennedy v. Buffalo County,* 134 Neb. 744, 279 N. W. 464. With this contention we cannot agree.

As a general rule of law, the competency of a witness to testify as an expert rests largely in the sound discretion of the trial court whose rulings will not be reversed unless clearly erroneous. *Schmuck v. Hill,* 2 Neb. (Unof.) 79, 96 N. W. 158; *Jensen v. Palatine Ins. Co.,* 81 Neb. 523, 116 N. W. 286; *Beebe & Runyan Furniture Co. v. Board of Equalization,* 139 Neb. 158, 296 N. W. 764.

An illustration of the application of this rule is found in the recent case of *Wahlgren v. Loup River Public Power District,* 139 Neb. 489, 297 N. W. 833. In that case, as disclosed by the opinion, this court held that it was error to exclude opinions as to value of real estate by witnesses who showed a lesser degree of familiarity with the real estate there involved than is shown by witnesses in the case at bar with regard to the real estate in question here.

It is true that the case of *Wahlgren v. Loup River Public Power District, supra,* related to condemnation and this to assessment for taxation, but each had as a basis valuation, the fixation of which depended on the testimony of competent expert witnesses. The rule applicable to one is equally applicable to the other.

It is claimed that the court unduly restricted the cross-examination of the witness P. J. Refshauge, in that he was not permitted to answer questions with reference to a loan made upon this real estate, and with reference to a policy of insurance on the improvements. The extent, course and scope of cross-examination rests within the discretion of the trial court, and it will not be reviewed unless there has been an abuse of such discretion. *Peterson v. State,* 63 Neb. 251, 88 N. W. 549. Also, under section 20-853, Comp. St. 1929, a violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial

rights of the party complaining. *Brooks v. Thayer County*, 126 Neb. 610, 254 N. W. 413; *Manley State Bank v. Spangler*, 130 Neb. 196, 264 N. W. 459.

This restriction of cross-examination could not have resulted in prejudice to the substantial rights of the appellants. The appellants offered no competent evidence of value. This witness fixed a value which was not in excess of the values fixed by other competent witnesses who were in no wise restricted, and the court fixed in its judgment a value in excess of that testified to by all of the witnesses, presumably based on the testimony and a personal inspection by the trial judge. As to this excess appellee has not complained by cross-appeal and the appellants have no ground for complaint, the appellee on the trial of the case having made a *prima facie* case in its favor.

The burden was on the appellee to establish *prima facie* the value of the real estate involved herein and, the appellants not having adduced any proof as to the value, all of the facts which the evidence on behalf of appellee tended to prove will be treated as established for the purpose of a *prima facie* case in favor of appellee. *Thamann v. Merritt*, 107 Neb. 602, 186 N. W. 1003; *Manley State Bank v. Spangler, supra.*

The judgment of the district court is

AFFIRMED.

WILLIAM W. GLANTZ, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.
300 N. W. 572

FILED OCTOBER 24, 1941. No. 31243.

Workmen's Compensation. "When a city, pursuant to agreement, furnished certain equipment, material, supplies, superintendence and other items for use on a Works Progress Administration project, but had no authority to control the details of the work, or to direct the mode and manner of doing it, the city is not

liable for the payment of benefits under the workmen's compensation law for injuries suffered by an employee on the project" *Williams v. City of Wymore*, 138 Neb. 256, 292 N. W. 726.

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

Clifford L. Rein, for appellant.

Clarence G. Miles, Hall, Cline & Williams and *Flavel A. Wright, contra.*

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

YEAGER, J.

This is an action under the workmen's compensation law of the state of Nebraska. The action is by William W. Glantz, plaintiff and appellant, against the city of Lincoln, Lancaster county, Nebraska, alleged employer of plaintiff, and the Travelers Insurance Company, a corporation, the workmen's compensation carrier for the city of Lincoln, defendants and appellees.

The plaintiff was, from August 29, 1939, to and including December 14, 1939, a Works Progress Administration employee and was engaged in projects which were in and for the benefit of the city of Lincoln. From some time in September he was engaged with other employees in street marking. The particular duty of plaintiff was the spreading of tar. To do this work he carried in his left hand a bucket weighing from 60 to 75 pounds, and with his right hand he brushed or spread the tar. On December 14, 1939, while he was spreading tar on M street, between Eleventh and Thirteenth streets, he claims that he picked up the bucket and "snapped" his back, felt pain therein and could not straighten up, and that he has been completely disabled from performance of any work since that date, although in his testimony he admits that he was employed on W. P. A. as late as February, 1940. He claims that this was a compensable injury under the workmen's compensation law of Nebraska.

There is no question that plaintiff was at the time working on a Works Progress Administration project of which the city of Lincoln was the sponsor. He was employed, assigned and paid by the Works Progress Administration.

The project which was being carried out was one wherein the Works Progress Administration was to expend federal funds under its rules and regulations in the amount of $8,901.85. Superintendence at a cost of $720 was also to be furnished by the Works Progress Administration. The city of Lincoln furnished some material and the sum of $250 for engineering, supervision and inspection.

The case was first tried by a single judge of the compensation court where the claim of plaintiff was dismissed. Thereafter it was tried to the full court where the claim was held to be compensable. An appeal was taken to the district court, and there it was held that the claim was not compensable on the grounds that the plaintiff was not an employee of the city of Lincoln, and that he did not sustain an accident and injuries within the meaning of the workmen's compensation law. From the judgment of the district court the plaintiff has appealed.

The only evidence to support the contention of the plaintiff that he was at the time of the occurrence in question an employee of the city of Lincoln is that this was a Works Progress Administration project which was for the benefit of the city of Lincoln, and that the city of Lincoln exercised some control over the performance of the work involved.

On the question of employment, it is sufficient to say that the record discloses that the Works Progress Administration employed the plaintiff; that he was under its direction and control; that it fixed his hours of employment, his wages and labor classification, and had the sole right to supervise his work and to discharge him, if necessary; and that after August 1, 1935, the federal government assumed the role of sole employer of relief workers on Works Progress Administration projects.

On the question of exercise of control by the city of Lin-

coln, the record discloses that one Henry Prosser was an employee of the city of Lincoln, and was in charge of equipment maintenance for the city. During the progress of the work on this project he was frequently on hand and gave directions, either directly or through the project foreman, to plaintiff as to the manner of performance of the work by plaintiff, and that for a portion of one day when the regular foreman was away Prosser acted as foreman. The record discloses no other supervision of work and no control of any kind over employment.

On these facts and under the decision in *Williams v. City of Wymore*, 138 Neb. 256, 292 N. W. 726, which is a case directly in point on the facts as well as the law, it becomes necessary to hold that plaintiff, at the time and place in question, was not an employee of the city of Lincoln. In that case it was held: "When a city, pursuant to agreement, furnished certain equipment, material, supplies, superintendence and other items for use on a Works Progress Administration project, but had no authority to control the details of the work, or to direct the mode and manner of doing it, the city is not liable for the payment of benefits under the workmen's compensation law for injuries suffered by an employee on the project."

In the light of the view taken of the question of employment of plaintiff by the defendant, city of Lincoln, it is not necessary to discuss the other assignments of error.

The judgment of the district court is

AFFIRMED.

WILSON & COMPANY, INC., APPELLANT, V. OTOE COUNTY ET AL., APPELLEES.

300 N. W. 415

FILED OCTOBER 24, 1941. Nos. 31154, 31155.

1. **Taxation.** Property for taxation purposes shall be valued and assessed at its actual value, that is, its value in the market in the ordinary course of trade.

2. **Time.** Where a statute provides that it shall take effect "from and after its passage and approval," in computing the time it takes effect, the day of its passage is excluded, and it goes into effect the next day.
3. **Taxation.** An erroneous and excessive valuation of property for taxation purposes may, upon complaint of the owner, be corrected on appeal to the district court.

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

Tyler & Frerichs, for appellant.

Moran & James, contra.

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

FALLOON, District Judge.

These proceedings are to review the actions of the board of equalization of Otoe county in placing valuations for assessment purposes on certain property of the appellant, Wilson & Company, Inc., for the years 1938 and 1939.

The 1938 valuations complained of are part of lot 5 in the northeast quarter, north of Missouri Pacific right of way, and 54/100 acres, in section 17-8-14, on which a value of $1,450 was placed, and Tract A in the northeast quarter of the northwest quarter, in section 17-8-14, on which was placed a valuation of $92,000. This action was affirmed by the Otoe county district court.

The 1939 valuations as fixed by the board of equalization involved five tracts and were as follows: Lot 3, 23.50 acres, $2,500, part of lot 5, 4.34 acres, $1,000, Tract A, 16.97 acres, $47,000, lot 13, 5.36 acres, $575, and lot 12, 63.98 acres, $4,100. The district court for Otoe county affirmed all values above set forth, except as to Tract A the court reduced its value to $36,000.

These two appeals were consolidated for trial in the district court, though separate judgments were rendered, and by agreement were consolidated for briefing and argument in this court.

The several tracts involved are all contiguous and lie adjoining the city limits of Nebraska City. They formerly constituted the Morton-Gregson meat packing plant which was closed the forepart of the year 1932, and the property abandoned for industrial purposes. Morton-Gregson was dissolved and the premises became the property of Wilson & Company, Inc.

The appellant contends that for both years the property should be assessed at its fair market or cash sale value, and that in 1938 the buildings and structures should have been assessed to Aaron Ferer & Sons whom it was claimed had bought them for demolition purposes.

Section 77-201, Comp. St. 1929, is the guide for assessing property for taxation purposes. It provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."

It is likewise the rule in this state that the valuation ultimately fixed by the board of equalization is final unless shown by clear and convincing proof to be erroneous.

Let us note here that the 1939 legislature amended section 77-201, *supra,* by adding thereto, as appears in section 77-201, Comp. St. Supp. 1939. This amendment was passed with an emergency clause and approved April 1, 1939. The emergency clause declares, "Whereas, an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law." Laws 1939, ch. 102. Section 77-1601, Comp. St. Supp. 1939, requires that all real property shall be assessed "on the first day of April," 1939. The question arises, what day did this emergency amendment go in effect, the date of its approval? Section 20-2222, Comp. St. 1929, provides that time "shall be computed by excluding the first day and including the last." This section, then section 895 of the Code, was construed by this court in *McGinn v. State,* 46 Neb. 427, 65 N. W. 46, and following the reasoning therein we conclude that where a statute provides that it shall

take effect, "from and after its passage and approval," in computing the time when it takes effect, the day of its passage is excluded, and it goes into effect the next day. In harmony with this rule of construction are *Parkinson v. Brandenburg,* 35 Minn. 294, 28 N. W. 919; *Mushel v. Board of County Commissioners,* 152 Minn. 266, 188 N. W. 555; *Arnold v. Board of Supervisors,* 151 Ia. 155, 130 N. W. 816; and *O'Connor v. City of Fond Du Lac,* 109 Wis. 253, 85 N. W. 327. Both the 1938 and 1939 valuations are therefore guided by section 77-201, Comp. St. 1929.

The witness Lathrop for the appellant fixed the valuation of the two tracts in dispute for 1938 at $1,175, and for 1939 he fixed the valuation for the five tracts at $4,371.50. He stated he did not take into consideration any of the improvements because he considered them a detriment to the real estate. This witness was reared in Otoe county, register of deeds there for nine years, abstractor, and kept records for four years for the Nebraska City Building & Loan Association, organizer of First Trust Company there and its president and managing officer since 1923, well acquainted with property in question as well as general property values in that community.

The valuation as put upon the property by the county commissioners, who are members of the board of equalization, was approximately what their board had determined, that is, for 1938 the valuation of the tracts in dispute was $93,450, and for the five tracts in 1939 was $55,175. The district court allowed the valuation to stand for 1938, but for 1939 the district court placed it at $44,175.

The county clerk, who is the county assessor, placed the valuation of the five tracts for 1939 at $51,000, that he did not consider whether the buildings were unoccupied or not, as long as they were there, that he considered partly their intrinsic value, that he also considered that the tax rate in Four Mile precinct where these buildings were located was 10.72 mills, whereas in Nebraska City the tax rate was 44.75 mills, that a $20,000 building there would correspond in taxes paid to a $80,000 building here. Much

of the other testimony adduced by the appellee was to the effect what it would cost to replace these buildings.

The evidence also shows that the operating plant closed down in May, 1932, and was not used afterwards except by the government in a relief program for killing drought cattle for a few months in 1934. A couple of buildings and tracts were rented which produced revenue of about $360 a year. The evidence also discloses that not to exceed 35 acres were tillable out of the approximate 115 acres.

The present assessor, Walker Neeley, said he was told to let the valuation heretofore made stand for 1938, and that he took in consideration that it would be expensive to build the buildings, he did not consider whether they were used or not.

The expert witness, Lewis E. Sholes, who had lived in Omaha for 61 years, 42 years of which was in the real estate business and for 40 years handling industrial properties, was called by the appellees. He testified that he had appraised properties in many cities and had visited and looked over this property so he could testify. His testimony was in regard to the property for industrial purposes, he put the values for April 1, 1938, and 1939, that he first visited this property for the hearing which was the last of May, 1940, that the property could be sold for industrial purposes, within three years if conditions were right, and if it were rehabilitated by an expenditure in excess of $16,000. He did not know of any demand at this time for the property and his whole testimony is so speculative and full of hopes for the future as to be practically worthless as a means of arriving at a true valuation. Moreover his testimony might well have been excluded as the knowledge he obtained in regard to these premises was too remote in time. There is no evidence that he ever saw the property in 1938 or 1939 or prior thereto. His estimation of the values was predicated upon so many assumptions purely speculative that it is of no practical benefit to the court in arriving at a correct judgment.

The evidence also discloses that it would cost $6,000 to

wreck other remaining buildings in which there would be little salvage. There is also some testimony that the property in question might be offered for sale at $3,000 by appellant.

The evidence further discloses that a contract was entered into by Aaron Ferer & Sons with Wilson & Company, Inc., on November 26, 1937, for the demolition of certain buildings on this packing company site. The consideration, as provided in the contract, was $10,105. This contract was never filed of record. The contract provided that "all of the material that is to be wrecked and removed will become the property of Ferer."

The contract further provided that certain bonds should be given for compensation insurance, public liability, and completion of work, before the work could be started, and that all work should be completed by December 31, 1938. The evidence discloses that some of the buildings were demolished prior to April 1, 1938, and on Tract A were demolished prior to April 1, 1939. Whether the consideration on this demolition contract had been paid or not was never mentioned before the board of equalization.

What other evidence was before the board of equalization does not appear, but the presumption is in favor of the equalization board that it properly assessed the property to the right party, and the appellant here having the burden to prove their action wrong, unless it conclusively so appears, their action in such regard should stand. The assessment should be charged to the owner, but under the contract and the evidence submitted in this regard it was probably properly assessed. Besides, in view of the action taken by this court, it is just and right that this contention of appellant should be denied. In saying this, we are not unmindful of the rule that buildings may be removed and separately assessed in the name of the real owner. But in this case the property was not to become Ferer's until removed, and under the evidence it has not been conclusively shown just when that part of the contract was fulfilled.

The testimony conclusively shows that the buildings

are old, out of use for many years, and that it would take large expenditures to make them fit for use.

Shall valuations be based on future dreams, or is the safer rule to follow, wait till the dreams come true and then base the correct valuation in the light of what actually is?

Property for taxation purposes shall be valued and assessed at its actual value, that is, its value in the market in the ordinary course of trade. It cannot be based on its intrinsic value or what its value might be in the future, but must be based on its actual or market value. An assessment made upon the theory of the inherent value of construction without considering its actual market value is clearly erroneous. To hold that theoretical values, based on possible conditions in the future, are actual values now would constitute constructive fraud, and should not be allowed to stand.

So it seems to us that, while there might be the possibility of a larger value in the future, or that by the expenditure of a large sum of money the premises might be made usable, likewise in an uncertain future, the great weight of the evidence is that at the times the assessments were made the actual value, within the meaning of the statute, would not exceed approximately one-fifth of the total placed upon the tracts collectively that are in dispute.

The burden has not been sustained by the appellant except as to Tract A which we find is erroneous and should be reduced from $92,000 to $12,000 for the year 1938 and for the year 1939 from $36,000 to $2,000. We also find that the other valuations should stand as found by the board of equalization and the court below. In other words, the total value of the two tracts in dispute for 1938 should be $13,450 instead of $93,450, while for the year 1939, the total value should be $10,175 for the five tracts instead of $44,175 as valued by the district court. Evidence of greater values cannot be found in the record. Reductions should be made as herein found. Both actions are accordingly reversed, with directions to the district court to enter the actual valuations as herein found.

REVERSED.

ANABEL HOLTZENDORFF, APPELLEE, V. EPPLEY HOTELS COMPANY ET AL., APPELLANTS.

300 N. W. 411

FILED OCTOBER 24, 1941. No. 31234.

1. **Workmen's Compensation.** The burden of proof is on the claimant to prove by a preponderance of the evidence that she sustained a disability which was caused by an accident arising out of and in the course of her employment. It cannot be based upon speculation or conjecture.
2. **Evidence.** "Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue." *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925.
3. **Workmen's Compensation.** Evidence examined and *held* insufficient to support compensation judgment of trial court.

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

Chambers, Holland & Locke, for appellants.

Carl E. Sanden, contra.

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

FALLOON, District Judge.

This is a proceeding under the workmen's compensation law brought by Anabel Holtzendorff, appellee, against the appellants, Eppley Hotels Company and St. Paul Mercury Indemnity Company. From an award before a single judge of the compensation court, appeal was taken direct to the district court, where the award was sustained.

There is no dispute in the record that the appellee was employed by the appellant hotel company and that she had an accident on May 13, 1940, while in said employment. The issue is whether in that accident she sustained a tearing of the ligaments and attachments to her uterus requiring a suspension operation. If she did, it was compensable and the award should be affirmed.

The record has been carefully read and a summary reveals about the following: According to the appellee, she had been working, at a salary of $35 monthly and meals, for the hotel company for two months, when on May 13, 1940, while on duty, she caught the heel of her shoe on the steps leading to the hotel basement, falling forward and rolling over, that she had the heel repaired by the engineers in the hotel basement, reported the accident, lay down a short time, and later walked four blocks to Dr. Marx to whom she had been sent for attention. She said her back was hurting at the time, she had a splitting headache, but was not hurting any other places then. There the doctor examined her, treated her, and on next day's examination told her that her uterus was clear back against her rectum, that he pulled it forward and later put in a brace which she wore until her operation. Her testimony was further to the effect that, a week after the accident, Dr. Marx told her she could return to work, she tried it on part of three days, the 20th, 21st and 22d, when she had to quit. The appellee said she felt so bad on the 22d, a Wednesday, that she called Dr. Marx, but he could not see her because it was his day off, so he told her to call the next morning. Next day, she went to another doctor, who examined her, sent her to St. Elizabeth Hospital, putting her to bed; about a week later, another doctor called who was her family doctor and physician, and it was concluded to perform an operation, which was done on June 1, 1940, and on June 11, 1940, she was discharged from the hospital. Her testimony also reveals that she has had considerable female trouble, that a short time before her fall she had a miscarriage, had trouble after that, had been to Dr. Campbell to have her uterus straightened up and also had seen Drs. Flynn and McCarthy a short time before her fall about her uterus. She said later she thought the miscarriage was probably a year or more before her fall.

The testimony of Dr. Smith, to whom she first went after leaving Dr. Marx, is to the effect that, because of the fall,

the ligaments and supporting muscles about the uterus of appellee had been torn, that there were no adhesions, because, if there were, it would not be more movable than normal, that he had forgotten about the miscarriage at first in his report, so the pencil marks, "Miscar. 2 yrs ago, about 1½ mo pregnant, Dr. McC," were added afterwards, that nothing but a pull could cause the tearing, though the perineum was normal, that he admitted hotel company's attorney wanted information, but he did not fill out any blanks therefor, nor did he ever advise the company that she needed an operation or that one was to be performed.

Dr. McCarthy testified that he had known appellee for fifteen years, knew the condition of appellee was of recent origin and that the fall caused it, though not every one that would fall might have the injury, but in her case he was positive, but it would not do that every time. He also stated that Dr. Flynn, about a year before, had called him to attend appellee following a miscarriage, and he operated to remove the placenta, then he took hold of the uterus with instrument and pulled it down into the vagina to remove the contents of the uterus, that he had to pull good and hard, so he knew the ligaments were in good shape when he did the pulling, though he would qualify his answer in that regard; that she recovered very rapidly and, so far as he knew, has no trouble. He also stated that Dr. Flynn made a vaginal examination last February before she started working for the hotel company, but he had little knowledge about that. He also stated that, when he operated, the uterus was up pretty well, that he found no really fixed adhesions, that the uterus could be moved around freely, and if she had a lot of good adhesions she would not have had such a prolapse. He admitted the hospital record over his signature on the operation sheet shows that he "Lifted uterus and adnexa out of lower pelvis, freed adhesions and suspended uterus."

The engineers at the hotel company who repaired the shoe did not recall whether appellee was crying, one was positive she was not, and she talked to them while she

was waiting, but there was nothing of any material assistance in their testimony, nor of the lady who was acquainted with her a couple of months or the man who took her to the lawyer, who sent her to Dr. Smith.

Dr. Marx testified for the appellants, told of the various examinations, that she first only complained of her back, that she told of family trouble, afraid she was pregnant and that he, on the 18th, gave her a vaginal examination, found her uterus retroflexed and retroverted, that it was bent back and tipped back, slightly enlarged and definitely attached to the back of the pelvis, bound there by adhesions and only slightly movable. He also stated she told him she had a pelvis inflammation some two or three months before and under care of Dr. Flynn, and he stated his opinion that the dense adhesions he found were the result of that inflammation. He further stated that, if an injury, such as the physicians of appellee described had resulted from the fall, the shock would have been such that she could not have been on her feet, and would have had to be brought on a stretcher to his office. He also stated the reason for the surgery was the dense adhesions and if, at operating time, there were acute inflammatory conditions, traumatic or otherwise, the customary section thereof had not been taken, nor was any tissue study in the hospital records of this case.

Here we have two medical experts on one side, contending that the fall produced the tearing of the ligaments to the uterus, and, on the other hand, a medical doctor and surgeon, whose examination is the opposite, that the uterus was stretched down towards the rectum and held there by dense adhesions which have been there for some time and was due to other causes. It might be very difficult to decide this case from the evidence produced, if it were not for the persuasive hospital record made by one of the doctors at the time the operation was performed, which corroborates the diagnosis of the first attending physician. The doctor who made this hospital record, after it was produced, goes on to say that her condition might have

been of a week, two weeks or maybe two months' standing.

If this female trouble was of several months' standing, and the record is replete with much female trouble, especially in connection with the uterus of appellee, then the opinion of the first examining physician is strengthened in that the condition he found on his examination was not due to any fall, and, if such is the true situation, her claim would not be compensable.

The burden of proof is upon the appellee to prove by a preponderance of the evidence that the disability she sustained was caused by an accident arising out of and in the course of her employment. It cannot be based upon speculation and conjecture. All three of these doctors cannot be right.

Justice Rose in *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925, lays down the rule: "Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue," that points towards the proper solution of this action. The appellee herself at first did not complain of any other injury except to her back, and also her testimony is to the effect that she went back up the stairs and later walked four blocks to the doctor. If her condition were such as her own doctors described, it would have been impossible or would have been more painful than the record discloses. Moreover, according to one of the doctors of appellee, other causes than a fall could produce the condition which he found.

"Awards for compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772.

The record and all the reasonable inferences arising therefrom do not sustain the position of appellee that her disability was caused by the fall on the hotel stairway, nor does it point thereto with any reasonable certainty.

Under the record, her claim is not compensable, nor does the record sustain the findings and judgment of the trial court. The judgment is therefore reversed and claim dismissed.

REVERSED AND DISMISSED.

DRAINAGE DISTRICT NO. 1 OF LINCOLN COUNTY, APPELLEE, V. KIRKPATRICK-PETTIS COMPANY ET AL., APPELLEES: SUBURBAN IRRIGATION DISTRICT, INTERVENER, APPELLANT.

300 N. W. 582

FILED OCTOBER 31, 1941. No. 31090.

1. **Appeal.** The transcript on appeal is the exclusive evidence of the proceedings in the trial court.
2. **Parties.** Intervention was unknown at common law and equity, and is a creature of statute. It is ancillary and supplemental to existing litigation, and is regarded as collateral or accessory to the principal action.
3. ———. "No rule is better settled or more essential to the rights of parties litigant than that every person is entitled to access to courts of justice without interference from persons who have no interest in the matters in litigation." *In re McClellan's Estate*, 27 S. Dak. 109, 129 N. W. 1037.
4. ———. Under the terms of the Nebraska statutes, an intervener who has or claims an interest in the matter in litigation may join either plaintiff or defendant, or he may oppose both when his interest requires it, but he cannot without consent of plaintiff substitute himself for the defendant.
5. ———. An intervener must plead some interest in the subject-matter of the litigation; a mere denial of plaintiff's right is not sufficient to give him standing in court.
6. ———. It is proper for the court to refuse to permit the intervener who has come in to defend the action, to continue where he has failed to sustain the material allegations of his petition in intervention.
7. ———. To entitle a party to intervene in an action he must have a direct interest in or lien upon the matter in controversy in the suit. A mere creditor, although he may have an indirect interest in the result of the action, has no right to intervene therein. Thus, a third party claiming an interest in

or lien on property upon which an attachment has been levied cannot intervene in the attachment suit to question the grounds for issuance of the writ or the validity of the demand upon which it is based.

8. ———. Nebraska statutes restrict statutory intervention by third parties to those claiming an interest in the event of any suit pending or to be brought. The term "event of any suit," thus employed, must be taken to mean the "legal event" of any suit.

9. **Statutes.** "Acts of the legislature must be construed with reference to, and their scope may not be extended beyond, the limitations of their constitutional title." *Geis v. Geis*, 125 Neb. 394, 250 N. W. 252.

10. **Judgment:** PARTIES. Where persons not made nominal parties to actions or proceedings are, nevertheless, represented by parties thereto lawfully authorized and empowered to institute and prosecute the same, such persons are, in the absence of collusion, bound by the judgment ultimately entered therein. Further, such persons have no absolute right to intervene in such case, and the right to do so may be denied by the court in the exercise of its discretion, and the discretion will usually be so exercised when there is no suggestion of fraud or collusion or that the representative will not act in good faith for the protection of all interests represented by him. The necessary limitation as to scope of interest justifying or authorizing intervention is operative irrespective of the rights or claims involved, or the nature of the suit in which the question may arise.

11. **Parties.** Ordinarily, an intervener must take the suit as he finds it, and is bound by the previous proceedings in the case, and cannot complain of the form of the action, or of informalities or defects in the proceedings between the original parties.

12. ———. The question as to whether pleadings or pleadings and proof establish that the party seeking to intervene has an actual interest in the subject of the controversy entitling him to participate therein to the extent of the actual interest possessed by him is a necessary preliminary question for the trial court's decision and is determinable when the action is finally decided.

13. **Statutes.** "In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject-matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately." 59 C. J. 993.

14. ———. In construing provisions of the revenue law of the state, all parts of it must be construed together. *Courtright v. Dodge County*, 94 Neb. 669, 144 N. W. 241. Also, "An imperative rule is that effect, if possible, must be given to every clause and part of the statute." *State v. Fink*, 74 Neb. 641, 104 N. W. 1059.
15. ———. Statutes applicable examined, and doctrine announced in *City of McCook v. Johnson*, 135 Neb. 270, 281 N. W. 69, unconditionally approved and adhered to.
16. ———. "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.
17. ———. The statutory words, "all provisions of said revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by said county, municipality, drainage district or other political subdivision of the state" (Comp. St. 1929, sec. 77-2053), necessarily include within their purview all provisions of the revenue laws of the state, including those here in controversy.
18. *Flansburg v. Shumway*, 117 Neb. 125, 219 N. W. 956, examined and distinguished.
19. **Taxation.** "Assessments made by an irrigation district * * * for the maintenance and operation of its canal or ditch are special assessments, even though made in proportion to valuation, and not by acreage or frontage" (*Erickson v. Nine Mile Irrigation District*, 109 Neb. 189, 190 N. W. 573), and as such are clearly embraced within section 77-207, Comp. St. 1929, providing: "All special assessments, regularly assessed and levied as provided by law, shall be a lien on the real estate on which assessed, but shall be subject to the general taxes mentioned in the last preceding section."
20. **Parties.** "The decision as to the right to intervene ordinarily does not turn on the question as to the merits of plaintiff's case." 47 C. J. 96.
21. ———. "Where * * * the person who intervenes, or who seeks to intervene, does not bring himself within the terms of the applicable statutes, or within the rules of law defining the right to intervene, intervention is not permissible." 47 C. J. 106.
22. ———. Proceedings instituted and carried on in this case by Drainage District No. 1 of Lincoln county, Nebraska, to secure foreclosure of the county treasurer's tax sale certificates and sale of premises covered thereby, *held* duly authorized by

applicable statutes, and under the circumstances of this case they afford no proper basis for intervention by appellant.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellant.

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

Heard before ROSE, EBERLY and YEAGER, JJ., and KROGER and ELLIS, District Judges.

EBERLY, J.

This is a tax lien foreclosure action brought by Drainage District No. 1 of Lincoln county, Nebraska. The transcript filed herein, prepared under direction of appellant, contains the following: (1) The petition of the Drainage District as filed in the district court for Lincoln county, Nebraska, on January 5, 1940, which sets forth four separate causes of action upon separate county treasurer's certificates of tax sales; (2) a petition of intervention and cross-petition of the Suburban Irrigation District filed in this cause on February 3, 1940; (3) a supplemental petition in the first cause of action filed on March 12, 1940; (4) a dismissal of its third and fourth causes of action filed by plaintiff on March 15, 1940; (5) the Suburban Irrigation District's answer to the supplemental petition filed herein by plaintiff, and also its "supplemental cross-petition;" (6) the final decree; (7) notice of appeal; (8) bond for costs for appeal. It thus appears in the terms of the final decree that the issues tendered in the first separate cause of action set forth in plaintiff's original petition as amended by its supplemental petition, and as set out in the second separate cause of action, were the sole subjects of the trial court's consideration. In its first cause of action the plaintiff sought a foreclosure of a county treasurer's tax sale certificate covering the NE¼ of section 28, township 14 north, range 31 west of the 6th P. M. In its second cause of action plaintiff prayed for the foreclosure of a county

treasurer's tax sale certificate covering the SE¼ of section 28, township 14 north, range 31 west of the 6th P. M. In both of these separate causes of action Kirkpatrick-Pettis Company, a Nebraska corporation, having its principal place of business within that state, was the alleged owner in fee of the lands described therein, and Truman A. Wilson and Goldie Wilson, his wife, were alleged to be in possession of the NE¼ of section 28, and all parts of the SE¼ of section 28 "lying north of Union Pacific right of way," and John Doe and Mary Doe, first and real names unknown, were alleged to be in occupation and possession of that part of the SE¼ of such section 28 "lying south of the Union Pacific right of way." It also appears that all defendants defaulted in the district court and no pleadings were filed in their behalf. On June 18, 1940, after hearing by the court "upon the petition and supplemental petition of the plaintiff and upon all pleadings on file," final decree was filed in which the court found in favor of plaintiff on each of its causes of action, and entered its judgment as prayed by Drainage District No. 1, except as to the priority of its lien. The court found generally against the petition of intervention and answer filed in said cause, and found that such petition of intervention of the Suburban Irrigation District should be dismissed at the costs of intervener in both the first and second causes of action. This decree also determined as to each cause of action set forth in plaintiff's petition the amount of general taxes of the state of Nebraska and its "governmental subdivisions," which were adjudged to be a first lien on the premises in each cause of action described. It also determined that the amount of the assessments due the Suburban Irrigation District and due to Drainage District No. 1 were secured by a second lien on the premises to which they relate, and were of equal priority. As to the amount recovered under each cause of action an attorney's fee was fixed and determined. From this decree the Suburban Irrigation District, in its capacity as intervener, appealed, and in the præcipe on appeal it is desig-

nated as the sole appellant. So far as advised by the transcript, no order allowing intervention was ever entered in this cause. In this connection it will be remembered that "The transcript of appeal is the exclusive evidence of the proceedings in the trial court." *Norwegian Plow Co. v. Bollman,* 47 Neb. 186, 66 N. W. 292. See, also, *Hoagland v. Van Etten,* 23 Neb. 462, 36 N. W. 755.

Intervention was unknown at common law and equity, and is a creature of statute. It is ancillary and supplemental to existing litigation and is regarded as collateral or accessory to the principal action. 47 C. J. 94.

"It is an action within an action, and being ancillary in nature, partakes of the character of the subject-matter of the main action, regardless of the character of its own subject-matter." 14 Standard Ency. of Procedure, 288.

In the consideration of this subject it must ever be remembered that "No rule is better settled or more essential to the rights of parties litigant than that every person is entitled to access to courts of justice without interference from persons who have no interest in the matters in litigation." *In re McClellan's Estate,* 27 S. Dak. 109, 129 N. W. 1037.

Under the terms of the Nebraska Statute (Comp. St. 1929, section 20-328) the intervener who has or claims an interest in the matter in litigation may join either plaintiff or defendant, or he may oppose both when his interest requires it, but he cannot without consent of plaintiff substitute himself for the defendant. 47 C. J. 115; *Clapp & Co. v. Phelps & Co.,* 19 La. Ann. 461, 92 Am. Dec. 545; 20 R. C. L. 682, sec. 20.

"A petition or complaint, or other pleading or application, by which a person seeks to intervene must show by proper averments that the petitioner has an interest which entitles him to intervene; and * * * should set forth his (applicant's) interest in traversable form, and a mere denial of plaintiff's right is not sufficient. * * * A petition or application should set forth facts and not mere conclusions. Thus a general averment to the effect that

applicant has an interest in the subject-matter of the litigation is not sufficient; he should allege the facts which show such interest." 47 C. J. 112.

We have heretofore briefly framed an applicable rule in this form: "An intervener must plead some interest in the subject-matter of the litigation; a mere denial of plaintiff's right is insufficient." *Moline, Milburn & Stoddard Co. v. Hamilton,* 56 Neb. 132, 76 N. W. 455. See, also, *Parker v. City of Grand Island,* 115 Neb. 892, 215 N. W. 127; *State v. Hall,* 125 Neb. 236, 249 N. W. 756; *Geis v. Geis,* 125 Neb. 394, 250 N. W. 252; *Cornhusker Electric Co. v. City of Fairbury,* 131 Neb. 888, 270 N. W. 482.

It is proper for the court to refuse to permit an intervener who has come in to defend the action to continue as a party where he has failed to sustain the material allegations of his complaint in intervention. *Marston Co. v. Central Alaska Fisheries Co.,* 201 Cal. 715, 258 Pac. 933.

"In some jurisdictions the view has been taken that, while a person may intervene who has an interest in the controversy, he cannot intervene when he merely claims an interest in the thing which is the subject of the controversy. * * * The rule frequently stated is that the right or interest which will authorize a third person to intervene must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation of the judgment." 47 C. J. 101. See, also, *Latham v. Chicago, B. & Q. R. Co.,* 100 Neb. 173, 158 N. W. 923.

In this jurisdiction we were early committed to the restricted rule that to entitle a party to intervene in an action he must have a direct interest in or lien upon the matter in controversy in the suit. A mere creditor, although he may have an indirect interest in the result of the action, has no right to intervene therein. *Kansas & C. P. R. Co. v. Fitzgerald,* 33 Neb. 137, 49 N. W. 1100; *Deere, Wells & Co. v. Eagle Mfg. Co.,* 49 Neb. 385, 68 N. W. 504; *Latham v. Chicago, B. & Q. R. Co.,* 100 Neb. 173, 158 N. W. 923; *State v. Hall,* 125 Neb. 236, 249 N. W. 756;

Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482.

In line with the principles announced in the foregoing cases, and as a definite application thereof, we are also committed to the doctrine that "A third party claiming an interest in or lien on property upon which an attachment has been levied cannot intervene in the attachment suit to question the grounds for the issuance of the writ." *Danker v. Jacobs,* 79 Neb. 435, 112 N. W. 579. This principle so announced is, in effect, modified in *Geis v. Geis,* 125 Neb. 394, 250 N. W. 252, only to the extent that "Writs of attachment having been levied in different actions on the same property, the plaintiff in the later case may intervene in the earlier case on proper showing, not to defend the principal action or to move to discharge the attachment, but to have the relative priority of the levies adjudicated." In addition, chapter 100, Laws 1887 (the statutory source of all rights of interveners), by its title restricts statutory intervention by third parties to those "claiming an interest in the event of any suit pending or to be brought." In this connection it will be remembered that any provision in a legislative bill which is not clearly expressed in its title cannot be enacted into law. *Union P. R. Co. v. Sprague,* 69 Neb. 48, 95 N. W. 46; *Haverly v. State,* 63 Neb. 83, 88 N. W. 171.

So, too, the term "event of any suit" must be taken to mean the "legal event" of any suit. *Ward v. Mallinder,* 5 East (Eng.) 489; *Swinglehurst v. Altham,* 3 Term Rep. (Eng.) 138.

"Acts of the legislature must be construed with reference to, and their scope may not be extended beyond, the limitations of their constitutional title." *Geis v. Geis,* 125 Neb. 394, 250 N. W. 252.

This necessary limitation as the scope of "interest" justifying or authorizing intervention is operative irrespective of the rights and claims involved, or the nature of the suit in which the question may arise.

Also, in view of the relation of the parties, the following

principle is invoked: "In many instances, persons not made nominal parties to the action or proceeding are, nevertheless, represented by such parties, and therefore are, in the absence of collusion, bound by the judgment. There is, however, no absolute right to intervene in such cases, and the right to do so may be denied by the court in the exercise of its discretion, and the discretion will usually be so exercised when there is no suggestion of fraud or collusion or that the representative will not act in good faith for the protection of all interests represented by him." 20 R. C. L. 684, sec. 23. See, also, *Fink v. Bay Shore Terminal Co.*, 144 Fed. 837 (above affirmed in *Zell v. Judges of the Circuit Court of the United States*, 203 U. S. 577, 27 S. Ct. 777); 47 C. J. 104.

Even if the petitioner be permitted to intervene the rule appears to be that "An intervener must take the suit as he finds it, and is bound by the previous proceedings in the case. Consequently he cannot complain of the form of the action, or of informalities or defects in the proceedings between the original parties." 14 Standard Ency. of Procedure, 330.

It may be conceded that the provisions of our Civil Code do not contemplate intervention by leave of court first obtained. It is ordinarily a matter of right, and not of permission. Nevertheless, the question whether pleadings or pleadings and proof establish that the party seeking to intervene has an actual interest in the subject of the controversy entitling him to participate therein to the extent of the interest possessed by him is a necessary preliminary question for the trial court's decision and is determinable when the action is finally decided. *State v. Holmes*, 60 Neb. 39, 82 N. W. 109; Comp. St. 1929, sec. 20-329.

At the final hearing in this case relative to the intervention sought by the Suburban Irrigation District, the final decree recites, as to the first cause of action, that the trial court "finds generally against the interveners upon the allegations of their petition of intervention and answer as filed in said proceedings, and finds that the petition of

intervention of the Suburban Irrigation District should be dismissed at the costs of said interveners in said first cause of action." As to the second cause of action this final decree recites: "The court further finds generally in favor of the plaintiff and against the interveners on the answer of the interveners herein." Thereupon the final decree dismissed the petition of intervention as to both the first and second causes of action. The scope of the final order appealed from necessarily limits the field of argument and authority proper to be considered in the determination of the correctness thereof.

Bearing in mind the limitation which our public policy as evidenced by our statutes imposes upon the right of intervention, we now address ourselves to a consideration of the specific claims presented by this appeal, prosecuted not from the disposition of the main case, but from the determination of the ancillary, collateral and accessory proceeding presented by the intervener.

As a basis of appellant's proceeding here presented, it claims that the case of *City of McCook v. Johnson*, 135 Neb. 270, 281 N. W. 69, was wrongly decided; that the doctrine of "trusteeship" announced therein is mere dictum; that there are no authorities to sustain it; that therefore the foreclosure proceedings by Drainage District No. 1 in the instant case (there having been no actual payment of money by such district at or prior to the time the certificates of tax sale were received by it) are wholly without authority of law; that section 77-2009, Comp. St. 1929, embraces all existing authority in Nebraska as to purchase of tax liens from county treasurers without payment in money of the tax lien embraced in the certificate of tax sale issued, and by its terms such authority is limited to county boards; that under section 77-2009 it is essential that drainage districts pay the moneys due on certificates of tax sale to become owners thereof and to be subrogated to all rights of the county, state and other legal subdivisions of the state to enforce its taxes under section 77-2041, Comp. St. 1929; that section 77-2010 provides for sale of

taxes and tax liens to city, village, drainage or irrigation districts, but only on payment of moneys represented by tax sale certificates; that section 77-2040 authorizes foreclosure proceedings only where the certificates of tax sale are sold to the county, and that this is not authority for proceedings where there is neither ownership nor specific trusteeship; that section 77-2041 is applicable only where the "money has been paid to the county treasurer," and under this section the plaintiff might foreclose for a certificate of sale issued to itself for its own taxes only as a basis of foreclosure proceedings; that sections 77-2039, 77-2040, and 77-2041, Comp. St. 1929, are the only provisions of our statute authorizing foreclosure of tax liens (thus omitting all consideration of section 77-2053, Comp. St. 1929).

A careful reading of appellant's brief, and due consideration of the cases cited and statutory provisions referred to therein, do not convince us of the logic of its argument, of the proper interpretation of the authorities on which it relies, and of the correctness of its final conclusions on the subject here in dispute.

It is to be noted that the sections here under consideration were all originally enacted as parts of "An Act to provide a system of public revenue," etc., duly adopted in 1903. Laws 1903, ch. 73. It is a comprehensive revenue measure, with 244 sections, fully providing for the levy and collection of public taxes. Section 201 *et seq.* of this enactment (now carried as section 77-2009 *et seq.*, Comp. St. 1929) largely relate to methods of collecting taxes where real estate has been offered for sale at public tax sale but remains unsold for want of bidders. As these several provisions referred to in appellant's brief originate in a single enactment, and though certain of them have been amended, still their proper legal effect is to be determined by the general rule of statutory construction, which is: "In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject-matter to which it applies and the

particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately." 59 C. J. 993.

The principles announced in the following authorities are applicable to the instant case:

"In determining the intention of the legislature, all provisions of the statute bearing upon the point in dispute should be taken into consideration and given due weight." *City of Lincoln v. Janesch,* 63 Neb. 707, 89 N. W. 280. See, also, *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138; *Chicago, B. & Q. R. Co. v. School District,* 110 Neb. 459, 194 N. W. 479.

In construing provisions of the revenue law of the state, all parts of it must be construed together. *Courtright v. Dodge County,* 94 Neb. 669, 144 N. W. 241.

"In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute." *Mills v. Bundy,* 105 Neb. 470, 181 N. W. 184. See, also, *Thomas v. Rasmussen,* 106 Neb. 442, 447, 184 N. W. 104.

The legislation here involved is not recent. All the provisions of our statutes on which the intervener relies were originally enacted as parts of chapter 73, Laws 1903, which constituted the general revenue law of that year. In the consideration of these sections as they now appear in the Compiled Statutes of this state, they must be read in connection with the context in which found, the paragraphs to which they are related, their historical development, and as constituent parts of one complete enactment, and thus being within the purview of the rules of construction already quoted.

Section 201 of the 1903 act, and unamended, now appears as section 77-2009, Comp. St. 1929, and authorizes the "purchase for the use and benefit, and in the name of the county," of any real estate advertised and offered for sale (for taxes) when the same remains unsold for want of bidders, etc. It will be noted that the powers conferred

are not exclusive, neither does the language thereof, standing alone, authorize directly or by necessary implication such purchase by the county board to be made without paying the moneys involved to the county treasurer.

Section 202 of this act of 1903 expressly provided: "Whenever any real estate subject to sale for taxes shall be within the corporate limits of any city or village, such city or village shall have the same power to purchase said real estate, and in like manner as the county board may purchase as specified in the preceding section. * * * No such sale shall be made to any city or village by the county treasurer when such lands have been previously sold to the county, but in any such case the city or village may purchase the tax certificate held by the county." In its amended form section 202 now appears as section 77-2010, Comp. St. 1929. Since its original enactment such section 202 has been twice amended, but the right and power of the city and village to purchase real estate at tax sales for the use and benefit and in the name of the city or village is still expressly perpetuated as fully and completely as originally conferred. Matters of detail and administration have been added to the original section without in any manner impairing the substantial powers originally conferred. In addition, it will be noted that by amendment there was added to the governmental agencies empowered to purchase in the same manner as cities and villages, "irrigation districts" and "drainage districts."

Section 203, as originally enacted in 1903, has not been substantially amended, and now appears as section 77-2011, Comp. St. 1929. It provides: "Whenever real estate is purchased by a county board, or by the city or village treasurer, the county treasurer shall not be required to account to the state treasurer, or to any person, for the amount of taxes due, until the county board or city or village authorities have sold the certificate or certificates of purchase of such real estate, or until, by redemption or foreclosure proceedings, he shall have received the money thereon."

This is the statutory source of the county treasurer's power to sell at private tax sale to county, city or village without receipt of price, without any discrimination in favor of the county being expressed. When, by amendment later, irrigation districts and drainage districts were added to the governmental agencies enumerated in section 77-2010, it will be noted that by an added proviso identical rights created by section 77-2011 were likewise conferred on irrigation districts and drainage districts, with reference to purchase of tax liens without immediate payment of the moneys involved.

Section 232 of the 1903 act was not amended and now appears as section 77-2040, and authorizes the institution of foreclosure action "Whenever the county board of any county, or the proper authorities of any city or village, or any person, shall have purchased any real estate for delinquent taxes of any kind, or become the owner by assignment of any tax sale certificates or tax deed, such county, city, village or person shall be deemed to be the assignee and owner of all the liens for taxes of the state, county, city, village, school district, town and other municipal subdivisions for which such tract or lot is sold," and as such "owner" is authorized to prosecute the tax foreclosure proceeding.

There is no specific requirement in this section, as contended for by appellant, that limits the city or village entitled to take advantage of this provision to one who has "paid money to the county treasurer" for the tax lien sought to be enforced. It must be read in connection with sections 77-2010 and 77-2011 which contemplate that the city "shall purchase such real estate" for taxes without payment of money. Obviously such a purchaser is clearly embraced within the terms of section 77-2040, and indeed such must be the construction adopted if the provision here under consideration be construed as part of the act of 1903 considered as an entirety.

Following section 77-2040 we find section 77-2041 which regulates the proceedings of foreclosure of certificates of

county treasurer's tax sales purchased under sections 77-2009, 77-2010 and 77-2011, and provides for the disposition of the funds realized therefrom. It will be noted in this connection that the proceeds of the foreclosure sale, if made, are payable to the clerk of the district court by the sheriff making the same. The clerk of the district court is required to immediately, upon receipt thereof, pay such proceeds of foreclosure sale to the county treasurer, whose duty it is to distribute the same to the tax creditors as set forth in the certificate of tax sale. Section 77-2046 is the statutory provision that, in the event the proceeds of sale are insufficient to discharge the tax liens unpaid thereon, a *pro rata* payment shall be made and the tract of land forever relieved therefrom. As herein suggested, all of these statutory provisions are to be construed together to determine the legal effect of each. So construed, appellant's contention as to sections 77-2009, 77-2010, 77-2040, 77-2041, as being inapplicable to cities and villages, cannot be accepted. A definite statement of the entire transaction contemplated by the act, which includes the sections last referred to, may be expressed thus: The city of McCook "purchased" its certificate of tax sale as authorized by section 77-2010. It paid no moneys to the county treasurer as contemplated by section 77-2011. It brought an action to foreclose the same as provided by section 77-2040, for which purpose in law it was deemed to be the "owner" thereof as therein provided. It prosecuted its action as such "owner" as directed by section 77-2041. When sale was completed it had no possessory right to the proceeds thereof, but the same were by the sheriff conducting the sale turned over to the clerk of the court, who, after payment of the costs, delivered the same to the county treasurer of the county, who, in turn, distributed them to the tax creditors as shown by his tax list and the decree of foreclosure. If insufficient to satisfy all tax creditors the distribution was to be *pro rata*. Clearly the city of McCook was at all times acting as statutory representative of all tax interests involved. Accepting the definition in

Webster's New International Dictionary (2d ed.) viz., "A person, whether real or juristic, to whom property is legally committed in trust; one entrusted with property for another," as a proper designation of a "trustee," that term was properly descriptive of the plaintiff in that case. At least, it must be admitted that under the governing enactments the city of McCook was expressly authorized by statute to bring the foreclosure proceedings without joining with it the persons for whose benefit it was prosecuted. Comp. St. 1929, sec. 20-304. See, also, *Meeker v. Waldron,* 62 Neb. 689, 87 N. W. 539. Obviously, its rights as trustee ceased when the sheriff became possessed of the avails of the foreclosure sale, not in behalf of the plaintiff in that case, but as a public officer possessing public funds. It necessarily follows that the principles announced in *City of McCook v. Johnson,* 135 Neb. 270, 281 N. W. 69, are correct in all respects and are unconditionally approved. See, also, *Taxpayers' League v. Wightman,* 139 Neb. 212, 296 N. W. 886, and *Darnell v. City of Broken Bow,* 139 Neb. 844, 299 N. W. 274.

With reference to the addition of "drainage districts" to the political organizations entitled to take advantage of the statutory provisions under consideration, it is to be observed that it was accomplished by an amendatory act duly passed and approved. We are committed to the rule: "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. See, also, *State v. Coupe,* 91 Neb. 463, 136 N. W. 41; *First Trust Co. v. Smith,* 134 Neb. 84, 277 N. W. 762.

In addition, by an act expressly made cumulative and enacted as chapter 228, Laws 1915, approved April 14, 1915, it was expressly provided: "That wherever power is now given by the revenue laws of this state to the County Treasurer of any County in this State to sell real estate, on which the taxes shall not have been paid as provided by law, it shall include the power to sell said real estate

for all the taxes and special assessments now levied or hereafter levied by any county, municipality, drainage district, or other political subdivision of the state, and *all provisions of said revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by said county, municipality, drainage district or other political subdivision of the state.*" (Italics ours.) The provision just quoted now appears as section 77-2053, Comp. St. 1929. The language italicized amounts to an incorporation by reference of the laws concerning the collection of taxes, and including all of the provisions hereinbefore referred to and considered, as a part of chapter 228, Laws 1915 (now 77-2053), to the same extent as though fully set out therein. *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273; *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412.

It follows that the proceedings instituted and carried on in the instant case by Drainage District No. 1 were duly authorized by the legislation heretofore considered, and can afford no possible basis for intervention.

The intervener insists that taxes for the maintenance of the irrigation district are general taxes, and a first lien on the property in parity with all other taxes due the county and the state. The controlling statutory provisions are the following:

"All general taxes due the state and its governmental subdivisions shall be a first lien on the real estate on which levied, and takes priority over all other encumbrances and liens thereon." Comp. St. 1929, sec. 77-206.

"All special assessments, regularly assessed and levied as provided by law, shall be a lien on the real estate on which assessed, but shall be subject to the general taxes mentioned in the last preceding section." Comp. St. 1929, sec. 77-207.

Flansburg v. Shumway, 117 Neb. 125, 219 N. W. 956, is cited by appellant in support of its contention. The question presented in that case arises from the following

situation: A mortgage executed November 18, 1916, was recorded December 18, 1916, and secured a note dated January 1, 1917. One of the covenants of the mortgage was, "To pay all taxes, assessments and charges, of every character, levied or charged in Nebraska, which are now, or may hereafter become liens upon said real estate." Taxes levied from 1917 to 1922, inclusive, were not paid. Section 17, ch. 73, Laws 1903, in force at the date of the execution and delivery of the mortgage, as well as when taxes were sold at treasurer's private sale, provided: "All general taxes due * * * irrigation districts * * * shall be a first lien on the real estate on which levied and take priority over all other incumbrances and liens thereon." By the terms of chapter 133, Laws 1921, approved April 26, 1921, section 17, ch. 73, Laws 1903, last above quoted, was repealed and sections 77-206 and 77-207 as now existing were enacted in lieu thereof. On that state of facts this court determined: "Statutory provisions in force at the time of the execution of a mortgage enter into and become part of the contract." Further, "Irrigation district assessments are taxes, within the meaning of section 17, ch. 73, Laws 1903, and section 5825, Comp. St. 1922, making general taxes a first lien on real estate, and take priority over an existing mortgage lien."

It is evident that this case cited, because of the diversity of facts involved, is not conclusive on the question here presented. The priority of the tax lien of the irrigation district must be determined by its inherent nature. Is it a "general tax" within the terms of the applicable statutes and within the limitations of the state Constitution authorizing its existence? The necessity of determining the inherent nature of assessments imposed by irrigation districts was presented to this court in *Erickson v. Nine Mile Irrigation District,* 109 Neb. 189, 190 N. W. 573. We there held: "Assessments made by an irrigation district to pay bonded debts and for the maintenance and operation of its canal or ditch are special assessments, even though made in proportion to valuation, and not by acreage or frontage."

See, also, *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411, 64 N. W. 1086; *Douglas County v. Shannon,* 125 Neb. 783, 252 N. W. 199.

These assessments of the irrigation district, sustainable only under the Constitution as special assessments, are necessarily embraced in section 77-207, above quoted, and, as such, are a second lien and of equal priority with the assessments of Drainage District No. 1, as determined by the district court.

From the entire record it appears that the intervener does not in any manner aver or rely upon collusion or fraud on the part of the parties to the lawsuit in which it seeks to become a party. In effect, it presents questions of law only as the foundation of its claim, and it must be admitted that plaintiff correctly pleads the several items of taxes as shown by the public records, for which recovery is sought, both as to items in which the Suburban Irrigation District is the beneficiary as well as for itself and the other public agencies involved.

It is thought that in the foregoing discussion we have disposed of all questions properly raised by the record which in any manner legally affect the right of the Suburban Irrigation District to intervene in the instant case.

True, the questions as to the necessity of plaintiff including in its proceedings all subsequent assessments and taxes levied or assessed upon the premises, its right to have a statutory attorney fee taxed in its behalf, the effect of the correction of the assessment of the northeast quarter according to the fact by adding to the assessable valuation the value of certain improvements actually a part thereof but by mistake assessed elsewhere, the effect of the refinancing by Drainage District No. 1 of its outstanding bond indebtedness, while deemed to have been properly disposed of by the trial court's decree, are not specifically determined in this opinion, but they are all questions which are for consideration in the main case and form no proper part of this ancillary proceeding. For, if these questions be decided adversely to the contention of plaintiff, the amount

of the proceeds of the judgment accruing to it might be diminished, but the amount of intervener's claim would not be affected.

While these questions seem to have been properly determined by the district court, they are not properly a part of this appeal, and are not at this time for decision or final review by this court. To the extent of their merits, if any merit they possess, they relate solely to plaintiff's case, not to intervener's proceeding. While in no way decisive of the matter, the intervener's pleadings contain no allegation that the proceeds of this property in suit will be insufficient to discharge necessary costs and all liens against it. The controlling principle invoked by the instant situation is: "The decision as to the right to intervene ordinarily does not turn on the question as to the merits of plaintiff's case." 47 C. J. 96. "Where, however, the person who intervenes, or who seeks to intervene, does not bring himself within the terms of the applicable statutes, or within the rules of law defining the right to intervene, intervention is not permissible." 47 C. J. 106.

When the Suburban Irrigation District was properly denied the right to intervene in these proceedings, it must be deemed to be a stranger to the proceedings without power to contest the right of plaintiff to recover or otherwise protect the rights of others. 47 C. J. 107.

In addition, in consideration of the authorities heretofore cited in connection with the record before us, in every step of this proceeding the Suburban Irrigation District has been lawfully represented by a statutory trustee, Drainage District No. 1, whose good faith and honesty in the entire transaction is unquestioned. Nor are there any charges of fraud or collusion against it made or established, and neither is the claim made by any one that such trustee within its statutory sphere will not act in good faith for the protection of all interests represented by it. It is deemed that, under the circumstances involved in this case, the fact of lawful representation would alone require the denial of intervener's application. In view of the entire

record, however, we are in accord with the action of the trial court denying intervention and dismissing the intervener's proceeding seeking that end. Such action of the district court is, therefore,

AFFIRMED.

KROGER, District Judge, concurs in the result.

E. M. ROSE, APPELLEE, V. CITY OF FAIRMONT, APPELLANT.
300 N. W. 574

FILED OCTOBER 31, 1941. No. 31239.

1. **Workmen's Compensation.** A claimant, under the workmen's compensation law, has the burden of establishing, by a preponderance of the evidence, a right to compensation.
2. ———. This burden is not met by surmise or conjecture, nor can it be based upon mere guess, speculation, or possibility, but must be established by sufficient legal evidence leading to the direct conclusion, or a legitimate legal inference, that an accidental injury occurred which caused the disability.
3. ———. Mere exertion which is not greater than that ordinarily incident to cranking a Model T Ford in cold weather, but which exertion, when combined with existing arteriosclerosis, serves to produce coronary thrombosis, does not constitute a compensable accidental injury.

APPEAL from the district court for Fillmore county: STANLEY BARTOS, JUDGE. *Reversed and dismissed.*

Blackledge & Conway, for appellant.

Robert B. Waring, contra.

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

PAINE, J.

This is an appeal by the city of Fairmont, defendant, from an award given E. M. Rose, plaintiff, under the workmen's compensation law.

The main facts are not in dispute. It appears that plaintiff, a man 50 years of age, had been water and light commissioner of the city of Fairmont for about 12 years, and

was earning $150 a month. Plaintiff is a slender man, weighing 153 pounds, and five feet eight inches tall. The city owned a Model T Ford truck, which was kept in a small lean-to at the back of the plant, and was used by plaintiff and other employees. While this Model T had a starter, it had not been used for several months because it ran the battery down so fast, therefore it was cranked by hand.

On the morning of April 12, 1940, the plaintiff needed to use the car, and with a helper went out and they took turns cranking it, each one turning it over six or seven times, then the other taking a hand, and as it worked loose perhaps turning it 15 or 20 complete revolutions at a trial. Finally either the plaintiff or Palmer got it to going. When plaintiff got half way through the cranking operation, he felt a pain in his chest, but did not stop or say anything to Palmer about it, and continued taking his turn at the cranking job.

After the car started, plaintiff drove to the blacksmith shop and got a piece of bar, and the pain in his chest continued, and he sat there a few minutes, and the pain subsided, and he drove the Ford out to the lift station and sewer check, about a quarter of a mile south of the city of Fairmont. When he got down there to the plant where they pump the sewerage out of the city, he went down a perpendicular ladder about 21 feet. Plaintiff testified: "You have to go down a ladder, straight down the side of this thing. And when I opened the manhole cover on top of it and pushed it back the pain started up again, and consequently on the way down the latter (ladder) it got worse. I stayed down there long enough to inspect the machinery and it kept right on hurting and I decided it was about time for me to get home, and I started up. There was a place part way down and I lay there a few moments. I thought it might quit if I lay down and relax, but it didn't. Then I climbed on out and got 'Mr. Ford' wound up."

He remained at the sewer station about 20 minutes, and started back to town, and drove home to relax and rest and find out what was wrong, and he said he went in the

house, "and as all wives do the wife got quite excited; and the first thing she did was bounce to the telephone and call a doctor." Dr. Ashby came and examined him in bed, and he laid around home for several months, not able to do any work because he would get dizzy and have a pain in his chest.

Dr. Uridil, called by defendant, testified that a couple of days before the trial in the district court plaintiff came to his office in Hastings to be examined, and that he also read the testimony of Dr. Ashby and Dr. Covey. He testified that plaintiff's blood pressure was rather low, 105/86. His heart was moderately enlarged, sounds were "close rhythm or tick-tock rhythm;" that the plaintiff had a slight hardening of the arteries immediately under the skin. Dr. Uridil said the heart would recover itself if given time and not abused, but that he would never have a complete normal recovery, although he might be able to walk about and supervise, and do manual work if he did not overload his heart. Dr. Uridil was asked to assume that plaintiff had a coronary thrombosis on April 12, 1940, and to state the cause of it. He said that coronary thrombosis cannot occur in a normal healthy artery. There must be some diseased condition and arteriosclerosis is a normal changing in the arteries, which does not happen all at once, and may be rapid or gradual in its onset.

It was perhaps 45 minutes from the time of the alleged accident until Dr. Ashby was called to plaintiff's home. Dr. Ashby testified that he found him in bed, that he was in a semiconscious condition, and after administering a stimulant he could hear his heart beat, and took his blood pressure, which was very low, 85/60; that plaintiff told him that when he got down in the pit he thought he was not going to get out, but he did get out and drove home, and probably suffered a collapse after he got home; that he suffered a dilatation. He said that after a few days plaintiff said he felt as well as he ever did, or gradually returned to normal. His pulse went down to around 70, and he advised plaintiff to go down and see Dr. Covey at Lincoln.

In his deposition Dr. George W. Covey testified that plaintiff consulted him on May 1, 1940, in his office at Lincoln. His principal complaint was of a recent attack of pain in his chest and prostration. In getting the history of the case, he found that he had had influenza during November, 1939, and again in January, 1940. Dr. Covey's examination consisted of a fluoroscopic examination of the chest under X-ray and electrocardiograms. The examination showed that plaintiff was suffering from the effect of coronary thrombosis, with resulting pericarditis. In giving a number of causes that could have caused the coronary thrombosis, such as plaintiff suffered on April 12, Dr. Covey made this answer: "Coronary thrombosis occurs usually under one or two conditions; either occurs while the patient is resting and perhaps asleep, or occurs when he is exerting himself, either ordinarily with some other factor entering in, like temperature or state of the digestive tract or actual amount of exertion he is undergoing in relation to what is usual for him. Those are the two large groups in which coronary thrombosis occurs."

The district court allowed $15 a week from April 12, 1940, for 25¼ weeks, and allowed $7.50 a week for a period of 274¾ weeks, and allowed $10 a week thereafter so long as permanent partial disability continues. In addition, it allowed an attorney's fee of $100, to Dr. Ashby, $177, to Dr. Covey, $35, and to a nurse, $5.

In *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N. W. 802, the deceased was unloading three tons of coal from his truck, when suddenly he crumpled up and died without regaining consciousness. The autopsy was conducted by Dr. Covey, and the doctors agreed that death was caused by aortic stenosis of the heart, Dr. Ryerson adding that the ventricular dilation might have been caused by inflammation, calcification, or hardening (sclerosis) of the blood vessels. It was held that, where any one or more of the essential elements of an accident are absent, there can be no recovery for accidental injury or death.

In *Gilkeson v. Northern Gas Engineering Co.*, 127 Neb.

124, 254 N. W. 714, the plaintiff pushed an automobile in the mud, causing a strain to the muscles of the heart, which brought about a mitral regurgitation, which resulted in total permanent disability, and it was held: "Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident that becomes such a part of the proximate cause of such disability as to be compensable under the provisions of the workmen's compensation act." It was stated in the text: "The exertion shown in this case is not shown to have been an injury caused by accident that formed any part of the proximate cause of the disability for which compensation is sought." The award was set aside and the action dismissed.

We are cited by plaintiff to the case of *Schirmer v. Cedar County Farmers Telephone Co.*, 139 Neb. 182, 296 N. W. 875, as a parallel case. In that case a workman, while climbing a telephone pole with spurs, slipped a few inches, and he grabbed the pole with his left arm, catching the weight of his body and thus preventing a fall. He immediately felt a sharp pain in his chest, went home a mile and a half, suffering great pain, then was taken to a hospital, where a definite diagnosis of coronary thrombosis was made. This court held that this accident arose out of, and in the course of, his employment, and sustained an award. In this case there was a very definite accident in slipping on the pole, from which moment he suffered great pain, and was immediately taken home, and then to a hospital. It is not difficult to distinguish this case from the one at bar, in which no accident occurred, as defined by the Nebraska statute (Comp. St. Supp. 1939, sec. 48-152), and, further, the plaintiff was cranking a car, which was something ordinarily incident to his employment, and no unforeseen or unexpected event happened suddenly or violently.

Other cases cited by plaintiff, such as *Manning v. Pom-*

erene, 101 Neb. 127, 162 N. W. 492, *Herbert v. State,* 124 Neb. 312, 246 N. W. 454, *Esau v. Smith Bros.,* 124 Neb. 217, 246 N. W. 230, and *Montgomery v. Milldale Farm & Live Stock Improvement Co.,* 124 Neb. 347, 246 N. W. 734, can each be distinguished from the case at bar.

The medical evidence discloses that the plaintiff suffered a coronary thrombosis, which does not arise in a normal healthy condition of the arteries. Such a thrombosis may occur while one is asleep, or while exercising, or from overloading the stomach with food so that it presses upon the heart. In this case, while cranking a Model T Ford, plaintiff felt a pain in his chest, but continued cranking at intervals. When the Ford started, he drove to a blacksmith shop, did his errand, and remained seated for a few minutes, then cranked the car and drove to the sewer plant, and climbed down a perpendicular ladder 21 feet long, attended to what called him there, but, still feeling the pain in his chest, he again cranked the Ford and drove home, where he went to bed, and his wife called a doctor. Was the heart attack, caused by the continued cranking of the Ford on a cold morning, an accident in the accepted definition of that term?

Under our Nebraska workmen's compensation law a claimant has the burden of establishing, by a preponderance of the evidence, a right to compensation. It cannot be left to surmise or conjecture, or based upon possibilities or probabilities, but must be established in the legal way, and not by guess or speculation. *Wayne County v. Lessman,* 136 Neb. 311, 285 N. W. 579; *Saxton v. Sinclair Refining Co.,* 125 Neb. 468, 250 N. W. 655; *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526, 191 N. W. 691; *Amos v. Village of Bradshaw,* 128 Neb. 514, 259 N. W. 374; *Price v. Burlington Refrigerator Express Co.,* 131 Neb. 657, 269 N. W. 425.

Mere exertion which is not greater than that ordinarily incident to employment, but which combines with preexisting disease to produce disability, is not a compensable "accidental injury."

Proof must be made by satisfactory evidence leading to the direct conclusion, or a legitimate legal inference, that an accidental injury occurred which caused the disability. *Wayne County v. Lessman*, 136 Neb. 311, 285 N. W. 579; *Gilkeson v. Northern Gas Engineering Co.*, 127 Neb. 124, 254 N. W. 714; *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N. W. 802.

We are of the opinion that no award can be supported by the evidence in this case, and the action is hereby dismissed.

REVERSED AND DISMISSED.

CARTER, J., concurring in the result.

I cannot agree with the court's attempt to distinguish this case from *Schirmer v. Cedar County Farmers Telephone Co.*, 139 Neb. 182, 296 N. W. 875. In my judgment, they are identical in principle and call for similar conclusions. In both cases the plaintiff was suffering from coronary thrombosis. In each case the disease caused the disability, superinduced by overexertion. In the *Schirmer* case the exertion and resulting exhaustion were the result of climbing a telephone pole in the course of plaintiff's employment. In the instant case it was the result of cranking a truck in the course of duty.

In both cases coronary thrombosis was the cause of the purported accident and the resulting disability. Instead of an accident causing the disability in each of these cases, the diseased condition of the claimant caused that which was described as an accident. Consequently, the cases cannot be satisfactorily distinguished. Except as herein noted, I concur with the opinion adopted by the majority.

WILLIAM A. LUKE, APPELLEE, V. ST. PAUL MERCURY INDEMNITY COMPANY ET AL., APPELLANTS.

300 N. W. 577

FILED OCTOBER 31, 1941. No. 31257.

1. **Workmen's Compensation.** The workmen's compensation law extends to and covers only workmen while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen.
2. ———. Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform service.
3. ———. The rule that recovery may be had under the workmen's compensation law if the servant, on a trip where his and his master's business are combined, is injured is applicable only when there is a combination of purposes of the master and servant to be performed on the same trip.
4. ———. *Held,* that the injury sustained by the plaintiff is not compensable under the workmen's compensation law.

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

Chambers, Holland & Locke, for appellants.

Good & Simons, contra.

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

YEAGER, J.

This is an appeal from an award in a workmen's compensation case in favor of William A. Luke, plaintiff and appellee, against the Young Men's Christian Association of Lincoln and Lancaster county, Nebraska, a corporation, the employer, and St. Paul Mercury Indemnity Company of St. Paul, a corporation, the compensation carrier, defendants and appellants.

The only question presented is one of liability, and it

depends upon whether or not the accident and injury sustained by the plaintiff, which accident and injury are admitted, arose out of and in the course of his employment as general secretary of the employer defendant.

The pertinent substantial facts are that plaintiff had been general secretary of the employer defendant, hereinafter referred to as the Lincoln Y. M. C. A., for more than 25 years. Under arrangement with the Lincoln Y. M. C. A. it was required that plaintiff should attend conferences at Association Camp, Estes Park, Colorado, on dates from July 22 to July 26, 1936. It was further arranged that he was to attend other conferences at Denver, Colorado, with certain Y. M. C. A. officials, the dates of which proposed conferences were not fixed or certain, but were probably to be held very shortly before the Estes Park conference. The traveling expense and expense of attendance were to be borne by the Lincoln Y. M. C. A. On July 9, 1936, plaintiff received word that his brother had died at his home near Billings, Montana. Immediately plaintiff made arrangements with the Lincoln Y. M. C. A. whereby he was allowed to attend the funeral of his brother, it being agreed that he should return from Montana to Denver and Estes Park in time to attend the conferences. He procured a round-trip ticket from Lincoln through Billings, Estes Park and back to Lincoln. The Lincoln Y. M. C. A. bore the equivalent of the cost of a round-trip ticket to Estes Park, and plaintiff the balance. The plaintiff went to the home of his deceased brother, where he remained until July 19, 1936. Following receipt of a communication or communications from his secretary, plaintiff, on July 19, 1936, started by train to Denver, Colorado, presumably to attend contemplated conferences, which conferences were in line of duty. Some time during the afternoon of the 19th, plaintiff was in the dining car eating a piece of watermelon when a fellow passenger lost his balance and caused a fork to be stuck into plaintiff's jaw, which injury is the basis of this action. The train arrived at Cheyenne, Wyoming, the following morning at about 2:30 o'clock. Denver and

Estes Park, Colorado, are west and somewhat south of Lincoln, Nebraska, and the point or points to which plaintiff went are west and north. The place of the accident was west and north and on a route which took plaintiff several hundred miles away from the direct route to Denver and Estes Park. From the time plaintiff left Lincoln, Nebraska, up to and including the time when the accident occurred, the plaintiff had not been engaged in the performance of any act for his employer or in the line of duty. At the time of the accident he was perhaps some hundreds of miles from the place or places where he was to become engaged in the line of duty, and likewise was some hundreds of miles from the direct route from Lincoln, Nebraska, to the place or places of duty engagement. He was returning to duty from a trip of his own selection and planning away from duty.

The plaintiff claims that this was an accident arising out of and in the course of his employment, and that it is compensable under the workmen's compensation law.

The workmen's compensation law extends to and covers only workmen while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen. Comp. St. 1929, sec. 48-152; *Pappas v. Yant Construction Co.*, 121 Neb. 766, 238 N. W. 531; *Hall v. Austin Western Road Machinery Co.*, 125 Neb. 390, 250 N. W. 258; *Hammond v. Keim*, 128 Neb. 310, 258 N. W. 478; *McNaught v. Standard Oil Co.*, 128 Neb. 517, 259 N. W. 517; *Seversike v. Omaha Flour Mills Co.*, 129 Neb. 754, 263 N. W. 151.

Measured by the wording of the statute and the interpretative decisions, the plaintiff was not at the time of his injury engaged in, on or about the premises where his duties were being performed. He was not at any place where his service to his employer required his presence as a part of such service. The accident did not occur during any time when his service was required.

The plaintiff had clearly left his employment and gone to a place where his duties did not require his presence. His departure was in no sense incidental to his employment.

It is well settled by the decisions of this court that, where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform service. *Pappas v. Yant Construction Co., supra; Hall v. Austin Western Road Machinery Co., supra; McNaught v. Standard Oil Co., supra; De Porte v. State Furniture Co.,* 129 Neb. 282, 261 N. W. 419; *Seversike v. Omaha Flour Mills Co., supra; Sheets v. Glenwood Telephone Co.,* 135 Neb. 56, 280 N. W. 238.

The plaintiff urges that the so-called dual purpose doctrine, or the rule that recovery may be had under the workmen's compensation law if the servant, on a trip where his and his master's business are combined, is injured, is applicable in the present circumstances. An examination of the authorities does not lead to this conclusion. Without exception these authorities make clear that there must be a combination of purposes of the master and servant to be performed on the same trip, and there is a clear indication that there must be no wide departure from the route whereon the master's service is to be performed.

There can be no doubt that the appellants are entitled to the relief sought by them on this appeal.

The plaintiff was injured on July 19, 1936, and thereafter about October 20, 1936, he reported his condition, stating that he was injured while en route to Estes Park, Colorado, on business for the Lincoln Y. M. C. A. He gave Thermopolis, Wyoming, as the place where the accident occurred. It appears that the compensation carrier defendant paid weekly benefits at the rate of $15 a week to October, 1938, and also $699.50 for medical expense, then concluding that the injury was not compensable under the

workmen's compensation act stopped payment and instituted action in the compensation court to have the claim declared noncompensable. At about the same time plaintiff filed action in the same court to have the claim declared compensable. The two actions were consolidated and heard together. The record in this condition is before this court.

The case is reversed and remanded, with directions to dismiss the petition of plaintiff and appellee, and to render judgment on the petition of defendants and appellants that the claim of plaintiff and appellee is not compensable under the workmen's compensation act.

REVERSED.

THOMAS R. P. STOCKER, APPELLANT, V. RALPH ROACH, APPELLEE.
300 N. W. 627

FILED OCTOBER 31, 1941. No. 31175.

1. **Negligence.** A motorist who sees anything upon the highway at night which is abnormal and in itself a warning and takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negligence which will bar his recovery for damage contributed to by his lack of care.
2. ———. Where the evidence establishes that a cross-petitioner was guilty of negligence more than slight, it becomes a question for the court, and it is the duty of the court to direct a verdict against him on his cross-petition.

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

Chambers, Holland & Locke, Ralph W. Ford, Herbert A. Ronin and *Thomas R. P. Stocker,* for appellant.

L. R. Doyle, Sam C. Zimmerman and *Lloyd E. Peterson, contra.*

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

ELLIS, District Judge.

In this action the plaintiff below, appellant here, sought to recover his damages resulting from personal injuries to himself, his wife, and damage to his automobile.

The defendant filed a cross-petition by which he sought to recover damages for personal injuries.

Upon trial the jury returned a verdict in favor of the defendant on his cross-petition in the sum of $3,327.50.

The accident happened on the 30th day of May, 1940, on east and west highway No. 2 about 2 miles east of Palmyra at about 10 o'clock p. m. The road at this point was flat and slightly down grade from a point approximately 500 feet east of the place of the accident. The road surface was what is called "armor coat," which is constructed by spraying the surface with a black oil on which is spread a coating of sand. The road was between 22 and 24 feet in width with earthen shoulders on each side, the width of which is in dispute, the evidence varying from 18 inches to 5 feet.

The weather was clear, the road dry, there was no moon and it was very dark. In other words, driving conditions were normal for the date and hour and nature made no contribution to produce the accident.

The plaintiff's theory, which the evidence in his behalf tended to support, was that while driving his 1933 two-door Ford westward its lights suddenly failed. He brought the car to a stop and then started it again, moving it westward and to the right so that, when stopped the second time, its right wheels were off the mat. The plaintiff got out of the car on the driver's side and his wife got out on the right side. Both walked back or eastward along the north edge of the mat 30 or 40 feet when they saw the illumination from lights of a car approaching from the east. Plaintiff testified that he had a lighted flashlight in his hand which he waved up and down. That without slackening its speed the approaching car kept on coming and when a short distance away veered a little to the north, struck Mrs. Stocker, knocking her into the ditch on the north side

of the road, then struck Mr. Stocker, knocking him into the same ditch, and then struck plaintiff's car, that the accident happened only two or three minutes after the plaintiff stopped his car.

The first motorist on the scene came from the east and testified that he saw flashlights from a point two blocks east and saw the Stocker car from about a block away.

The evidence is undisputed that the Stocker car had an almost vertical rear window, an unbroken reflector type tail-light lens and a bright metal standard type bumper on the rear. The evidence is undisputed that the car had been cleaned, waxed and polished the day before the accident and had not been driven in mud or over wet roads during the intervening time.

The evidence likewise is undisputed that the left front part of defendant's car struck the right rear part of plaintiff's car and that defendant's car came to rest after the collision on its left side in the north ditch with its front end to the east. The plaintiff's car after the collision rested on the mat north of center line.

The defendant testified that he was driving a 1936 Ford tudor; that it was in good mechanical condition, with lights and brakes working all right, that the lights were regular Ford lights, were on the regular driving position and were satisfactory to drive with. He further testified that he was driving about 35 miles an hour when he saw an object right in the center of the road about 100 to 150 feet ahead of him. On cross-examination he testified that this object was 200 feet ahead when he first saw it. He said that he looked ahead the minute he saw the object and saw no sign of a car coming; that in a matter of seconds he saw that it was a lady with her hand in the air; that he kept his eyes on her until he got by her, when, looking ahead, he saw a car a few feet ahead of him; that he pulled to the north but could not avoid it.

He further testified that the left wheels of the other car were 12 to 16 inches north of the white center line of the highway. He denied that there was a warning by flash-

light or otherwise. He said he saw Mr. Stocker and that he was standing next to the left rear fender of his car. He denied striking either Mr. or Mrs. Stocker. He said he could not say what color the Stocker car was, but that its color appeared to be a good deal the same color as the road. On cross-examination, when asked if he slackened his speed after seeing the object in the road, he answered, "Very little," and "Slightly, but not to any great extent; no." That after seeing the lady he did not look to see what was on down the highway. He did not apply his brakes. He admitted that the Stocker car was not over 30 or 40 feet beyond where Mrs. Stocker was standing.

At the close of defendant's case the plaintiff moved for a directed verdict on defendant's cross-petition. The motion was then overruled and on being renewed at the close of all the evidence was again overruled. These rulings of the trial court are among the errors assigned here.

The plaintiff contends that on the evidence the defendant, as a matter of law, was guilty of negligence in such a degree as to bar his right to recover on his cross-petition. In support of his contention the plaintiff cites *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340; *Redwelski v. Omaha & C. B. Street R. Co.,* 137 Neb. 681, 290 N. W. 904; *Fischer v. Megan,* 138 Neb. 420, 293 N. W. 287; *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902, and other cases.

Responding, the defendant contends that the rule of the above mentioned cases does not apply when the object is of a color similar to that of the roadway or blends with the color of the roadway and cites *Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585, 194 N. W. 731; *Day v. Metropolitan Utilities District,* 115 Neb. 711, 214 N. W. 647; *Adamek v. Tilford,* 125 Neb. 139, 249 N. W. 300.

We have reviewed all of these cases cited by the defendant and do not think the factual situation involved in any of them is such as to make them controlling in the situation before us or of any value as precedents herein. All of these involve situations where the general rule did not apply be-

cause of the inherent character of the obstruction or defect in the highway.

In *Hendren v. Hill, supra,* we said: "It is the duty of an automobile driver, in driving a car in the nighttime, to keep such an outlook ahead that he will see an obstruction as soon as it is illuminated by his lights, and it is his duty to have his car under such control that he can stop to avoid a collision with an object within the area lighted by his lamps."

The law has been stated as follows: "A motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights is negligent as a matter of law." *Redwelski v. Omaha & C. B. Street R. Co.,* 290 N. W. 904 (137 Neb. 681). See *Fischer v. Megan, supra,* and cases cited.

In most of the cases of collision at night it is claimed by the driver of the colliding vehicle that he had no warning of the obstruction, did not see it until he was quite close to it and because of speed was unable to stop notwithstanding some effort to do so.

In the principal case we have the admission of the defendant that while moving at only 35 miles an hour when 100 or 200 feet away he saw an object in the road and that in a matter of seconds he saw that it was a lady with upraised hand. Notwithstanding what he then saw and was aware of, he did not slacken his speed or apply his brakes. His testimony is that not over 40 feet beyond the point where the lady was standing was the car with which he collided, to his injury, but that he did not see it until he had passed the lady. Accepting for the moment that he did not see anything beyond Mrs. Stocker until he had passed her, it seems to us to be clear that if he had slackened his speed, as common prudence would dictate, he would have been in a position to avoid the collision. Such a course would not only have afforded more time to ascertain what was ahead of him but would have enabled him to stop quicker in event there was need to do so. From

his own testimony it appears that he had good brakes but did not use them at all.

If this court should decline to hold the defendant's conduct to be negligent, the court would be in the anomalous position of holding that failure to see an object within range of a driver's lights, or failure to so drive or control a car that the driver can avoid collision with obstacles appearing within range of his lights, constitutes negligence, but that failure to exercise *any care* after being aware of an obstacle, if not a warning, is not negligence.

A motorist who sees anything upon the highway at night which is abnormal and in itself a warning and takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negligence which will bar his recovery for damage contributed to by his lack of care.

It necessarily follows that we are unwilling to accept the defendant's testimony and theory that after he saw Mrs. Stocker (who, according to the evidence, was dressed in black with a light collar) he kept his eyes on her and saw nothing but her until he had passed her, notwithstanding that almost directly in line with her stood a car with shiny finish, reflector tail-light lens and bright metal bumper. To do so would violate common knowledge and experience and give judicial sanction to the fiction that useful human vision, so vital in negotiating modern traffic, is limited to a vertical plane of the approximate width of a human being, revealing nothing in immedate proximity latterly or closely and directly beyond.

The defendant seeks to avoid the legal effect of his conduct by invoking the rule, as stated by the defendant, that, where "a person is placed by the negligence of another in a situation of peril, his or her attempt to escape danger, even by doing an act which is also dangerous and from which injury also results, is not contributory negligence, such as will prevent him or her from recovering for an injury if the attempt be such as a person acting with ordinary prudence might under the circumstances do." In stating

the rule the defendant omits the essential element which must always be present to justify its application, namely, that the dangerous situation must not have been contributed to by the fault of the person seeking to invoke it.

"The extension of that rule is also to the effect that one cannot claim the benefit of the doctrine where the emergency was brought about by the negligent act of the party seeking to invoke it. The rule is applicable only when a person is confronted by such an emergency, he having been placed in such a position by the exercise of ordinary care." *Sheehy v. Abboud,* 126 Neb. 554, 253 N. W. 683. We cannot say that one who observes a person on the highway with hand upraised in warning and wholly ignores such a warning, with the result that he is unable to avoid a collision, is without fault. The rule obviously can have no application here.

Where the evidence establishes that a cross-petitioner was guilty of negligence more than slight, it becomes a question for the court, and it is the duty of the court to direct a verdict against him on his cross-petition. See *Klement v. Lindell,* 139 Neb. 540, 298 N. W. 137, and cases cited.

The trial court erred in not sustaining plaintiff's motion for a directed verdict on defendant's cross-petition and the cause must be reversed and remanded, with instructions to do so.

Only because it may afford some explanation of the jury's verdict and for the further reason that both parties have devoted considerable space to it in their briefs, we will discuss briefly instruction No. 18, which is as follows: "You are instructed that the mere fact that an accident occurred resulting in injury to plaintiff and to defendant raises no presumption that either were to blame or that either should recover damages. Accidents sometimes occur without fault on the part of any one and such accidents are termed as unavoidable. If, from a consideration of all the evidence in this case, you believe that the accident was unavoidable, your verdict should be for the defendant."

In instruction No. 21 the court set forth the elements and measure of damages if the jury found "in favor of the plaintiff" and the same if they found "for the defendant." The plaintiff assigns as error the giving of instruction No. 18. We think it is quite apparent that the trial court, being at the moment unmindful of defendant's cross-petition, used a form of instruction whch would have been proper in the absence of a cross-petition. The error in the instruction is obvious and we think prejudicial to a degree that was not and could not be cured or overcome by other instructions.

There are numerous other assignments of error relating to rulings on evidence and the giving or refusal of instructions. We have considered them but do not consider it necessary to discuss them in view of the disposition of the case.

The cause is reversed and remanded, with instructions to enter judgment dismissing defendant's cross-petition and granting plaintiff a new trial of the issues presented by plaintiff's petition and defendant's answer.

REVERSED.

BENJAMIN F. HOLLINGSWORTH, APPELLEE, V. EARL D. MCLEAN, APPELLANT.

300 N. W. 580

FILED OCTOBER 31, 1941. No. 31170.

1. **Mechanics' Liens.** The interest of a part owner may be subject to a mechanic's lien for improvements thereon, made at his instance, though it does not affect the interest of the other co-owners.
2. **Executors and Administrators.** A person, though he may be a representative of others, when he fails to disclose his position, and contracts with another by which a liability is created against him, may be held liable individually thereon, especially where he has an interest in the property affected, even though the persons whom he represents are not themselves liable, and even though the contract deals with property in which those other persons are interested along with himself.

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

Beeler, Crosby & Baskins, Robert B. Crosby and *Horace E. Crosby,* for appellant.

Hoagland, Carr & Hoagland, contra.

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

FALLOON, District Judge.

This is an action to foreclose a mechanic's lien brought by the appellee against the appellant, individually and as administrator of his father's estate, and the other heirs, representatives and lien holders. The amount claimed was $1,000 and interest and was based upon the installation of an irrigation pump and well upon certain land belonging to the estate, and in which the appellant, Earl D. McLean, had an interest.

The petition alleged that the original agreement was had with the appellant who was managing and looking after the estate of his father, Allan McLean, deceased, that the well was installed about August 1, 1939, and that on September 13, 1939, within the four-month period, a mechanic's lien was filed in Lincoln county, set forth interests of other heirs and mortgagees and prayed for foreclosure of this lien and for marshalling of the assets.

The appellant alleged in his answer that he was the administrator and in control of said estate as such, that appellee installed pump at his own risk, that if the pump and well did not meet appellant's approval, it was to be pulled out and removed from the premises, that it was unsatisfactory, request had been made for its removal and refused, and denied that he acted individually, and acted only as such administrator and asked for dismissal of this action.

It is not necessary to note the contentions of the other defendants, as the decree was not against them and the only appellant is Earl D. McLean, against whom the decree was entered in his individual capacity.

It was stipulated by the other heirs that they would testify that they had no actual knowledge or information as to the arrangements for the construction of the well in dispute, that they did not look after the operation of said lands or authorize the administrator in reference to the construction of this well, nor had they ever approved his action therein at any time afterwards.

The court below decreed that the appellee should recover judgment against the appellant, Earl D. McLean, for the sum of $986, which was the contract price less credit for a check valve, and further decreed that this sum was a first lien against the interest of Earl D. McLean in section 36, township 14 north, range 31, in Lincoln county, and appellee was entitled to marshalling of the assets as against the mortgage liens of record. Both appellee and appellant have appealed.

The evidence is sufficient to sustain the finding of the trial court in regard to the making of the contract, that it was completed, that the pump was reasonably satisfactory, and that the statute had been complied with in the filing of the lien. Nor is there any evidence in the record that would sustain a judgment against the other heirs or the estate.

The evidence discloses that by several letters the appellant agreed to pay the amount claimed by the contract, wanted to pay it from the proceeds of a beet crop, and at those times did not claim pump was unsatisfactory.

Most of the contentions of the appellant in regard to the evidence and law are without merit under the record and will therefore be ignored in this opinion.

The evidence fully sustains the decree unless it is prohibited by law. The appellant has an interest in this property, and the evidence did not disclose how he was acting and, in any event, it would make no difference. He contracted for the irrigation pump and well and the appellee, having furnished it, is entitled to a lien on his interest. The interest of a part owner may be subject to a mechanic's lien for improvements thereon, made at his instance, though

it does not affect the interest of the other coowners. See *Roxbury Painting & Decorating Co. v. Nute,* 233 Mass. 112, 123 N. E. 391, *Ness v. Wood,* 42 Minn. 427, 44 N. W. 313, and *Berglund & Peterson v. Wright,* 148 Minn. 412, 182 N. W. 624.

Whether the appellee checked the county records in Lincoln county to find out what interest the appellant had is of no avail to the appellant in this proceeding, as the fact remains he did have an interest, he entered into the contract, and the lien was filed against him and the property in which such interest was held.

That the appellee, having furnished the material and labor for an improvement upon the real estate, is entitled to a lien for the labor and material upon the interest and title of the appellant with whom he contracted, is so generally accepted through all the holdings of this court that no citation of authorities is necessary. Not only was the court below right in granting such lien against the interest of the appellant, but he was not in error in entering a personal judgment against the appellant. See *Howell v. Hathaway,* 28 Neb. 807, 44 N. W. 1136.

A person, though he may be a representative of others, when he fails to disclose his position, and contracts with another by which a liability is created against him, may be held liable individually thereon, especially where he has an interest in the property affected, even though the persons whom he represents are not themselves liable, and even though the contract deals with property in which those other persons are interested along with himself.

Under both the law and the evidence, the district judge is fully sustained in his findings.

AFFIRMED.

SAMUEL CAMPAGNA, APPELLEE, V. HOME OWNERS LOAN CORPORATION, APPELLANT.
300 N. W. 894

FILED NOVEMBER 21, 1941. No. 31206.

1. **Courts.** The municipal court of Omaha may hear and determine an action to recover back a 100-dollar payment of earnest money on a contract to purchase real estate, where defendant failed to comply with a covenant to convey the property to plaintiff "free and clear of all liens and encumbrances whatsoever," though the city charter provides that the municipal court shall not have cognizance of any action in any matter wherein the title or boundaries of land may be in dispute.
2. **Vendor and Purchaser.** In a covenant to convey land free and clear of all liens and encumbrances whatsoever, the word "encumbrances" may include whatever prevents or impedes its transfer, and a judgment standing on the public records unpaid and uncanceled may be an encumbrance, though the lien expired by the lapse of time and by the death of the judgment debtor.
3. **Appeal.** Where there is no defense in fact or law to a case made by plaintiff, errors of the trial court in the proceedings, if any, are immaterial on an appeal by defendant from the judgment against him.

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

Ray E. Dougherty, Louis W. Heyde and *Mose Silverman,* for appellant.

Paul J. Garrotto, contra.

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

ROSE, J.

This action was brought in the municipal court of Omaha by Samuel Campagna, plaintiff, to recover back $100 paid by him to Home Owners Loan Corporation, defendant, as earnest money on an unperformed contract for the sale and purchase of lot 9, block 6, Campbell's addition to Omaha.

In writing, January 14, 1939, for the price of $7,200, defendant agreed to sell and plaintiff to buy the lot described.

The contract, on compliance with its terms, obligated defendant "to convey said property to plaintiff free and clear of all liens and encumbrances whatsoever," to furnish an abstract showing such a title and to execute and deliver a warranty deed accordingly. Failure of defendant to convey the lot to plaintiff "free and clear of all liens and encumbrances whatsoever" was alleged in the petition. On pleadings putting in issue the validity of the claim for a return of the earnest money, the municipal court entered a judgment in favor of plaintiff for $100 and interest. On appeal by defendant to the district court the judgment was the same. The questions for determination are presented by an appeal from the district court to the supreme court.

Jurisdiction of the municipal court over the subject-matter of the action and of the district court by appeal was challenged by defendant. The exercising of jurisdiction by either court is assigned as error. This position is based on a provision of the Omaha charter that the municipal court "shall not have cognizance of any action: * * * In any matter wherein the title or boundaries of land may be in dispute." Comp. St. 1929, sec. 22-206. Under the law of Nebraska the position thus taken is untenable. The title to the land is not in dispute. The record shows that defendant owns the fee and can convey title. The action is one to recover back earnest money paid under a written contract requiring defendant to convey the land "free and clear of all liens and encumbrances whatsoever." The pleadings raised an issue as to the existence of an encumbrance and as to the failure of defendant to make such a conveyance. The amount of the earnest money was within the jurisdiction of the municipal court. In principle the jurisdiction of the municipal court was properly entertained under a former opinion in which the court said:

"In *Mushrush v. Devereaux,* 20 Neb. 49, it was held that county courts and justices of the peace have jurisdiction, within the limits of amount, in actions to recover back a deposit, or money paid upon an agreement for the sale of land, where the defendant fails to perform his agreement to con-

vey the same. *Campbell v. McClure*, 45 Neb. 608, is undistinguishable from the present case, except from the fact that the land there conveyed was in this state, and the covenant was personal only. It was held that a justice of the peace had jurisdiction, and that the action did not draw in question the title. The distinction here urged does not affect the question. The cases cited show that the language of the Constitution does not exclude jurisdiction merely because to settle personal rights it becomes necessary to inquire into some fact concerning the title to land." *Hesser v. Johnson*, 57 Neb. 155, 77 N. W. 406.

In this view of the law the objections to jurisdiction were properly overruled.

Counsel for defendant earnestly contend, nevertherless, that an abstract showing title clear and free of all liens was presented to plaintiff, that he refused without cause to perform his contract of purchase, and that consequently he was not entitled to a return of the earnest money. The determining question, however, is the existence of an encumbrance within the meaning of the contract executed by the parties. As the abstract was first submitted to plaintiff it contained an entry showing that, in a criminal prosecution, a federal court had imposed a fine of $500 on a former owner of the land and that the fine stood on the public records as an unpaid judgment. Counsel advised plaintiff, in effect, that the abstract should show a title clear of this judgment. Plaintiff repeatedly demanded correction of the defect and, upon failure of defendant to make the correction, declined to complete the purchase and demanded a return of the earnest money. The abstractor was later persuaded by defendant to remove from the abstract the entry relating to the fine on the grounds that the death of the former owner, upon whom the fine was imposed, made the judgment unenforceable and that the lien thereof expired by the lapse of time. The fine and the judgment, however, remain on the public records in their original form. The government did not release the judgment and the federal court did not strike it from the record. Defendant took no action in court to have

it canceled as void. The contract to convey the land was not limited to a conveyance free from liens but extended further to all encumbrances whatsoever. In this sense "whatsoever" is a word of broad significance, meaning encumbrances of any kind. *Doonan v. Killilea,* 87 Misc. 427, 149 N. Y. Supp. 832; *Schuck v. Shook,* 10 N. Y. Supp. 935. In a legal sense the word "encumbrance" has been defined "to be anything that impairs the use or transfer of property," and, "As applied to an estate in land, it may fairly include whatever charges, burdens, obstructs, or impairs its use, or prevents or impedes its transfer." 20 C. J. 1250, 1252.

The judgment, standing on the public records unpaid and uncanceled, though unenforceable as a lien, nevertheless impedes the transfer as shown by uncontradicted evidence. Under the contract plaintiff was not required to accept a conveyance at the risk of litigation to clear the record of an encumbrance impeding the transfer of the property.

In these views of the facts and the law, there was no defense to the case made by plaintiff for the return of his earnest money. It follows that errors in the proceedings of the district court, if any, are immaterial.

AFFIRMED.

THOMAS GORMAN, APPELLANT, V. JOHN BRATKA, APPELLEE.
300 N. W. 807

FILED NOVEMBER 21, 1941. No. 31062.

Evidence. If a party to a suit makes a written statement which is prepared by a third person, where the party denies the authenticity and correctness of the instrument, the party preparing the instrument, or some one cognizant with the facts, should be called to lay a proper foundation for its admission in evidence.

APPEAL from district court for Douglas county: JOHN W. YEAGER, JUDGE. Supplemental opinion on motion for rehearing of case reported in 139 Neb. 718. *Former opinion adhered to.*

David O. Mathews, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

PAINE, J.

The original opinion in this case is found in 139 Neb. 718, 298 N. W. 691, in which the cause was remanded for a new trial.

In the motion for a rehearing, it is argued at length that there was no error in the refusal of the trial court to admit the written statement of the defendant, John Bratka, in evidence.

The record shows that, at about noon of the same day on which the automobile collision had occurred about 9:30 a. m., the defendant, Bratka, went to the office of Al Hummel, an insurance agent, in the Keeline building, Omaha, and sat in a chair next to Mr. Hummel, who took down the statement on a typewriter, making carbon copies, and the entire statement makes a long page of typewriting, each paragraph being single-spaced.

Mr. Bratka testified that Mr. Hummel would ask him some questions, and then he would write, and when it was completed Mr. Hummel read it to him, and then he signed the statement, and admits his signature on the bottom of exhibit No. 15. Near the end of this statement appear the words, "I have read the above report and it is true and correct." This is followed by the sentence, "Correction: My son was riding in the rear seat with my sister-in-law instead of the front seat as mentioned above," showing a very minor correction in the interest of accuracy, for Bratka had first told Mr. Hummel to write that his son, John D., aged three, was in the front seat with him and his wife, and below this correction is repeated the statement just above his signature, "I have read the above report and it is true and correct." Then follows his admitted signature.

On cross-examination, Mr. Bratka strenuously denied that

he had made the statement therein reading: "All of a sudden I collided with a car which was going north on 60th street. I did not see this car until we collided. I could not say how fast this car was going since I did not see it until we collided." He also denied one or two other statements therein.

An examination of exhibit No. 15, with the knowledge possessed by any one familiar with typewriting, would be convincing that this disputed statement could not have been interpolated in a single-spaced typewritten statement after he had signed it, for it is complete and regular and properly spaced.

However, it was held in the case of *Moore v. Krejci*, 139 Neb. 562, 297 N. W. 913: "A written statement, purportedly given by the plaintiff to an action and offered for the purpose of impeachment, is not admissible in evidence without a proper foundation."

The defendant having denied that the written statement was in the form in which he gave it, the district judge was justified in refusing its submission until further foundation had been laid.

The opinion heretofore rendered is modified by this supplemental opinion to that extent, and the proper rule is stated: That if a party to a suit makes a written statement which is prepared by a third person, where the party denies the authenticity and correctness of the instrument, the party preparing the instrument, or some one cognizant with the facts, should be called to lay a proper foundation for its admission in evidence.

The balance of the opinion, holding that the owner of the automobile was but a guest of the bailee driver, and that the plaintiff had no control over it after the bailment took place, and the driver's negligence could not be imputed to the plaintiff, states the law correctly, and sustains the reversal of the case, which is remanded for a new trial, as in the original opinion.

FORMER OPINION ADHERED TO.

ORVILLE MOFFITT, APPELLANT, V. STATE AUTOMOBILE INSURANCE ASSOCIATION, APPELLEE.
300 N. W. 837

FILED NOVEMBER 21, 1941. No. 30989.

Insurance. A hay grinder mounted upon four wheels is, while being drawn by a truck upon a public highway, a trailer or vehicle within the meaning of a provision of an insurance contract excluding liability when such truck is being used for towing or propelling any trailer or vehicle.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. Opinion on motion for rehearing of case reported in 139 Neb. 512. *Former judgment of reversal vacated and judgment of district court affirmed.*

Horace V. Noland, Peterson & Devoe and *C. E. Barney,* for appellant.

Wear, Boland & Nye, contra.

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

CARTER, J.

Plaintiff recovered a judgment against Ralph Dean for the negligence of the driver of Dean's truck while it was being operated on a public highway. At the time of the accident the truck was towing a hay grinder. Prior to the time of the accident, defendant had issued a policy of automobile insurance to Ralph Dean, insuring him against loss resulting from the negligent operation of the truck. This suit was brought to compel defendant to pay the judgment plaintiff had obtained against Dean.

Defendant contends that no liability exists under the contract of insurance because of the following exclusionary clause contained in the policy: "This contract does not cover losses resulting * * * while any automobile described herein is being used or maintained under any of the following conditions: * * * (d) Loss or damage while the automobile described is being used for towing or propelling any

trailer or vehicle." The only question for determination is whether the hay grinder was a trailer or vehicle within the meaning of the exclusionary provision of the insurance policy.

The hay grinder is described in the stipulation of facts as having four wheels with rubber tires which were the same width as the inner wheels of the truck, they being standard truck width. The grinder weighed between one and one and one-half tons and was not equipped with any braking device. The hay grinder was about ten feet long and eight feet high and had both a front and rear axle with no independent motive power. The weight of the grinder was about equally distributed over the four wheels. The chassis was not constructed or designed to carry passengers, goods or merchandise, its function being limited to the conveyance and support of the hay grinder.

We think the hay grinder was a vehicle within the meaning of the insurance contract. In construing a contract of insurance, the words used will be considered in their ordinary and popular sense. What, then, is the commonly accepted meaning of the word "vehicle?" We think the common meaning is: "That in or on which a person or thing is or may be carried from one place to another, esp. along the ground, also through the air; any moving support or container fitted or used for the conveyance of bulky objects; a means of conveyance." Webster's New International Dictionary. One of the definitions of the word "trailer" by the same authority is: "A nonautomotive highway vehicle designed to be hauled, as by a tractor, a motor truck, or a passenger automobile." Giving the words of the policy their ordinary and usual significance, it seems to us that the hay grinder and its four wheeled support are within the exclusionary provision.

We think the foregoing decision is supported by ample authority. It has been held that a mowing machine is a vehicle. *Trussell v. Ferguson,* 122 Neb. 82, 239 N. W. 461. A thresher and cleaner mounted on axles and wheels while being drawn from farm to farm has been held to be a ve-

hicle. *Vincent v. Taylor Bros.*, 180 App. Div. 818, 168 N. Y. Supp. 287. A child's conveyance constructed from the frame of a pony buggy having front and back axles and four wheels from a Ford automobile was held to be a vehicle. *Waddey v. Maryland Casualty Co.*, 171 Tenn. 112, 100 S. W. (2d) 984. A bobsled towed behind an automobile has been held to be a vehicle and trailer. *Long v. Hicks*, 173 Wash. 17, 21 Pac. (2d) 281. A horse-drawn road grader going to place of work was held to be a vehicle in *Sant v. Continental Life Ins. Co.*, 49 Idaho, 691, 291 Pac. 1072. And in *Maryland Casualty Co. v. Cross*, 112 Fed. (2d) 58, it was held that a two-wheeled vehicle attached to the rear of an automobile for carrying tools and materials is a trailer or a vehicle used as a trailer within an exclusionary provision of an insurance contract.

There is much in the briefs regarding definitions contained in chapter 39, Comp. St. Supp. 1939. We realize that for purposes of classification for licensing or taxing the legislature often must define the terms used to adequately express the purpose of a legislative act. But such definitions do not change the common meanings of words used in matters disconnected therewith, unless such definitions be adopted by reference. The legislative definition of terms used is ordinarily limited to the act itself, or matters incidental to it.

Plaintiff contends for the rule that in case of ambiguity or uncertainty the meaning thereof should be resolved against the insurer, it being the one who prepared the contract. As a principle of law, the statement is correct. But the court must not indulge in scholastic subtleties to make words with certainty of meaning ambiguous in order to apply the rule. In the words of the late Judge Sanborn: "This rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured." *Standard Life & Accident Ins. Co. v. McNulty*, 157 Fed. 224. See *Gorman v. Fidelity & Casualty Co. of New York*, 55 Fed. (2d) 4.

We conclude that the hay grinder herein described was a

trailer or vehicle within the common and ordinary meaning of the words used in the exclusionary clause of the policy and that our former opinion appearing in 139 Neb. 512, 297 N. W. 918, is in error in holding to the contrary.

AFFIRMED.

GUY N. SCOTT ET AL., APPELLEES, V. METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK, APPELLANT.

300 N. W. 835

FILED NOVEMBER 21, 1941. No. 31204.

1. **Witnesses.** The introduction in evidence of a proof of death by the physician of the assured, containing statements as to the cause of death, does not ordinarily waive the provisions of the statute against physicians testifying concerning information received in the course of professional employment.
2. **Insurance.** Whether the failure of an assured to answer completely the questions asked regarding previous consultations with physicians is a sufficient misrepresentation to avoid a policy of insurance is a question for the jury, where the evidence is not conclusive that said misrepresentation was material to the insurance risk or that it was made with intent to deceive or defraud.
3. ———. In order to defeat a recovery because of the falsity of a representation, the company must show that the representations made were false, that they were made knowingly by the assured with intent to deceive, that they were material to the risk and relied upon by the company.
4. ———. If the evidence be in conflict upon any one or all of the elements constituting the foregoing defense, the question is one for the jury.

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

Beghtol, Foe & Rankin and *Walter E. Nolte,* for appellant.

Kenneth S. Wherry, contra.

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

CARTER, J.

This is an action at law to recover $1,000 alleged to be due the plaintiffs on a policy of life insurance written by the defendant upon the life of Hazel S. Scott, plaintiffs' mother. From a verdict and judgment for plaintiffs the defendant appeals.

The record shows that the policy was issued on March 7, 1939, and that all premiums had been paid. The defendant alleges, however, that the assured made false and fraudulent statements in making application for the policy by stating that her health was excellent when she was in fact suffering from cancer, and by stating that she had consulted no physicians, healers or other practitioners and attended no clinics or hospitals during the five years immediately prior to making the application, except one, when in truth and fact several doctors had been consulted during the period. Defendant alleges that said false and fraudulent statements were relied on by the company in accepting the application, and by their medical examiners in making the medical examination, to such an extent that the policy would not have been issued if such false and fraudulent statements had not been made. These issues were submitted to the jury and decided favorably to plaintiffs.

The defendant complains chiefly on the refusal of the trial court to admit certain testimony of Dr. C. W. Thomas in evidence. The offer of proof made shows that Dr. Thomas would testify that during the years 1931 to 1935, inclusive, on occasions when the relationship of physician and patient existed, he had diagnosed the case of Hazel S. Scott as cancer and that he had at that time advised her of this condition. Was this evidence admissible? We think not.

Our statute, section 20-1206, Comp. St. 1929, bars such evidence as incompetent upon objection being made that it is a privileged communication. Under section 20-1207, Comp. St. 1929, it is provided that such evidence may be admitted if the privilege be waived or if the party in whose favor the privilege exists shall offer evidence with reference to the physical or mental condition of the person involved, or the alleged cause thereof.

It is first urged that the physician's certificate showing the cause of death, furnished by the beneficiaries as a part of the proofs of death and offered in evidence by plaintiffs, constitutes such a waiver. According to the weight of authority, where an insurance policy does not contain a provision for a waiver of the privilege, the introduction in evidence of a certificate of death by an assured's physician does not waive the provisions of the statute against physicians testifying to privileged communications received in the course of professional employment. *Fidelity & Casualty Co. v. Meyer,* 106 Ark. 91, 152 S. W. 995. The defendant, under the guise of ascertaining the fact of death, has no right to insist upon information concerning the cause of death as that is not relative to the requirements of the policy. Physicians' statements contained in a proof of death concerning the nature and extent of the last sickness must be regarded as gratuitous.

The record shows a written waiver of the privilege given by one of the beneficiaries. It is limited in time by its terms to a period of three years immediately prior to its date. The offered testimony of Dr. Thomas, drawn in question here, concerned knowledge and happenings occurring outside the scope of the waiver. Clearly, the waiver can have no application to such evidence. Our examination of the record reveals that the trial court, in the light of the rules herein announced, ruled correctly on all objections made to the introduction of evidence by the defendant. There is evidence in the record that the assured had consulted with physicians within five years of the making of the application for insurance which were not therein listed. The evidence shows that she was treated for colds, overly tense nerves, indigestion and minor things common to most persons. There is nothing in the record to show that any of these things were related to or material to the insurance risk. Nor does it appear from the evidence in the record that such incomplete answers were made with intent to deceive or defraud, except such inference as may be drawn from the fact that the answers were incomplete. Clearly,

this raised a question for the jury which is foreclosed by the verdict.

The evidence shows that the assured was advised on November 6, 1939, or within a few days thereafter, that she was suffering from a cancer. There is evidence in the record that it would take at least one year for the cancer to reach the stage of development to which it had progressed at the time of its discovery. Other physicians testified to the uncertainty of trying to fix the period required for the cancer to develop to the stage in which it was found. Whether or not the cancer actually existed on the date the policy was issued is a question of fact under the record for the jury to determine. There is no competent evidence in the record that assured knew she had a malignant condition when she applied for the policy of insurance. The applicable rule is well stated in *Carpenter v. Sun Indemnity Co.*, 138 Neb. 552, 293 N. W. 400, wherein this court said:

"In order for alleged misrepresentations in an application for insurance to constitute a defense to an action on the insurance contract evidenced by the policy in writing, it is incumbent upon the insurance company to plead and prove: (1) That the statements and answers were made as written in the application; (2) that they were false; (3) that they were false in some particular material to the insurance risk; (4) that they were made knowingly by the insured with the intent to deceive; (5) that the insurance company relied and acted upon such statements or representations, and was deceived by them to its injury; (6) that the false statements so relied upon constitute a part of the completed application indorsed upon or annexed to the insurance policy in suit as delivered to the assured."

We think that the trial court was right in submitting the case to the jury and that the evidence was sufficient to sustain the verdict returned.

AFFIRMED.

EDWIN YODER ET AL., APPELLEES, V. NU-ENAMEL CORPORATION, APPELLANT.

300 N. W. 840

FILED NOVEMBER 21, 1941. No. 31219.

1. **Corporations.** Where a foreign corporation enters the state to transact business therein and fails to designate, as provided by section 24-1201, Comp. St. 1929, an agent or agents upon whom legal process may be served as against the corporation, valid service of process may be made against the corporation upon the state auditor without special appointment of such officer as its agent; and such service extends to all actions relating to any transactions by the foreign corporation while in the state, though it may have ceased to do business in or may have withdrawn from the state prior to the bringing of the action.
2. **Case Overruled.** The decision of this court in *Schwabe v. American Rural Credits Ass'n*, 104 Neb. 46, 175 N. W. 673, is overruled in so far as such decision is in conflict with the decision in this case.
3. **Courts.** A case is not authority for any point not necessary to be passed on in order to decide the cause. *Bliss v. Beck*, 80 Neb. 290, 114 N. W. 162.
4. ———. "For court's opinion to be binding as precedent, there must have been application of judicial mind to precise question necessary to determine in order to fix parties' rights." *Mutual Benefit Health & Accident Ass'n v. Bowman*, 99 Fed. (2d) 856.

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

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

Sterling F. Mutz, contra.

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

MESSMORE, J.

This is an action at law to recover a stipulated amount of money pursuant to and under a contract entered into between Nu-Enamel Nebraska Company, one of the plaintiffs, and the Nu-Enamel Corporation of Dover, Delaware, defendant. The issue to be determined is whether or not the district court acquired jurisdiction over the person of the

defendant. The issue was properly raised by special appearance, objecting to the jurisdiction of the court. The special appearance was overruled. The defendant answered and preserved the jurisdictional question therein. A jury was waived; trial had to the court on the merits, resulting in a judgment for the plaintiffs in the sum of $1,296.80 and costs. Defendant appeals.

The defendant is a Delaware corporation, with its principal place of business at Cleveland, Ohio. It had never qualified in Nebraska or appointed a resident agent for service of process to be had upon it, as required by section 24-1201, Comp. St. 1929. Some time prior to September, 1937, the defendant, engaged in the business of manufacturing and distributing Nu-Enamel paint products, sold from its factory in Ohio some of its merchandise to one Sternberg, who operated three retail stores in Omaha where he sold such products. Sternberg became indebted to defendant for the merchandise furnished. Defendant took possession of the three retail stores, merchandise and equipment as liquidation of the debt. After taking over the stores, defendant operated the business and at the same time endeavored to and did dispose of the stores October 29, 1937, when all of the merchandise, fixtures and appurtenances thereof were transferred to the plaintiffs by contract. The contract contained many provisions with reference to the handling of defendant's products, the length of time the contract was to run, the rights of the respective parties to terminate it, and the advertising displays incident to proper advertising. We deem it unnecessary to set out the contract in full. This action was started May 11, 1940.

Section 24-1201, Comp. St. 1929, the statute involved, provides in part: "Such foreign corporation shall also make and file a certificate * * * appointing an agent or agents in this state, * * * upon whom process, or other legal notice of the commencement of any legal proceeding, or in the prosecution thereof, may be served; and such service of process or of any such other legal notice, as aforesaid upon the auditor of public accounts, or upon any such agent, or

agents, shall constitute valid service upon such corporation in all courts of this state, in counties where the cause of action, or some part thereof, arose, or in counties where the contract, or portion thereof entered into by such corporation has been violated or is to be performed." Service of summons was made on the state auditor of public accounts, as provided by the statute.

The defendant, as shown by the record, transacted business in this state without qualifying and without appointing a resident agent. This situation presents the question: Under such circumstances, do the statutes of Nebraska authorize service of summons to be made upon the state auditor of public accounts as against the defendant?

The language in *Schwabe v. American Rural Credits Ass'n*, 104 Neb. 46, 175 N. W. 673, as follows: "At the time service was attempted the association had never domesticated itself; it had never filed the written authority which the law requires, authorizing the auditor to accept service for it," seemingly supports the defendant's contention that, under such circumstances, the service of process, as had in the instant case, is erroneous. In this connection, this court held in the cases of *Buckley v. Advance Rumely Thresher Co.*, 106 Neb. 214, 183 N. W. 105, and *Wilken v. Moorman Mfg. Co.*, 121 Neb. 1, 235 N. W. 671, in substance, as follows: Where a foreign corporation is doing business in this state, valid service of process may be made against it upon the state auditor, without specific appointment of such officer as its agent. In so holding no mention is made of the language in *Schwabe v. American Rural Credits Ass'n, supra,* as heretofore stated, on this proposition. This presents a conflict as between the *Schwabe* case and *Wilken v. Moorman Mfg. Co., supra,* and *Buckley v. Advance Rumely Thresher Co., supra,* on this particular point. Such situation warrants the overruling of *Schwabe v. American Rural Credits Ass'n, supra,* in so far as it is in conflict with the holding in the *Buckley* and *Wilken* cases, on the point herein discussed.

The important question presented in the instant case is:

Assuming that the state auditor was the agent of the defendant for the purpose of serving process on it as provided in section 24-1201, Comp. St. 1929, is such service effective when made on the state auditor, after the corporation has ceased to do business in the state, in a cause of action, arising out of its previous transaction of business therein?

It will be noted that the language of the statute under consideration is silent as to when the authority of the state auditor to accept service of summons on the foreign corporation is intended to terminate. The question resolves itself into one of judicial construction.

In *Schwabe v. American Rural Credits Ass'n, supra,* the special appearance of a foreign corporation, objecting to the jurisdiction of the court, was sustained. There were three attempts to make service of summons under the provision of the statute in question. The last summons was issued to the sheriff of Lancaster county. The return showed service upon the deputy state auditor, who did not send copy of the summons to the defendant corporation, but returned it to the clerk of the district court, with a letter stating that service could not be made upon him for the reason that the corporation has never domesticated itself in the state. It is obvious, from a reading of the statute, that this service was erroneous and sufficient to conclude the case in favor of the foreign corporation without further statement by the court. However, the court went further and used the following language: "At the time service was attempted the association had never domesticated itself; it had never filed the written authority which the law requires, authorizing the auditor to accept service for it (this question has been determined by authorities cited in the instant case); and, furthermore, as the record shows, *it was not at that time, and had not been for a long period prior thereto, attempting to do business in this state, but had quit the state.*" (Italics ours.) This last-mentioned language is *dictum.* The federal circuit court of appeals, in the case of *Yoder v. Nu-Enamel Corporation,* 117 Fed. (2d) 488, sustained the defendant's special appearance, objecting to the jurisdiction of the

court in the instant case, basing its decision on this *dictum*, and setting forth the authorities wherein such court was required to follow the indication of the decisions of this court on the question involved. The logical rule is reflected by the following authorities:

In 8 Thompson, Corporations (3d ed.) 1014, sec. 6727, it is said: "The general rule is that where a foreign corporation consents, on coming into a domestic state to do business, that service on a designated state officer shall be a valid service on the company, that consent extends to all actions relating to any business done by the company while in the state, though it may have ceased to do business or have withdrawn from the state prior to the bringing of the action."

In 21 R. C. L. 1344, sec. 94, in discussing cessation of business and withdrawal from the state, the author says "that a corporation cannot by * * * withdrawing from the state escape from the jurisdiction of the courts of the state as to an action brought by a citizen of the state or one arising from a contract made while the corporation is engaged in business in the state." See cases cited in note 14; also, annotation, 45 A. L. R. 1447.

The weight of authority, under statutes corresponding to the statute involved in the instant case, definitely supports the logical and salutary rule as indicated in the preceding authorities. We firmly believe that the intent of the legislature, in adopting the statutory provisions herein discussed, was not to require the plaintiffs, in a situation as here presented, to travel to Cleveland, Ohio, at great expense, to have their rights adjudicated under a Nebraska contract.

Construing the *dictum* contained in *Schwabe v. American Rural Credits Ass'n, supra,* which constituted the basis of the decision in *Yoder v. Nu-Enamel Corporation, supra,* the following authorities are applicable:

A case is not authority for any point not necessary to be passed on in order to decide the cause. *Bliss v. Beck,* 80 Neb. 290, 114 N. W. 162. "For court's opinion to be binding

as precedent, there must have been application of judicial mind to precise question necessary to determine in order to fix parties' rights." *Mutual Benefit Health & Accident Ass'n v. Bowman,* 99 Fed. (2d) 856.

The precise question before the court in *Schwabe v. American Rural Credits Ass'n, supra,* was the manner and form of the service attempted. The precise question to which the language, constituting the *dictum,* would apply was not before the court and, obviously, not necessary to determine.

We conclude that the case of *Schwabe v. American Rural Credits Ass'n, supra,* be and is hereby overruled in all respects wherein the decision therein conflicts with the decision in the instant case.

The judgment of the district court in overruling the defendant's special appearance, objecting to the jurisdiction of the court over the person of defendant, is

AFFIRMED.

EDGAR BURKHOLDER, APPELLANT, V. KATIE E. CLARK, EXECUTRIX, APPELLEE.

300 N. W. 839

FILED NOVEMBER 21, 1941. No. 31303.

1. **Workmen's Compensation.** The burden of proof is on the employee to prove by a preponderance of the evidence that his claim comes within the provisions of the workmen's compensation act, as is required by law.
2. ———. Evidence examined and *held* insufficient to show that the injury sustained by plaintiff occurred in the regular trade, business, profession or vocation of his employer, within the meaning of section 48-106, Comp. St. 1929.

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

Hubka & Hubka, for appellant.

Sackett, Brewster & Sackett, contra.

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

MESSMORE, J.

This is a compensation case. The Nebraska workmen's compensation court found for the plaintiff and awarded compensation for total permanent disability. From this award defendant appealed to the district court, which found for the defendant, setting aside the award of the compensation court and dismissing plaintiff's cause of action. Plaintiff appeals, contending the district court was in error in that its finding and judgment were contrary to the evidence and the law.

The evidence discloses that the plaintiff, a painter and paper hanger, had worked on several occasions for one E. L. Call, now deceased, who owned about 12 pieces of rental property in the city of Beatrice, Nebraska. In addition, he owned several lots, upon which were situated a large barn and the residence of Call. The plaintiff was finishing the painting of this barn when he fell and severely injured himself, resulting in permanent disability.

The contention of the plaintiff is that the injury sustained by him occurred in the regular trade, business, profession or vocation of his employer, Call. Comp. St. 1929, sec. 48-106. This contention is based on the fact that the plaintiff had worked for Call on his rental properties on different occasions over a period of eight years.

The cases of *Kaplan v. Gaskill,* 108 Neb. 455, 187 N. W. 943, cited by defendant, and *Bauer v. Anderson,* 114 Neb. 326, 207 N. W. 508, cited by plaintiff, to support their respective positions, disclose that the workmen in both instances were working on rental properties of the employers, while in the instant case definitely the plaintiff was working on the residence property of Call, as distinguished from rental property. In view of the circumstances, we conclude that the plaintiff was not injured in the usual course of the trade, business, profession or vocation of his employer, within the meaning of the workmen's compensation act. Comp. St. 1929, sec. 48-106.

The plaintiff has failed to prove by a preponderance of the evidence that his claim comes within the provisions of the workmen's compensation act, as is required by law. See *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Cunningham v. Armour & Co.,* 133 Neb. 598, 276 N. W. 393.

The judgment of the district court is

AFFIRMED.

FRED MORROW V. STATE OF NEBRASKA
300 N. W. 843

FILED NOVEMBER 21, 1941. No. 31232.

1. **Criminal Law.** The commencement of a criminal action is by filing a criminal complaint.
2. ———. In order that jurisdiction may be conferred upon a magistrate, a complaint must be filed agreeable to the provisions of section 29-404, Comp. St. 1929.
3. **Oath.** An oath to be valid must be an outward pledge by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God.
4. **Criminal Law.** "The district court shall hear and determine any cause brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside." Comp. St. 1929, sec. 29-613.
5. ———. The right of a *de facto* deputy county attorney to act as such is not triable under a plea in abatement in a criminal action.

ERROR to the district court for Douglas county: HENRY J. BEAL, JUDGE. *Reversed, with directions.*

Boyle & Boyle, for plaintiff in error.

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

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

YEAGER, J.

This is a criminal action which was commenced by the filing of a complaint in the municipal court of the city of Omaha, Douglas county, Nebraska, wherein the defendant, plaintiff in error, Fred Morrow, also known as Fred Marrow, in the language of the statute was charged with keeping and exhibiting gaming tables, devices and apparatus, to win or gain money or other property of value. A warrant was duly issued and the defendant was brought to trial before the court on November 9, 1939. He was duly and regularly arraigned and pleaded not guilty, whereupon a trial was had and the defendant was found guilty and sentence was imposed. From the judgment and sentence of the municipal court an appeal was taken to the district court for Douglas county.

On December 9, 1940, in the district court, the defendant moved to quash the complaint on account of defects appearing on the face of the complaint. This motion and the defects pointed out will be specifically discussed later on in this opinion. On the same day a plea in abatement was filed. On December 12, 1940, the motion to quash was overruled as was also the plea in abatement. Following these rulings the defendant was arraigned and, having refused to plead, a plea of not guilty was entered. After the entry of the plea a jury was duly impaneled. At this point the defendant objected to the presentation of the prosecution by Alfred A. Raneri on the ground that he was not a deputy county attorney. This objection was sustained, whereupon the formality of his appointment was carried out and he was then, over objection of the defendant, permitted, with a regular deputy county attorney, to continue to represent the prosecution. The trial then proceeded, resulting in conviction and sentence of the defendant on the charge contained in the complaint.

From this conviction and sentence the defendant has prosecuted error to this court.

The first assignment of error presented is the ruling of the district court on defendant's motion to quash the com-

plaint. The objection is that the complaint is defective in form, and that it is improperly verified. Omitting formal parts the commencement is as follows: "The complaint and information of James T. English, county attorney, by Alfred A. Raneri, deputy of Douglas county aforesaid, made in the name of the state of Nebraska, before the judge of the municipal court, within and for the city of Omaha, in said county, this 26th day of October A. D., 1939, who, being duly sworn, on his oath says * * *." The complaint is signed and verified as follows: "James T. English, county attorney, by Alfred A. Raneri, deputy. Subscribed in my presence and sworn to before me this 26th day of October, 1939. Geo. Holmes, judge of the municipal court of the city of Omaha."

The commencement of a criminal action is by filing a criminal complaint. Section 29-404, Comp. St. 1929, is the applicable provision and is as follows: "Whenever a complaint in writing and upon oath, signed by the complainant, shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed."

This statute applies to felonies and misdemeanors alike as becomes apparent from a reading of section 29-402, Comp. St. 1929, which is a part of the same legislative act.

In order to confer jurisdiction upon a magistrate in a criminal case, a complaint must be filed agreeable to the provisions of this section of the statute. *White v. State,* 28 Neb. 341, 44 N. W. 443. This rule is supported by the decisions of other jurisdictions. *Ex parte Burford,* 3 Cranch (U. S.) *448, 2 L. Ed. 495; *Curl v. People,* 53 Colo. 578, 127 Pac. 951; *Bissell v. Gold,* 1 Wend. (N. Y.) 210. There is sound reason for the rule which received the recognition of the common law. The reasoning is well stated in 4 Am. Jur. 11, sec. 11, as follows: "To prevent illegal restraint for trivial causes, the general rule of the common law is that, except where the gravity of the offense seems to justify an

immediate arrest without a warrant, or a crime has been committed in the presence of the officer or person making the arrest, no arrest may lawfully be made until a warrant has been issued after formal charge filed with a magistrate or court having jurisdiction of the subject-matter. No arrest for a misdemeanor committed outside the presence of the one complaining should be made without a warrant based on a proper affidavit."

As will be observed there must be a complaint which must be in writing. The complaint must also be on the oath of the complainant. Certain of these essentials were in no sense complied with. It is sufficiently clear that James T. English, described as county attorney, is the complainant. It is also clear that the complaint is neither signed by him nor on his oath. On the face of the complaint it appears conclusively that all of the mechanics of signing and taking oath were performed for the complainant by Alfred A. Raneri who was described as a deputy county attorney.

The requirements of the statute in question were not satisfied by the taking of an oath for James T. English by Alfred A. Raneri. There was no legal oath. This court in *Pumphrey v. State,* 84 Neb. 636, 122 N. W. 19, has approved Bouvier's definition of an oath as "an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God." The complaint was on its face clearly defective.

In the municipal court no objection was raised as to the form or sufficiency of the complaint, and the defendant was duly and regularly arraigned and proceeded to trial. In that court he waived the defect. The question now arises, having waived the defects apparent on the face of the complaint in the municipal court, did he have the right to raise the question on his appeal to the district court?

This question is answered by section 29-613, Comp. St. 1929, which is as follows: "The district court shall hear and determine any cause brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at

any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside."

It necessarily follows that, on attention being called to the defective complaint in question by motion to quash before plea, it became the duty of the district court to order a new and proper complaint to be filed, and thereafter to proceed with the trial on such new complaint.

Another error assigned is that the court erred in allowing Alfred A. Raneri to conduct the prosecution, it being asserted that he was not a duly and regularly qualified deputy county attorney. This objection is without merit. In the first place, Alfred A. Raneri, under the record presented here, was a *de facto* deputy county attorney, and his right to act in the capacity outlined herein was not triable under a plea in abatement. *Gragg v. State,* 112 Neb. 732, 201 N. W. 338.

The other errors complained of are directed to the sufficiency of the evidence to sustain a conviction. It would be an usurpation of power for this court to pass upon the sufficiency of this evidence in advance of its presentation to a jury upon a proper and sufficient complaint.

The district court should have sustained the motion of defendant to quash and should have ordered the filing of a proper and sufficient complaint.

We conclude, therefore, that the conviction of the defendant should be, and it is, reversed and the cause is remanded, with directions to proceed in compliance with the law as set forth herein.

REVERSED.

PAINE, J., dissenting.

The last portion of section 29-2308, Comp. St. 1929, reads as follows: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an

examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

This law has been in force since 1921, and I desire to set out some of the facts in this record, and then submit the question whether this is not the exact situation for which this law was designed in order to avoid a miscarriage of justice.

In the case at bar, it is disclosed that on October 18, 1939, the return to the search warrant issued in this case recited that a number of Saratoga slot machines, race horse machines, Chuck-a-Luck dice games, and other gambling paraphernalia had been seized by the police force of Omaha.

On October 26, 1939, a complaint was filed, which read, "The complaint and information of James T. English, county attorney, by Alfred A. Raneri, deputy of Douglas county aforesaid," which complaint was signed and sworn to by Alfred A. Raneri under the form above set out before George Holmes, judge of the municipal court of the city of Omaha.

The defendant was arrested and brought into court and, having waived any defect appearing on the face of the complaint, was regularly arraigned and pleaded not guilty, and trial was had. Thirteen witnesses were examined. He was adjudged guilty by the court and fined $500 and sentenced to three months in the county jail by the municipal judge, Dennis E. O'Brien.

The bill of exceptions in this case shows that on December 12, 1940, this case came on for trial before Henry J. Beal, one of the district judges, and a jury. The attorney for defendant before arraignment moved the court to discharge the defendant upon several grounds, principally because Alfred A. Raneri, who signed the complaint as deputy county attorney, is not a deputy county attorney of said county, and that he has never given a bond as required by law, and in support of said motion Alfred A. Raneri was called to the witness-stand and testified that he was city prosecutor, and assistant city attorney, and deputy county attorney, by appointment of James T. English, county attorney, in writing, but admitted that he had never filed a bond.

Thereupon, Rudolph Tesar was called as a witness and testified that he had been deputy county attorney for six years. He was asked if Alfred A. Raneri was a deputy county attorney and testified that he was a special deputy county attorney, assigned to the police station.

A recess was thereupon taken until 2 o'clock, and counsel for defendant examined Alfred A. Raneri further as a witness. He stated that his written appointment from James T. English was dated July 18, 1939, and was a general delegation of power. When asked to give a rough idea of how many cases he handled for the county, he stated that one-half of the cases he handled in police court were state cases under state complaints, and that they would run to between 150 and 200 cases a week, and upon cross-examination stated that he handled state complaints in misdemeanor cases as a deputy county attorney, and had been in the performance of such duties since his appointment, and had signed all of these complaints in the same manner.

A recess was then taken until 3:40 o'clock, at which time the defendant was called before the court for arraignment. Objection was made by his counsel that there was no valid or sufficient complaint filed, and that Alfred A. Raneri is not a deputy county attorney, and has no right to use the name. Defendant stood mute when the complaint was read to him.

Eighteen men were called into the box as prospective jurors, and thereupon the defendant's counsel objected to Alfred A. Raneri proceeding with the impaneling of the jury on the part of the state. The court sustained the motion, and James T. English, county attorney, proceeded to impanel the jury, and thereafter court adjourned until Friday, December 13, 1940, at which time the jury, having been duly impaneled and sworn, were excused from the room.

County attorney James T. English thereupon made a statement to the court that, as objection had been made to Mr. Raneri proceeding with the trial because he had not posted a bond, he now informed the court that he had now furnished bond, and such bond was introduced in evidence

as exhibit No. 1, in the sum of $1,000, running to the county of Douglas, and signed by Alfred A. Raneri as principal and the Fidelity & Deposit Company of Maryland as surety. On the back of said bond appears the signature of Alfred A. Raneri to a short oath, and also to a much longer oath to the effect that he will faithfully discharge the duties of deputy county attorney, and on the same day said bond was duly approved by Willis G. Sears, one of the district judges of Douglas county, and said bond bears the filing mark showing it was filed by the county clerk on the same day, December 13, 1940.

Thereupon, counsel for the defendant enters a long objection to the appointment of Alfred A. Raneri, and to the bond, being exhibit No. 1, and insists that the bond must be approved by the county commissioners. However, section 26-904, Comp. St. 1929, provides that the bond shall be approved by the judge in district court, therefore the motion is overruled, and the bond is received in evidence. Thereupon, the jury were called into the room, and the trial proceeded with the introduction of evidence.

Alfred A. Raneri, as deputy county attorney, thereafter conducted the case in the district court, the bill of exceptions consisting of some 318 pages of the evidence of the witnesses as to the connection of the defendant with the gambling machines, the evidence disclosing that the defendant operated a concern known as the Central Distributing Company, at 1462 South Thirteenth street, which place was raided under the search warrant, and a large number of machines were found, and also keys which fitted machines placed in various establishments in Omaha.

The evidence of William H. Graham shows that he was employed in the editorial department of the Omaha World-Herald, and visited a number of places where Saratoga machines were installed, and saw machines in operation; that he played one of these machines in Roy La Rue's establishment between Twenty-third and Twenty-fourth streets on Ames avenue, and spent 80 cents, struck a winning combination on the slot machine, and received 15 cents; that at

Sharley's Club he saw many people playing the slot machine, and when they resulted in a winning combination they paid out in nickels. The 15 cents for winning was paid by the bartender. At the establishment of Charlie Hutter, 2322 N street, he played somewhere between $1 and $1.50, and got back 15 cents.

Mr. Graham testified that it was a part of his job to study these slot machines; that he had seen the insides of a large number of them during the Hopkins administration, when some 500 of them were in the courthouse, and since sheriff Dorrance came in, Graham testified, he had examined and done a little work on perhaps 50 of them, and then he gave definite testimony as to how the machine, exhibit No. 5, taken out of Roy La Rue's place, worked. He said it was a slot machine manufactured by the Pace Manufacturing Company of Chicago.

The evidence disclosed that, when the defendant's employee went to these establishments in a pick-up truck licensed in the defendant's name, the nickels were poured out and divided, the bartender taking half of them and the defendant's agent taking the balance away with him.

With this statement of the facts before us, may we examine the law. We find in *Gragg v. State,* 112 Neb. 732, 201 N. W. 338, a plea in abatement was filed, charging that the pretended acts as county attorney were without authority of law and of no force and effect. The record shows that the appointment was regular, but he did not take the official oath, nor file a bond, but he had performed the duties of county attorney, and had been recognized as county attorney. The plea in abatement was overruled, and this court held that, where one is regularly employed to act, and is performing the duties of a county attorney, even though he has not given the statutory bond, or taken the required oath, such person is a county attorney *de facto.* At page 736 the court has this to say: "However, the title to a public office cannot be collaterally attacked, nor can it be determined under a plea in abatement, but ordinarily by *quo warranto.* 32 Cyc. 691."

In the case of *Baker v. State*, 112 Neb. 654, 200 N. W. 876, in which a deputy county treasurer was charged with embezzling money, it was contended that his conviction could not stand because he had not taken the oath nor filed the bond, but this court affirmed the judgment sentencing him to the penitentiary.

Professor Lester B. Orfield, author of a recent text-book, "Criminal Appeals in America," and a member of the commission just appointed by the United States supreme court to prepare a new criminal code, in an article in 13 Neb. Law Bulletin, beginning at page 179, in discussing a similar reversal on a technicality by this court in another case, says:

"The effect of section 29-2308, Neb. Comp. Stat. 1929, would seem to be to require affirmance here. This statute, adopted in 1921, is designed to prevent reversals for purely technical reasons. This of course does not mean that every case must be affirmed merely on a showing of guilt of the defendant. The statute does not strip the defendant of his constitutional rights, such as trial by jury, a public trial, and the privilege of immunity from self-incrimination. The statute does not do away with rights granted to defendants by the Constitution. Further than that it would seem to guarantee the defendant a fair trial. Apparent technicalities may prevent a fair trial in particular cases and defendants should be allowed to show that they have so prevented. But where no harm was done by the error the decision should be affirmed. Cases were once frequently reversed for slips in indictments. The statute would seem among other things to be aimed at such reversals. * * * In many cases of reversal, defendant is never brought to trial again, or if retried, is acquitted though the reversal was for purely technical reasons."

To sum up the matter, it appears that Alfred A. Raneri was duly appointed a deputy county attorney in writing on July 18, 1939, and filed more than 100 state complaints a week on an average, signing them the same as he signed the complaint in question; that counsel for the defendant in this case, in making a multitude of objections, happened to strike

the objection that Mr. Raneri had never filed a bond, which, it seems, through an oversight had been neglected. The next day, when the trial began, Mr. English, having stated that he knew nothing about the details of this case, showed to the court that since adjournment Mr. Raneri had filed the required bond, the same had been duly approved by a district judge, and filed with the county clerk, and thereafter Mr. Raneri conducted the case.

It appears to me that this oversight in neglecting to file a bond was not in any way prejudicial to the defendant. A raid was made on his establishment, and he was found in charge of the handling and management of these illegal gambling machines, and of keys which fitted those in many establishments.

Large numbers of witnesses testified in this case, which was tried in December, 1940. By the reversal of a case of this nature, and sending it back for retrial, it will ordinarily be found that it is difficult or impossible to secure these same witnesses, and, as happened in other similar cases, such a defendant will either not be brought to trial again, or, if brought to trial, by the impossibility of securing all of the witnesses he will be acquitted by the jury, although the evidence in this case sustains the verdict of the jury that he was guilty of the offenses charged.

In my opinion, the defendant in the case at bar was not deprived of his liberty without due process of law, as promised in section 3, art. I of the Constitution. He has been given a fair and impartial trial by a jury, as promised in section 6, art. I of our Constitution. He has faced the witnesses testifying against him, as required by section 11, art. I of our Constitution, and these witnesses gave such overwhelming and convincing evidence that the jury promtly returned a verdict of guilty.

I adopt the language of Judge Rose in his dissenting opinion in *Cooper v. State,* 120 Neb. 598, 234 N. W. 406, and close this dissent with his words: "I made 'an examination of the entire cause,' and I say with conviction there was no prejudicial error or miscarriage of justice in the proceed-

ings and sentence. Under the evidence a verdict of not guilty would have been a travesty on justice and a reproach to the law."

THOMAS W. BURCHMORE, APPELLEE, V. H. M. BYLLESBY & COMPANY, APPELLANT.

1 N. W. (2d) 327

FILED NOVEMBER 28, 1941. No. 31205.

1. **Principal and Agent.** "A principal is liable to third persons for the torts of his agent when committed in the course and within the scope of the agency, although the principal never authorized, participated in or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principal's business, but for a purpose personal to the agent himself." *Larson v. Fidelity Mutual Life Ass'n,* 71 Minn. 101, 73 N. W. 711.
2. **Conversion.** "To maintain an action for conversion of chattels, a party must have actual possession of the property, or the right to immediate possession." *Coulter v. Cummings,* 93 Neb. 646, 142 N. W. 109.
3. ———. "Conversion in law is unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of his goods, temporarily or permanently." *Coulter v. Cummings, supra.*
4. ———. "An action for conversion will not lie for the disposition of property which the plaintiff has authorized. If he has an action, it is for the price or value of the property. In such a case, in order to recover the value of the property, the plaintiff is required to prove that defendant expressly or impliedly agreed to pay him the purchase price, or the market value thereof." *Coulter v. Cummings, supra.*
5. **Limitation of Actions.** "An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Rucker v. Ward,* 131 Neb. 25, 267 N. W. 191.
6. ———. "If the fraud or mistake ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time such discovery

ought to have been made, for a plaintiff cannot excuse delay in instituting suit of his cause of action if his failure to discover it is attributable to his own neglect." *Sweley v. Fox*, 135 Neb. 780, 284 N. W. 318.

7. **Principal and Agent.** "An agent's statement is not binding upon his principal as an admission unless it is made within the scope of his real or apparent authority, during the continuance of his agency and while in the discharge of a duty thereunder." 20 Am. Jur. 505, sec. 596.
8. **Fraud.** "Restatements of the fraudulent representation do not of themselves constitute concealment, and where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfil his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations." *Feak v. Marion Steam Shovel Co.*, 84 Fed. (2d) 670, 107 A. L. R. 583.
9. **Appeal.** "A verdict of a jury whose finding is based upon conjecture and not on the evidence cannot be permitted to stand." *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5, 96 N. W. 998.
10. **Trial.** "It is the duty of a trial court to direct a verdict at the close of the evidence where the evidence is undisputed, or where evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment." *Fairmont Creamery Co. v. Thompson*, 139 Neb. 677, 298 N. W. 551.

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

Brown, Crossman, West, Barton & Fitch and *Edward A. Nelson*, for appellant.

Peter & Dalton and *M. L. Donovan, contra.*

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

SIMMONS, C. J.

This is an action to recover damages for the alleged conversion by Richard R. Blissard, a sales representative of the defendant, of a certificate of stock of the Fairmont Creamery Company belonging to Mary L. Burchmore. The plaintiff is an heir of, and assignee of, the claim from the estate

of Mary L. Burchmore. The defendant is an investment banking house.

The defense was that Blissard acted as an independent dealer in the sale of the stock; that defendant neither handled the stock nor received the proceeds; and had no knowledge of the transaction until after Mrs. Burchmore's death; that the action was barred by the statute of limitations, and that Mrs. Burchmore was negligent in the handling of the transaction, and plaintiff was estopped to maintain the action.

Defendant's motion for a directed verdict at the close of the trial was overruled. The jury found for the plaintiff. Defendant appeals.

The defendant is a corporation described as a banking investment house dealing generally in securities such as those involved in this action.

Blissard was a sales representative of the defendant from August 15, 1929, to January 31, 1934, and thereafter operated his own business as an independent dealer until his death February 11, 1938. By the terms of his employment Blissard was required, while employed by defendant, "to devote his entire energies" to the sale of defendant's securities, and all his transactions were to be subject to defendant's approval and for its account.

Mary L. Burchmore, who died January 20, 1938, was a customer of defendant during the time Blissard was employed by defendant, and Blissard generally handled her transactions with defendant. After he established his own business Mrs. Burchmore became his customer. In her will, executed September 23, 1931, Mrs. Burchmore named Blissard as executor. He made out her 1932 tax return. In December, 1935, she gave him access to her safety deposit box and in November, 1937, she gave him power of attorney to issue checks against her bank account.

Mrs. Burchmore became the owner of the stock involved in March of 1930. May 16, 1933, Blissard telephoned Buffett & Company, an investment house, and asked for an offer on the stock, received one, and some minutes later

called again and accepted the offer and agreed to deliver the stock to the Fairmont Creamery Company. That he did. The stock, when delivered, is referred to as "in bearer form," *i.e.*, it bore the signature of Mrs. Burchmore to an undated assignment in blank, witnessed by Blissard, and a guaranty by a bank official of Mrs. Burchmore's signature. The Fairmont Creamery Company verified the possession of the certificate to Buffett & Company, and Buffett & Company on the same day issued its check to Blissard in payment, and issued written confirmation of the sale and mailed it to "Bud Blissard" in care of the defendant. The record is silent as to where or when Mrs. Burchmore assigned the stock, where or when Blissard witnessed her signature, and where or when the bank official guaranteed her signature. It is likewise silent as to how or where Blissard came into possession of the stock or what his rights or instructions were in regard to the same. It is admitted that Blissard received the stock from Mrs. Burchmore about May 10, 1933. The record is likewise silent as to what disposition was made of the proceeds of the check. Blissard indorsed the check. It was paid by the bank on which it was drawn. Save such as may be inferred from his indorsement, there is no evidence that Blissard received the proceeds. Neither is it shown whether or not Mrs. Burchmore received the proceeds. In the bank where she kept a checking account at the time of this sale and immediately following, no deposit was made of a sum comparable to that for which the stock was sold.

After Mrs. Burchmore's death, there was found among her papers in her safety deposit box the following receipt:

"Richard R. Blissard Original
"Investment Securities
"1006 First National Bank Bldg. 2-28-1934
"Omaha, Nebr.
"Received of Mrs. John Burchmore
31 shs Fairmont Crmy 6½% Pfd #P4056
10 shs U. Stock Yards Omaha Com Certf #2867
"(Signed) R. R. Blissard"

This receipt, referred to as "Exhibit 18," will be discussed later herein. The circumstances under which it was issued are not shown. That it does refer to the stock involved in this action is not disputed.

The purchaser of the stock described Blissard as a "recognized dealer." At no point in the handling of the stock sale was Mrs. Burchmore disclosed to Buffett & Company as the owner of the stock, nor was the defendant in any way involved in the transaction, except such connection as may be inferred from the fact that Blissard was its sales representative and the confirmation was mailed to Blissard in care of the defendant. There is no evidence that the stock was ever in defendant's place of business or in the possession of any of its representatives other than as herein set out.

Defendant details in the evidence the complete method of handling the purchase of stock, beginning with the receipt issued to the seller in the Omaha office to and including confirmation notice mailed direct to the seller from defendant's Chicago office. It is patent that the sale of this stock was not handled by the defendant as all of its transactions were regularly handled and as its transactions were handled over a period of time for and with Mrs. Burchmore.

Mrs. Burchmore received from the Fairmont Creamery Company some 13 quarterly dividends of $50.38 each on this stock. The last one was for April 1, 1933. Included in the last five remittances were small dividend payments on common stock. After April 1, 1933, she received some 18 payments of small quarterly dividends of from $5 to $10 on her common stock with the Fairmont Company.

From the date of the sale of her stock by Blissard, May 16, 1933, to the date of her death January 20, 1938, Mrs. Burchmore made no inquiry of the defendant regarding this stock and presented no claim to the defendant based upon an alleged conversion of this stock or otherwise. Neither did she ever contend to the Fairmont Company, to Buffett & Company, or to any one else that the stock had been converted or wrongfully handled by them or Blissard.

The defendant had no notice of this transaction until after the death of Mrs. Burchmore. After her death and Blissard's death, her heir has attempted to piece together his theory of what happened. The action herein appears, from the court's instructions to the jury, to have been filed August 19, 1939.

Defendant, by appropriate assignments of error, assails the judgment on the grounds that the evidence establishes that Blissard sold the stock as an individual dealer and for Mrs. Burchmore; that the evidence does not establish a conversion of the stock by Blissard; that the action is barred by section 20-207, Comp. St. 1929; and that the trial judge erred in the admission in evidence of exhibit 18 for any purpose.

Plaintiff to sustain the judgment contends that where an agency exists and the principal is disclosed, and the act was within the scope of the agent's authority, it will be presumed that it was done in behalf of and with the intent to bind the principal; that the burden rests upon the defendant to establish its affirmative defense that Blissard acted in his private capacity; that a principal who puts an agent in a position to commit a fraud is liable to the defrauded person where the act is done within the scope of his authority; and that whether or not Blissard was acting for his principal within the scope of his authority or for himself individually is a question of fact for the jury.

Upon what theory can a judgment for the plaintiff be sustained?

The problem here is not one of disputed facts but rather disputed conclusions drawn from those facts. A court is not at liberty to conjecture, nor a jury to imagine, the facts which appear to have been known only by Blissard and Mrs. Burchmore. Their lips are sealed by death. More than conjecture and imaginings is necessary to sustain a judgment requiring one party to pay money to another.

If a wrongful act was committed by any one, it was done by Blissard (and that can only be a surmise based upon the fact that there is no proof that he accounted to

Mrs. Burchmore for the proceeds of the sale and upon the fact that he issued a receipt for the stock dated February 28, 1934, long after he had sold it and did not have it in his possession). But Blissard is not a party to this action, and he is beyond the judgment of an earthly court. True, Blissard was the trusted employee of the defendant. It is likewise true that Mrs. Burchmore trusted him in her personal affairs as pointed out in the statement of facts recited heretofore.

Mrs. Burchmore placed this stock in the possession and control of Blissard, so indorsed as to permit him to sell it and receive the proceeds in the ordinary course of trade. Did she, in doing that, place it in the hands of Blissard personally or as an agent of the defendant? Blissard agreed to devote his "entire energies" to the service of the defendant and for its account, but that he did not do so is patent from this record. This, moreover, is clear from the record. From May, 1933, to her death in January, 1938, Mrs. Burchmore made no inquiry of defendant as to what disposition had been made of her stock, and why it had not been handled as her other transactions with defendant had been handled; nor did she advise defendant that she considered she was dealing with it and was looking to it for an accounting of the proceeds of the sale. Had she been dealing with the defendant, ordinary business prudence would have dictated such a course, but she did not take it.

Mrs. Burchmore had been receiving substantial dividends on the stock from the Fairmont Creamery Company. These stopped in the summer of 1933; yet she made no inquiry of the Fairmont Company to determine why, when a mere inquiry of that company would have disclosed that her stock had been sold by Blissard and that he had been paid its value. The conclusion is inescapable that Mrs. Burchmore trusted and looked to Blissard and Blissard alone in this transaction, and that it was either for his personal benefit or the benefit of Mrs. Burchmore.

In *Division No. 1, Railway Employees' Department, A. F. L., v. American State Bank,* 113 Neb. 196, 202 N. W.

632, this court approved the following statement of law: "A principal is liable to third parties for the torts of his agent when committed in the course and within the scope of the agency, although the principal never authorized, participated in or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principal's business, but for a purpose personal to the agent himself." Under this principle and the undisputed facts, the defendant is not liable.

Clearly, the case was pleaded and tried upon the theory that it was an action for the conversion of the stock, and under accepted rules that is the view which this court on appeal must take of the issue. Plaintiff here however presents the case as one of conversion of the proceeds of the sale.

Did plaintiff prove a conversion of the stock by Blissard? The amended petition alleges that on or about May 10, 1933, the defendant by and through Blissard "came into possession" of the stock certificate. Defendant by oral statement made at the opening of the trial admitted that on or about May 10, 1933, Blissard received the certificate from Mrs. Burchmore, "the owner thereof." But, as has been pointed out, the record is silent as to where, how, or under what conditions he received it. Was he to sell it, hold it for safe-keeping, or did he have any rights of property in it? Was it secured under any false pretext? The record contains no evidence on any of these matters.

In *Coulter v. Cummings*, 93 Neb. 646, 142 N. W. 109, this court reviewed an action brought to recover for the sale or conversion of capital stock of a corporation. Plaintiff had turned his shares of stock to the defendant. It was there held: "To maintain an action for conversion of chattels, a party must have actual possession of the property, or the right to immediate possession." Did Mrs. Burchmore have the right to the immediate possession of this certificate of stock when Blissard sold it? This record contains no evidence on that proposition. In *Coulter v. Cummings, supra,* it was further said:

"Plaintiff failed to testify that he was entitled to the possession of the stock in question at the time the action was begun. He produced no evidence that he ever demanded possession of the stock, or requested the defendant to pay him anything as the purchase price thereof. Conversion in law is unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of his goods, temporarily or permanently. * * * In order for the plaintiff to recover the value of his stock, it was necessary for him to show, by some competent evidence, that the defendant had promised to pay him its value."

(Syllabus) "An action for conversion will not lie for the disposition of property which the plaintiff has authorized. If he has an action, it is for the price or value of the property.

"In such a case, in order to recover the value of the property, the plaintiff is required to prove that defendant expressly or impliedly agreed to pay him the purchase price, or the market value thereof."

Was Blissard's sale of the stock "unauthorized" by Mrs. Burchmore? Did Blissard promise to pay Mrs. Burchmore the value of the stock or the proceeds from the sale? The evidence does not establish an unauthorized sale nor a promise to pay Mrs. Burchmore either the value of the stock or the proceeds of the sale.

The conclusion is inescapable that plaintiff has not proved the conversion upon which his cause of action is based.

Section 20-201, Comp. St. 1929, provides: "Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued."

Section 20-207, Comp. St. 1929, provides: "Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated;

an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

The rule early adopted and long followed by this court is: "An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Rucker v. Ward,* 131 Neb. 25, 267 N. W. 191. Again, in *Sweley v. Fox,* 135 Neb. 780, 284 N. W. 318, this court said: "If the fraud or mistake ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time such discovery ought to have been made, for a plaintiff cannot excuse delay in instituting suit of his cause of action if his failure to discover it is attributable to his own neglect. 17 R. C. L. 858, sec. 218; 44 A. L. R. 78, Ann.; 106 A. L. R. 1338, Ann." Under the issues as made up in this case, the burden was upon the plaintiff to prove facts that avoid the bar of the statute. *Baxter v. National Mtg. Loan Co.,* 128 Neb. 537, 259 N. W. 630. Did Mrs. Burchmore know of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery? Was the failure to discover the fact of the sale of her stock attributable to her own neglect? This record shows that Mrs. Burchmore had a considerable sum invested in, and that she bought and sold, securities. It shows that she knew how these transactions were handled. She assigned this stock so that it was possible for Blissard to sell it and do exactly what he did do. Why she did it or for what purpose no one knows. If, as plaintiff contends, it was placed in Blissard's hands to sell as a representative of the defendant, then she must have known, from the handling of her other business, that within a few days at most she should have received from the defendant a confirmation of the sale and a remittance of the proceeds. But she received no such confirmation and no such re-

mittance and for over five and a half years made no investigation and no inquiry. Certainly, a person of ordinary intelligence and prudence would have made that inquiry; even more so would one who had bought and sold such securities have made that inquiry. Nor can it be disputed that that inquiry would have caused to be revealed the fact that defendant had no part in the transaction and that Blissard had sold her stock and received payment. Clearly, that inquiry ought to have been made and the discovery could have been made in the summer of 1933. There is nothing in this record to indicate that the defendant's managing officers knew, or in the exercise of reasonable diligence could have discovered, the facts of this transaction.

Mrs. Burchmore had been receiving regular quarterly dividends on this stock. Those dividends stopped July 1, 1933. Would not a person of ordinary intelligence and prudence have inquired of the Fairmont Company as to why the dividend was not received? Should not such an inquiry have been made in July of 1933? Clearly, it would have revealed the sale of this stock by Blissard and that he had received payment therefor. Here again, under the undisputed facts and the law, the conclusion is clear that this action is barred by the statute of limitations for the failure of Mrs. Burchmore to institute proceedings within four years after the acquisition of knowledge of facts sufficient to put her on notice.

But plaintiff argues that exhibit 18 establishes the fact that Blissard perpetrated an unlawful concealment upon Mrs. Burchmore and that the concealment continued until her death.

Exhibit 18 was admitted by the court, over fully and amply stated objections of the defendant, for the purpose of showing that Mrs. Burchmore did not know as of February 28, 1934, that the stock had been sold by Blissard. It is Blissard's own receipt on his own form purportedly issued from his own place of business. It does not show when he received the stock or the condition under which

he received it. At most, it is but Blissard's admission that he had received the stock, a fact which was admitted at the beginning of the trial. It in no way refers to, binds, or attempts to bind, the defendant. Assuming that it was issued when dated, exhibit 18 was signed by Blissard a month after the termination of his employment with the defendant. Admittedly Blissard at that time had no authority to act for the defendant. The receipt does not purport to be the receipt of the defendant. It may indicate that Blissard had not paid Mrs. Burchmore the proceeds of the sale of the stock; it may indicate that he had concealed the sale from her; it may indicate that he represented to her that he had the stock at that time; it may also indicate that Mrs. Burchmore was at that time continuing to trust Blissard and look to him for its safe-keeping; but these are all conclusions which, if determined at all, must be arrived at from the study of the instrument itself unaided by any evidence as to the circumstances under which it was issued or how it came into the possession of Mrs. Burchmore. If the purpose and effect of the receipt were to deceive Mrs. Burchmore and conceal from her the sale of the stock, it was a purpose which Blissard had and an effect which he achieved for and on his own behalf, and not for and on behalf of the defendant, for whom he had no authority to act at that time. If exhibit 18 is proof of concealment it was Blissard's act of concealment, and not the act of the defendant.

Wherein is exhibit 18 admissible in an action against the defendant? The rule is that "An admission made before the declarant was employed as the agent of the party against whom it is sought to be used or after such employment had terminated cannot be received." 22 C. J. 380. "An agent's statement is not binding upon his principal as an admission unless it is made within the scope of his real or apparent authority, during the continuance of his agency and while in the discharge of a duty thereunder." 20 Am. Jur. 505, sec. 596. See, also, *Ellison v. Albright*, 41 Neb. 93, 59 N. W. 703; *Waits v. Columbia Fire Underwriters Agency*, 129 Neb. 207, 261 N. W. 170.

The trial court erred in admitting exhibit 18 in evidence. But even if admissible, exhibit 18 is of no assistance to the plaintiff. On the plaintiff's theory, two inferences must be drawn from it: One, Mrs. Burchmore was on February 28, 1934, inquiring of Blissard as to the whereabouts of her stock; two, Blissard fraudulently concealed from her the fact that he had sold her stock and represented to her that he had the stock in his possession.

As to the first, if this inference is true, then almost four years before her death and more than four years before the beginning of this action Mrs. Burchmore was not only put upon inquiry, but was actually inquiring, as to her stock. It does not appear to be questioned that, where the statute began to run as against Mrs. Burchmore, it continued to run as against the plaintiff after her death. See *Carden v. McGuirk*, 111 Neb. 350, 196 N. W. 698.

As to the second, while it may be argued that Mrs. Burchmore was persuaded by Blissard in February, 1934, that he had her stock in his possession at that time, yet the undisputed evidence shows, as has been pointed out, that in 1933, some months before the date of this receipt, Mrs. Burchmore was clearly put on notice of facts which, if investigated, would have revealed the fact that her stock had been sold by Blissard and that he had been paid for it. After the statutory period had begun to run against Mrs. Burchmore, could Blissard as an individual and the alleged wrong-doer, stop the operation of the statute by giving assurance that the alleged conversion had not taken place? The rule well supported by reason and authority is that "Restatements of the fraudulent representation do not of themselves constitute concealment, and where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfil his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations." *Feak v. Marion Steam Shovel Co.*, 84 Fed. (2d) 670, 107 A. L. R. 583. "One who has knowledge

of the perpetration of a fraud against him cannot thereafter claim that concealment of the fraud suspends the running of the statute. And further, one who has notice of a fraud perpetrated upon him sufficient to put him on inquiry cannot remain inactive and rely upon concealment to stay the statute. Instead he must exercise such care and make such effort to ascertain the facts regarding the perpetrated fraud as in the exercise of reasonable care and diligence he could and should make." *Chalker v. Fidelity & Deposit Co.*, 268 Mich. 333, 256 N. W. 343. See, also, *Phillips v. Baker*, 114 S. W. (2d) (Tex. Civ. App.) 421; *Brackett v. Perry*, 201 Mass. 502, 87 N. E. 903; *Skrodzki v. Sherman State Bank*, 348 Ill. 403, 181 N. E. 325.

We are mindful of the fact that on the questions of agency, conversion, and running of the statute of limitations the jury found for the plaintiff. However, it has long been the rule of this court that "A verdict of a jury whose finding is based upon conjecture and not on the evidence cannot be permitted to stand." *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5, 96 N. W. 998. Defendant moved for an instructed verdict. In *Fairmont Creamery Co. v. Thompson*, 139 Neb. 677, 298 N. W. 551, this court said: "It is the duty of a trial court to direct a verdict at the close of the evidence where the evidence is undisputed, or where evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment." The trial court should have directed a verdict for the defendant.

The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LENA SNYDER, APPELLEE, V. HOMER E. RUSSELL ET AL., APPELLANTS.

1 N. W. (2d) 125

FILED NOVEMBER 28, 1941. No. 31195.

Automobiles. When the owner of a car, who is not present and has no direction or control over the machine, has loaned it to an-

other for bailee's sole use and benefit, the owner, who is neither principal nor master, is not ordinarily liable for the negligence of such bailee.

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

Fred N. Hellner and *Fischer, Fischer & Fischer*, for appellants.

Gray & Brumbaugh, contra.

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

PAINE, J.

Plaintiff, a pedestrian, brought suit against the two defendants for personal injuries sustained by her when struck by an automobile as she was about to board a street car. The jury returned a verdict against each of the defendants for $4,000, and the defendants appeal.

The accident happened at the northwest corner of Twentieth and Paul streets in Omaha, about 8 o'clock on the evening of December 9, 1939. The plaintiff lived in an apartment in the Fontenelle Project, located near this intersection. She came out of her apartment to board a street car, having an appointment with her brother down-town, She was standing on the curb, and the light from a grocery store, as well as the light from the approaching street car, made it easy to see her. Suddenly an automobile, which had been following the street car, darted out to pass the street car, and the plaintiff was struck by the headlamp and bumper and thrown about 27 feet, alighting between the north and south-bound street car rails. The driver had put on the brakes hard, but the automobile skidded along, and was finally brought to a stop 25 or 30 feet beyond where the plaintiff was lying in the street.

The automobile was driven by Miss Luella Wagner, who owned and conducted a beauty shop at Twentieth street and Ames avenue. The night before the accident she had been at the apartment No. 2, Drake Court, of defendant

Homer E. Russell, and he planned to have a card party the next night, and invited Mr. and Mrs. Fierman to come, and invited Miss Wagner to come too, and when she said that she might have some late appointments on Saturday night, he testified in answer to the question, "What did you say to her?" "I told her that I had an extra car out there that if she wanted to take it she was entirely welcome to it."

It seems she drove the car home that night, having driven cars for ten or twelve years, and when she had finished her appointments on Saturday night she was driving back to his apartment to attend the card party when the accident occurred.

Homer E. Russell, a widower, was a carpenter, regularly employed at the Ak-Sar-Ben, and some time before the accident had traded his Plymouth coupé for a new car with Andrew Murphy & Son, and they had a chance to sell his old car, and sent out the Dodge sedan, transferred his license plates to it, and told him to drive it until they got in a new car for him.

Mr. Russell testified that he had met Miss Luella Wagner at the Shrine circus at the Coliseum in the spring of 1939, and began keeping company with her, but that they were not engaged on the night of the accident. He testified that immediately after the accident that night he was called on the telephone by Miss Wagner, and went out at once to the scene of the accident; that he gave a slip of paper to a man there, with his name and address, in care of the Ak-Sar-Ben den, Sixty-third and Shirley streets, and the numbers of his office and residence telephones, and talked to the police there, telling them that it was his car. On January 19, 1940, Mr. Russell married Miss Wagner. The amended petition, filed May 10, 1940, was against Homer E. Russell and Luella W. Russell as defendants.

The plaintiff testified that she had not seen the automobile following the street car, and the screech of its brakes caused her to turn around and see the headlights just an instant before she was struck. She was standing on the curb two or three feet from the street car tracks, and was

taken in an ambulance to the hospital, and four days later was taken home in a wheel chair.

Dr. Werner P. Jensen, a city physician, was called to the hospital about 8 o'clock the night of the accident, and examined her in the emergency room, and found she had multiple bruises and abrasions and injury to her back; she had a brush burn on her forehead, and a tuft of hair had been torn away, abrasions on her nose and under her right eye; she had bruises and burns on her right elbow and wrist and little finger; she had pain in her neck on attempting to move her head. There was a large black and blue area on her right hip and left buttock, being a round imprint just the size of the headlight of a car. Her right leg was black and blue, her right ankle swollen, and there were abrasions on the inner side of her left ankle where the skin had been torn. He cleaned all of these abrasions, and applied antiseptic dressings. X-rays were taken of her pelvis and lumbar spine, but no fractures were shown. The muscles and ligaments of her back were painful, and were taped. She ran some fever, due to absorption of blood from the large black and blue areas where she was hit. At the end of four days she was allowed to go home. He called at her home some three times, and afterwards she called at his office, coming there by car or taxi, some nine times.

The plaintiff before the accident was working on W. P. A. as a housekeeping aid. She would go as directed to some poor family, and do "the heavy laundry, washing and ironing, housework, cleaning and cooking," where they needed work done because of sickness, for which she received $57.50 a month. After she recovered and began work, she was unable to do this heavy housework and laundry work, and the W. P. A. gave her lighter work when she went back on March 19, 1940.

The errors relied upon for reversal consist of objections to the giving of certain instructions by the court on its own motion, and because the court refused to give instructions Nos. 1, 2 and 3 requested by the defendant Homer E. Russell, and for the refusal to sustain the motion of

Homer E. Russell to enter a judgment in his favor, notwithstanding the verdict against him. It is also charged that the court erred in refusing to grant a new trial for newly discovered evidence, and the final error relied upon for reversal is that the verdict is grossly excessive.

The issue in regard to agency was as follows: It was alleged in the second paragraph of the amended petition that "Said defendant, Luella Russell, at the time of said collision, was operating said car for and on behalf of and as the agent of said Homer E. Russell."

Homer E. Russell filed a separate answer to said amended petition, in which he "specifically denies that the said Luella W. Russell, formerly Luella W. Wagner, was acting as his agent on the 9th day of December, 1939."

"Agency may result from a contract between the parties or it may result from a direction by a person to another to act on his account with or without a promise by the other so to act and with or without an understanding that the other is to receive compensation for his services if he does act." 1 Restatement, Agency, sec. 16, comment *a*.

"A person conducting an activity through servants or other agents is subject to liability: (a) If he is negligent in the conduct of such activity; or (b) if he permits his servants or other agents to act negligently upon his premises or with his instrumentalities." 1 Restatement, Agency, sec. 213.

When motion for a directed verdict in his behalf was refused, Homer E. Russell tendered instruction No. 1, which was refused by the court, and read as follows:

"You are instructed that in order to find for the plaintiff and against the defendant, Homer E. Russell, you must find that the plaintiff has established by a preponderance of the evidence the following facts:

"1. That the car was owned or under the control of the defendant, Homer E. Russell.

"2. That Luella Wagner was acting as defendant Homer E. Russell's servant or agent.

"3. That at the time of the accident Luella Wagner was acting with Homer E. Russell's knowledge and direction.

"You are instructed that if the plaintiff has failed to prove any of these three matters by a preponderance of the evidence, then you shall find for the defendant, Homer E. Russell."

An owner of a car, who is not present and who has no control of the machine, which is not being used in furtherance of his business or undertaking, is not liable in the absence of any statute imposing liability for negligence. See 5 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 2930.

Where the owner of an automobile loans it to another for purposes of his own, and not for the purposes of the owner, the owner is not ordinarily liable for the negligence of the bailee. *Jones v. Harris,* 122 Wash. 69, 210 Pac. 22, 22 Negligence and Compensation Cases Ann., 36; Berry, Automobiles (3d ed.) sec. 1040; *Zeeb v. Bahnmaier,* 103 Kan. 599, 176 Pac. 326, 2 A. L. R. 883; *Gorman v. Bratka,* 139 Neb. 718, 298 N. W. 691.

"The owner of an automobile, who loans it to another to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way." *Mogle v. A. W. Scott Co.,* 144 Minn. 173, 174 N. W. 832.

This court has held that, when a truck was borrowed by the driver during the noon hour to get his watch which was being repaired, the truck was not being used in the service of the owner, but for the personal convenience of the driver. *Ebers v. Whitmore,* 122 Neb. 653, 241 N. W. 126. See, also, *Wise v. Grainger Bros. Co.,* 124 Neb. 391, 246 N. W. 733.

A plaintiff must show that the driver of the car is the agent, servant, or other employee of the owner, and was at the time operating or driving the same in the service of the owner. *Dirks v. Ensign Omnibus & Transfer Co.,* 107 Neb. 556, 186 N. W. 525.

Mrs. Eva Hedglin, a prospective purchaser of an automobile, had a car turned over to her for the sole purpose of

trying out the car. While driving it on the highway, unaccompanied, she collided with another automobile. Plaintiff contended that the relationship of master and servant existed between the firm which owned the automobile and Mrs. Hedglin at the time of the accident. This contention was rejected by this court on the ground that she was not an agent of the defendant company, but merely a prospective purchaser, and that the essential elements were entirely lacking. *Werner v. Johnson,* 122 Neb. 870, 239 N. W. 207.

In an Omaha case, Arthur Brandeis' family borrowed Emil Brandeis' car, with chauffeur. While the chauffeur was returning the car to the garage, a collision occurred, which injured the plaintiff, Neff. It was held by this court that at the time of the accident no such relation of master and servant or of principal and agent existed between the owner of the car and the chauffeur as would render said defendant liable for such injuries, and the judgment of the district court was reversed and the case was remanded. It is said in the text that one cannot infer "that the chauffeur, whose negligence was the cause of the accident, was at that point of time the servant of the defendant and under his control," and that "such an inference is too far fetched and is not warranted by the evidence." *Neff v. Brandeis,* 91 Neb. 11, 135 N. W. 232.

The evidence in the case at bar discloses that the card party to be held at Homer E. Russell's apartment on the night of the accident was not a joint enterprise. There is no evidence but that it might have been a game to be played by three people as well as four. It is also shown that he permitted Luella Wagner to take his car for her own convenience; that she acted independent of any suggestions or directions from him; that she drove the car over the route and at the speed she desired, and was not in any way subject to his direction, control, or management. He had simply given her permission to use his car if she desired. There was no definite time fixed at which Luella Wagner was expected to be there. The accident occurred at about 8 o'clock, and Luella Wagner telephoned to Homer E.

Russell, and he immediately drove from his apartment to the scene of the accident, left his name and telephone number, and returned to his apartment around 9 o'clock, which was before the Fiermans arrived.

The record shows the following motion: "Mr. Fischer: Comes now the defendant, Homer E. Russell, at the close of all of the evidence, and separately moves the Court for a dismissal of this action as to him, or, in the alternative, to direct a verdict for him, for the reason that the plaintiff has utterly failed to prove either the agency of Luella Russell, or to prove any scope of employment, and has failed to prove that the defendant, Luella Wagner Russell, was acting within the scope of such employment."

This motion should have been sustained by the court, and the action should have been dismissed as to Homer E. Russell.

We will now consider the charge of defendant that the verdict of $4,000 is so grossly excessive as to shock the conscience of the court.

While the amount asked for in the prayer of the petition is usually immaterial, still the defendant calls our particular attention to the fact that the jury gave the plaintiff all she prayed for in her petition, which is claimed to be unusual.

The injuries of the plaintiff, while painful at the time, were soon healed. No bones were broken, and in four months she continued her work with the W. P. A. It is the opinion of this court that the verdict of the jury in the case at bar was excessive, and must have been influenced by passion or prejudice.

It is directed that the action as against Homer E. Russell be dismissed. The judgment against Luella W. Russell is set aside, and the cause is remanded for a new trial.

REVERSED.

JENNIE BURSTEIN, APPELLEE, V. STATE MUTUAL LIFE ASSURANCE COMPANY, APPELLANT.

1 N. W. (2d) 115

FILED NOVEMBER 28, 1941. No. 31144.

1. **Insurance.** An insurance policy must be considered as containing provisions required by statute to be included in it.
2. ———. A loan agreement in an insurance policy, providing: If any premium on the policy remains unpaid at the end of the grace period, the company is authorized to deduct from the cash surrender value of said policy at the date of default the total indebtedness represented by the certificate or certificates of indebtedness then outstanding against the policy, including interest to the date of default, and to apply the balance as a net single premium to the purchase of paid-up insurance, payable at the same time and on the same conditions as in the original contract, or, if such has been provided by the policy, extended term insurance in the amount of the face value of the policy, including additions (if any) but less the total indebtedness, *held,* to mean that interest on the policy loan is chargeable only to the premium due date, since, under express terms, interest can be collected only to the date of default, which refers to the date when the premium was due.
3. ———. The language, "at the date of default" and "including the interest to the date of said default," appearing in the contract, *held* to mean that interest was payable on the policy loan to and including the premium due date and not during the grace period allowed in the policy.
4. ———. In construing the grace period provision contained in the insurance contract in the instant case, the grace period does not contemplate free insurance. The grace is allowed to permit the insured to have this extension of opportunity within which to pay another premium and thus avoid forfeiture for nonpayment on the date fixed for payment.
5. ———. Under the terms of the insurance contract, the loan agreement and the statutes which the contract and loan agreement endeavor to follow, and in consideration of the nonforfeiture provisions of the policy and the selection by the insured of automatic extended insurance, as contained therein, *held,* the settlement date of the insurance contract for all purposes was the premium due date and not at the expiration of the grace period.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Finlayson, Burke & McKie, for appellant.

Monsky, Grodinsky, Marer & Cohen, contra.

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

MESSMORE, J.

Plaintiff, beneficiary under an insurance policy, issued by defendant company on the life of her husband, brought this action to recover the face value of the policy, less the amount of a policy loan.

December 13, 1917, the defendant issued to Harry Burstein a policy in the face amount of $2,000, with an annual premium of $62.96, payable quarterly. All premiums were paid with the exception of one due June 13, 1936, which was not paid within the grace period of 31 days. The insured was privileged to and did borrow from the defendant company on the security of the cash value of the policy. On June 13, 1936, the cash value of the policy amounted to $960.82. The amount of the loan, with interest to that date, was $948.50. The defendant proceeded to make settlement on the policy by charging the amount of the policy loan, including accrued interest on the loan during the 31-day grace period, or to July 14, 1936, in the amount of $953.30, leaving a balance of $7.52 for the purchase of extended insurance. The settlement option, which the insured designated in his application for insurance, was automatic extended insurance. The amount of $7.52 would purchase extended insurance for 230 days from June 13, 1936, or until January 29, 1937. The insured died May 9, 1937. Interest on the policy loan from June 13, 1936, to July 14, 1936, amounted to $4.80. In the event this sum of $4.80 was not charged as interest, it would have remained a part of the cash value of the policy available for the purchase of extended insurance and would have extended the insurance from July 13, 1936, to July 15, 1937,—beyond the date of the insured's death.

The issue is: If the computation of interest made by de-

fendant company is legal and correct under the terms of the policy, then the policy lapsed prior to the death of the insured; otherwise, the amount of such interest, used for the purchase of extended insurance under the terms of the policy, would continue the policy in force as extended insurance beyond the date of the insured's death, and the amount of extended insurance would be $1,051.50.

The trial court entered judgment for the plaintiff in the amount of $1,262.75 and allowed the sum of $200 as plaintiff's attorney fees. The defendant appeals. To determine this issue requires an examination of the policy, the loan agreement, and the statutes.

"An insurance policy must be considered as containing provisions required by statute to be included in it." *Kelly v. Prudential Ins. Co.*, 130 Neb. 873, 266 N. W. 757.

Section 44-602, Comp. St. 1929, provides in part: "No policy of life or endowment insurance, except policies of industrial insurance or where the premiums are payable monthly or oftener, shall be issued or delivered in this state unless it contains in substance the following provisions: * * * 2. A provision that the insured is entitled to a grace of one month within which the payment of any premium after the first year may be made, subject, at the option of the company to an interest charge not in excess of six per cent. (6%) *per annum* for the number of days of grace elapsing before the payment of the premium, during which period of grace the policy shall continue in force."

The policy provides with reference to the grace period: "After the payment of the first regular premium, annual, semiannual or quarterly, a grace of thirty-one days, *without interest,* will be allowed in the payment of all future premiums. During the period of grace this policy shall remain in full force." (Italics ours.)

The loan agreement provides: "If any premium on said policy remains unpaid at the end of the grace period, said Company is hereby authorized to deduct from the cash surrender value of said policy *at the date of default* the total indebtedness represented by this and any other cer-

tificate or certificates of indebtedness then outstanding against said policy, *including interest to the date of said default,* and to apply the balance as a net single premium to the purchase of paid-up insurance payable at the same time and on the same conditions as in the original contract, or, if such has been provided by the policy extended term insurance in the amount of the face of the policy including additions (if any) but less the total indebtedness." (Italics ours.)

It will be noted in the first line of one paragraph contained in the loan agreement "grace period" is used; in the second line of the paragraph "date of default" is used. It is clear that two different dates are contemplated. Under the wording of the contract, interest can be collected only to the premium due date, since, by express terms, interest can be collected only to the date of default, which can refer only to the date when the premium was due. While it might appear that some ambiguity exists as to the word "default," yet, properly and fairly interpreted, this is not true. The defendant contends that the words, "at the date of default," and "including interest to the date of said default," appearing in the same paragraph of the loan agreement, mentioned above, refer to the end of the grace period and not to the premium due date, and further contends that, in consideration of the provisions of the policy, the loan agreement, and statutes, as herein set out, the defendant was prohibited from making settlement on the policy until the grace period expired. The following provisions of the policy and statutes are of assistance in determining this question:

"Policy Loan. After two full annual premiums have been paid on this policy, and provided it is not continued as Extended Insurance, the holder hereof, upon its proper assignment and delivery to the Company, shall be entitled to a loan from the Company on the sole security of this policy, with interest at the rate of six *per centum* per annum, of a sum not exceeding its loan value, as shown by the accompanying table, *less interest on the amount so*

loaned to the next anniversary of this policy, and less any indebtedness to the Company under this policy and any unpaid portion of the premium for the then current policy year. Failure to repay any such loan or to pay interest thereon shall not avoid this policy while the total indebtedness hereon is less than such loan value at the time such default in payment occurs nor until thirty-one days after notice has been mailed by the Company to the last known address of the insured and assignee, if any." (Italics ours.)

Section 44-602, Comp. St. 1929, contains further provisions required to be included in the policy, as follows: "8. A provision that after three full years' premiums have been paid, the company at any time, while the policy is in force will advance, on proper assignment or pledge of the policy and on the sole security thereof" an amount as a loan that may be equal to or not exceed the cash surrender value of the policy and specifying the rate of interest which may be collected "in advance on the loan to the end of the current policy year. * * * 9. *A provision which, in event of default in premium payments after premiums shall have been paid for three years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy* and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserves, less a sum not more than two and one-half *per centum* of the amount insured by the policy, and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. * * * " (Italics ours.)

The policy in the instant case provides: "In case of failure to pay any premium when due, or within the grace period, this policy shall thereupon lapse and become void, and all premium payments previously made shall be forfeited to the Company, and its only liability hereunder shall be such, if any, as is stated in this policy."

An analysis of the foregoing provisions of the policy

and of the statutes, which the policy endeavors to follow, clearly indicates that the date of the default is the date when the premium is due, and interest on a policy loan may be collected only to the end of the current policy year, which means the date when the premium is due. In addition, we refer to the nonforfeiture options of the policy: Option "(c) have the insurance extended in force as Extended Insurance from the anniversary last past for its face amount, including any outstanding dividend additions and less any indebtedness to the Company hereon or secured hereby, but without the right to loans."

"Automatic Extended Insurance. Upon the written request of the insured, Extended Insurance, as described above under Option (c), may be made the automatic option in case of default in the payment of any premium by an indorsement on this policy, made at the Home Office of the Company, provided such request is filed at the said Home Office when there is no premium due hereon and unpaid."

The insured accepted the option of extended insurance in his application as follows: "E. In case of failure to pay the premuim when due, do you desire the Extended Insurance or Paid-up provision of the proposed policy to become automatic? Extended."

"Term of Extended Insurance and Amount of Paid-up Insurance. The term for which this policy will be continued as Extended Insurance or the amount of Paid-up Insurance, as given in the accompanying table, is such as the Cash Value will purchase as a net single premium at the attained age of the insured, according to the American Experience Table of Mortality, with interest at three *per centum* per annum."

The question is whether, where the insured is entitled to a period of extended insurance under his policy, such period commences at the due date of the premium or at the date of expiration of the grace period for the payment of the premium. No general rule can be formulated governing the solution of the problem indicated, inasmuch as the policy provisions control in each instance, and are affected

in some cases by applicable statutory provisions.

"In some cases, computation of the period of extension commencing from the date of default in the payment of premium has been held correct, and especially are the courts led to such a result where the period of extended insurance is expressed to run from the 'date of default.' " 29 Am. Jur. 388, sec. 470.

"The period of extended insurance 'from date of default' in the payment of a premium, to which an insured is entitled under a life insurance policy, runs from the date when the premium fell due and not from the expiration of the grace period during which the insurance was to continue in force and after which, in case of nonpayment it was immediately to cease and become void." *Life & Casualty Ins. Co. v. Wheeler,* 106 A. L. R. 1270 (265 Ky. 269, 96 S. W. (2d) 753). See annotation, 106 A. L. R. 1276. The language of the policy in the instant case is similar to the language in the policies analyzed in the cases appearing in the annotation, 106 A. L. R. 1276. Authorities holding to the rule announced in *Life & Casualty Ins. Co. v. Wheeler, supra,* are numerous and constitute the weight of authority, and further citation is deemed unnecessary.

We conclude, in view of the authorities reviewed, the provisions of the policy, and statutes, that the automatic extended insurance, as appearing in the policy, starts from and becomes effective on the premium due date of the policy,—in the instant case June 13, 1936.

Defendant argues that the insured, during the grace period, receives no free insurance, in the event of death; that during such period a premium would be charged from the due date thereof to the date of death occurring within the grace period; therefore, to adopt plaintiff's contention, —that the date to which interest may be charged and the date from which extended insurance begins to run must coincide,—means that an insurance company is compelled either to waive interest on an unpaid indebtedness for the 31 days of grace, or to grant 31 days of free insurance. A comprehensive interpretation of the term "grace period,"

found in the following authority, disposes of defendant's argument as to free insurance:

In *Davis v. Metropolitan Ins. Co.*, 161 Tenn. 655, 32 S. W. (2d) 1034, in construing the grace period provision, the court said: "It must be borne in mind that this grace provision does not contemplate *free* insurance. The grace is allowed in order that the insured may have this extension of opportunity within which to pay another premium and thus avoid forfeiture for nonpayment on the date fixed for payment."

Few cases have been decided by the courts involving the right of an insurance company to charge interest on a policy loan during the grace period. The principal cases to which we are referred follow:

In *Mayers v. Massachusetts Mutual Life Ins. Co.*, 11 Fed. Supp. 80, the question of the right to charge interest during the grace period was not raised. However, there is language in the opinion to support the defendant's contention, in substance, as follows: On September 19, 1932, the premium due date, the indebtedness on the policy amounted to $1,999.44, the cash surrender value was $2,009, leaving a balance of $9.56. This amount would have purchased extended term insurance on the policy for only a few days. On the 31st day after September 19, 1932, to wit, October 20, 1932, the last day of grace, the cash surrender value was $2,009, and the indebtedness on the policy was $2,009, which would indicate that interest was charged on the loan during the grace period.

In *Smith v. John Hancock Mutual Life Ins. Co.*, 195 Ark. 699, 114 S. W. (2d) 15, cited by defendant, the following language in the opinion apparently supports defendant's contention: "When thirty-one days expired, the indebtedness was increased from $820.61 to $825.53, the difference of $4.92 being interest on the loan which accrued during the period of grace. The result was that instead of having a credit of 39 cents when the forfeiture occurred, an indebtedness of $4.53 had resulted."

While plaintiff and defendant both cite the case of

De Long v. Jefferson Standard Life Ins. Co., 109 Fed. (2d) 585, the facts in the case are somewhat analogous to those in the instant case and support the plaintiff's contention herein. The court was interpreting the law of Florida in construing a life policy, which was a Florida contract. The policy was issued January 23, 1924. The insured paid all premiums due thereunder until January 23, 1935, but failed to pay the premium on that date and did not pay interest on outstanding loans against the policy. He died February 25, 1935,—33 days after the due date of the unpaid premium. On January 23, 1935, the cash value of the policy was $6,000. The indebtedness (principal and interest) outstanding against it on that date totaled $5,936.40, leaving a net cash value of $63.60, which was sufficient to keep the policy in force beyond the date of death, if applied to the purchase of extended insurance, unless interest on the loans continued to accrue from January 23, 1935, until the insured's death. The purchase of extended insurance with the $63.60 revived the policy for 44 days after January 23, 1935, and the insured died 33 days after said date. Thus, the policy was in full force and effect at the time insured died, and the court so held, and the insurance company was not permitted to charge interest on the policy loan during the grace period. The policy in the foregoing case provided that on default in payment of any premium the policy shall cease and terminate and the payments received thereon shall become the property of the company, except as specified. In this respect the policy is analogous to the policy in the instant case. The term, "except as specified," relates to the nonforfeiture provisions. The court, speaking with reference to the due dates of premiums and analyzing the provisions of the policy, said: "From these provisions, it is manifest that the policy became forfeited on the date the unpaid premium was due, except for rights reserved thereunder by the grace period and the nonforfeiture provisions. Upon the expiration of the grace period, the election rights under the nonforfeiture provisions alone remained, and these rights were necessarily

determined by the status of the policy on the date of the unpaid premium. It was conceded in argument that, if there had been no loan on the policy, the settlement would have been reckoned as of the due date of the unpaid premium. * * * The existence of a loan does not furnish the basis for a different date. The indebtedness against the policy is deemed to have been liquidated on that date by a charge against the cash value, and the balance represents the net cash value." Several cases are cited supporting this proposition, viz., *Hawthorne v. Bankers' Life Co.*, 63 Fed. (2d) 971; *Equitable Life Assurance Society v. MacKirgan*, 86 Fed. (2d) 271; *Ratliff v. Kentucky Home Mutual Life Ins. Co.*, 87 Fed. (2d) 965; *Pacific Mutual Life Ins. Co. v. Goss*, 99 Fed. (2d) 658.

The provisions of the policy, the loan agreement, the statutes and the authorities warrant the conclusion that the defendant was without power or authority to charge interest on the policy loan from June 13, 1936, to July 14, 1936.

The judgment of the district court is affirmed. The plaintiff's attorneys are allowed a fee in the amount of $150 for services rendered in this court.

AFFIRMED.

WALTER V. ESCHER V. STATE OF NEBRASKA.

1 N. W. (2d) 322

FILED DECEMBER 5, 1941. No. 31058.

1. **Criminal Law.** Section 29-2308, Comp. St. 1929, provides that "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."
2. ———. This record resulting in a conviction for a conspiracy to commit a felony, to wit, embezzlement, is reviewed, prejudicial

error is not found in the errors assigned, and it does not appear that a substantial miscarriage of justice has occurred.

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

Dryden, Dryden & Jensen, for plaintiff in error.

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

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

SIMMONS, C. J.

Defendant Escher, Charles B. Morearty and Zazel I. Alban were charged with conspiring to commit a felony, to wit, embezzlement. Escher was tried separately and convicted. He appeals.

The indictment charges that the three parties named were on February 27, 1936, officers and agents of the United Securities Corporation, and that beginning about February 27, 1936, and continuing until September 23, 1937, they did by a series of acts in furtherance of said conspiracy take into their possession money and property of said corporation with intent to defraud said corporation, convert to their own use and embezzle said money and property.

The trial was a lengthy one. The bill of exceptions consists of some 1,500 pages of testimony and copies of exhibits, together with a large container of exhibits, in all several hundred in number. Copies of many exhibits offered and received or offered and rejected are set out in the bill of exceptions. In several instances these exhibits, some of which are typewritten documents of many pages, are copied into the record, not once but several times. There is no excuse for this practice. Reporters should not do it; attorneys should protest it; and trial courts should protect the litigants from such a record. It adds needlessly to the expense of an appeal, increases the work of examin-

ing a record in this court, and serves no purpose save the enrichment of the reporter.

The United Securities Corporation, hereinafter called the corporation, was organized in 1935. Its stock was sold to investors. Escher was a salesman engaged in that effort. It appears he was also a stockholder in the corporation. Sometime prior to February 3, 1936, Escher conceived the idea of gaining control of the corporation from its then officers. Escher employed Morearty as his attorney. Proxies for the stockholders were drafted, and Escher was instrumental in securing their signature, naming Morearty as proxy with broad powers. At the annual meeting February 3, 1936, Morearty, one Onken and Alban were elected directors, although Morearty and Alban were not stockholders. Morearty was elected president, Onken vice-president, and Alban secretary-treasurer. Some difficulty was encountered by the new officers in securing possession of the books, records and property of the corporation. But this difficulty was adjusted by a settlement in which, among other things, the old officers became the owners of the office furniture and fixtures of the corporation. Morearty's office then became the office of the corporation. The new board gave Morearty broad powers in handling the affairs of the corporation and dealing with its assets. His salary was fixed at $75 a week. The corporation at that time had possession of some negotiable stock that its officers had secured from two Iowa women. This stock had been pledged for a loan to the corporation. It had also a block of stock in an Iowa corporation, then in receivership, but which was of material value. Immediately after gaining possession of the property, Morearty and Escher began a series of transactions over a period of months that resulted in the corporation's assets being first converted into cash, and then transferred to Escher and Morearty, or a corporation which Morearty organized and controlled. From February, 1936, to May, 1937, the business of the corporation was largely dealings with Escher and Morearty's corporation. But little other business

was done. When the new officers gained control of the corporation, it had $88 in cash in its bank account. Morearty and Escher went to Iowa to find out the facts about the ownership of the Iowa securities from the two women who had trusted the former officers. The expenses of this trip were paid from corporation funds. They came back and although the debt to the bank, for which the securities were pledged, was not due, these securities were ordered sold, the debt liquidated, and the difference of over $3,000 was placed to the credit of the corporation in its bank account. Next Escher was issued a corporation check for $500, and he gave his unsecured note to the corporation.

Then the stock in the Iowa corporation was sold for some $20,000, and although Morearty seems to have closed the deal, he testified that Escher made the contacts, and in any event Escher was paid $1,004.27 commission on the sale. Escher deposited the check representing this payment in a Lincoln bank, withdrew $452, and shortly thereafter Morearty deposited $452 "currency" in his Omaha account. Morearty admitted receipt of the money and testified that it was an attorney's fee paid him for services to Escher in securing control of the corporation. A number of other checks were issued to Escher for various amounts and his unsecured notes were taken payable to the corporation.

Also, Escher would purchase securities of debatable value, and sell them to the corporation, usually at a profit to himself. These securities were taken by Morearty without more than a casual investigation as to their actual value. The corporation then sold them back to Escher at a 5 per cent. book profit to the corporation, and Escher gave the corporation his unsecured promissory notes in payment. Escher then sold the stock to other purchasers, in at least one instance at a price materially less than the purchase price. The net of these transactions was that Escher got the stock and the profit to him, and the corporation got his notes, unsecured and not collected. In at least one of these stock transactions Escher did not deliver the stock,

although he had been paid for it, and later bought it back, although the corporation never had had it. In the main the records of the company disclosed these transactions, although in at least one instance it is admitted that a "loan" of $500 was included in and carried on the books as a part of the purchase price of stocks.

Morearty also organized an investment corporation that seems to have had one or more stores in California. Escher was a salesman for the stock in that corporation. Three United Securities Corporation checks totaling $2,000 were issued to the manager of the California store, and the United Securities Corporation received in return therefor stock in the Morearty corporation. Morearty repurchased some of the stock in his investment corporation from dissatisfied stockholders and gave his personal check in the sum of $960 therefor and immediately issued a United Securities Corporation check to "cash" for the same amount which he, Morearty, indorsed and deposited, so that that stock got into the ownership of the corporation. A total of $2,960 of the corporation's money went out for stock in Morearty's investment corporation.

Throughout this period Morearty claims that he was working on a number of big deals which would have been to the great profit of the corporation; only one of them materialized to the actual profit of the corporation. Escher also had big deals, one of which was the refinancing of a corporation in Lincoln. By an instrument dated September 8, 1936, Escher and the corporation recited this refinancing agreement and the corporation agreed to advance Escher funds to cover his costs in carrying out the contract, and Escher agreed to give his notes therefor and to assign to the corporation his profits from the refinancing deal and to collateralize his then indebtedness to the corporation by the assignment of profits and in addition to pay the corporation a bonus of 2 per cent. of his gross profits on the refinancing deal. The assignment is attached to the instrument.

Throughout all of these transactions the corporation paid

Morearty's expenses, Escher's expenses, Morearty's salary and a part of his office expense, etc. All checks were signed by Alban and countersigned by Morearty.

A 5 per cent. dividend was paid in January, 1937, although the corporation at that time was showing an operating loss of a considerable amount.

Without attempting to detail each transaction, it may be said that the evidence shows that Escher and Morearty were working together in many, if not all, of these transactions, so that before May of 1937 the entire assets of the corporation were dissipated; and in September, 1937, Morearty resigned and recommended the liquidation of the corporation and turned its assets over to the vice-president. The vice-president does not seem to have comprehended what was going on and does seem to have trusted Morearty and Escher.

It should be said here that Alban's connection with these transactions appears to be that she was a secretary in Escher's Lincoln office, and that her only affirmative action was to sign the checks as secretary-treasurer. These checks, it appears, were often, if not always, signed by her in advance of their issuance and countersigned by Morearty when issued, so that Morearty controlled the actual issuance of the checks.

The defense was that Escher was not an employee or officer or agent of the corporation and could not be an embezzler; that no embezzlement occurred; that the transactions were loans, and the sale and purchase of stock, and payment of commission earned, and were all made in good faith; and further that Escher had secured the corporation by the assignment of his profits from the Lincoln refinancing deal; and that there was no criminal intent. It may be said that, so far as this defense relies upon facts, the jury's verdict disposes of those contentions contrary to Escher, and there is ample evidence in the record to sustain their conclusion in that regard.

Defendant's first proposition is that in a case of this kind it is necessary for the state to prove a felonious intent. As

we read this record that intent was clearly established. These men played fast and loose with the money of other people. They looted this corporation. Clearly the jury looked beyond the books and records of the corporation, and determined that the things which they did and the results which they accomplished were the acts of conspirators motivated and directed with the felonious intent which the indictment charges. Their declarations of good faith and innocence were disbelieved by the jury when weighed as against the things which they did.

Escher next contends that the trial court erred in refusing to permit the introduction of documentary and other evidence which, he contends, would have proved the absence of a criminal intent. The trial court admitted in evidence the agreement between Escher and the corporation dated September 8, 1936, to which reference is made in the statement of facts. The trial court refused to admit in evidence proof of a refinancing proposal made by Escher and accepted by the Lincoln corporation in February, 1937; its performance by Escher; its breach by the Lincoln corporation; and testimony of lawyers that Escher had a valid recoverable claim for some $19,000. We do not consider that the trial court erred in denying the admission of this testimony. It must be remembered that the defendant was charged with having entered into a conspiracy with others to embezzle. That conspiracy, as the state's evidence shows, was formed and overt acts committed long before the refinancing agreement was made with the Lincoln corporation. The felonious intent had to exist when the conspiracy was formed and the acts done. Proof that subsequent to commission of the crime Escher had earned money, which if collected and which if paid to the corporation would have restored in part its looted assets, does not prove the absence of a criminal intent when the crime was committed. The trial court properly refused to permit the jury's attention to be diverted from the peculation charged to Morearty and Escher to a controversy between Escher and the Lincoln corporation.

Defendant next argues that the trial court erred in giving instruction No. 4: "With reference to the crime of embezzlement charged, you are instructed that a statute of the state of Nebraska provides, with reference thereto, in substance, as follows: 'If any *person,* agent * * * factor or commission agent of any private person or any copartnership, except apprentices and persons within the age of eighteen years, or if any officer * * * agent, clerk, servant, factor, or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, shall embezzle or convert to his own use,' " etc. The statute, section 28-544, Comp. St. 1929, to which the instruction refers, begins as follows: "If any *clerk,* agent, attorney at law, servant, factor or commission agent of any private person or any copartnership, except apprentices and persons within the age of eighteen years, or if any officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, shall embezzle or convert to his own use, fraudulently take or make away with or secrete with intent to embezzle or fraudulently convert to his own use, without the assent of his or her employer or employers, or the owner or owners thereof, any money, goods, rights in action or other valuable security or effects whatever, belonging to any persons, body politic or corporate, or which is partly the property of any other persons, body politic or corporate, and partly the property of such officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, which shall have come into his or her possession or care," etc. It is noted that the trial court in the opening clause used the words "If any person," whereas the words of the statute are "If any clerk." The argument here is that the statute limits to certain defined classifi-

cations those who can commit the crime of embezzlement, whereas the court by the word "person" used an all-inclusive word, broader than the statute, and thereby included in the category of those who could commit the offense persons not named in the statute. It should be pointed out that the statute includes in the classifications also "all persons employed or commissioned by any employer, corporate or private." The clause as stated by the court, standing alone, is confusing, for it reads "If any person * * * of any private person or any copartnership * * * shall embezzle," etc. However, it could not have misled the jury, for there was no embezzlement from "any private person or any copartnership" charged or proved. The embezzlement charged and proved was from an incorporated company, and as to that the instruction appears to properly recite the statute.

Defendant next cites *Hamilton v. State,* 46 Neb. 284, 64 N. W. 965, and argues that the evidence in this case establishes a debtor and creditor relationship between the defendant and the corporation, that that alone is not sufficient to sustain a conviction, and that under the instructions the jury could have found a verdict of guilty based upon that relationship alone. We do not so read the instructions, and the defendant does not point out the basis of this contention. Morearty was a lawyer, Escher a licensed and experienced broker. They knew what they were doing. This evidence shows much more than a mere relationship of debtor and creditor. There is ample evidence to support the conclusion that the giving of the notes and the bookkeeping devices set up were but blankets of apparent legality under which the consummation of their conspiracy and the looting of this corporation took place.

Defendant next states: "An instruction which recites some of the essential elements of the crime charged and omits others, and tells the jury that the things recited in the instructions would constitute the crime is erroneous and constitutes reversible error. We refer to instruction number five given by the court. The court says that if the

agent knowingly appropriates money of his principal to his own use, it is embezzlement within the spirit as well as the letter of the law. At this point the court should have said, 'knowingly with the intent to embezzle or fraudulently convert the money.'" The instruction is its own best answer to this complaint. The instruction in full is: "To constitute embezzlement there must be a fraudulent intent to deprive the owner of his money and to appropriate the same. This element must, like any other element in the case, be proved by the evidence beyond a reasonable doubt. Every sane person is presumed to intend the natural and probable consequences of his voluntary acts. To determine the intent of the defendant in this case, you are to examine all the circumstances, testimony and evidence introduced in the case. The gravamen of the offense known as embezzlement is the intent. There must be criminal intent, but this intent must of necessity be gathered from the acts of the agent and the circumstances surrounding the particular case, and if the agent knowingly appropriates money belonging to his principal to his own use, even though at the time he does so he intends to restore it, it is embezzlement within the spirit as well as the letter of the law." Not only does the court in the quoted instruction point out the necessary element of the intent, but repeatedly throughout these instructions that element is not only stated but stressed. There is no merit in this contention.

The defendant next contends that the court erred in refusing to give a requested instruction and charges that under the instructions of the court it is possible for the jury to believe the defendant guilty of embezzlement, although they might not be of the opinion that there was any conspiracy. The answer to this is that the court gave an instruction requested by the defendant as follows: "You are instructed that in this case your first duty is to determine whether or not a conspiracy, as alleged in the indictment, has been proved by evidence beyond a reasonable doubt. The sole and only crime charged is a conspiracy

to embezzle 19 certain specific items of funds and property, as set forth on the 2d and 3d pages of the original indictment, and in this connection you are instructed that the conspiracy is the gist of the action and must be proved by evidence beyond a reasonable doubt before it is competent and proper for you to consider any of said 19 items aforementioned which are set out as acts done in furtherance of the alleged conspiracy. These acts are known in the law as overt acts and if you find from the evidence that the State has failed to prove the conspiracy as alleged by evidence beyond a reasonable doubt independent of the proof of the alleged overt acts, then you are to acquit Walter V. Escher of the crime charged."

Defendant in his "review of the evidence" makes a number of references to rulings of the trial court on the rejection and admission of evidence. These, while not specifically assigned as error, have been considered along with the assignments discussed, in the light of the statutory rule that "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308.

Prejudicial error has not been found and no substantial miscarriage of justice has occurred.

The judgment of the trial court is

AFFIRMED.

SADIE A. BROWN ET AL., APPELLEES: EDWARD J. KEOGH ET AL., APPELLANTS, V. WILLIAM PRICE ET AL., APPELLEES.
1 N. W. (2d) 319

FILED DECEMBER 5, 1941. No. 31057.

Telegraphs and Telephones. Where a duly incorporated, solvent, public service telephone company continues to transact the business for which it was incorporated after expiration of its charter by the lapse of time and, later, the executive officers make, in good faith, an effort to reincorporate for the purpose of conducting the same business in the same corporate name and continue to do so, the new telephone company is a *de facto* corporation under the facts stated in the opinion.

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

Frank B. Morrison and *Fred J. Schroeder,* for appellants.

Cordeal, Colfer & Russell, contra.

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

ROSE, J.

This is a suit in equity in which the corporate existence of the Curtis & Southwestern Telephone Company, a public service corporation, was put in issue by the pleadings. It was incorporated in 1908 to transact a public telephone business for 25 years. The 25-year period expired November 1, 1933, but the expiration was overlooked for a time and the executive officers and directors of the corporation, without interruption, continued to transact in its name the business for which it was organized. The president and secretary, acting for the stockholders, filed with the secretary of state December 30, 1937, and with the county clerk of Frontier county January 4, 1938, articles of reincorporation for the purpose of carrying on the same business in the same corporate name for another period of 25 years. It has since been so conducted.

Minority stockholders, each the owner of an original share, are plaintiffs.

Defendants are the executive officers and the directors of the corporation and the Curtis & Southwestern Telephone Company.

On formal pleas that the original charter expired by its own terms November 1, 1933, that the corporation had no existence thereafter for commercial purposes and that it was not reincorporated, plaintiffs seek relief in equity as follows: A decree adjudging the nonexistence of the corporation; an injunction to prevent defendants from continuing to transact corporate business; appointment of a receiver for the purposes of liquidation under directions of the court.

Upon a trial of the cause the district court dismissed the suit in equity. Plaintiffs appealed.

The material facts are shown without conflict of evidence and the findings on a trial *de novo* are the same as the findings of the district court. Executive officers and directors conducted the business of a telephone company from 1908 continuously until the time of the trial below. The efforts to reincorporate were made in good faith. New articles of incorporation were drawn, signed by the president and secretary, and filed in the proper offices. The filing fees were paid. The annual occupation taxes, including the one for the year 1938, were paid and payment certified by the secretary of state. After reincorporation, notices of annual meetings of stockholders were given and pursuant thereto meetings were held at which corporate business was transacted as formerly. Annual dividends, except for one year, were paid. In the proceedings to reincorporate the telephone company, there was no fraud. There was no evidence of insolvency or mismanagement to call for the appointment of a receiver to wind up the business of furnishing telephone services to the public. The decree of the district court dismissing the suit provided for the protection of the rights and interests of plaintiffs as holders of original shares of stock.

Under the rulings announced in *Elson v. Schmidt*, p. 646, *post*, 1 N. W. (2d) 314, decided herewith, the reorganized

and continuously operated telephone company is a *de facto* corporation, and consequently plaintiffs are not entitled to any equitable relief herein except that granted by the district court.

AFFIRMED.

LINDEN N. ELSON, APPELLANT, V. CHARLES SCHMIDT ET AL., APPELLEES.

1 N. W. (2d) 314

FILED DECEMBER 5, 1941. No. 31056.

1. **Corporations.** Where the constitution of a corporation contains an article with the following provision: "Shares (of stock) are transferable on the books of the Company upon presentation of the Certificate properly indorsed, provided all indebtedness of the owner to this Company has been paid, and provided further, that one of the four Companies is the purchaser or each have had opportunity to purchase at par or less," and the stock is sold to one of the four companies, as provided in such article, *held,* that such provision amounts to a valid contract between the parties thereto, is a reasonable restriction and is binding on such corporations and the respective stockholders thereof.
2. **Telegraphs and Telephones.** Where four independent corporations, directed by their representative, incorporate a fifth, each of the four corporations receiving an equal share of the stock therein, and vest the control thereof in a central board of directors, made up of one representative of each of the four corporations, for the purpose of creating one central exchange and to keep control thereof from passing to outsiders, and one of the original corporations sells out to one of the other four corporations, and where the charter of the corporation so formed expires, and subsequently the central board of directors thereof, in a meeting, votes to extend the corporate life and to readopt the constitution for a definite period, and the presidents of the three remaining corporations sign the amended articles of incorporation and file the same in the office of the county clerk of the county wherein the corporation is situate, and also in the office of the secretary of state, paying corporation taxes which are accepted, and corporation permits are issued by the state, and where such corporation, during the period of its extension, continues to function for the purpose for which it was originally

created and continues to be managed in the same manner, *held*, to constitute a *de facto* corporation, and the constitution thereof is still existent and valid.

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

Fred J. Schroeder, Frank B. Morrison and *Peterson & Devoe,* for appellant.

Cordeal, Colfer & Russell and *Butler, James & McCarl, contra.*

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

MESSMORE, J.

Plaintiff, a stockholder of the Curtis & Fox Creek Telephone Company, brought this action in equity, to set aside the sale of certain stock owned by Curtis & Fox Creek Telephone Company in the Curtis Telephone Company. From an adverse decision of the trial court, plaintiff appeals.

A statement in detail of some of the facts is necessary to an understanding of this case. For convenience, the Curtis & Southwestern Telephone Company will be referred to in this opinion as the Southwestern Company; the Curtis & Fox Creek Telephone Company as the Fox Creek Company; the North Star, Sheridan & Curtis Telephone Company as the North Star Company, and the Curtis Telephone Company as the Curtis Company. The record discloses:

In November, 1908, a rural telephone company was incorporated under the laws of this state as the Curtis & Southwestern Telephone Company. In April, 1910, the North Star, Sheridan & Curtis Telephone Company was incorporated. In May, 1910, the Curtis & Fox Creek Telephone Company was incorporated. In addition to the foregoing companies, there was the Farmers Telephone Company of Maywood. These four independent corporations operated telephone lines in and out of the town of Curtis, Nebraska. In March, 1911, the four companies, in order to eliminate the many problems which arose incident to the independent operation by them, incorporated a fifth

corporation which took over the central office equipment of the four companies and all of the lines in the town of Curtis, the four companies retaining the rural lines. Each of the four companies received an equal share of stock in the Curtis Telephone Company, the central company. The control of the Curtis Company was vested in a board of directors, made up of one representative of each of the four original companies. Some time later, and before 1916, the Fox Creek Company took over the Farmers Telephone Company of Maywood, including said company's stock in the Curtis Company, thereby vesting the Fox Creek Company with one-half of the stock of the Curtis Company. As a consequence, the Fox Creek Company elected two representatives to the board of directors of the Curtis Company.

At the time of the incorporation of the Curtis Company, a constitution and by-laws were adopted. Contained in the constitution appears article IV as follows: "Shares are transferable on the books of the Company upon presentation of the Certificate properly indorsed, provided all indebtedness of the owner to this Company has been paid, and provided further, that one of the four Companies is the purchaser or each have had opportunity to purchase at par or less."

The ownership of the stock of the foregoing companies in the Curtis Company appears as follows: The Fox Creek Company 22 shares of the capital stock, and the Southwestern Company and the North Star Company each 11 shares. The charters of the North Star Company and of the Fox Creek Company expired in 1935. In 1936 the charter of the Curtis Company expired. Regardless, the four companies continued business as usual until March 1, 1938, when appellant, who had then acquired a majority of the outstanding stock of the Fox Creek Company, demanded that the company be liquidated by the members of the board of directors serving at the time the charter expired in their capacity as trustees, as by law provided. On March 3, 1938, a meeting of the trustees was held, and on the same day the trustees entered into an agree-

ment with the Southwestern Company, by the terms of which they sold the 22 shares of stock of the par value of $50 each to the Southwestern Company for the sum of $1,100. March 8, 1938, an assignment of the stock was executed and payment received for the same. It is this sale that the appellant seeks to set aside. He informed the trustees that he would pay the sum of $4,225 for the 22 shares of stock. The trustees based their action in selling the stock at par on the provisions of article IV of the constitution above quoted, and the question presented is the validity of that section, which gives rise to appellant's assignment of error: That the provisions of article IV are invalid as an unreasonable restraint upon the transfer of property and against public policy. In this respect the trial court found as follows:

"The transaction was consummated in the carrying out of the agreement made and set out in article IV of the constitution of the Curtis Telephone Company; the telephone companies, parties to the transaction complained of, being both incorporators and parties to the agreement contained in the section of the constitution of the Curtis Telephone Company heretofore set forth, that provision amounted to a contract between the parties thereto." In determining the validity of article IV, a brief history of the aims and desires of the incorporators at the time of incorporating the respective companies and in incorporating the Curtis Telephone Company is of value.

The four companies were all rural lines; all four desired one exchange. It is apparent they wanted to keep control from passing to outsiders. To avoid this, all four companies joined in the adoption of the constitution which, when read and analyzed, in addition to article IV, discloses the intention of the four companies to vest the management and control of the Curtis Company in the rural companies which form it.

Article III of the constitution of the Curtis Company provided that the capital stock shall be $5,000, of a par value of $50 a share, "to be issued for cash in hand or

property at a fair valuation, to each of the four contracting Companies in equal amounts, share and share alike." Article VI of the constitution vested the management of the company in the board of directors of the four companies, each board having one vote, and each company being entitled to select one officer of the central company. Article VII provided that the expenses of the company should be prorated between the four companies.

It will be noted that article IV of the constitution gave the right to the other stockholders of the corporation to purchase the stock at par before the stock could be sold and transferred to an outsider. Article IV was adopted prior to the incorporation by the parties who subsequently became incorporators of the Curtis Company. It is obvious that the parties agreed among themselves how the corporation should be organized and how its stock should be sold and transferred. To that end, they might reasonably foresee where the stock and management of the corporation would rest.

Appellees' answer specifically pleads that article IV, heretofore quoted, constituted a contract between the four telephone companies which participated in the adoption of the article. The trial court declared article IV to constitute a contract. There is a direct conflict in the authorities, and the courts are not uniform in sustaining the validity of a by-law containing provisions such as appear in article IV. The courts which have determined such a by-law to be invalid base their decisions upon the premise that such an article regulates the alienation of corporate stock; that corporate stock is personal property, and, when held by an individual, he may sell or dispose of it as he deems proper; that shares of corporate stock may be seized and sold on execution, bequeathed by will and distributed by administrators; therefore, regulation of alienation of corporate stock is a restraint on the alienation of property and against public policy.

After a careful reading of the authorities, we find that the weight thereof is to the effect that a corporate by-law,

which requires the owner of stock to give to the other stockholders of the corporation, in case the corporation is required to purchase its own stock, an option to purchase the same at an agreed price, or at the then existing book value thereof, before offering the stock for sale to an outsider, is a reasonable restriction and binding upon the stockholders. Cases holding to such effect are *Sterling Loan & Investment Co. v. Litel,* 75 Colo. 34, 223 Pac. 753; *People v. Galskis,* 233 Ill. App. 414; *Fopiano v. Italian Catholic Cemetery Ass'n,* 260 Mass. 99, 156 N. E. 708; *Feldstein's* Estate, 25 Pa. Dist. Rep. 602; *Nicholson v. Franklin Brewing Co.,* 82 Ohio St. 94, 91 N. E. 991, 137 Am. St. Rep. 764, 19 Ann. Cas. 699.

In the annotation, 65 A. L. R. 1170, we find the following language: "A number of authorities adhere to the doctrine that, regardless of the validity of a by-law giving the corporation or the other stockholders an option to purchase the stock of any stockholder desiring to dispose of the same, as a corporate restriction, such a by-law gives rise to a binding contract as between the corporation and the stockholders and as between the latter *inter sese.*" In furtherance of the foregoing authority, the tendency of more recent decisions is to sustain such restrictions as contained in article IV, *supra,* if reasonable, and if the stock has been accepted following the adoption of the restriction, with knowledge of its provisions, whether valid as a by-law or not, on the ground that it constitutes a valid agreement between the stockholder and the corporation. *Searles v. Bar Harbor Banking & Trust Co.,* 128 Me. 34, 145 Atl. 391, 65 A. L. R. 1154; *New England Trust Co. v. Abbott,* 162 Mass. 148, 38 N. E. 432; *Weiland v. Hogan,* 177 Mich. 626, 143 N. W. 599; *Model Clothing House v. Dickinson,* 146 Minn. 367, 178 N. W. 957; *Blue Mountain Forest Ass'n v. Borrowe,* 71 N. H. 69, 51 Atl. 670. So, whether we hold the restriction on the alienation of the stock is valid under the provisions of the by-law, or sustain the restriction by virtue of an agreement entered into between the original incorporators, as evidenced by the by-law, which agreement

and by-law were thereafter acted upon and observed by the stockholders of the corporation, the result is the same. See *Baumohl v. Goldstein,* 95 N. J. Eq. 597, 124 Atl. 118. The reasoning of the New Jersey court appears on page 602 of the opinion as follows:

"There seems to be no reason in principle why they (the stockholders of a corporation) should not be permitted to retain the control of the corporation in which they have embarked their fortunes among themselves, or such of them as stand by the vessel, where no question of a *bona fide* purchaser without notice is involved. In this court, where the intent of the parties is the thing sought to be enforced, every effort should be made to hold men to agreements into which they have voluntarily entered, where the same are not obnoxious to any law or policy, and upon the strength of which others have changed their position or circumstances, or parted with a valuable consideration. It is *their* business and *their* money which is involved. It is by their efforts that success is attained, if attained at all. Surely, the public cannot be aggrieved, and individuals acting in accordance with equitable doctrines cannot be injured, because if they have no knowledge or notice of a fact they are not injured by it."

A case containing the substance of the foregoing language and analyses of several cases cited by appellant is *Doss v. Yingling,* 95 Ind. App. 494, 172 N. E. 801. Cases supporting the rule pronounced in that case are *Weiland v. Hogan, supra; New England Trust Co. v. Abbott, supra; Barrett v. King,* 181 Mass. 476, 63 N. E. 934; *Nicholson v. Franklin Brewing Co., supra; Mason v. Mallard Telephone Co.,* 213 Ia. 1076, 240 N. W. 671.

The case of *Miller v. Farmers Milling & Elevator Co.,* 78 Neb. 441, 110 N. W. 995, upon which appellant relies, may be distinguished from the case at bar. In that case the by-laws prohibited Miller from selling the stock to any one without the consent of the directors, while in the case at bar the stock would first be offered at par to the stockholders; then, if not purchased by them, it could be sold

to persons outside the corporation. Thus, there was no absolute prohibition of the sale of the stock. The consent of the directors was not required.

In the instant case, the Fox Creek Company was one of the original stockholders, responsible for article IV, that gave its consent to the existence of the article and the provisions thereof, while in *Miller v. Farmers Milling & Elevator Co., supra,* Miller was not an original stockholder. We believe the foregoing sufficient to disclose the inapplicability of the *Miller* case to the case at bar.

We conclude that article IV of the constitution of the Curtis Company is valid as a contract between the original parties and binding upon the Fox Creek Company, one of the original incorporators. The trustees of the latter company, in making this sale, carried out the contractual obligation contained in the original charter under which the rural telephone companies had operated and under which they had built up whatever value there was to the stock. The parties to the sale have not acted fraudulently; they did just what the provisions of the article stated they should do. There is no merit in the contention of the appellant as to fraud, and his further contention that the amount received for the stock is unconscionable, as compared with the offer made by him is not an issue, when article IV is held to be a valid contract.

Appellant contends: In the event article IV be declared valid, either as a contract between the stockholders or as a by-law, such article is no longer in effect, for the reason that it had expired April 1, 1936, when the charter of the Curtis Company expired. The affairs of the Fox Creek Company were also in the hands of the trustees, its charter having expired; therefore, upon the expiration of the corporate charter, the last board of directors become the trustees for dissolution, to distribute the assets of the corporation among its stockholders. Comp. St. 1929, sec. 24-107. This raises the question as to the validity of the charter amendment of the Curtis Company so as to extend the life of such corporation.

On July 9, 1937, the central board of the Curtis Company, composed of the duly-appointed representatives from all three of the rural companies that owned it, met at Curtis and voted to extend the corporate life of the Curtis Company for 25 years and to readopt the constitution of that company. At that time the amended articles of incorporation of the Curtis Company were signed by the three presidents of the three companies and were filed in the office of the county clerk of Frontier county July 10, 1938, and also in the office of the secretary of state. Thereafter, the Curtis Company continued to function as a corporation, furnishing telephone service, being managed by the central board composed of representatives from each of the three companies. After the filing of the amended articles of incorporation, the state of Nebraska accepted payment of corporation taxes, issued corporate permits for the years ending June 30, 1937, and June 30, 1938. What was really done was to preserve the business of the corporation and the relation of the stockholders to it.

This court in *Parks v. James J. Parks Co.*, 128 Neb. 600, 259 N. W. 509, said: "It is essential to the existence of a *de facto* corporation that there be (1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; (2) a *bona fide* attempt to organize a corporation under such law; (3) a colorable compliance with the requirements of such law; and (4) an actual user of corporate power."

The case of *Elson v. Schmidt,* 136 Neb. 778, 287 N. W. 196, involved the identical transaction as in the case at bar, the distinction being in the form of the relief asked,—in the cited case an injunction to restrain the sale, in the instant case to set aside the same sale. Certain facts, very similar to those in the instant case, were set out therein, where an attempt was made by the Southwestern Company to reincorporate. The question in the case cited above arose mainly as to satisfying general requirements of the laws relative to stock subscription. The court, in an analysis of all the facts, said: "While technically the new corpora-

tion was a separate entity from the old, the effect of what was done was simply to preserve the business of the old Curtis & Southwestern Telephone Company and the relationship of the stockholders to it." The court decided that the attempt to incorporate contained all of the essential elements that constituted a *de facto* corporation, within the meaning of the decision in *Parks v. James J. Parks Co., supra.*

Again referring to the *Parks* case, the company adopted amendatory articles of incorporation, included therein by reference the articles of the old corporation that had expired because of its own limitations as to time provided in its articles, subsequently filed amended articles with the county clerk of its residence and with the secretary of state, paid its corporation tax, and exercised the general powers of a corporation toward the business, for the carrying out of which it was purported to have been organized, said business being a lawful one, within the provisions of section 24-201, Comp. St. 1929. The court held that such corporation constituted a *de facto* corporation.

We conclude that the facts in the instant case with reference to extending the life of the Curtis Company as a corporation meet all of the requirements that would constitute a *de facto* corporation, within the meaning of the holdings in *Parks v. James J. Parks Co., supra,* and *Elson v. Schmidt, supra.* Therefore, the appellant's contention as to article IV being invalid and ineffective, for the reason that it had expired on April 1, 1936, must fall. Other assignments of error need not be determined.

The judgment of the trial court is

AFFIRMED.

GEORGE E. WILLIAMS, APPELLANT, V. FRANCIS ELIAS, APPELLEE.

1 N. W. (2d) 121

FILED DECEMBER 5, 1941. No. 31194.

Limitation of Actions. The two-year statute of limitations in a malpractice suit (Comp. St. Supp. 1939, sec. 20-208) does not commence to run until the treatment ends.

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

Bruce Fullerton and *Loren H. Laughlin,* for appellant.

Philip M. Everson and *Herman Ginsburg, contra.*

Thomas M. Davies and *Hall, Cline & Williams, amici curiæ.*

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

MESSMORE, J.

This is a malpractice suit. The original petition was filed April 20, 1940; an amended petition was filed July 19, 1940. Defendant on August 9, 1940, demurred to the amended petition for the reason that, on its face, it shows that more than two years have elapsed between the time of plaintiff's injury and the filing of the petition in the district court, and the statute of limitations bars any action on the alleged injury. The demurrer was sustained, and plaintiff's action dismissed. Plaintiff appeals.

The only question to determine on this appeal is whether or not the plaintiff's cause of action is barred by the provisions of section 20-208, Comp. St. Supp. 1939, the statute of limitations, which limits the bringing of malpractice actions to two years.

The substance of the amended petition follows. It alleges the qualifications of the defendant to practice his profession in this state and in his community; that plaintiff, a laborer, was injured April 4, 1938, while working in a rock quarry in the process of lifting a heavy rock, when

he fell against the sharp edges of a rock wall, injured the left sacroilliac joint and fractured the laminæ of the fifth lumbar vertebra on the lower left side, displaced, tore and strained the muscles, cords and tendons surrounding and connected with the left sacroilliac joint of the fifth lumbar vertebra, and by reason of such injuries and because of neglect in treatment of the same, the left sciatic nerve became and was impinged.

On April 9, 1938, plaintiff employed defendant as his physician and surgeon to perform such services in the treatment of plaintiff's injuries as were necessary and proper in such case, gave to defendant a full and complete history thereof, stating where he was suffering pain, and answered all interrogatories propounded by defendant. Plaintiff alleges that it was defendant's duty to make a thorough examination of his injuries for the purpose of ascertaining the nature and extent thereof, and to use the means generally and commonly employed by physicians and surgeons for diagnosis and treatment of such case; that the proper and thorough examination of plaintiff's injuries, commonly used in the vicinity, is by hand, feeling and manipulating the parts affected. Such parts alleged to be affected are described in detail, as well as the examination to be made to determine the nature and extent of the injuries, and the further allegation appears in the petition that an X-ray should be taken of the parts affected. Plaintiff alleges that defendant failed to make such examination and to properly ascertain the nature and extent of plaintiff's injuries, and in this respect was negligent. The amended petition alleges further treatment of the plaintiff by defendant and the dates thereof, and oral request made of defendant by plaintiff for an X-ray June 10, 1938, which was denied him; that the defendant treated the plaintiff until August 15, 1938, when he sent plaintiff to a hospital in Omaha, Nebraska, where he was examined, X-rayed and the nature of his injuries ascertained and treated. Plaintiff was placed in a plaster cast to immobilize the fractures. Other details of treatment and diagnosis, not

necessary to be here set out, are contained in the amended petition.

The question presented in the instant case has not been passed upon by this court. The district court adopted the following rule:

"It is generally held that the period of limitations for actions of this kind commences from the date of the wrongful act or omission, rather than from the date of the damage caused"—citing *Fadden v. Satterlee,* 43 Fed. 568 (under Iowa statute). Annotation, 74 A. L. R. 1318. The foregoing rule is the prevailing one in California, Iowa, Maryland, Massachusetts, Montana and Vermont.

In *Capucci v. Barone,* 266 Mass. 578, 165 N. E. 653, the court said: "The damage sustained by the wrong done is not the cause of action; and the statute is a bar to the original cause of action although the damages may be nominal, and to all the consequential damages resulting from it though such damages may be substantial and not foreseen." And in *Coady v. Reins,* 1 Mont. 424, decided in 1872, the court held that the statute begins to run from the time of the negligent act or the breach of duty.

In applying the above rule to the instant case, the malpractice charged is a breach of duty to correctly diagnose the nature and cause of plaintiff's disability. Therefore, treatment and prescription must necessarily be distinguished from diagnosis. The trial court reasoned: "The injury to the patient's legal rights which gives rise to his cause of action occurs at the time that it is charged the correct diagnosis should have been made (April 9, 1938), for that is when the physician breached his duty." The reasoning is supported by the above rule. Decisions which have not applied the foregoing rule follow.

In *Gillette v. Tucker,* 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639, the court held: "It is the duty of the physician and surgeon to exercise due and ordinary skill, care and attention, not only in and about an operation which he decides to be necessary, but also, in the absence of a mutual understanding, or notice to the contrary, to

render such continued further care and treatment as the necessity of the case requires; and he is liable for injuries and damages which proximately result from the want of such ordinary skill, care and attention." The court made the following pronouncement (p. 129): "But if evil consequences followed (the diagnosis), and plaintiff was injured, her cause of action accrues when her injuries occurred; and if these injuries blended and extended during the entire period the surgeon was in charge of the case, her right of action became complete when the surgeon gave up the case without performing his duty." The foregoing decision was rendered by a divided court. The dissenting opinon therein held that the period would start running at the time of the act complained of, rather than the date the injurious consequences became apparent. This rule was adopted in *McArthur v. Bowers*, 72 Ohio St. 656, 76 N. E. 1128; subsequently, in *Bowers v. Santee*, 99 Ohio St. 361, 124 N. E. 238, the *McArthur* case was overruled and the doctrine announced in *Gillette v. Tucker, supra*, reaffirmed.

The contention is made that the Ohio cases cited involve a breach of contract of employment, as distinguished from a tort. The holdings in such cases are not strictly confined to the contract of employment alone, but conclude, in any event, the diagnosis and treatment cannot be separate, but must be considered together in determining malpractice. During the period from the first diagnosis to and including the date of the last treatment, the relation of physician and patient existed.

The Minnesota supreme court held in *Schmitt v. Esser*, 178 Minn. 82, 226 N. W. 196: "The statute of limitations does not commence to run against a cause for malpractice of a surgeon employed to treat a fracture until his treatment ends." The court said: "In malpractice cases there is of course difficulty in determining the precise moment when the act or omission which caused the damage took place. The neglectful or unskilful act may occur at some particular moment in months of attendance upon the

patient or it may persist and characterize the whole treatment. Therefore it would seem advisable not to apply the bar of the statute on demurrer unless it clearly appears from the complaint that the unskilful or negligent act which caused the injury took place at a date more than two years before the action was brought."

In *Schanil v. Branton,* 181 Minn. 381, 232 N. W. 708, the court held: "The two-year statute of limitations in a malpractice case * * * does not commence to run until the treatment ends, following former decisions" of the Minnesota court.

In the case of *Sly v. Van Lengen,* 198 N. Y. Supp. 608 (120 Misc. 420), the court held: "Where a physician in performing an operation failed to remove a sponge from plaintiff's pelvic cavity, and did not remove it thereafter, though he continued to treat her for more than 2½ years, plaintiff's cause of action was not barred, under Civil Practice Act, sec. 50, because suit was not brought till more than 2 years after the operation; the tort being continuing, and the period of the statute not beginning to run until the physician ceased his treatments."

We will not endeavor to set out and analyze all of the cases cited touching upon this question. The case of *De Haan v. Winter,* 258 Mich. 293, 241 N. W. 923, supports the rule announced in the Ohio and Minnesota cases, *supra.* The Michigan court said (p. 296): "When did plaintiff's cause of action accrue? Until treatment of the fracture ceased the relation of patient and physician continued, and the statute of limitations did not run. *Schmit v. Esser,* 183 Minn. 354 (236 N. W. 622), and reported with annotations in 74 A. L. R. 1312. While decisions are not in accord upon this question, we are satisfied that in such an action as this the statute of limitations does not commence to run while treatment of the fracture continues. Failure to give needed continued care and treatment, under opportunity and obligation to do so, would constitute malpractice. During the course of treatment plaintiff was not put to inquiry relative to the treatment accorded him."

In determining which of the foregoing rules, as set out by the authorities, should be adopted in this state, it is necessary to review definitions applicable. It is noted that defendant contends that the faulty diagnosis, in and of itself, constituted the breach of duty owing by the physician to the plaintiff in this case; that the resulting damage to the plaintiff by virtue of the treatment by the physician is separable from the diagnosis, and no recovery may be had, if there was negligent treatment.

"Diagnosis" is defined by Webster's New International Dictionary (2d ed.) as follows: "The art or act of recognizing the presence of disease from its symptoms, and deciding as to its character; also, the decision reached." "Determination of a type or condition through case or specimen study." "Conclusion arrived at through critical perception or scrutiny." The foregoing definitions are practically the same as contained in Dorland's American Illustrated Medical Dictionary (16th ed.), and in Stedman's Medical Dictionary, 1939, latest edition, with the exception that in the latter the diagnosis is divided into several parts: "Clinical diagnosis;" made from a study of the symptoms only (in the instant case the petition indicates that the diagnosis made by the physician was by the symptoms); "Physical diagnosis. A diagnosis made by means of physical measure, such as * * * palpation and inspection." The latter is apparently the diagnosis which it is alleged in the amended petition should have been made.

"Malpractice" is defined in Webster's New International Dictionary (2d ed.) as "The treatment of a case by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence, any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties." In Stedman's Medical Dictionary, "malpractice" is defined as "Mistreatment of a disease or injury through ignorance, carelessness * * * ."

It will be noted in the very definition of malpractice that "treatment" is the predominating word and is not separated

from "diagnosis." This would indicate that in the treatment of a patient the diagnosis might change from time to time, and it is commonly accepted in the medical profession that the diagnosis, in the first instance, is not binding on the physician. He should have the right, during the course of treatment, to change the diagnosis. With this in mind, it would seem that the construction placed upon the alleged malpractice of the defendant in the instant case is too narrow.

An analysis of the amended petition discloses: Plaintiff employed defendant as a physician to perform services in the treatment of his injuries as were proper in such case, and defendant failed and neglected to so perform such duties required of him. It was his duty to diagnose the cause, to find from an examination the fractures and injuries suffered by the plaintiff, and to treat them in the manner usually done by physicians in his locality. The defendant did not give him such an examination as would be required in such case and declined to give him an X-ray examination, as requested by plaintiff on June 10, 1938, but continued to diagnose and treat the plaintiff for lumbago, and by so doing plaintiff's spinal column and the sacroilliac joint became deformed, stiff and enlarged. Plaintiff was under observation and treatment by defendant for five months. The diagnosis referred to was a continuing bi-weekly one, and each time an incorrect diagnosis was made and an incorrect treatment applied, plaintiff's injuries were extended. It was not the error in the diagnosis originally made by defendant but its adherence thereto and course of treatment that brought about the injuries.

The reason for the holdings as appear in the Ohio, Minnesota and other cases, cited in support thereof, is that it is just to the physician and surgeon that he may not be harassed by premature litigation instituted in order to save the right of the patient in the event there should be substantial malpractice. The physician and surgeon must have all reasonable time and opportunity to correct the evils which made the observation and treatment necessary

and to correct the ordinary and usual mistakes incident to even skilled surgery. The doctrine announced in the foregoing cases is conducive to that mutual confidence which is highly essential in the relation between surgeon and patient. The treatment and employment should be considered as a whole, and if there occurred therein malpractice, the statute of limitations should begin to run when the treatment ceased. Especially is this true in a situation, such as presented in the instant case, where plaintiff's condition required treatment, rather than surgery.

The statute of limitations, in the instant case, was not a complete bar until August 15, 1940. We hold that the two-year statute of limitations in a malpractice case (Comp. St. Supp. 1939, sec. 20-208) does not commence to run until the treatment ends.

The trial court erred in sustaining defendant's demurrer. The cause is reversed and remanded for further proceedings.

REVERSED.

LOUIS WILLIE, ADMINISTRATOR, APPELLANT, V. FRED WACKER ET AL., APPELLEES.

1 N. W. (2d) 120

FILED DECEMBER 5, 1941. No. 31249.

1. **Appeal.** "The only question which can be presented on appeal to the supreme court in a civil action, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment." *Doon v. Adcock*, 127 Neb. 335, 255 N. W. 548.
2. ———. In the absence of a bill of exceptions and of the pleadings of the respective parties, the appellate court cannot determine whether the giving of an instruction was prejudicially erroneous, since the pleadings and evidence may have justified the verdict.

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

Lloyd E. Chapman and *Clifford L. Rein*, for appellant.

L. R. Doyle and *Carl H. Swanson, contra.*

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

MESSMORE, J.

This is a damage action for personal injuries sustained by plaintiff's intestate in a collision between two motor vehicles on a public highway in Nebraska. We have before us a partial transcript of the proceedings had in the lower court; the pleadings are omitted, and there is no bill of exceptions.

For reversal appellant contends that instruction No. 12 is prejudicially erroneous. It reads: "You are instructed that if you find at the time of the collision the driver of the car in which plaintiff's intestate was riding was driving said automobile on the left of the center of the highway, and that the driving of said automobile on the left side of the center of the highway was the proximate cause of the collision, your verdict will be for the defendants."

"The only question which can be presented on appeal to the supreme court in a civil action, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment." *Doon v. Adcock,* 127 Neb. 335, 255 N. W. 548. It was said in the opinion: "In the absence of a bill of exceptions, it is manifest the appellate court cannot determine that any instruction, however erroneous, was prejudicial, since the evidence may have been such as would have justified the trial court in directing the verdict which was returned by the jury." It was further said: "In the absence of a bill of exceptions, instructions to the jury will be presumed to be free from error, unless they contain statements of law which could not be correct in any possible case made by the proofs under the issues tendered by the pleadings"—citing *Home Fire Ins. Co. v. Weed,* 55 Neb. 146, 75 N. W. 539; *McGraw v. Chicago, R. I. & P. R. Co.,* 59 Neb. 397, 81 N. W. 306. Where there is no bill of exceptions containing the testimony, it will be presumed that the verdict rendered is sustained by sufficient

evidence. *Landman v. City of Benson,* 91 Neb. 479, 136 N. W. 43; *Doon v. Adcock, supra.*

In an analysis of instruction No. 12, the appellant refers specifically to the pleadings. We are only able to ascertain the pleadings from instruction No. 1, given by the court. Cases do arise, and properly so, where the proximate cause of an accident is the driving of an automobile on the left side of the center of the highway.

We are not privileged to assume that instruction No. 1 contains all the pleadings of the respective parties adequately and sufficiently to enable the court to determine whether or not the instruction complained of is prejudicially erroneous. We have neither the pleadings nor the evidence in this case before us. Under the circumstances and in view of the authorities cited, the judgment of the district court is

AFFIRMED.

MARGARET HICKEY, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

1 N. W. (2d) 304

FILED DECEMBER 12, 1941. No. 31229.

1. **Negligence.** Where an inference of negligence arises from the uncontradicted established facts, it is not necessary for the trial court to submit the question of negligence to the jury.
2. **Appeal.** It will not be presumed that passion and prejudice influenced the minds of jurors. That influence must appear from the record before a new trial will be granted for that reason.
3. ———. Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed.

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

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Paul P. Massey and *John C. Mullen, contra.*

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

SIMMONS, C. J.

Plaintiff recovered a judgment in the sum of $12,000 against the defendant for personal injuries received in an accident. Defendant appeals and presents two propositions: First, the trial court erred in not submitting the question of defendant's negligence to the jury; second, the verdict was excessive and the result of passion and prejudice.

Plaintiff, an unmarried woman, was born in 1894. At the time of the accident and for many years prior thereto she was an employee of the Union Pacific Railroad in a clerical position. Her work required considerable use of her right hand in writing, typing, and the use of adding machines and other mechanical office equipment. Her salary at the time of the accident was $139.20 a month or $1,670.40 a year.

The accident occurred on the morning of February 10, 1939. The weather was clear; the temperature eight degrees below zero. About six inches of snow was on the ground, and the streets were slippery. This condition existed generally in the city of Omaha; evidence as to the specific condition at the scene of the accident was not shown. Plaintiff was a fare-paying passenger in a motor bus operated by the defendant. The bus was crowded; the windows frosted. Plaintiff was standing up in the bus when it collided with a street car operated by the defendant. Further details of the accident are not shown, except that there was an unobstructed view of the point where the accident occurred for a block in the direction from which the bus approached. There was a stop sign governing the street car when entering the intersection where the accident occurred.

Plaintiff's injury consisted of a comminuted fracture of the upper right arm. She was taken to the hospital, where the customary effort was made to set the broken bone, including the application of weights to the hand to pull the

arm out so that the bones could be properly placed. This was not successful. Next an operation was performed, the arm opened, a steel plate placed in the arm, fastened with screws to the bone, and a band placed around the fracture to hold the loose part of bone in place. This was successful, and the bone healed in proper position. A second operation was performed some weeks later and the metal materials removed. The wound healed properly leaving, however, a scar on the arm almost seven inches in length. Following these operations the entire arm and hand were in casts for long periods of time. After the last operation healed it was discovered that plaintiff had what is described as a wrist drop. This was caused by the controlling nerve becoming encased in the callus that formed when the bone was healed. It did not respond to treatment, and finally plaintiff went to Mayo's at Rochester, where another operation was performed, the nerve removed from the callus and its function restored. The hand during these months was necessarily not used. Then began the treatments of the hand, 121 in number, extending over a period of several months. These consisted of a heat and pressure treatment intended to restore the normal use of the hand. The pain and suffering from the injury, operations, anæsthetics, and treatments are described in the record as severe. There appears to be some restriction in the use of the arm, but no deformity, unless the scar comes within that classification. Plaintiff has become nervous and has lost weight. The evidence was that her hand and fingers had been restored in their use some 50 per cent., but that she could not close the hand so as to "make a fist." The only dispute in the evidence was as to the permanency of the disability. Plaintiff called three doctors who testified that there would be little, if any, further recovery; that further treatments would be useless; and that only use of the hand could help.

Plaintiff was under the care of the medical department of the railroad company. The chief surgeon had performed the operation on her arm and had in large part treated her case. Plaintiff did not call him. Defendant called him

as its only witness. He was a bit more hopeful of further, if not complete, recovery in the use of her hand. On this issue the jury must be held to have resolved the question of the permanency of the injury in favor of plaintiff.

Under the operating rules of the railroad, plaintiff could not go back to work until released by the chief surgeon, and he had not restored her to a working status at the time of the trial. The evidence is not at all convincing that she could ever fully perform her former tasks, nor is there assurance of other employment if she failed to satisfactorily do her work, when and if restored to duty.

The trial was had approximately two years after the accident.

The railroad furnished the medical and hospital care so that expense is not involved in this litigation.

Plaintiff alleged that the collision and injuries were the direct and proximate result of defendant's negligence. Defendant by answer admitted plaintiff's status as a fare-paying passenger and the collision, and denied generally all other allegations.

The court instructed the jury in substance that they should find for the plaintiff if she had established by a preponderance of the evidence, first, an injury in consequence of the collision, and, second, a pecuniary damage. Defendant argues that the burden is upon the plaintiff to establish negligence; that only an inference of negligence arises from the fact of the collision, sufficient to take the case to the jury without further proof; and that the defendant could either (1) proceed in an effort to explain away the inference or (2) allow the case to be submitted on plaintiff's testimony. In the instant case the defendant followed the latter course. Defendant admits that it owed the plaintiff the highest degree of care consistent with the practical operation of the bus on which she was riding. Plaintiff had established sufficient facts to take her case to the jury. Defendant admits that an inference of negligence arose against it. Defendant's evidence went solely to the question of the extent of plaintiff's injuries and the result-

ing amount of her damage. There is no question here of the shifting of the burden of proof, but only whether there was presented a question of negligence to be submitted to the jury.

The question is, where an inference of negligence arises from the uncontradicted established facts, is it necessary for the court to require that the jury find whether or not there was negligence? Wigmore states the rule as follows: "The question of negligence goes to the jury unless the facts are undisputed and fair-minded or reasonable men could draw but one inference from them." 9 Wigmore, Evidence (3d ed.) 518, sec. 2552(c). Here defendant admits that the inference is against it. See, also, same authority, pp. 270 to 282, secs. 2485, 2486, 2487, for a discussion of this question generally. This court has stated the rule as follows: "Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to determine; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court." *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426, 150 N. W. 374. See 64 C. J. 338.

The evidence was undisputed from which an admitted inference of negligence arises. There was no issue of negligence to present to the jury.

The defendant next complains that the court refused to give two requested instructions to the jury to the effect that defendant as a common carrier for hire was required to exercise the highest degree of skill and care in the operation of its bus, but that it was not an insurer of defendant's safety; and that the burden of proof was upon the plaintiff to show that her injuries were the proximate result of defendant's negligence and that that burden never shifts. In the light of the decision just reached as to the issue of negligence, it is apparent that the situation did not call for the giving of either of these requested instructions.

Defendant in its brief and at the bar of this court vigor-

ously urges that the verdict is excessive, so much so as to indicate that it is the result of passion and prejudice, and asks that the judgment be reversed or a remittitur be ordered. The statute provides that a new trial shall be granted for excessive damages appearing to have been given under the influence of passion or prejudice. Comp. St. 1929, sec. 20-1142. "Passion and prejudice will not be presumed to have influenced the minds of the jurors." 4 C. J. 774. Passion and prejudice must appear to have influenced the verdict of the jury. The verdict in this case does not appear to have been so influenced.

Is the verdict excessive? Defendant cites a series of cases wherein this court has ordered remittiturs and argues that this verdict by analogy should be reduced. How the court arrived at its conclusion in those cases is not clearly demonstrated. Plaintiff cites other cases in which verdicts larger than this have been sustained and argues that by analogy the verdict here is too small and certainly not excessive.

If we were to follow these two arguments to their logical conclusion, it would result in the court classifying injuries, establishing a pattern for juries, and fixing a ceiling above which and a floor below which verdicts should not go. This we obviously have no right to do. In cases where the error cannot be demonstrated, should we order the increase of a verdict which we believe to be too small? To do so would be just as reasonable as to order a remittitur in a case where we think the verdict is excessive.

The difficulty encountered in following either of these arguments is that, in these actions, no two cases are the same in their results to the party injured and no two juries are the same. It cannot be denied that the determination of the amount to be recovered by the injured party is primarily a jury question.

Approximately a third of the verdict may be accounted for in loss of salary for two years. Defendant says that it is then being required to pay over $8,000 for a 50 per cent. loss in use of the right hand. This is not a correct

statement of the evidence. There was the shock, the pain and the suffering from the injury, the effort to properly place the bones, three operations, long periods of hospitalization and longer periods when the arm was in the cast with continued pain and suffering throughout this period; the 121 painful treatments following the third operation; the physical appearance of a crippled hand and a scarred arm; and the partial permanent loss of earning capacity in the work for which plaintiff was fitted. The ability of the plaintiff to use the training of her brain in competitive industry depends to a large part upon the efficiency with which she can use her right hand. These damages suffered by an unmarried, self-supporting woman were all before the jury for their consideration. It is for the jury to say under proper instructions as to the law what the compensation shall be.

That, the jury have done in this case, and we cannot with assurance say that their conclusion is wrong.

The rule is: "A verdict awarding damages for personal injuries will not be disturbed as being excessive, unless this court can say as a matter of law that the amount thereof is excessive." *Banta v. McChesney*, 127 Neb. 764, 257 N. W. 68.

The judgment of the district court is

AFFIRMED.

WILLARD BEHRENS V. STATE OF NEBRASKA.
1 N. W. (2d) 289

FILED DECEMBER 12, 1941. No. 31172.

1. **Automobiles.** "Chapter 110, Laws 1931, having been enacted to secure uniformity in the state laws regulating the operation of vehicles on highways throughout the nation, should be construed in the light of the cardinal principles of the act itself to give effect to this design." *Bainter v. Appel*, 124 Neb. 40, 245 N. W. 16.
2. **Criminal Law.** "In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms

declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." *Lane v. State*, 120 Neb. 302, 232 N. W. 96.

3. **Statutes.** "In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject-matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately." 59 C. J. 993.
4. ———. All parts of an act relating to the same subject should be considered together and not each by itself.
5. ———. "A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 758, sec. 399.
6. **Automobiles.** Where the deceased voluntarily leaped from a moving vehicle and was injured, but without any contemporaneous swerving on part of the same, or without striking or being struck thereby, or in any manner coming in contact therewith, such accident is not within the scope of the penal provisions of section 39-1159, Comp. St. Supp. 1939.
7. ———. An automobile driver is not criminally liable for failure to stop and failure to render aid to an injured person when he does not know that an accident has happened, or injury has been inflicted, or a death has occurred. Such lack of knowledge when *bona fide* will afford a proper defense.

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

Frank J. Reed, for plaintiff in error.

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

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

EBERLY, J.

In this case the defendant, Willard Behrens, prosecutes error from the judgment and sentence of the district court for Scotts Bluff county determining him guilty of a violation of section 39-1159, Comp. St. Supp. 1939, and ordering

that he be confined in the Nebraska reformatory for men for a term of from three (3) to four (4) years. The information on which he was tried, in substance, charged that the "defendant on the 28th day of July, 1940, in the county of Scotts Bluff, * * * then and there being did then and there, drive and operate a certain motor vehicle when and while the said motor vehicle was involved in an accident resulting in the death of Irene Margheim, and did then and there wilfully, feloniously and unlawfully fail to stop said motor vehicle at the scene of said accident," etc. Three sections of our statutes are of importance in this proceeding:

Section 39-1159, Comp. St. Supp. 1939, which reads as follows: "(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident and any person violating this provision shall upon conviction be punished as provided in section 56 (Comp. St. Supp. 1939, sec. 39-1187) of this act. (b) The driver of any vehicle involved in an accident resulting in damage to property shall immediately stop such vehicle at the scene of such accident and any person violating this provision shall upon conviction be punished as provided in section 54 (Comp. St. Supp. 1939, sec. 39-1185) of this act. (c) The driver of any vehicle involved in an accident resulting in injury or death to any person or damage to property shall also give his name, address and the registration number of his vehicle and exhibit his operator's or chauffeur's license to the person struck or the driver or occupants of any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person."

Section 39-1187, Comp. St. Supp. 1939, which provides penalties for an infraction of the previous provisions, and section 39-1190, Comp. St. Supp. 1939, relating to the in-

terpretation of the statutory provisions here under consideration are involved.

These provisions were originally enacted as a part of chapter 110, Laws 1931, an act entitled "An act relating to motor vehicles and regulating the operation of vehicles on the highways," etc. In *Bainter v. Appel,* 124 Neb. 40, 245 N. W. 16, it is stated: "This legislation evidences the substantial adoption by Nebraska of the provisions of the 'Uniform act regulating the operation of vehicles on highways' as recommended and approved by the commissioners on uniform state laws in 1926, and which since that time has been, in effect, adopted by the legislatures of seventeen of the states of the Federal Union, in addition to our own. Section 59 of this chapter 110 provides: 'This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact similar legislation.' In the construction of similar enactments adopted for the purpose of securing uniformity and certainty in certain laws throughout this nation, this jurisdiction is committed to the view that each of such statutes should be so construed, in the light of the cardinal principles of the act itself, as to give effect to this design. *Peter v. Finzer,* 116 Neb. 380; *International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325. See, also, *Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.,* 239 U. S. 520."

The incident forming the basis of this prosecution occurred on Sunday, July 28, 1940. On that afternoon and evening, a party of four young people, composed of the defendant, Willard Behrens, aged 19 years, who lived near Gering, his friend, Reuben Herdt, whose home was east of Scottsbluff, out over the Overland Drive, Elizabeth Giesel, aged 17 years, who lived in Gering, and Irene Margheim, whose home was in southeast Scottsbluff. The party indulged in an automobile ride. They then spent some two and a half hours at a skating rink, following which lunch was had. Then the Giesel girl was taken to her home in Gering. The remainder of the party, with Behrens at the

wheel and Irene Marghéim with him in the front seat, and Reuben Herdt in the back seat of the automobile, started for Scottsbluff to return the two latter to their respective homes. Arriving at Scottsbluff they were proceeding eastward on the Overland Drive. The defendant testifies that, just as they had passed the intersecting street leading to the home of Irene Margheim, "we started down east Overland, and I don't remember just what street it was, but she said, 'Here is where you turn to take me home.' And I said, 'Well, let's take Reuben home, he just lives a little ways out here—we will be back in fifteen minutes.' * * * Then she said, 'Take me home first or I will jump out.' And she opened the door and jumped out." This testimony is substantially corroborated by the evidence of Reuben Herdt, the only other eyewitness of the transaction. Herdt also testifies that the speed of the automobile did not exceed 20 miles an hour, and Behrens' evidence is that the speed of the automobile was from 15 to 20 miles an hour. Behrens also testifies: "After she jumped out, why, I said to Reuben, 'See if she is up.' And he looked around and he said, 'It looks like she is walking.' " Behrens then continued on his way. His further testimony is: "Q. Did you know when Lizzy jumped out—when Irene jumped out that she was injured? A. No; not from the speed we were driving. I could have jumped out myself and stayed on my feet. Q. Did you believe after talking to Reuben that she was on her feet and was uninjured? A. Yes; I did." This occurred almost in front of the Wardman Hotel in the city of Scottsbluff. The record is silent as to the state of illumination of the street at this place beyond Herdt's testimony that it was dark. About the time of the accident a highway patrolman was on this Overland Drive about three blocks east from where the dead body of Miss Margheim was discovered lying on the south side of this drive approximately four feet from the edge of the pavement. During this time he was in this position he had observed "a car going east," which he does not identify, and which he says, "was not going rapidly." Behrens' testimony, as

follows, is undisputed: "Q. Did your car in any way swerve from the road or leave the usual traveled part of the road at the point she left the car? * * * A. No; it did not. Q. Did your car strike anything at that time? A. No. Q. Or did anything strike your car? A. No; it did not. * * * Q. Did your car sustain any injury or damage in any way to your knowledge that night? A. No."

A serious question presented is, does the record before us sustain the conviction of the defendant?

"In this state (Nebraska) all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." *Lane v. State,* 120 Neb. 302, 232 N. W. 96. See, also, *State v. De Wolfe,* 67 Neb. 321, 93 N. W. 746; *State v. Pielsticker,* 118 Neb. 419, 225 N. W. 51.

So too, the defendant pleading not guilty is clothed with the presumption of innocence which stands as evidence in his favor, until the state by its proof shows him to be guilty beyond a reasonable doubt, and all doubts must be resolved in favor of the accused. *Bourne v. State,* 116 Neb. 141, 216 N. W. 173; *Flege v. State,* 90 Neb. 390, 133 N. W. 431.

Section 39-1159, Comp. St. Supp. 1939, is a penal statute and is interpreted in accordance with the rule above set forth, and proof of offenses charged thereunder must conform in degree to that prescribed for the establishment of commission of crimes. "Criminal liability does not attach in all cases where a literal application of the language of the statute might be made." 9-10 Huddy, Cyclopedia of Automobile Law (9th ed.) 179, sec. 103. Such section 39-1159 should be so construed as to render it a consistent, harmonious whole. In other words, a statute should be so construed as to make all its parts harmonize with each other and to render them consistent with its general scope and object. *Jones v. York County,* 47 Fed. (2d) 837; *State v. Bartley,* 39 Neb. 353, 58 N. W. 172.

It is also true that the proper rule of construction appears

to be: "In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject-matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately." 59 C. J. 993. See, also, *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33; *Gibson v. Gibson*, 43 Wis. 23.

"It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 659, sec. 344.

"A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 758, sec. 399.

The foregoing are but instances of the application of the well-established canons of construction: *"Noscitur a sociis"* (the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it). 2 Lewis' Sutherland, Statutory Construction (2d ed.) 803, sec. 414; and *"Ex antecedentibus et consequentibus fit optima interpretatio"* (a passage is best interpreted by reference to what precedes and what follows it). Broom's Legal Maxims (10th ed.) 389. See, also, *Hamilton v. Thrall*, 7 Neb. 210.

The subject of this legislation quoted, and of each of the three sentences which together comprise it, is "any vehicle involved in an accident." These words we find employed in the three sentences which together contain the full expression of the legislative intent with reference thereto. Such expressed intent as a consistent and harmonious whole is necessarily controlling. This controlling intent as deduced from the whole will prevail over that of a

particular part considered separately. Also, the words or phrase "any vehicle involved in an accident" repeated in this statute must bear the same meaning in all sentences, unless a different intention appears. In the third sentence the nature and character of the involvement expressed by the words, "any vehicle involved in an accident resulting in injury or death to any person," is clearly made to appear by the legislative use of the words "to the person struck" and "any vehicle collided with." There must be a striking of the person or an actual collision with a vehicle with ensuing results to accomplish the involvement in the accident which this law penalizes as set forth in the first sentence. Only by the application of this definition to the terms of the statute will it be and constitute a harmonious whole, and thus only will the act punishable by it be made penal by the plain import of the written law.

Under the undisputed evidence in this case, it is not established that the deceased was struck or injured by the automobile, but rather that she voluntarily jumped from the moving vehicle and was injured in alighting, without in any manner coming in contact with defendant's automobile. This accident resulting in her death was not therefore one in which the automobile of which the defendant was then the driver was "involved" as that term is employed in section 39-1159, Comp. St. Supp. 1939.

The question of lack of knowledge on part of the accused as affecting his criminality is also presented by this record. As to this it may be said that under this statute an automobile driver is not criminally liable for failure to stop and failure to render aid to an injured person when he does not know that an accident has happened, an injury has been inflicted, or a death has occurred. *People v. Rallo,* 119 Cal. App. 393, 6 Pac. (2d) 516; *People v. Ely,* 203 Cal. 628, 265 Pac. 818; *Scott v. State,* 90 Tex. Cr. 100, 233 S. W. 1097.

Further, lack of such knowledge constitutes a proper defense. *Olson v. State,* 36 Ariz. 294, 285 Pac. 282. It is a question of fact and not of law. Although we have

this question of knowledge on part of the accused in this case as a matter of conflicting evidence, he was entitled to have his theory of this transaction submitted to the jury by a proper instruction, and a refusal by the district court so to do constituted error.

The judgment and sentence of the trial court being erroneous, the same are reversed and the cause remanded.

REVERSED.

CHAPPELL, District Judge, dissenting.

I cannot concur with my colleagues in the able majority opinion. A belief that defendant is guilty, out of his own mouth and under his own law, impels an effort to give reason to it. I agree generally with the statement of facts appearing in the majority opinion except that there are some facts not recited which, to me, are important in this factual determining case.

Defendant Willard Behrens, 19 years old, driving his father's car, met another youth, Reuben Herdt, in the afternoon of Sunday, July 28, 1940, the day of the alleged offense. Later in the evening they picked up two young girls, Irene Margheim, the deceased, being one of them, and took the girls with them in the car. Irene Margheim was the partner of defendant, and at the time of the tragedy was riding in the front seat with him. They drove around for a while, roller-skated, and lunched in taverns and cafes. The evening before, on Saturday, these boys and others had purchased a case of beer. They had been drinking beer during the afternoon of Sunday. In the evening, before the tragedy, the boys drank the last of the beer which they had purchased on Saturday night, two bottles each, before they got to Gering, where they drank some more beer at a tavern. There is no evidence that the girls drank any. Late at night the boys took the other girl home first, after which they started home with Irene Margheim. Defendant was not bothering her in any way, or putting his arms around her at the time, but, when they had stopped the car before, he had done so. Defendant drove past the corner to turn towards her home,

and she said to him, "You should have turned there," and defendant replied: "I can't. I am past. We will take Reuben home first." Defendant testified that she then said, "Why don't you take me home first?" "Take me home first or I will jump out." Reuben Herdt testified that she said to defendant, "If you don't stop and let her out, she would jump," or "If you don't take me home first, I will jump out," or "Willard, if you don't take me home, I will jump out." She said that a couple of times, but defendant drove on, and immediately thereafter she jumped out of the car while it was going about 20 miles an hour. She left the car, however, from two to four blocks after they had passed the corner to turn to her home. Defendant himself testified that he did not know how she got out of the car. He did not know whether she jumped, or fell out, but he knew that she got out of there some way. The two boys heard the click of the door, felt the breeze when the door was opened, and she was out of the car, it being uncertain whether she stood on the running-board and tried to face the way the car was going or whether she went straight out. The defendant slowed up and closed the door, then resumed his previous speed, but he did not stop.

Defendant testified that he asked Reuben Herdt, "Did she get up?" or "See if she is up. If she ain't, we better stop." And that Reuben Herdt replied, "It looks like she did," or "It looks like she is walking." Reuben Herdt denies that he said this to defendant, and testified that he said to defendant, "Maybe we ought to stop," but that defendant did not stop. In a statement made by defendant immediately after his arrest, he said, "We should have stopped, I know that." Defendant drove on a mile or more, where Reuben Herdt, admittedly at defendant's direction, threw the empty beer bottles out of the car, and defendant turned around and drove back to the place of the accident. They saw her lying in the road. He told his brother a short time after the accident that they went past the body. Defendant testified, "We saw something laying there and we didn't stop." In his statement, made immediately after

his arrest, he said, "She was laying there. * * * Right east, right west of them gas pumps. * * * On the south. * * * Kinda northeast and southwest. * * * Crumpled up. * * * Sideways," but defendant did not stop the second time. He drove on to Gering by a devious route, on side streets, got his brother and another, then drove back to the place of the accident; saw the girl lying in the road, a crowd and the police, but he did not even stop the third time, for the reason, in his own words, "Because we knew it was against the law to monkey with a dead person or injured person." He drove on home, where he was arrested a few hours later. The girl was dead from a basal skull fracture caused by impact with the road. Defendant was tried by a jury of his peers, his own neighbors, and after a fair and impartial trial they found him guilty as charged in the information.

Defendant's assignment that the trial court erred in its refusal to give his requested instruction No. 5, bearing upon the question of whether defendant had knowledge of the injuries or death, is without foundation in either law or fact.

In this kind of case, most courts hold that such knowledge, scienter, is not a necessary element for the state to prove beyond a reasonable doubt in order to convict the defendant. *State v. Masters,* 106 W. Va. 46, 144 S. E. 718. It is a matter of defense, and then only if present as an issue. It clearly appears in the state's evidence that defendant had knowledge of such injuries or death, and although defendant first denies it, says that he did not even look back to see what happened, he thereafter *admits it in his own evidence.* It is never an issue when so admitted by defendant. Nevertheless, the trial court, in instructions given the jury three times, and both in the affirmative and the negative (see instructions Nos. 4, 6 and 7), placed the burden of proving scienter beyond a reasonable doubt upon the state. The defendant had the benefit of such favorable instructions.

Defendant's chief contention, ably presented, is that the

statute does not apply to this kind of case. He admits that Irene Margheim sustained an accident, as ordinarily defined, after leaving the car, but contends that his car was not involved in it. Can this defendant thus escape all responsibility under the law?

The statute involved is section 39-1159, Comp. St. Supp. 1939, which provides: "(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident and any person violating this provision shall upon conviction be punished as provided in section 56 (Comp. St. Supp. 1939, sec. 39-1187) of this act." True, there are also b and c subdivisions of this statute, defining other offenses, but subdivision a, involved herein, defines a complete, separable offense, the violation of which is punishable by a complete, separable, statutory penalty. There is nothing complicated or uncertain in subdivision a. All its words are of ordinary significance. It is not ambiguous. On the contrary, it is simple as the language that ordinary men can write. It was written and passed to prevent concealment, apprehend the guilty, and promote a humanitarian doctrine. In California the language of the statute, in so far as is here applicable, is exactly the same language as that of the Nebraska statute. Speaking of it, the California court said, in *People v. Kinney,* 28 Cal. App. (2d) 232, 82 Pac. (2d) 203: "That language clearly does not limit the performance of such acts to the drivers of automobiles which strike and injure a pedestrian, or which are involved in a collision with other vehicles. It includes all machines which are involved in *accidents of any nature whatever* in which another individual is injured or killed."

To determine whether a car is involved in an accident, we must, by the evidence, determine its relationship to cause and effect. A cause is that which occasions or affects a result; a person or thing that is the occasion of an action or state; it is that without which the result would not have been; an agent that brings something about; that which produces an effect. An effect is that which is

produced by an agent or cause; the immediate result of a cause. Involved means connected with something; drawn into a complication, or implicated; included by rational or logical construction; included necessarily, or carried as a consequence, which is that which follows something on which it depends, or the relation of an effect to its cause.

Whether the parties were negligent in any manner is beside the point here. If the latch on the car door had become loosened or defective, without fault on defendant's part, so that the door had opened and deceased fell out without fault on her part, and impact with the road had killed her, it would be an accident in which his car was involved.

But here is the stronger case: Defendant's conduct and actions of the deceased threw her from the car to the road while it was in motion, and she was killed. Defendant's car was thereby involved in an accident. It was inextricably implicated to the same extent as if, when she was flying through the air, defendant's car had struck and killed her. Defendant's car was a part of the accident, and contributed to it. Without defendant's car and conduct, there would have been no accident and no death. His car was part of it, and he was a party to it. To hold otherwise will open the gates to perfect motoristic, crimeless death, without fear of criminal prosecution and conviction for failure to stop, or for manslaughter. Courts should not adopt a construction which will lead to such consequences unless the language of the statute will admit of no other as logical construction, which is not true in this case.

The record shows that defendant is a young man whose general reputation for being a law-abiding citizen in the community is good. I would not object if the court should temper justice with mercy and reduce the sentence consistent with conviction for a felony, but in all other respects the judgment should be affirmed.

PAINE, J., concurs in the dissent.

DAISY MYRTLE BOWERS, ADMINISTRATRIX, APPELLEE, V. CARL B. KUGLER, APPELLANT.

1 N. W. (2d) 299

FILED DECEMBER 12, 1941. No. 31209.

1. **Evidence.** The admission of *res gestæ* statements is designed to bring out all reasonable means of ascertaining the truth. While such statements are hearsay, they are properly admitted, because they are so closely connected with the main transaction as to be a part of it.
2. ———. Such *res gestæ* declarations are regarded as verbal acts, and are as competent as any other evidence when relevant to the issues.
3. ———. The fact that the declarant died only a short time subsequent to his utterance has sometimes been considered an important element in determining the admissibility of his *res gestæ* statements, but the better rule is that this fact has no weight in itself in determining the admissibility of the statements made.
4. **Appeal.** The admission in evidence, as part of the *res gestæ*, of a declaration giving the opinion of the declarant is prejudicial error.
5. **Negligence.** Negligence is not presumed; the mere happening of an accident does not prove negligence.
6. ———. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.

APPEAL from the district court for Webster county: FRANK J. MUNDAY, JUDGE. *Reversed and dismissed.*

Baylor, Tou Velle & Healey, Butler, James & McCarl and *Howard S. Foe,* for appellant.

L. A. Sprague, James H. Falloon, Gerald M. Mullen and *John C. Mullen, contra.*

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

PAINE, J.

Plaintiff, as administratrix, brought this action to recover for the death of her husband, killed in a motor vehicle accident near Red Cloud. The jury returned a verdict for

$15,600, which the trial judge ordered reduced to $13,600. The defendant appeals from the judgment entered thereon.

The plaintiff's husband, Delbert L. Bowers, aged 29, was the owner and driver of a practically new 1937 1½-ton Chevrolet truck, in which he hauled fruit and stock and other things to central and western Nebraska, earning about $200 a month. He was driving east at the time of the accident, and two men were riding with him.

Carl B. Kugler, defendant, doing business as the Kugler Oil Company, with his principal place of business at Culbertson, was the owner of a gasoline transport, consisting of a tractor, on which was the cab and the trailer, carrying a loaded gasoline tank. This gasoline transport was driven by Lester Elliott, and Gus Lonn was riding with him. All five men in the two trucks were burned to death in this accident.

It appears that about 11 o'clock on the night of September 22, 1938, which was a clear night, the Bowers fruit truck was going east on highway No. 4, and approaching a bridge located between two hills about four miles west of Red Cloud, the highway being about 24 feet wide, with only a 16-foot road across the bridge. The gasoline transport was going west, and, it is charged, was negligently run against the north side of the bridge with force and violence, especially at the east end of the bridge, breaking off a wooden guard-rail and scarring the steel supports, and the steel channel irons along the north side of the bridge were damaged clear across the bridge.

It is charged by plaintiff that the transport dragged against the north side of the bridge and, as it came off the west end of the bridge, sideswiped the fruit truck, which was on its side of the road, throwing it off the highway. The gasoline in both trucks ignited and burned for hours, destroying both trucks.

The evidence of the condition and position of the trucks is important, and the testimony of the witnesses varies somewhat on the exact location of the two trucks after the collision, but from a review of all the evidence it may be

stated that the trailer part of the gasoline transport was bottom side up in the middle, or to the south side, of the highway, at a distance of 25 to 75 feet west of the west end of the bridge, and the cab on the tractor part was tipped over on its side on the south half of the road, but still attached. The sheriff was finally able to allow four or five cars to proceed on the north side of the gasoline transport before it blew up between 4 and 5 o'clock in the morning, but no traffic could get by on the south side.

The fruit truck, headed east, was in the ditch off the road on the south side, partly on the fence, about 14 feet from the west end of the bridge, and lots of pears and some apples were a smouldering mass. The front left end of the cab on the fruit truck was badly bent and caved in, and on the left side the fender was caved down on the wheel, and the left front tire was mashed and blown out. While the headlights were not broken, it is clear, from the evidence as to tracing the marks from the roadbed to where it was lying, that the transport had struck the left-hand side of the fruit truck when it was about 12 feet west of the west end of the bridge, and had bent in the fenders, and bent the front left wheel back underneath the motor.

Gilbert Reed lived on his farm near this bridge. They had gone to bed upstairs when, Mrs. Reed testified, she was awake and saw a car coming from the east go by and heard a crash. They ran to the window, and Mr. Reed testified that the flames were leaping up from something burning in the road. They dressed and rushed out, Mrs. Reed and son reaching the scene of the accident first, as Mr. Reed stopped to telephone the sheriff, who came out immediately, and stayed during the night and the next day. There was a hole in the right side, and near the top, of the transport tank, out of which the flames were shooting. As soon as Mr. Reed arrived at the place of the accident, he saw a man coming up out of the creekbed on the south side of the road, entirely denuded except for his boots and the gloves on his hands, and entirely covered with burns. This man was Lester Elliott, the driver of the gasoline

transport. He was taken into the Reed home and placed on a cot, and told them to telephone his employer, the defendant, at Culbertson, Nebraska, and notify him of the accident; the objection to this evidence being sustained by the court.

Darrel Smith, who arrived within five minutes after the accident, met Gus Lonn in the road, with his hair and eyebrows burned off, his shirt partly burned off, and he had on no trousers. The objection to the offer to prove that he said that Elliott, the driver of the transport, had hit another transport was sustained.

The defendant sets out 20 errors relied upon for reversal, insisting that the court should have sustained the defendant's motion for a directed verdict, that the court committed error in permitting certain evidence to be introduced, and that the court erred in giving instructions Nos. 1, 2, 6 and 8 on its own motion, and in refusing to give instructions Nos. 18, 23 and 26 tendered by defendant.

The defendant objects to instruction No. 1, and charges that the trial court copied the pleadings of the parties almost verbatim, which the defendant insists has been condemned repeatedly by this court. The plaintiff denies in her brief that the pleadings were copied, and argues that the trial court gave only a brief synopsis of the same.

This method of instructing on the issues was discussed at considerable length in the case of *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N. W. 97, and in that case it was held that it was not prejudicial error for the trial court to summarize six pages of pleadings into three pages of instruction No. 1.

It was further discussed in the later case of *McClelland v. Interstate Transit Lines*, 139 Neb. 146, 296 N. W. 757, and it is said that, if copying the pleadings at length results in prejudice to the complaining party, it is a sufficient ground for reversal.

However, in the case at bar, we cannot see how prejudice resulted in this case because the trial court followed the pleadings too closely.

Strenuous objections are made to the admission of certain evidence, especially in the testimony of Gilbert Reed as to his conversation with Elliott, the driver of the transport, whom he met coming up the bank of the dry creek, badly burned, within a few moments after the accident happened.

Repeated strenuous and lengthy objections were made by defendant's counsel to any *res gestæ* evidence, and the jury were excused, and arguments were made to the court.

Mr. Reed was asked: "What did you hear him say? A. He was very profane, and —" the last part of the answer was stricken out on Mr. Baylor's motion. "A. I said, 'What did you hit?' Q. What did he say? A. 'A God damned stock truck.' * * * A. I made the remark to 'Come over here!' or 'Shut up and come over and we'll help you;' and after he got over there, I said, 'What did you hit?' and he said, as I have answered before; and I said, 'What are you driving?' and he said 'A Kugler Oil Company transport.' * * * I then says, 'How did it happen?' * * * Q. What did he say? * * * Mr. Baylor: Object to the question as incompetent, irrelevant and immaterial, hearsay, as calling for the statement of another which is merely a narration of past events, and for the statement of another as to that other person's conclusion; and, further, that it calls for a statement by the witness of what another said, which in no way would be binding upon a principal, and no foundation having been laid. The Court: Overruled. A. 'Oh, my God! it might have been my fault; I thought he was coming on.' Mr. Baylor: I move to strike out the answer as the mere statement of what was said by another which was merely that other person's conclusion, and especially that part of the answer with reference to 'it might have been my fault' as particularly that other person's conclusion, and not binding in any way upon the defendant, not a part of the *res gestæ,* and a mere narration and not a statement of fact. The Court: Objection overruled."

The last statement of the witness was a mere opinion or

statement of his conclusion; it was not binding in any way on the defendant, it was not a statement of fact.

Res gestæ is the act speaking for itself. It embraces all those circumstances which are illustrative of the main act. The lapse of time may be more or less, provided the declaration is connected with, and caused by, the event, and tends to explain it, and was not made as an afterthought. 20 Am. Jur. 553, sec. 662.

The *res gestæ* statement must be made under the immediate force of circumstances, and not as an afterthought.

The admission of *res gestæ* statements is designed to bring out all reasonable means of ascertaining the truth. While such statements are hearsay, they are properly admitted, because they are so closely connected with the main transaction as to be a part of it. Such *res gestæ* declarations are regarded as verbal acts, and are as competent as any other evidence when relevant to the issues. *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 Pac. 709, 41 A. L. R. 1027; 3 Wigmore, Evidence (2d ed.) sec. 1747; *Roh v. Opocensky*, 126 Neb. 518, 253 N. W. 680.

The fact that the declarant died only a short time subsequent to his utterance has sometimes been considered an important element in determining the admissibility of his statements, but the better rule is that this fact has no weight in itself in determining the admissibility of the statements made. 20 Am. Jur. 570, sec. 675.

Although there are some exceptions, a statement of a mere conclusion or opinion is not ordinarily admissible as a part of the *res gestæ*, which should be confined to declarations which relate to provable facts. 22 C. J. 469; *Field v. North Coast Transportation Co.*, 164 Wash. 123, 2 Pac. (2d) 672, 76 A. L. R. 1114; 1 Jones, Evidence (4th ed.) 630, sec. 344; *Wert v. Equitable Life Assurance Society*, 135 Neb. 654, 283 N. W. 506.

The ruling of the trial court in the case at bar, in admitting as part of the *res gestæ* the declaration giving the opinion of the driver of the transport, was prejudicial error.

The errors which we have now considered require that the

judgment be reversed and this cause remanded for a new trial.

Having reached this conclusion, we will now consider the defendant's argument that there is no negligence proved which warrants the submission of this case a second time to a jury.

The evidence shows that the bridge was damaged, that there was a tire mark on the batter chord on the north side of the bridge, and two eight-foot sections of channel irons, or rails, were dislodged, and one was stuck in the ground. A tire may have blown out, as all except one of the tires were down after the fire.

The evidence also shows that, about 12 feet west of this bridge, there were two four-foot furrows in the side of the road, running towards where the fruit truck was found.

The facts of exactly the location of each truck after the fire do not tend in any way to show or prove exactly how this terrible accident, which caused the death of five men, came about.

We fail to find any substantial affirmative proof that the negligence of the driver of the gasoline transport caused this accident. There is no evidence that he was driving at an unlawful rate of speed, or that the truck was not properly lighted, or that he steered or drove the truck negligently, for striking the side of the bridge may have been caused by a tire blowing out. There were no eyewitnesses who testified in court as to a collision, if one occurred, or whether the fruit truck was standing or in motion, or at what moment the gasoline started to burn, or why.

The real problem presented, as to which one of several inferred causes may actually have caused the gasoline transport to tip over, cannot be solved by the evidence in the bill of exceptions.

Negligence can never be inferred from the mere fact that an accident happened.

The statements made by these witnesses, all of whom came after both trucks had been blazing fiercely, are insufficient to prove what happened, or to prove any neg-

ligence on the part of the driver of the transport, to say nothing of negligence of that degree which warrants a recovery in this case. *Anderson v. Interstate Transit Lines,* 129 Neb. 612, 262 N. W. 445; *Leonard v. Trimble,* 133 Neb. 254, 274 N. W. 593; *Mischnick v. Iowa-Nebraska Light & Power Co.,* 125 Neb. 598, 251 N. W. 258; *Bernhardt v. Chicago, B. & Q. R. Co.,* 132 Neb. 346, 272 N. W. 209; *Klein v. Beeten,* 169 Wis. 385, 172 N. W. 736; *Miner v. Scholton,* 250 Mich. 645, 231 N. W. 120; *Loucks v. Fox,* 261 Mich. 338, 246 N. W. 141.

The burden rested upon the plaintiff to establish by a preponderance of the evidence that the driver of the transport was guilty of negligence, which negligence was the proximate cause of the death of Delbert L. Bowers.

The circumstances, as shown by the evidence, lead to no more than a conjecture or surmise that such was the case. Therefore, it is our opinion that the evidence does not warrant a recovery, and the judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

MESSMORE, J., dissenting.

I respectfully dissent from the majority opinion, in that I am convinced that the physical facts and surrounding circumstances do not warrant a dismissal of this case.

The bridge in question was durable, made mostly of steel and concrete. The batter chord on the northeast corner was approximately 10 inches in width, coming up to a 45-degree angle and reinforced underneath with lattice-work for support. After the accident 14 to 16 inches of the guard-rail on the northeast corner of the bridge was broken off, as was a two-by-six-inch plank. The wheel guard on the north side was torn up to about two-thirds of the way across the bridge. There were tracks on the bridge floor, clearly indicating that something had dragged from at least half to two-thirds of the way across. Strips of iron were rolled into small parcels. The batter chord was broken, sprung and pushed down. Tire marks appeared up to the top of the batter chord. The position of

the oil transport immediately after the accident was directly west of the bridge in the proximate center of the highway, and was bottom-up, the cab part in a jack-knife shape.

The physical facts are important and disclose that the transport must have been driven at a high rate of speed, because when it struck the northeast corner of the bridge and batter chord it tore the bridge floor loose from the pier to which the end of the floor was attached, and, likewise, the steel braces under the batter chord. The transport turned in a southwesterly direction and must have struck the fruit truck, parked on the shoulder of the road with sufficient force to throw such truck into a ditch south of the south shoulder of the road, the transport proceeding for a distance of 40 feet west of the west end of the bridge.

The channel cord was torn from the northeast corner and thrown to the southwest corner, and was found sticking in the ground at such point. This clearly indicates that the fruit truck was not on the bridge when the accident occurred. Had it been, it would have had to pass over the channel cord sticking in the ground; in addition, the guard-rail would have been damaged, and a part of the dirt bank destroyed.

My contention is that the physical facts and circumstances surrounding the accident are amply sufficient to warrant the submission of negligence on the part of the driver of the transport to the jury, and such negligence might and could constitute the proximate cause of the damages, as pleaded in plaintiff's petition. In consideration of the record, as I understand it, I cannot countenance a dismissal of this case.

C. W. SWINGLE & COMPANY, APPELLANT, V. EARL E. REYNOLDS, APPELLEE.

1 N. W. (2d) 307

FILED DECEMBER 12, 1941. No. 31045.

1. **Monopolies.** Anti-trust laws, laws forbidding unreasonable restraint of trade and laws relating to monopolies were enacted primarily for the protection of the public and not for the purpose of interfering with the right to make private contracts growing out of legitimate business transactions.
2. **Good-Will.** The purchase of business property is a sufficient consideration for a contract by the seller that, for a reasonable time in a limited territory, he will not engage in the buyer's business.
3. **Contracts.** A contract of employment may constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of the employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business.
4. ———. Partial restraints upon the exercise of any business are not unreasonable when they are ancillary to a valid contract affecting the business of the party in whose favor they are imposed, if made in good faith and are apparently necessary to afford reasonable protection to such party.
5. ———. An agreement by the seller of property acquired by him for the purpose of rendering and processing dead animals that he will not engage in such business south of the Platte river in Nebraska for five years, *held,* under the terms of the contract and the evidence adduced, to be a reasonable limitation, and not in violation of public policy as creating an unreasonable restraint of trade or an unlawful attempt to create a trust or monopoly incompatible with the public interest.

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

Stewart, Stewart & Whitworth and *Robins & Yost,* for appellant.

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

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

CARTER, J.

This is an action to recover damages for the breach of a contract of sale containing a covenant not to engage in the business of rendering dead animals in the territory south of the Platte river in Nebraska for a period of five years. At the close of plaintiff's evidence the trial court directed a verdict for the defendant.

The plaintiff had for many years been engaged in the business of rendering and processing dead animals in the state of Nebraska in a territory extending from the Missouri river west to Oxford and lying south of the Platte river. Plaintiff's plant was located at Lincoln and was served by company trucks operating in the territory hereinbefore described.

In March, 1937, plaintiff and defendant entered into a written contract whereby plaintiff purchased from the defendant certain real estate and machinery which defendant had acquired while constructing a rendering plant at Fairbury, Nebraska. The contract contains the following paragraph: "As a part of the consideration for the foregoing sale and purchase of the above described property, Reynolds hereby agrees not to engage either directly or indirectly in any manner whatsoever for a period of five years from this date in the rendering business, which is understood to include the collection, transportation, rendering and processing of dead animals, packing house offal and butcher shop offal, in that part of the state of Nebraska which is south of the Platte river."

On October 7, 1937, defendant and C. W. Bruenig commenced the construction of a rendering plant at Wahoo, Nebraska, the plant being located south of the Platte river. Plaintiff alleges that it commenced operation in November or December, 1937, and that defendant was connected with the plant until December 21, 1938. There is evidence in the record that operations commenced on December 2, 1937, and that defendant sold his interest to Bruenig on December 21, 1938.

This action was commenced to recover damages for the

violation of that part of the contract providing that defendant was "not to engage either directly or indirectly in any manner whatsoever for a period of five years from this date in the rendering business, * * * in that part of the state of Nebraska which is south of the Platte river." Defendant for defense contends that the action is based on an unlawful agreement, that the restriction recited in the contract is violative of the anti-trust laws, and of the laws forbidding restraint of trade and monopolies.

The general rule is that the purchase of the property and business of another furnishes a sufficient consideration for an agreement that the latter will not again engage in that business in the same vicinity. Such a contract to be against public policy must have a tendency to militate against the public interest. *Farmers State Bank v. Petersburg State Bank,* 108 Neb. 54, 187 N. W. 117. Partial restraints upon the exercise of any business are not considered unreasonable when they are ancillary to any valid contract made in good faith and are apparently necessary to reasonably protect the parties, or either of them. But if it appears that the main purpose of the transaction is to create a monopoly and the making of the contract is only incidental to the accomplishment of that purpose, the contract will not be enforced. *Wittenberg v. Mollyneaux,* 60 Neb. 583, 83 N. W. 842.

The evidence reveals the fact in the instant case that defendant had not completed his plant at Fairbury, that he did not intend to complete it, that a going business had not been established, and, consequently, defendant had no good-will to sell. The defendant well knew that the restrictive covenant was essential to the consummation of the deal. It is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits. Unless such contract be against the public interest, the parties should be held to their engagements.

It must be admitted by a practical consideration of the subject that any restrictive covenant of this nature does to some extent eliminate competition and tend toward monopoly. Any statement to the contrary simply fails to consider its practical aspects. Also, it may be said that such contracts are generally made for the very purpose of eliminating some competition. To state it otherwise would require us to overlook actualities in modern business methods. We think the plaintiff had a right to purchase defendant's property and business for the very purpose of eliminating him as a competitor, and the contract being in all respects the voluntary act of the parties and free from misrepresentation and fraud, it is binding unless it contravenes the public interest.

The question might well be posed as to how the public interest has been contravened by the making of the contract in question. Defendant promised to refrain from business for a period of five years in the south Platte territory in Nebraska. Certainly, the five-year limitation is not unreasonable, and defendant does not so contend. Is the territorial limitation unreasonable? The evidence discloses that plaintiff's trucks operate at points 160 miles distant from its plant at Lincoln. That it is possible to operate at more distant points cannot be questioned. Other competitors are not prevented from competing with plaintiff in any of the south Platte territory. In fact, other plants are now operating in the restricted area at McCook, Tecumseh and Wahoo. The elimination of one competitor from a restricted area for a limited time in the business field recited in the record does not appear to us to constitute such a restraint of trade or tendency toward monopoly incompatible with the public interest as to warrant one of the parties to avoid his solemn agreement which he made in consideration of a sum of money greatly in excess of value given, if the restrictive covenant be void.

The general rule is that "A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it * * * is

greater than is required for the protection of the person for whose benefit the restraint is imposed." Restatement, Contracts, sec. 515. The contention is made that the inclusion of the territory south of the Platte river and west of Oxford, Nebraska, makes the restriction unreasonable. The evidence shows that the business of plaintiff did not extend into this area. "Neither the period of time during which a restraint is to last, nor the extent of the territory that is to be included is conclusive but the length of time and even more the extent of space are important factors in the determination of the reasonableness of a restrictive agreement." Restatement, Contracts, sec. 515, Comment c. Ordinarily, the inclusion of the territory west of Oxford within the restricted area would make the territorial scope of the restrictive clause excessive and require a finding that the limitation was unreasonable.

The record shows, however, that the plaintiff company or its stockholders were contemplating the construction of a rendering plant at McCook, Nebraska. In the contract the following provision appears: "In the event a corporation is organized by the Company or its stockholders to operate a rendering plant at McCook, Nebraska, Reynolds shall, upon request, be made the manager of such plant at a good salary plus 10 per cent. of the net profits of the business of such company and Reynolds shall also have the right to purchase from the Company, or its stockholders, one-half of any stock which such Company, or its stockholders, acquire in the new corporation. Reynolds shall give the Company written notice before such plant is ready for operation if he desires to become manager thereof, and if he desires to purchase such stock and such stock shall then be transferred to Reynolds and paid for by him." That the foregoing provision was considered a binding contract of employment is evidenced by defendant's answer in which it is alleged that in April or May, 1937, "and before the rendering plant at McCook, Nebraska, referred to in plaintiff's petition, was ready for operation, defendant orally gave notice to the plaintiff that he desired to exer-

cise the right given him by said contract * * * to become manager of said plant, * * * that plaintiff thereupon accepted said oral notice and promised and informed the defendant that it would take the matter up further with defendant prior to the commencement of operation of said plant at McCook." It is evident therefore that the contract of the parties had a double aspect, one having to do with the sale of the plant at Fairbury, and the other having to do with a contract of employment in a plant to be constructed and operated at McCook, Nebraska.

An authoritative text states the rule applicable to a contract of employment as follows: "The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly: * * * (f) A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent." Restatement, Contracts, sec. 516. We think the contract of employment to be performed at McCook, Nebraska, and recognized by the answer of defendant as a valid contract, constitutes a sufficient consideration for the restrictions imposed in the south Platte territory west of Oxford. The restrictive promise was reasonably limited and therefore enforceable.

We conclude therefore that the contract of sale of the real estate and personal property at Fairbury and the agreement therein contained to employ defendant in the operation of the rendering plant at McCook, Nebraska, are sufficient to sustain the limitations imposed by the contract as to the time and space in which defendant might compete with plaintiff in the rendering and processing of dead animals. The limitations being reasonable under the circumstances, they are not incompatible with the public interest or against public policy.

Damages to plaintiff through loss of profits occasioned

by the competition of the rendering plant promoted and partially financed by defendant and operated by Breunig at Wahoo were definitely shown by evidence as yet uncontradicted. It is argued that plaintiff took away the truck formerly operated at Wahoo in its business before the rendering plant there went into operation, and, consequently, is not entitled to recover damages for the loss of business in that field. At the very least, the question of the voluntary abandonment of the territory is a question for the jury.

We think the evidence required that defendant's motion for a directed verdict be overruled.

REVERSED AND REMANDED.

ELLIS, District Judge, dissenting.

I am unable to agree with the conclusion reached in the opinion adopted by the majority of the court.

I think the plaintiff's evidence establishes two bases requiring condemnation of the restrictive clause, either of which standing alone would be sufficient. First, that the clause is unreasonable and unnecessarily broad in its territorial scope and, second, that it was not actually ancillary to the purchase of property but was in fact the primary purpose—the clause, without which, the contract would not have been entered into.

The plaintiff's second amended petition alleges that plaintiff at all times mentioned was engaged in business *"in that part of the eastern half of the state of Nebraska which is south of the Platte river."* In its reply the plaintiff alleges that at the time the contract was executed the McCook territory was *"not then adequately served* by any rendering establishment." In support of these allegations the plaintiff's president testified as follows: "Q. So prior to 1937 the McCook territory, the South Platte territory west of Oxford was not adequately served by a rendering plant? A. That is right. Q. Were there any other plants in Nebraska doing business out there? A. I don't think so. Q. There wasn't any plant in Nebraska that was in a position to reach that territory? A. Yes."

Plaintiff's evidence also shows that its western-most agencies were at Franklin and Hastings and that its trucks from these points "might go out as far as Oxford." This seems to dispose of the suggestion in the majority opinion that other plants were free to compete in the whole of the restricted territory and especially in view of the fact that at the time the contract was made the *only other plant* south of the Platte was located at Tecumseh.

As indicated in the majority opinion, the defendant had merely begun the construction of a plant in Fairbury. It was not in any degree in operation and necessarily had no established business or value or good-will as a going concern. There is no contention that the prospective territory to be served by this plant was not included and within the territory already being served by the plaintiff. Conceding that a legitimate purpose of such a contract may include the protection of the business enjoyed by the purchaser before the purchase as well as the protection of the business being purchased, mere statement seems to demonstrate the unreasonableness of attempting to include all the territory south of the Platte and west of Oxford—a territory in which the plaintiff was not operating, had no business to protect and, by the plaintiff's own proof, a territory not adequately served by *any* plant.

An examination of our own cases reveals no case in which the court has upheld such contracts except where the facts disclosed a reasonable basis for the scope of the territorial restriction and an apparent necessity to afford fair protection to the purchaser. This is apparent from the pains taken by the court to demonstrate the reasonableness of the territorial restriction in *Tarry v. Johnston*, 114 Neb. 496, 208 N. W. 615. In that case this court said: "The reasonableness of such a restraint is the test of its validity." *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842: "But partial restraints are not deemed to be unreasonable when they are ancillary to an actual purchase of property made in good faith, and are apparently necessary to afford *fair* protection to the purchaser. (Italics ours.) * * *

Of course, if it be shown that the main purpose of the agreement is to secure a monopoly, and that the purchase of the property was a mere incident or means to that end, it is within the rule applicable to ordinary combinations in restraint of trade, and will not be enforced."

If this contract is to be approved, covering as it does a substantial territory in which the purchaser had no business to protect, it will be rather difficult in the future for the bench and bar to know whether there is a limit and, if so, where and on what basis it is to be determined.

With reference to the purpose or intent of the plaintiff in entering into the contract the plaintiff's president testified as follows: "Q. Mr. Swingle, would you have entered into the agreement Exhibit A if the provision relating to Reynolds reentering business in the territory south of the Platte River in Nebraska had not been in the contract? A. No. Q. Why not? A. Because there would have been no benefit there. It would have been worthless to us." He also testified that the land and improvements thereon at Fairbury were of no use to plaintiff. On cross-examination plaintiff's president testified as follows: "Q. So, Mr. Swingle, the real purpose of entering into this contract was to obtain this provision that Mr. Reynolds would stay out of the South Platte territory for five years. A. It was to get that and to get his services at the McCook plant that we proposed to build." With reference to the latter part of this answer, it is based on the provision in the contract in question which is set forth in the majority opinion. It is quite apparent that this provision did not give the plaintiff any option on defendant's services and was, of course, wholly unenforceable by defendant against some other corporation not a party to the contract. The plaintiff did not build a plant at McCook and neither were the persons who built the plant there all stockholders in the plaintiff corporation. If plaintiff thought that the contract gave it a legal claim to defendant's personal services for a plant at McCook, it increases the difficulty in justifying his exclusion from the territory of the plant he would be in charge of.

The suggestion by plaintiff's president that the only other purpose (other than to exclude defendant from the whole South Platte territory) of the contract was to get defendant's services is so naive and so utterly without foundation in law or fact as to justify the inference that plaintiff was aware of the glaring need for justification of the actual and unlawful purpose of the restrictive provision. In most of these cases the court is necessarily compelled to rest condemnation on justifiable inferences of unlawful purpose, but here we have an express admission of the purpose which the law condemns.

With reference to the suggestion that no monopoly was created by this contract, it is rarely true that a monopoly is created by one such contract but rather by a series of them successively negotiated. It is the purpose and tendency to create a monopoly which is proscribed. The public policy involved will not be served if condemnation is withheld until the final and consummating contract is submitted. It may be pertinent at this point to note that plaintiff's evidence shows that the *only* other plant located in the south Platte territory was the one located at Tecumseh. In this same connection it may be pointed out that the record shows that the plaintiff was forced by competition during a part of the period since the contract was made to pay the farmers for the carcasses collected. While not of great importance, it gives point to the public policy which condemns such contracts where unreasonable in territorial scope and made with ulterior purpose. It likewise makes clear the value of the protection from competition to be obtained from only a few such contracts.

2 Restatement, Contracts, in covering this topic contains the following:

Section 513. "A bargain is in restraint of trade when its performance would limit competition in any business or restrict a promisor in the exercise of a gainful occupation."

Section 514. "A bargain in restraint of trade is illegal if the restraint is unreasonable."

Section 515. "A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it

"(a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or

"(b) imposes undue hardship upon the person restricted, or

"(c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or

"(d) unreasonably restricts the alienation or use of anything that is a subject of property, or

"(e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment.

"Comment: * * *

"c. Neither the period of time during which a restraint is to last, nor the extent of the territory that is to be included is conclusive but the length of time and even more the extent of space are important factors in the determination of the reasonableness of a restrictive agreement. * * *

"Illustrations of Clause (a): * * *

"2. A sells his business to B, and as part of the bargain promises not to engage in a business of the same kind within a hundred miles. The scope of neither A's nor B's business extends so far. The restraint is more extensive than is necessary for B's protection and the promise is illegal. * * *

"Illustrations of Clause (b): * * *

"7. A and B enter into a contract of employment in which B promises not to engage in a similar business anywhere within the State after the termination of the employment. A's business does not extend throughout the State but he hopes

> that it may later do so. B's promise to refrain from entering into a similar occupation is illegal."

The Restatement is in accord with all previous holdings of this court and there is therefore no reason why the desirable purpose of the Restatement should not be furthered by keeping the law of the state in accord with it.

I submit that the restrictive clause in issue is within four out of the five separate proscribing tests set forth in the Restatement.

The majority opinion finds that the inclusion of the territory west of Oxford "would make the territorial scope of the restrictive clause excessive and require a finding that the limitation was unreasonable," but that the clearly indicated condemnation of the contract is to be avoided by another provision, viz., the provision relating to defendant's employment by plaintiff. Referring to this provision, as quoted in the majority opinion, it seems apparent that it did not purport to and did not create any enforceable right in the plaintiff. If it had any significance and was legally enforceable under any circumstances, which is at least doubtful, the provision was for the benefit of the defendant alone or, in other words, was part of the consideration flowing to the defendant. There is utterly no basis for any claim that the provision afforded any protection to the plaintiff or its business. This being true, it seems to me that the majority opinion introduces a new and dangerous test to be applied and perhaps superimposed on those heretofore recognized as determining the validity of such contracts. It amounts to a pronouncement by the court that in the future, in passing upon the validity of a restrictive provision, the bench and bar must consider the nature and amount of the consideration moving to the restricted party.

Heretofore it has only been necessary to consider the time and territorial scope of the restriction in the light of the other party's business, its nature and extent. If this test produced a result of unreasonableness, then the contract was unenforceable and the consideration and other pro-

visions of the contract became wholly immaterial.

In the future, in order to make legal a contract otherwise illegal because in unreasonable restraint of trade, it will only be necessary to put into the contract some nebulous provision in favor of the restricted party. Having in mind that we are not here concerned with the promises or obligations of the contracting parties under the ordinary law of contracts but rather with a rule arising out of the public interest and for the public benefit, I consider that the majority opinion can only result in confusion and the ultimate nullification of the rule itself.

As to the holding in the majority opinion that defendant's answer in this action made this contract (which, as indicated above, is found by the majority to be illegal) a legal contract, it contains implications which will be received with profound shock and especially by the bar. It is true that the defendant's answer contains the matter quoted, but the answer also sufficiently pleaded illegality of the contract. As indicated, I think the plaintiff's evidence fully established this latter defense.

Under the prevailing rules of pleading any defendant has a right to plead as many defenses as he may have so long as they are not incompatible in the sense that proof of one necessarily disproves the other. See Comp. St. 1929, sec. 20-812; *Tighe v. Interstate Transit Lines*, 130 Neb. 5, 263 N. W. 483, and cases cited. I think it will be conceded by all that the defense of illegality was a legitimate defense properly asserted and in good faith. Perhaps the judicial history of this case will serve as justification for the defendant's alternative defense. However, he will find little satisfaction in this justification since by pleading his alternative defense he destroyed the one which, except for the other, the majority finds would have been a complete defense. Those members of the bar who are retained to defend will need to look well to the danger of pleading more than one defense.

The appellant's contention that it is inequitable and unconscionable to permit the defendant to retain the bene-

fits of the contract in the face of his breach is not without appeal, but it overlooks the fundamental premise that the condemning rule of law has its source in the public interest and resultant public policy. This rule overrides the contract, the interests and equities of the parties and ought not be parried aside by an incidental, though abhorrent, result which necessarily has been produced in every case where the courts have denied enforcement of such contracts.

The contract in question apportions the total consideration paid by the plaintiff among some eight different items of property acquired from the defendant but does not apportion any part of the consideration to the exclusion clause. Without encumbering the record with the evidence as to the character and value of the property received by the plaintiff, it may be said that the plaintiff received seven acres of land and other property of substantial value to it, so that no unconscionable amount was paid for defendant's promise which disabled him from engaging in business for a substantial period of time and in an unconscionably large territory. The purchaser in this case was not without fault in demanding a restriction wholly unnecessary and unreasonable.

The foregoing indicates the basis of my opinion that the trial court was correct in his appraisal of the facts, justified in his application of the rule, and that the judgment ought not to be reversed.

JEPPE J. REFSHAUGE, SUCCESSOR-TRUSTEE, APPELLANT, V. SESOSTRIS TEMPLE ANCIENT ARABIC ORDER NOBLES OF THE MYSTIC SHRINE: FIRST TRUST COMPANY OF LINCOLN, APPELLEE.

1 N. W. (2d) 320

FILED DECEMBER 12, 1941. No. 31091.

APPEAL from the district court for Lancaster county: JEFFERSON H. BRODY, JUDGE. Supplemental opinion on

motion for rehearing of case reported in 139 Neb. 775. *Motion to recall mandate overruled.*

T. F. A. Williams, for appellant.

Hall, Cline & Williams, contra.

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

MESSMORE, J.

In his motion for rehearing appellant contends the court in the opinion contradicted the record in holding and reciting therein the following: "The payments made by the Shrine Building Association were made when no outstanding amounts were due under the first mortgage. There was no default, on the part of the Shrine Building Association, of any of the provisions of the first mortgage agreement or the bonds, at the time the payments were made." The appellant submits the following: "When $1,000 was paid on the principal of the second mortgage October 9, 1930, $2,000 was then due and unpaid on the principal of the first (trustee) mortgage, such instalment of principal on the first mortgage being paid December 20, 1930." Such payment was made, however, on January 9, 1931, instead of December 20, 1930. The foregoing does not make the quoted statement of the court erroneous. We have set forth in the opinion the substance of the first mortgage. We again cite the pertinent and applicable parts thereof to the case at bar on the proposition under discussion.

Article IX of the first mortgage contains the following:

"1. It is further agreed that in the event default be made by first party (Shrine Building Association) in the payment of any instalments of interest or of the principal of any of said bonds, or if default be made in the observance of provisions of any covenant or condition herein contained to be kept or to be performed by the first party, the Trustee (First Trust Company), acting under its own discretion, *may, if such default shall continue for a period of six months,* and upon the request of the owners of twenty-

five per cent. of the bonds then outstanding and secured hereby, must declare the entire principal and interest upon all outstanding bonds to become due and payable; * * *

"2. In the event default be made by first party in the payment of any instalment of interest or in the payment of the principal of any of said bonds, * * * the Trustee hereunder, personally or by its agents or attorneys, may enter into and upon all or any part of the trust estate, and use, operate, manage and control the same for the benefit of the owners of the bonds secured hereby.

"3. In the event default shall be made by the first party in the payment of any instalment of interest or in the payment of any of said bonds, * * * the Trustee hereunder, acting upon its own discretion, *may, and if such default shall continue for six months,* if required by the holders of twenty-five per cent. of the bonds then outstanding and secured by this agreement, shall commence proceedings in a court of competent jurisdiction to foreclose the lien of this agreement. * * *" (Italics ours.)

The substance of the foregoing provisions of the trust agreement are contained in the opinion. Appellant does not support, by legal authority, his contention that the Shrine Building Association could not make the application of payments as were made on the first and second mortgages. The quoted provisions of the trust agreement distinctly disclose the circumstances under which the first mortgage is due and payable and the duties of the trustee to collect, by foreclosure, moneys due. The case is predicated on the trust agreement, which defines the duties of the trustee, and no duties in conflict with the provisions of the trust agreement will be implied.

A further review of the record shows: The supplemental decree of the district court of July 5, 1940, reads: The moneys paid to the First Trust Company, to be applied and which were applied on the second mortgage held by the trust company, "were not paid from the income or profit from, or from the property mortgaged to secure the bondholders represented by the plaintiff; that said sums so

paid were applied as directed by the persons paying the same; and that neither the plaintiff nor any of the bondholders had any right or lien thereon." This language is unmistakably clear. Neither the bondholders nor the plaintiff had a lien on the moneys applied on the payment of the second mortgage. Under the mortgage agreement, the Shrine Building Association had the right to the income from the mortgaged property from every source, and the further right to use such income in any manner it deemed best. Exercising this right, the Shrine Building Association, by its officers, made the payments on the first and second mortgage as shown in the opinion. To repeat:

The trust agreement gave to the officers of the Shrine Building Association the right to allocate the moneys on the respective mortgages as in their judgment they deemed best. Under the circumstances as presented in this case, we conclude the motion to recall the mandate and to file a second motion for rehearing should be and is hereby overruled.

MOTION OVERRULED.

MACK INVESTMENT COMPANY, APPELLEE, V. R. E. DOMINY ET AL., APPELLANTS.
1 N. W. (2d) 295

FILED DECEMBER 12, 1941. No. 31236.

1. **Pawnbrokers.** The legislature has power to regulate interest, and legislation affecting interest to be charged, as disclosed by the small loan act (Comp. St. 1929, secs. 45-112 to 45-123, inclusive) is within the police power of the state. *Althaus v. State*, 99 Neb. 465, 156 N. W. 1038.
2. **Contracts.** "When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1929, sec. 20-1216.
3. ———. Typewriting is writing within the contemplation of the statute, providing that, when an instrument consists partly of written and partly of printed form, the written controls the printed form, where the two are inconsistent. *New Masonic*

Temple Ass'n v. Globe Indemnity Co., 134 Neb. 731, 279 N. W. 475.

4. ———. Where a loan made for 18 months contains three brokerage charges, computed on the basis of anticipating the amount of principal which would be due at the end of 6 months and 12 months, and adding to that amount a 10 per cent. brokerage fee on the unpaid balance at the end of each period, anticipating that the regular payments would be made until the end of the 6 and 12 months' periods, and there is no evidence of a renewal, extension or transfer of such loan made after the expiration of 6 months from the date of such loan, such charge of brokerage fees, which the licensee endeavors to exact or collect, is in excess of the interest or charge as provided in section 45-119, Comp. St. 1929, and the licensee forfeits all right to receive any sum whatever on said indebtedness, the same being based on an illegal contract, contrary to the sound public policy of this state.

APPEAL from the district court for Kimball county: J. LEONARD TEWELL, JUDGE. *Reversed and dismissed.*

Torgeson & Halcomb, for appellants.

R. P. Kepler and *John H. Kuns, contra.*

Walter R. Johnson, Attorney General, Robert A. Nelson, Theodore L. Richling, Peter E. Marchetti and *Flansburg & Flansburg, amici curiæ.*

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

MESSMORE, J.

This is a replevin action wherein plaintiff (appellee) seeks to recover possession of a 1936 model Chevrolet pick-up coupé, of the stipulated value of $250, by reason of a chattel mortgage, given by defendants (appellants) to the plaintiff to secure the payment of a note as hereinafter described. This action was originally filed in the county court, resulting in a dismissal. The plaintiff appealed to the district court. Plaintiff's petition in the district court alleges in substance:

The plaintiff is a trade-name for John H. Mack (referred to hereinafter as plaintiff), who has been licensed

since June 1, 1939, to transact business as a loan broker, as provided for by law. Plaintiff claims a special property in the Chevrolet pick-up by virtue of a chattel mortgage, securing payment of a note dated June 1, 1939, upon which the defendants have made two payments, viz., July 3, 1939, $24.99; September 5, 1939, $24.99. No other payments have been made. The petition alleges plaintiff's right to immediate possession of the Chevrolet pick-up, damages, and further prays judgment for the sum of $343.75, together with interest thereon at the rate of 10 per cent. per annum from September 5, 1939. The original petition of replevin, filed by plaintiff in the county court, setting forth in substance the same facts, states that there was due plaintiff $399.84. The amended petition for replevin, filed by plaintiff in the county court, prays judgment against the defendants for the sum of $362.13, with interest at 10 per cent. per annum from September 18, 1939, the amount due on the chattel mortgage. Defendants' answer in the district court contains a general denial, admits that defendants borrowed $350 from the plaintiff and promised to pay plaintiff, in consideration of a loan, in 18 monthly instalments of $24.99 each, or $449.82; alleges that the contract is usurious and constitutes a charge in excess of that permitted by the statutes of Nebraska. Thus, it is apparent that plaintiff, in his original pleadings, made an effort to collect the full amount of the note.

The court, in consideration of the motions of both plaintiff and defendants to return a verdict in favor of each respective movant, made a finding generally for the plaintiff and against the defendants; that on June 1, 1939, plaintiff loaned $350 to the defendants, who executed a note; that the defendants made the payments as heretofore set forth in plaintiff's petition; that plaintiff was entitled to possession of the Chevrolet 1936 pick-up, of the value of $250; that plaintiff has been damaged in the sum of one cent. After motion for a new trial was overruled, defendants appealed to this court.

The principal assignment of error is that the judgment of the district court is erroneous in that the court failed to find such contract usurious and void. This involves a consideration of certain provisions of the small loan act. Comp. St. 1929, secs. 45-112 to 45-123, inclusive. The purpose and intent of the legislature in passing this act were to protect the borrower against excessive and usurious rates of interest on small loans, and other charges, made under one subterfuge or another, and to control and regulate, rather than protect, the lender.

The legislature has the power to regulate interest, and legislation like that under consideration (the small loan act) is within the police power of the state. *Althaus v. State,* 99 Neb. 465, 156 N. W. 1038; *Griffith v. State of Connecticut,* 218 U. S. 563, 31 S. Ct. 132. The law regulates the interest chargeable by licensed lenders authorized to make an additional charge, called a "brokerage fee," not exceeding one-tenth of the money actually lent and, in exceptional cases, to charge an examination fee of 50 cents.

The plaintiff contends that the fine print contained in the chattel mortgage form (exhibit 1) provides that it would not be entitled to collect any more than the law permits under the small loan act. An analysis of this language and of the typewritten parts of the chattel mortgage and other evidence discloses the intent of the plaintiff to collect the full amount of the note.

"When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1929, sec. 20-1216. Typewriting is writing within the contemplation of the statute, providing that, when an instrument consists partly of written and partly of printed form, the written controls the printed form, where the two are inconsistent. *New Masonic Temple Ass'n v. Globe Indemnity Co.,* 134 Neb. 731, 279 N. W. 475.

The chattel mortgage, given by the defendants to the plaintiff June 1, 1939, in the original amount of $350, sets out as security the Chevrolet pick-up and certain house-

hold goods, and, in addition, sets out in typing that "18 payments of $24.99" are to be made by defendants to the plaintiff. The instalment payments aforesaid were computed on the basis of anticipating the amount of principal which would be due at the end of six months, and adding to that amount a 10 per cent. brokerage fee on the unpaid balance, and anticipating the regular payments would be met until the end of the six-month period. An additional brokerage fee was charged on the unpaid principal remaining a year from June 1, 1939. Originally, a brokerage fee of $35 was charged when the loan was made June 1, 1939, which was due and payable at the end of the first six-month period, viz., December 1, 1939, in accordance with the terms of the note.

The cases of *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N. W. 429, and *Fidelity Finance Co. v. Westfall*, 127 Neb. 56, 254 N. W. 710, are not controlling. The facts and parties present a different situation than exists in the instant case, rendering such decisions of little value in determining the case at bar. The case of *Personal Finance Co. v. Gilinsky Fruit Co.*, 127 Neb. 450, 255 N. W. 558, is under a different section of the statute from that involved herein and is of no value in determining the case before us.

Section 45-119, Comp. St. 1929, provides in part: "Any person * * * shall be entitled to loan money * * * and to charge the borrower thereof for its use or loan, interest not to exceed the rate of ten *per centum per annum* and a brokerage fee of not more than one-tenth of the amount actually loaned. No charge in addition to the said interest and brokerage fee shall be *exacted, charged* or collected * * *. *It shall not be lawful* for said lender to divide or split up applications for loans or said loans under any pretext whatsoever so as to require or exact *any other or greater charges* than prescribed herein; * * * Said licensee shall be entitled to charge for each renewal, extension or transfer of any loan made *after the expiration of six months from date of said loan a new brokerage fee* as

hereinbefore specified, providing said renewal, extension or transfer shall be for a period of not less than six months from date of making said renewal, extension or transfer; and said new brokerage fee shall be chargeable only upon the balance of the principal * * *. The brokerage fee chargeable either upon an original loan or upon a renewal, extension or transfer shall not be payable in advance but only upon final payment of loan. * * * If interest or charges in excess of those hereinbefore prescribed shall be received by any licensee, the said licensee shall thereupon lose all his right to collect or receive any sum whatever on said indebtedness." (Italics ours.)

Plaintiff's contention is that the forfeiture contemplated in section 45-119, Comp. St. 1929, cannot be inflicted unless the record shows that excessive charges were actually received by a licensee; that the two payments made by the defendants in the instant case were on July 3 and September 5, 1939, and made within six months following the making of the loan by agreement of the parties, and that such payments were applied only to the interest and principal.

The loan in the instant case is definitely for a period of 18 months. The contract provided for three brokerage fees on accounts to be due, anticipated by the lender. The language contained in section 45-119, *supra,* is clear and explicit that not more than one brokerage charge can be made on any one loan,—"No charge in addition to the said interest and brokerage fee shall be exacted, charged or collected * * * ." Comp. St. 1929, sec. 45-119. In the event a loan is renewed, extended or transferred, the licensee shall be entitled to charge a brokerage fee *after* the expiration of six months from date of said loan upon the balance of principal. There is no evidence here of renewal, extension or transfer. Said section does not provide that the lender has the right to anticipate future brokerage fees. It provides for the brokerage fee to be charged upon the original loan or upon renewal, extension or transfer. It shall not be payable in advance but only upon final payment of loan.

The plaintiff relies on the words "shall be received," contained in the latter part of section 45-119, Comp. St. 1929. Attention is again directed to the language of said section: "No charge in addition to the said interest and brokerage fee shall be exacted, charged or collected." The distribution of the loan, as shown on exhibit 6, being a slip attached to a check and detached before the check was cashed, contains the following:

"Bal. GMAC (General Motors Acceptance Corp.)	$61.64
"Cash	$288.36
"Loan	$350.00

"18 payments of $24.99 starting July 5, 1939."

On the back of the chattel mortgage a payment of $24.99 is noted, dated "9-18," with a balance of $399.84, placed there by a Denver bank which discounted plaintiff's paper; also a balance of "$424.83 JHM," placed there by direction of an employee of plaintiff who had charge of this loan. This evidence is conclusive that the plaintiff intended to collect from defendants 18 payments of $24.99 each; he merely delayed the payment over such period as is provided in the note. The excess brokerage charges must be said to permeate the whole loan and necessarily a part thereof is collected when each instalment is paid. The contract made between the parties fixed their status and the amounts agreed upon to be paid.

Plaintiff felt justified in securing three brokerage fees for one transaction, and it is the exacting and charging of the three brokerage fees, set up in the contract and agreed to be paid by the defendants, which constitute the violation of section 45-119, Comp. St. 1929. The action is based upon an illegal contract, contrary to the avowed public policy of this state, and the plaintiff, as licensee, loses all right, under section 45-119, Comp. St. 1929, to collect any sum whatever on this indebtedness. The letter of the statute admits of no other interpretation by any construction.

Other assignments of error need not be discussed. Suffice

it to say that section 45-121, Comp. St. 1929, is not involved in this action, and so far as the instant case is concerned, we are not required to interpret such section. We determine this case solely on the instrument before us, affecting this particular loan, and the applicability thereto of section 45-119, Comp. St. 1929.

We conclude that the judgment of the trial court should be and is hereby reversed, and the cause dismissed.

REVERSED AND DISMISSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1942

HARRY L. BROWN, APPELLEE, V. WILLIAM M. HAITH, APPELLANT.

1 N. W. (2d) 825

FILED JANUARY 9, 1942. No. 31251.

1. **Master and Servant.** An employee who has established rights to benefits under the unemployment compensation act before the deputy and appeal tribunal is a necessary party defendant in an action for a judicial review of the decision of the appeal tribunal under the provisions of section 48-706, Comp. St. Supp. 1939.
2. ———. Service upon such a defendant is not complete until the employee has received notice of the service of a petition for judicial review upon the commissioner or the person designated by him to receive service.
3. ———. The rights of an employee to receive the benefits provided by the act cannot be redetermined in a proceeding for judicial review to which such employee is not a party.

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

Hubka & Hubka, for appellant.

John E. Sidner and *Raymond W. McNamara, contra.*

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

SIMMONS, C. J.

This case presents questions of the proper procedure to secure a judicial review of the decision of an appeal tribunal

in an unemployment compensation case under the provisions of section 48-706, Comp. St. Supp. 1939; and of the service of notice by which jurisdiction of the person of necessary parties is secured in the district court.

Harry L. Brown was an employee of William M. Haith for some time prior to October 14, 1940, in Gage county. On that date Brown requested more wages, and when refused he "quit."

October 21, 1940, Haith prepared a disqualification notice, placing an "x" in the printed form opposite the following "left work voluntarily without good cause." This was supplemented by an explanatory statement.

November 21, 1940, Brown filed his claim for benefits, stating that he "quit" his job, and claiming benefits under the unemployment compensation law. The matter was investigated and a disqualification notice, dated December 11, 1940, sent Brown, reciting that the decision was that he "left work voluntarily without good cause;" that he was disqualified for the week he was "separated" and for five weeks thereafter, and was further disqualified for any week of unemployment when he did not report in person to a Nebraska state employment service office. A letter to the same effect was sent to Haith.

December 16 Haith filed an "Appeal from decision of the Claims Deputy" wherein he objected to the deputy's decision and requested a hearing before the appeal tribunal for the following specific reason: "I question the constitutionality of section 48-*705*. Employee leaving work voluntarily is entitled to benefits after serving six disqualifying weeks." Notice of hearing was issued on the above claim.

February 24, 1941, the appeal tribunal rendered its decision affirming the deputy except as to the date when the five weeks period began to operate.

This is all of the record as to what took place up to and including the decision of the appeal tribunal. It is taken from copies of the papers offered in evidence by the commissioner in the proceedings to which we now refer.

March 6, 1941, Haith filed in the district court for Gage

county what he denominated "An action for judicial review Petition" wherein the parties were set out as "Harry H. Brown, *Appellee,* vs. William M. Haith, *Appellant,* and O. M. Olsen, first real name unknown, Commissioner of Department of Labor, State of Nebraska, and Donald P. Miller, Chairman of the Unemployment Compensation Tribunal, *Defendants.*" (The emphasis is supplied.)

In this petition Haith asserting that he "is commencing this action * * * for judicial review" sets out the procedure before the deputy and appeal tribunal; his employer status individually and through a corporation, 96 per cent. of the stock being owned by himself and wife; the employee status of Brown; and makes a series of attacks, on constitutional grounds, against the act as a whole and section 48-702(g)(4) in particular; alleges that he has been required illegally to make contributions to the fund and that Brown is not entitled to benefits; and prays that the decision of the appeal tribunal be reversed and Brown's claim for benefits dismissed. Miller demurred to the petition and the action was dismissed as to him. Olsen answered, made certain admissions, and alleged that the corporation was directly controlled by Haith; that considering the personal and corporate employees Haith had eight or more employees and came within the provisions of the law as an employer.

A journal entry shows that on April 4, 1941, the appellant, appearing in person and by counsel and the commissioner by counsel, presented evidence by stipulation and submitted the case.

The court found the act "as a whole" to be constitutional; that Haith was an employer within the provisions of the act; that section 48-702(g)(4) does not offend against the Constitution; and found generally against Haith and sustained the decision of the appeal tribunal. On motion for a new trial Haith contended that the court erred in holding that the act was constitutional; that Haith controlled the corporation; that section 48-702(g) (4), *supra,* was constitutional; that Haith was an employer within

the law; and erred in affirming the appeal tribunal. The motion for a new trial was overruled. Haith appeals and assigns seven errors upon which he relies for reversal. These vary in part from the seven grounds set out in the motion for a new trial.

Section 48-706, Comp. St. Supp. 1939, was the act in force when this matter was heard before the deputy, the appeal tribunal and the district court. The section contemplates an appeal to the courts only after the party claiming to be aggrieved "has exhausted his administrative remedies," and the decision of the appeal tribunal has become final. It then provides for a "judicial review" of those proceedings.

The act provides how this judicial review may be secured. Section 48-706(h). First, the party aggrieved *commences* an action by petition in the district court, in which of necessity he is plaintiff, against the commissioner and "any other party to the proceeding before the appeal tribunal" who are the defendants. This clear provision as to the designation of parties was not followed in the instant case and appears to have been the foundation for the fatal error that followed. Second, the petition is to be served upon the commissioner or some one designated by him. That was done in this case. Third, there shall be left with the party so served (*i.e.*, the commissioner or party designated) "as many copies of the petition as there are defendants." There is no showing that this was done. Fourth, the commissioner shall "mail one such copy to each such defendant." There is no showing that this was done. Fifth, "The commissioner and all other parties defendant shall file their answers in said action within ten days *after notice of receipt* of such petition." Sixth, "With his answer, the commissioner shall certify and file with said court all documents and papers, together with the appeal tribunal's findings of fact and decision therein." This provision for the bringing of the record to the district court was not followed by the commissioner.

This act must be so construed that its beneficial purposes

may be effected. That does not mean that the plain provisions of the act may be entirely ignored. We are confronted with a situation which we cannot ignore, but which does not appear to have been presented to the district court, and was not presented by the parties to this court.

The employee, for whose benefit this law was enacted, is entitled to be made and remain a party to the litigation that directly affects his rights, unless he voluntarily removes himself therefrom. These facts must affirmatively appear of record. Brown initiated a claim for benefits, investigation was had and an award made. From that Haith appealed to the appeal tribunal and the award was substantially affirmed. Brown does not appear to have been dissatisfied with either award. Haith was. Haith desired a judicial review. This under the statute is a new proceeding "commencing" in the district court. Brown certainly was a party, and a necessary one, before the deputy and the appeal tribunal. The statute specifically says that he "shall be made a defendant" in the proceeding in district court. Brown was not made a party defendant. The sole purpose of Haith's petition for judicial review as expressed by its prayer was to have the decision of the appeal tribunal reversed and have Brown's claim for benefits dismissed. Certainly, Brown had a direct interest in that matter. There is no showing of a service of notice of the district court proceeding upon Brown. True, the statute provides that the petition shall be served upon the commissioner or some one designated by him "and such service shall be deemed completed service on all parties * * *," but the statute does not stop there; it continues with "but there shall be left with the party so served as many copies of the petition as there are defendants and the commissioner shall forthwith mail one such copy to each such defendant." This language so used must necessarily mean that one of the essential steps of securing service upon a defendant other than the commissioner is the leaving of a copy of the petition with the commissioner for each defendant and a mailing by the commissioner of such copy to each de-

fendant. This conclusion is strengthened by the next sentence which provides that all parties, other than the commissioner, shall answer within ten days after "notice of receipt of such petition by the commissioner." In short, a defendant, other than the commissioner, is not required to answer until ten days after he has had notice of a service of the petition upon the commissioner. It appears that the legislature intended that a defendant would have notice that the petition for judicial review was filed before his rights under the award could be affected. This conclusion is fortified by the amendment to this section (Comp. St. Supp. 1941, sec. 48-706) providing, "Upon the filing of a petition for review by the commissioner or upon the service of the petition on him, the commissioner shall forthwith send by registered mail to each other party to the proceeding a copy of such petition, and such mailing shall be deemed to be completed service upon all such parties." We must necessarily hold that the district court did not secure jurisdiction of the person of Brown by the mere service of the petition upon the commissioner. Brown made no appearance in the district court. No service is shown upon Brown; no default is entered against him; nor is reference made to him. The stipulation by which all of the evidence was admitted was by Haith and the commissioner, and makes no reference to Brown. He was likewise not considered in the proceedings in serving, allowing and settling the bill of exceptions. True, in the præcipe in this court Brown is designated as an appellee, but at that point he seems to have been sunk without a trace, for thereafter there have been filed in this court one stipulation regarding the filing of the bill of exceptions and four stipulations advancing brief day, all of which are entered into by the commissioner and Haith with no attention given to Brown. It thus appears that Brown, the employee whose claim for benefits is attacked and is directly involved in this proceeding, has been entirely ignored in this proceeding. Such disregard of the rights of a party cannot be condoned. Brown was not before the district court and he is not before

this court. Brown established certain rights in the proceedings before the deputy and the appeal tribunal. Those rights cannot be redetermined in a proceeding for judicial review to which he is not a party. The appeal is accordingly dismissed.

APPEAL DISMISSED.

KATHERINE NICHOLS, SPECIAL ADMINISTRATRIX, APPELLEE, V. LUMIR HAVLAT, APPELLANT.

1 N. W. (2d) 829

FILED JANUARY 9, 1942. No. 31188.

1. **Automobiles.** Pedestrians have the right to use the public street at any time day or night, and, in the absence of applicable statute or ordinance limiting the same, have the right to walk longitudinally in a street or highway, and are not, as a matter of law, guilty of contributory negligence in so doing.
2. ———. A motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within an area lighted by his headlights is negligent as a matter of law.
3. ———. The existence and presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility, are not to be deemed intervening causes, but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances.
4. **Negligence.** The burden of proving contributory negligence as an affirmative defense is upon the party pleading it, and must be established by a preponderance of the evidence.
5. ———. Intoxication itself does not prevent a recovery for damages resulting from negligence of defendant, where it did not cause, or contribute to, the injury inflicted, and plaintiff may recover for all damages he would have suffered if sober.
6. **Evidence** in the record examined, and *held* sufficient to support the judgment of the trial court.

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

Brown, Crossman, West, Barton & Fitch, for appellant.

Boyle & Boyle, contra.

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

EBERLY, J.

This is an action for damages because of the death of George Nichols, 63 years of age, prosecuted by Katherine Nichols, his widow, as special administratrix of his estate, against Lumir Havlat. Nichols was struck and killed by defendant's truck, then being operated under defendant's direction and control, on the night of April 17, 1940, west of the city limits of Omaha, while decedent, as a pedestrian, was proceeding on and along an arterial highway known as the Q street highway. From a verdict for plaintiff in the sum of $7,000, and judgment entered thereon, and the order of the trial court overruling his motion for a new trial, the defendant appeals.

"Q street" highway, so far as involved in the accident, is comparatively straight, extending from west to east. The traveled portion thereof is paved with brick, with an 8-inch cement shoulder on either side thereof, and these together make up a roadway 18 feet in width. The roadbed is substantially level, with a slope to the west, not excessive but gradual. No permanent natural objects interfere with the view of the traveler passing over the same. On the night of April 17, 1940, the defendant was engaged in transporting 375 bushels of corn in his 1939 Chevrolet truck, with an Omaha standard trailer attached thereto, to the town of Dorchester, Nebraska. The truck, trailer, and contents weighed approximately 31,080 pounds. The defendant had crossed the Omaha bridge, and about 10 o'clock he was approaching the intersection of Sixtieth street and Q street. The night was dark but clear; the pavement was dry. There is no evidence that atmospheric conditions were other than normal. As they approached the Sixtieth street intersection the defendant was asleep alongside the driver

in the driver's cab, and evidently continued in that condition until after the occurrence of the accident. His employee, Lumir Belohlavy, was at the wheel and in full charge of the operation of the truck. As this driver was crossing the intersection of Sixtieth street with Q street the lights of an oncoming car from the west blinded him. Thereafter he was unable to discern objects on the paved portion of the highway for a distance of approximately 450 feet until he came abreast of the approaching car with the dazzling lights. Then for the first time he discovered the presence of some object on the right or north half of the pavement approximately in the center of the north lane, about two feet ahead and directly in front of him. His unchallenged testimony is: "Q. 'Question—So that you now tell the court and jury that as you crossed 60th street going west you were blinded by the lights of this intermediate car that you couldn't see anything until after those lights passed you, is that right?' To which you answered: 'After they came abreast of me; yes.'" This witness further testified: "Q. How far do you tell us now you were west of 60th and Q when your truck struck Mr. Nichols? A. About a block and a half. * * * Q. Did you see Mr. Nichols before you hit him? A. No. Q. Never saw him at all, did you? * * * A. No. I didn't. * * * I didn't see him, no, until he was in front of me. Q. Did you see him then? A. I saw something; yes. Q. Did you know what it was? A. No. Q. And how far do you think this something was in front of you when you claim you put your brakes on? A. I would say about two or three feet ahead of me. Q. Well, what is it, two feet? A. About two feet; yes. Q. Now, that's downgrade there, isn't it, as you go west from 60th and Q? A. Yes. * * * Q. And it was downgrade all the way until you hit this something, wasn't it? A. Yes. Q. What speed do you think your truck was traveling at the time you saw this something? A. Oh, between twenty-five and thirty miles an hour. * * * Q. And do you tell us with the car going twenty-five to thirty miles an hour and you see something two feet ahead of you, and

you had your foot on the brake before you hit that something, is that it? A. Yes; I have two levers to the brakes. * * * Q. After you hit this something, wasn't it? A. Before I hit it. Q. You hadn't applied the brakes until you saw this something, had you? A. No. Q. After you passed 60th and Q? A. No. Q. You had lights on your truck, did you? A. Yes. Q. How far would you say they would shine down the road? A. The lights I had on at the time would shine a hundred feet ahead. Q. Would you say a hundred to one hundred and twenty-five? A. Somewhere in that distance. I don't know exactly. * * * Q. Isn't that what you testified to at the inquest and at the last trial? A. Yes; I did. Q. One hundred to one hundred and twenty-five feet? A. Yes. * * * Q. Did you afterwards see what you had hit? A. After I hit it, you mean? Yes. Q. And what was it that you hit? A. I hit a man in the road. * * * Q. Wasn't it George Nichols? A. Yes."

And on cross-examination this witness testified: "Q. Now, then, as you traveled west from 60th you were meeting this car that was coming towards you, weren't you? A. Yes. Q. And that was the car that interfered with your vision? A. Yes; that's the one. Q. And how soon after this car passed you did the object loom up in the road in front of you, this Mr. Nichols? A. Just as I come abreast with this car. Q. And that was the first time you had seen Mr. Nichols? A. That was the first time. Q. And what did you do as soon as you saw him? A. Well, I slammed on the brakes and swerved sharply to the left. * * * Q. Where was the object on the pavement when you first saw it? A. Well, it was in the center of the north lane. Q. And the north lane is the lane for traffic going west? A. Yes."

On redirect examination he testified: "Q. And you traveled a block and a half against these other lights, where you couldn't see anything except this light? A. That's right. Q. And when those lights passed you a block and a half west, four hundred and fifty feet under your measurement, you saw something in the road all at once, is that

right? A. Yes; that's right. Q. And you didn't know what it was, did you? A. No."

And on recross-examination: "Q. But what you mean to say is that you didn't see the man because of the lights of this other car blinding you? A. That's right."

As a result of the application of the brakes and the turning of the truck to the left at the moment of the collision with the deceased, as testified to by witness Belohlavy, the course of the truck was diverted from the north traffic lane into the south and then upon the south shoulder and finally overturned in what appears to be in the nature of a road ditch or borrow pit on the south of the paving. The application of the brakes also caused skid marks to appear on the paving. The north skid mark extended along the paving for the distance of 119 feet to the place it went off the paving. From this point to where the truck overturned, the evidence in the record is that the distance was 250 feet. Immediately after the accident Mr. Nichols' dead body was found with his head and shoulders on the north edge of the pavement, and his feet and the rest of his body were out on the pavement. The evidence further discloses that the deceased had a broken arm and that his neck was broken; that his legs were both broken below the knees and one of them above the knee, and he had sustained numerous internal injuries. There is evidence in the record that the truck was traveling from 43 to 50 miles an hour at the moment of impact; but for the purpose of this appeal the most favorable evidence to defendant's contention will be accepted as establishing the fact that the truck was then traveling from 25 to 30 miles an hour. No horn was blown from the truck at any time during the occurrence. It is also to be noted that the headlights with which this truck was equipped substantially failed to conform to the requirements of the Nebraska statutes (Comp. St. Supp. 1939, sec. 39-1176), and so far as disclosed by the record before us, the presence of this truck on our highways at the time of the accident was unlawful.

At the conclusion of all the evidence the trial court sus-

tained plaintiff's motion to withdraw all questions of fact from the consideration of the jury, for the reason that the evidence then adduced showed conclusively that defendant was guilty of actionable negligence, and that it also established the fact that the plaintiff's decedent was not guilty of contributory negligence "as a matter of law or fact." The cause was then submitted to the jury on the sole question of the amount of damages sustained for which plaintiff was entitled to recover. The appellant challenges the sufficiency of the evidence as an entirety to sustain this action of the trial court. In addition to his challenge to the insufficiency of plaintiff's evidence, the defendant's contention in part rested upon the following evidence introduced in his behalf: A witness testifies that about 10 o'clock he was standing at the southwest corner of the intersection of Sixtieth and Q streets waiting for the Ralston bus. He there discovered the decedent walking along the north half of Q street approaching from the east a block away. The night was dark but he could see Nichols when there was a car coming behind him. Along the north side of the paved portion of the highway was a dirt shoulder. As Nichols came walking along Q street to the west, "he was off and on to the north side of the pavement; * * * he was onto the pavement and then back onto the shoulder." Nichols' presence on the north side of this highway operated to interfere with the use thereof by two automobiles coming from the east. One of the passing cars coming up behind him skidded about ten yards and then came to a stop. Nichols said something to the passing car, but witness could not definitely say what was said. Witness watched Nichols as he crossed the intersection of Sixtieth and Q streets, then about 20 feet from witness. Nichols stopped in this intersection, looked at witness, and then continued westward on the north half of the highway on the north shoulder and north half of the paved portion thereof on to the westward. He further testified: "Q. And describe to the jury what he was doing with reference to going down that highway up to the time you saw the bus pass him. A.

Well, as I said before, he was off and on the pavement, and was staggering, and just as the bus was coming up, *he stopped in the north half of the pavement* and was urinating, and as the bus passed him, well, that's the last I saw of him." (Italics supplied.)

Another of defendant's witnesses testified that he was driving a Stiles passenger bus from Ralston to South Omaha over the Q street road. As he was approaching the Sixtieth street intersection he discovered a pedestrian (Nichols) some 75 feet ahead of his bus. He further testified: "Q. What was he doing, Russell, when you saw him? A. He was urinating in the middle of the road. Q. And when did you see that he was doing the urinating? A. Approximately the time I drew abreast of him. Q. And which way was he facing at that time? A. Southeast. Q. And can you describe to the jury what actions he was taking or doing besides the urinating at that place? A. He was standing, at a staggering standstill, sort of maneuvering around in the middle of the road while he was urinating." And, on cross-examination: "Q. And as you came east there that night, driving that bus, and you were driving it east, of course, you had no trouble seeing Mr. Nichols out there, did you, with your lights? A. I did not; I saw him. * * * Q. And when you came up, he moved over to the north of the road, didn't he? A. He moved— Q. No. Did he move over to the north of the road? A. Not as I came up; no. Q. Before you went by him? A. Yes. * * * Q. He moved over to the north side of the road, over toward the north curb, didn't he? A. Yes. * * * Q. Of course, from the time that you passed Mr. Nichols going east up to the corner you didn't see him any more, did you? A. No. Q. The last time you did see him, however, he was going to the north side of the road, wasn't he, as you passed him? A. Yes. Q. That would be away from the center to the north side of the road? A. Yes. Q. That would be on the west lane, to the north? A. Yes." After witness arrived at the Sixtieth street intersection, defendant's truck passed him and his bus going west. The evidence also disclosed

that Nichols at the time of the accident was wearing dark blue clothing and a dark hat or cap. The uncontradicted evidence discloses that the color of his clothing did not merge with the colors of the pavement and he was easily discovered by automobiles approaching him both from the east and the west. Further, the evidence in the record discloses affirmatively that the accident was wholly due to the blinding headlights of an approaching car and was in no manner contributed to by the color of the clothing worn by the deceased.

The deceased came to his death while proceeding longitudinally westward on the north half of the paved portion of Q street. This jurisdiction is committed to the rule that pedestrians have the right to use the public street at any time day or night, and, in the absence of applicable statute or ordinance limiting the same, have the right to walk longitudinally in a street or highway, and are not, as a matter of law, guilty of contributory negligence in so doing. *Cotten v. Stolley,* 124 Neb. 855, 248 N. W. 384; *Brenning v. Remington,* 136 Neb. 883, 287 N. W. 776.

It is also an established doctrine in this state that a motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within an area lighted by his headlights is negligent as a matter of law. *Redwelski v. Omaha & C. B. Street R. Co.,* 137 Neb. 681, 290 N. W. 904; *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572; *Cotten v. Stolley, supra; Most v. Cedar County,* 126 Neb. 54, 252 N. W. 465; *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340; *Fischer v. Megan,* 138 Neb. 420, 293 N. W. 287.

On principle it appears that the existence and presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility, are not to be deemed intervening causes, but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. *Anderson v. Byrd,* 133 Neb. 483, 275 N. W. 825; *Fischer v. Megan, supra.*

Clearly, in the instant case the driver of this 31,080-pound truck and trailer, permitting it to cover this distance of 450 feet at the rate of 25 to 30 miles an hour, during which visibility to the front was wholly destroyed by the blinding headlights of an oncoming car, violated the rule of due care and the requirement that his motor vehicle, under conditions then obtaining, should not be driven so rapidly that it could not be stopped within the area rendered visible to him by his headlights. The accidental colliding with Nichols, first seen by this driver within two or three feet of his truck, at the instant the truck and trailer came abreast of the car with the blinding headlights, and out of the area of invisibility occasioned thereby, is legally attributable to the clear violation of the rule of safety repeatedly approved by this court, and constituted negligence as a matter of law.

This conclusion is in harmony with the principles announced in other jurisdictions. *Hammond v. Morrison,* 90 N. J. Law, 15, 100 Atl. 154; *Foster v. Cumberland County Power & Light Co.,* 116 Me. 184, 100 Atl. 833, L. R. A. 1917E, 1044; *Osbun v. DeYoung,* 99 N. J. Law, 204, 122 Atl. 809; *Devine v. Chester,* 7 N. J. Misc. 131, 144 Atl. 322; *Cordts v. Vanderbilt,* 7 N. J. Misc. 856, 147 Atl. 464; *Meads v. Deener,* 128 Cal. App. 328, 17 Pac. (2d) 198; *House v. Ryder,* 129 Me. 135, 150 Atl. 487; *Russell v. Szczawinski,* 268 Mich. 112, 255 N. W. 731; *Day v. Cunningham,* 125 Me. 328, 133 Atl. 855.

However, the defendant insists that the deceased was intoxicated and guilty of contributory negligence to such a degree that would prevent recovery, or at least constitute a question for the decision of a jury. It will be remembered that the "burden of proving contributory negligence, an affirmative defense, is upon the party pleading it, and must be established by a preponderance of the evidence." *Carlson v. Roberts,* 133 Neb. 166, 274 N. W. 473; *Cotten v. Stolley, supra.*

To establish that the deceased was intoxicated, two witnesses detail certain acts and conduct, including a "stagger-

ing about" in deceased's progress westward along Q street. It appears that there was an inquest held upon the dead body, but as to whether there was an autopsy with an examination of the stomach content, and the results thereof, the present record is silent. None of the witnesses testifying, however, expresses the opinion that the deceased was intoxicated when they observed him. This, if it existed, was competent evidence. 7 Ency. of Evidence, 701; 22 C. J. 599. It was witnesses called by the defendant who had this evidence, if it existed. Assuming, but not determining, that the evidence in the record would, if believed, establish as a fact, in the absence of countervailing proof, that Nichols at the time of his death was intoxicated, or under the influence of liquor, this fact, if it was in truth a fact, under the evidence in the record, does not become a matter of legal importance.

"It is neither axiomatic nor knowledge common to all that men when drinking are utterly reckless of their safety or insensible to their duty to protect themselves." 20 R. C. L. 129, sec. 107.

Intoxication itself would not prevent a recovery. Where intoxication is not a contributory cause of injury inflicted, the plaintiff may recover for all injuries he would have suffered if sober. *Chicago & N. W. R. Co. v. Drake,* 33 Ill. App. 114; *Ward v. Chicago, St. P., M. & O. R. Co.,* 85 Wis. 601, 55 N. W. 771; *Houston & T. C. R. Co. v. Reason,* 61 Tex. 613; *Meyer v. Pacific R.,* 40 Mo. 151.

In *Cotten v. Stolley, supra,* Day, J., discusses the questions substantially presented in the following language:

"Is the evidence in this case, which establishes that Alta Cotten was walking either upon the right-hand side of the pavement or upon the graveled shoulder to said pavement, proof of contributory negligence on her part? There is no presumption of contributory negligence in this case. In *Engel v. Chicago, B. & Q. R. Co.,* 111 Neb. 21, it was held: 'Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the pre-

sumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown.' The rule applicable to this situation is stated by one authority as follows: 'Pedestrians have the right to use a public street at any time of day or night. * * * They have a legal right to travel in the street, * * * and the mere fact that one does so, does not render him guilty of contributory negligence as a matter of law.' 13 R. C. L. 291, sec. 242. In an annotation, 67 A. L. R. 109: 'The rule is generally recognized that, in the absence of applicable statute or ordinance, a pedestrian has the right to walk longitudinally in a street or highway, and is not, as a matter of law, guilty of contributory negligence in doing so.' In *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 41 A. L. R. 1027, it is held that the common-law rule that pedestrians have a right to travel anywhere upon a public highway has not been changed in California by the legislature. And again, in *Kofoid v. Beckner*, 70 Cal. App. 624, it was said: 'Notwithstanding the fact that the number of reckless drivers have rendered the paved portion of our highways a danger zone, pedestrians have a right to the use thereof, and are chargeable only with such ordinary and reasonable care for their own safety as a prudent person would ordinarily exercise.' In *Pixler v. Clemens*, 195 Ia. 529, it was held that it is not contributory negligence, as a matter of law, to walk along the side of the road. There is no statutory provision in this state restricting the use of the highway by a pedestrian, and while a pedestrian walking on the highway is bound to exercise reasonable and ordinary care for his safety, one who is walking either on the right-hand edge of the pavement or on the graveled shoulder adjacent thereto is not guilty of contributory negligence as a matter of law. In 42 C. J. 1146, the rule is stated as follows: 'In the absence of statutory restriction, a pedestrian traveling on a street or highway is not confined to the use of the sidewalk or footpath, but has a right to walk in the roadway, and is not

negligent as a matter of law in so doing. * * * A person walking in the roadway is bound to use ordinary care to discover approaching motor vehicles, and a failure so to do is negligence; but he is not as a matter of law negligent in failing to turn about constantly and repeatedly to observe the possible approach of vehicles from behind him, especially where there is ample room for an automobile to pass him.' There is no evidence of contributory negligence on the part of Alta Cotten, even if she were walking on the pavement in the line of traffic, as is contended."

These principles thus announced in *Cotten v. Stolley, supra,* were expressly approved and adhered to in *Brenning v. Remington, supra,* and are controlling in the instant case. There is no evidence or proof as to what the deceased was doing immediately prior to the impact. When last seen alive he was proceeding along the highway where he had a right to be. No presumptions of negligence will be indulged against him, and no evidence of his contributory negligence appears in the record. The burden of presenting this proof, of course, is imposed on the defendant.

It follows that the trial court committed no error in withdrawing from the jury consideration of the question of negligence of the defendant and of contributory negligence of plaintiff's decedent. The issue as to amount of damages allowed is not argued in the briefs. The action taken by the district court in the trial of this case involved no substantial error, and its judgment is

AFFIRMED.

YEAGER, J., dissenting.

A dissent on my part gives me no great pleasure since it brings me into sharp conflict with the majority opinion of my associates in whose ability, integrity and fairness I have profound faith and confidence. In cases where I am able to recognize that there is room for doubt on the matter of legal or factual interpretations and applications, I am usually willing to bow to and acquiesce in the will of the majority; also, I am prone not to insist too strenuously upon technical or precise refinement where I feel that the

ultimate conclusion in the particular case is the proper one. It is only in those situations wherein I have a firm conviction that disturbing violence has been done to an existing substantial principle of substantive or adjective law, or that a new and haunting rule in one or the other or both of these fields is sought to be established, or that a particular case is being determined conformable to an incorrect or inadequate reflection of facts, that I have a disposition to express my disagreement with the majority in an opinion.

I find myself unable to agree with the majority here since it is my firm conviction that the decision in this case strikes down with a single blow certain principles of law and procedure which have been considered basic and fundamental since the law concerning the use of public ways and public highways has become crystallized, and since juries have been the triers of the facts in negligence cases.

Let it be said here that I find no fault with the statement of the case or of the facts as set out in the majority opinion. The facts which I shall set out later on herein are not contradictory and are not meant to be contradictory of those set out in the majority opinion, but are set out only for the purpose of supporting, under the issues in this case, what I conceive to be the true, existing and sound theories and principles of the law.

No good purpose would be served by restating the case and the issues here. They are sufficiently and correctly set forth in the majority opinion. The first six paragraphs of the opinion contain a statement of the case, the issues, and a partial statement of the evidence, and these paragraphs are fully adopted herein.

As stated in the majority opinion: "At the conclusion of all the evidence the trial court sustained plaintiff's motion to withdraw all questions of fact from the consideration of the jury, for the reason that the evidence then adduced showed conclusively that defendant was guilty of actionable negligence, and that it also established the fact that the plaintiff's decedent was not guilty of contributory negligence 'as a matter of law or fact.' The cause was then submitted

to the jury on the sole question of the amount of damages sustained for which plaintiff was entitled to recover."

It is the contention of the appellant that this action of the trial court was not sustained by the evidence. The action of the trial court is sustained in the majority opinion. The substance and effect of this holding is that the defendant was guilty of actionable negligence as a matter of law, and also that as a matter of law the defendant offered and adduced no competent substantial evidence on the issue of contributory negligence tendered by the answer, such as would permit submission of this question to a jury.

For the purposes of this dissent we may agree that the record discloses actionable negligence on the part of the defendant, and we may agree further that in the absence of any evidence on the issue of contributory negligence the trial court would have been required to submit only the question of damages to the jury, but I cannot agree that there is no competent substantial evidence to support the claim that the deceased was at the time of the accident guilty of negligence which contributed in some degree to the happening of the accident. In expressing the view I take full cognizance of the rule that the burden of establishing contributory negligence rested on the defendant, and I find no fault with the rule.

Now, in affirmation of the defense of contributory negligence, what is disclosed by the bill of exceptions? In answer to this question let us first get a picture of the fixed surroundings and conditions, and the conditions on that night. The defendant's truck was traveling westward on Q street road, the main arterial highway for traffic leaving and entering South Omaha from the west. This is a country road and not a city street. At the point of the accident the road declines to the west, not sharply but in a considerable degree. The paving with its shoulders provides a paving width of about 18 feet. The highway is quite heavily traveled. Whether or not at the time of the accident the traffic was what might be called heavy is not made clear by the record, but certain it is that there was some traffic

going in both directions. It was in the nighttime, and it appears that the vehicles on the highway carried the usual and customary lighting facilities and that they were lighted. The defendant's truck was traveling westward and it was lighted, but probably with lights not sufficient to meet statutory requirements, and the deceased was traveling on foot in the same direction. Both were traveling on their right or north half of the paved portion of the highway. The manner of operation of the truck is described in the majority opinion and with that I find no fault. The manner in which the deceased was traveling and his movements are referred to and with this I find no fault, but I think a further statement is necessary to a proper approach to what I conceive to be the chief and most grievous fallacy in the majority opinion, that is, the evidence on the question of contributory negligence, or that evidence adduced by the defendant tending to show that at the time and place in question the deceased failed to exercise the ordinary and reasonable care for his own safety required of him by the law.

I call attention first to the testimony of Russell Meacham, a witness called by the defendant, the driver of a bus which was traveling eastward, which is as follows: "Q. Were you driving a Stiles passenger bus from Ralston to South Omaha about 10:00 o'clock the night of April 17th? A. Yes, sir. * * * Q. Well, now, Russell, as you came along that highway that night, driving east, before you got to 60th street did you see any one in the highway? A. Yes, sir. Q. Did you see a pedestrian in the highway? A. Yes, sir. * * * Q. How far west of the intersection of 60th and Q was the man standing in the highway? A. Approximately—this is all guessing, I can't say for sure—I imagine it was somewhere between one hundred and one hundred and twenty-five feet. Q. West of 60th? A. Yes, sir. Q. Now, what time of night was that? A. Fifteen minutes until 10:00, to be exact. Q. And how far were you from the pedestrian when you saw him? * * * A. Well, about seventy-five feet. Q. Did you then drive your bus on

up to the place where the man was standing in the highway? (Objection to this question sustained.) Q. What did you do then, Russell? A. After I saw the man? Q. Yes. A. I drove up to somewhere near abreast of him, sort of studying him as I drove up and passed him. * * * Q. What was he doing, Russell, when you saw him? A. He was urinating in the middle of the road. Q. And when did you see that he was doing the urinating? A. Approximately the time I drew abreast of him. Q. And which way was he facing at that time? A. Southeast. Q. And can you describe to the jury what actions he was taking or doing besides the urinating at that place? A. He was standing, at a staggering standstill, sort of maneuvering around in the middle of the road while he was urinating. * * * Q. Now, Russell, you say it was about a hundred and twenty-five feet from the intersection of 60th and Q? (Question not answered.) * * * Q. And he was in the act of urinating when you passed him? A. He was. Q. And where with reference to the center of the highway was he? A. Approximately in the middle of the highway. * * * Q. And did you know then who the accident had been between? A. I did. Q. And who was it? * * * A. It was between the truck driver and Mr. Nichols. * * * Q. What was the first thing that attracted your attention to Mr. Nichols on the highway as you came up toward him? * * * A. His being in the middle of the road was the first thing that attracted me, and, secondly, his staggering actions. * * * Q. Just what was he doing, just tell the jury what it was. (Objection sustained.) (Defendant's attorney): Let the record show that the witness Meacham would have testified, if he had been permitted, that the deceased, George Nichols, was staggering around in the highway, and that was what called his attention to him. * * * Q. Well, what did you do with reference to your automobile as you drew alongside of the deceased, before the accident, as you were coming toward him or coming up where you were passing him? A. I slowed down and then drove around him. Q. And he stayed right there in the road? A. He did. * * * Q. And as you came

east there that night, driving that bus, and you were driving it east, of course, you had no trouble seeing Mr. Nichols out there, did you, with your lights? A. I did not; I saw him. * * * Q. And when you came up, he moved over to the north of the road, didn't he? A. He moved— Q. No. Did he move over to the north of the road? A. Not as I came up; no. Q. Before you went by him? A. Yes. * * * Q. He moved over to the north side of the road, over toward the north curb, didn't he? A. Yes. * * * Q. Of course, from the time that you passed Mr. Nichols going east up to the corner you didn't see him any more, did you? A. No. Q. The last time you did see him, however, he was going to the north side of the road, wasn't he, as you passed him? A. Yes. Q. That would be away from the center to the north side of the road? A. Yes. Q. That would be on the west lane, to the north? A. Yes."

The next witness to whose testimony attention is called is William Malverd, also a defense witness. He testified in part as follows: "Q. Were you on the highway on Q street the night of April 17, 1940, about 10:00 o'clock? A. Yes, sir. Q. And where were you standing? A. In the southwest corner on 60th and Q. Q. And were you waiting for the Ralston bus? A. Yes, sir. Q. How long had you been standing there? A. About ten minutes. Q. Did you see any object or did you see Mr. Nichols any place on Q street while you were waiting there for that bus that night? A. Yes, sir. Q. And where did you see him first? A. Well, it was east of 60th. Q. About how far east of 60th? A. Oh, I don't hardly remember that, but— Q. Well, give us your best recollection. A. Around a block, I would say. Q. And how long had you waited for the bus? * * * A. About ten minutes. Q. And part of that time you had observed Mr. Nichols, had you? A. Yes, sir. * * * Q. And which way was he walking? A. West. * * * Q. Well, did you stand there on the corner of 60th and Q waiting for a bus? A. Yes, sir. * * * Q. And which way were you facing? A. Toward the north, and looking both ways now and then. * * * Q. And you had stood on that corner watching the

street and watching the objects on the street that were within your view? A. Yes, sir. Q. What kind of a night was it? A. Dark. * * * Q. Well, did you see Mr. Nichols? A. The only time I would see him was when there was a car coming from behind him. * * * Q. And what did he do then? * * * A. Well, he was off and on to the north side of the pavement. Q. And describe to the jury what you mean by that? A. Well, I would say he was staggering in a way. * * * Q. Now, where was he on the pavement and where was he off the pavement, as you have stated? A. You mean what part of the block? Q. Yes; that's right. A. Well, it was a short distance east of 60th. Q. And did you see any cars pass Mr. Nichols east of 60th? A. Yes, sir. Q. And what took place, just what did you see when these cars were passing him? A. Well, one in particular, I would say, skidded about ten yards and came to a stop. * * * Q. What did Nichols do with reference to these cars? A. Well, he said something to them, but I didn't really hear, I couldn't definitely say what he said. Q. Now, you have stated that he was sometimes on the pavement and sometimes off. Now, what do you mean by that? A. Well, just what I said; he was onto the pavement and then back onto the shoulder. Q. Now, did you watch him as he crossed 60th street. A. Yes, sir. Q. Describe to the court and jury what he was doing as he crossed 60th street? (Not answered.) * * * Q. How far were you from Mr. Nichols when he crossed 60th street? A. About the width of the pavement. Q. And about how far would that be? A. About twenty feet. Q. And tell the jury just what he did then as you saw it, describe his condition? * * * A. Well, he stopped and looked at me, and, as I said before, he was off and on the pavement as he walked down. Q. Did he go out onto the north shoulder and then back onto the pavement? A. Yes, sir. Q. Well, describe to the jury just what you observed as to his condition? * * * A. I saw him staggering off and on the pavement. * * * Q. Now, between 60th and 61st can you tell the jury about how far he traveled of that distance before the bus passed him? A. I would say between

a fourth and a third of the way. * * * Q. And describe to the jury what he was doing with reference to going down that highway up to the time you saw the bus pass him? A. Well, as I said before, he was off and on the pavement, and was staggering, and just as the bus was coming up, he stopped in the north half of the pavement and was urinating, and as the bus passed him, well, that's the last I saw of him. * * * Q. About how far off of the pavement would Mr. Nichols travel before he would go back onto the pavement? * * * Q. Well, all right, after he left 60th street going west? * * * A. Oh, I would say to the middle of the shoulder on the north. * * * Q. Mr. Nichols all the time was walking either on the north half of that highway or on the shoulder? A. Yes, sir. Q. Always on the north side all the time you saw him? A. Yes, sir. Q. You never saw him on the south half of that road? A. No, sir; I didn't. Q. You claim the last time you saw him was as the bus passed him? A. Yes, sir. Q. And at that time you say he was about half way in the north traffic lane that goes west? A. Yes, sir. * * * Q. Standing still? A. Yes, sir. Q. Then you never saw him again, did you, until after you saw him dead? A. That's right."

On the basis of this testimony, is there evidence of negligence on the part of the deceased which contributed to the accident which caused the death, or was the trial court and is this court required to say on the record that as a matter of law deceased was in the exercise of ordinary and reasonable care for his safety? The effect of the holding of the majority in truth is either directly that the deceased was in the exercise of ordinary and reasonable care for his own safety, and that there was no evidence of contributory negligence, or indirectly that we now have come to the point in Nebraska jurisprudence when the weighing of the evidence no longer falls within the exclusive province of the jury, but it now is a function and prerogative of the trial court to, up to some uncertain and undefined point or place, determine the sufficiency, not existence, of evidence of contributory negligence. In all earnestness and sin-

cerity I must state that I find each and both of them entirely unacceptable and as, I believe, definitely unsound and unwarranted.

Lest I be misunderstood I want to state that I make no contention that the defendant proved contributory negligence. I contend only that he adduced sufficient competent evidence of contributory negligence to require the submission of that question to a jury under proper instructions. If there had been a fair trial under proper instructions with this question submitted, and the question had been ruled on adversely to the defendant by the jury, there possibly could have been, on the record presented here, no just cause for complaint.

The question presented by this appeal is not answered by the proposition stated in the majority opinion that "This jurisdiction is committed to the rule that pedestrians have the right to use the public street at any time day or night, and, in the absence of applicable statute or ordinance limiting the same, have the right to walk longitudinally in a street or highway, and are not, as a matter of law, guilty of contributory negligence in so doing," which proposition finds confirmation in *Cotten v. Stolley*, 124 Neb. 855, 248 N. W. 384, and *Brenning v. Remington*, 136 Neb. 883, 287 N. W. 776. This is the rule, but of what assistance is it here? It is not contended that the deceased was, as a matter of law, guilty of contributory negligence.

In the majority opinion it is stated: "It will be remembered that the 'burden of proving contributory negligence, an affirmative defense, is upon the party pleading it, and must be established by a preponderance of the evidence.'" The cases of *Carlson v. Roberts*, 133 Neb. 166, 274 N. W. 473, and *Cotten v. Stolley, supra*, are cited. No fault is found with the rule here announced, but wherein does it apply in this case? As stated, contributory negligence is an affirmative defense and to be available as a defense it must be established by a preponderance of the evidence, but *preponderance* is not a question for the court, but exclusively for the jury.

Further, in the majority opinion this statement is found: "In *Cotten v. Stolley, supra,* Day, J., discusses the questions substantially presented in the following language:" With the statement that the case of *Cotten v. Stolley* presents substantially the same questions as are presented here I respectfully disagree in part. In that case the woman was pushing the baby carriage down the street and on the right side, as was her right, innocent of any untoward acts or conduct, and the accident occurred much as this one did. The court in that opinion did not practically exclude for the future the defense of contributory negligence in cases such as the one before us now. The court in that case made two significant pronouncements. The first is quoted from a former decision of this court in the following language: "Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown." *Engel v. Chicago, B. & Q. R. Co.,* 111 Neb. 21, 195 N. W. 523. It becomes clear to me that nothing can be found in that case to sustain the action of the trial court in the case at bar. The presumption that contributory negligence does not exist obtains only until evidence to the contrary is adduced. Certainly, the court did not mean to say, *unless the contrary is shown conclusively, or as a matter of law.* It was never intended that the jury should be ousted of its function in such circumstances.

The second is a quotation from the case of *Kofoid v. Beckner,* 70 Cal. App. 624, 234 Pac. 113, and is as follows: "Notwithstanding the fact that the number of reckless drivers have rendered the paved portion of our highways a danger zone, pedestrians have a right to the use thereof, and are chargeable only with such ordinary and reasonable care for their own safety as a prudent person would ordinarily exercise." This pronouncement exacts that pedestrians

on highways shall exercise reasonable and ordinary care for their own safety. Of course, if there is an entire absence of competent evidence of a lack of reasonable and ordinary care there is no requirement, and should be none, that the question of contributory negligence should be submitted to the jury, but that is not the situation here. The undisputed evidence in this case points out that the deceased, at night on a heavily traveled highway, immediately before the accident, was staggering or walking unsteadily back and forth in a manner manifesting all outward evidences of extreme intoxication, from the north shoulder to or toward the center of the pavement directly in the path of westbound traffic, and that once he stopped near the center of the highway to respond to a call of nature. In the light of these undisputed facts I fail to see how this court could arrive at the conclusion that the deceased, as a matter of law, was not guilty of contributory negligence. Whether or not he was guilty of contributory negligence, whether or not he was in the exercise of reasonable and ordinary care for his own safety was a question patently for the jury to determine.

An adherence to the rules announced in this dissent would not imply a denial of recovery by plaintiff in this case. It would require only that the case should be submitted to a jury under proper instructions embodying the comparative negligence rule.

SIMMONS, C. J., and ELLIS, District Judge, concur in the dissent.

VILLAGE OF BELLEVUE, APPELLANT, V. BOHEMIL STERBA ET AL., APPELLEES: WILLIAM N. LESHOVSKY ET AL., INTERVENERS, APPELLANTS.

1 N. W. (2d) 820

FILED JANUARY 9, 1942. No. 31231.

1. **Municipal Corporations.** Where a village has authority to make a contract, but such contract is unenforceable because irregularly

made, a recovery quantum meruit may be had against the village when it has accepted and retained the benefits thereof.

2. ———. But where the statute (Comp. St. 1929, sec. 17-517) prohibits the making of a contract and avoids the obligation thereof on the part of the village, a recovery quantum meruit cannot be had.

3. ———. Where a statute prohibits an officer of a village from having an interest in any contract with the village, and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported contract may be recovered back at the suit of the village or of a taxpayer suing in its behalf.

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

William R. Patrick, for appellants.

Brown, Crossman, West, Barton & Fitch and *Edward A. Nelson, contra.*

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

CARTER, J.

This was an action brought by the village of Bellevue to recover a judgment against its former trustees and officers for money alleged to have been unlawfully paid to one Bohemil Sterba while he was a member of the board of trustees of the village. The interveners were taxpayers of the village, interested in protecting the funds of the village. A trial was had to a jury who returned a verdict for the defendants. Plaintiff and interveners appeal.

The record shows that a new school building was being constructed in Bellevue in 1936. The school building required a sanitary sewer connection and outlet. The closest connection to the village sewer was some eleven blocks away. The village, having no funds available to construct the sewer, procured a Works Progress Administration grant for the construction of the sewer. The total estimated cost was $12,256.25, of which the village was to contribute $2,416.25. Superintendence and control of the project were

to be in the Works Progress Administration. During the same year the village procured a Works Progress Administration grant to construct 3,400 feet of water mains at an estimated cost of $2,998 of which the village was to contribute $1,060. Superintendence and control of this project were likewise to be in the Works Progress Administration.

The record shows that during the year 1937 the defendant Sterba received three warrants on the general fund of the village in the amount of $500 and one warrant on the water fund in the amount of $25.25. It is the legality of the payment of these warrants that constitutes the controversy in this case. It is admitted that, during the times herein mentioned, Sterba was a member of the board of trustees of the village; that the payments so made were not included in an estimate of expense for any fiscal year, nor were they included in any appropriation ordinance or sanctioned by a majority of the voters of the village, either by petition or special election; and that Sterba filed no written verified claim for any of said payments.

Defendant Sterba contends that he was employed as superintendent of the sewer and water projects by the Works Progress Administration. It is then urged that the village did not pay the sponsor's contributions to the projects to the Works Progress Administration because of the delay that it would cause in getting the construction under way and that the making of such payments direct was waived. The implication is that the village was to pay Sterba out of the amount it agreed to pay. There is, however, no contract or written evidence of any such arrangement with the Works Progress Administration. There is no competent proof in the record of any agreement that the village was to provide work and labor and charge it to the amount the village agreed to contribute to the project. But if such an agreement did exist, the prohibition of the statute was a bar to the employment of Sterba. There is some evidence in the record that Sterba was employed by the Works Progress Administration. If so, it is the Works Progress Administration and not the village that is liable for his

services. There is no record of any kind showing that the Works Progress Administration assigned or authorized any expenditures by the village of any part or all of the amount which the village obligated itself to pay the Works Progress Administration on these projects. It is clear therefore that Sterba was either an employee of the Works Progress Administration to whom he must look for his pay, or he was employed by the village to perform services in its behalf.

Appellants contend that Sterba could not lawfully enter into a contract of employment with the village because of the provisions of section 17-517, Comp. St. 1929, which provides: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party; and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation." This section has a salutary purpose—the insuring of honest and efficient village government. The prohibition against an officer of a village entering into contracts with the village is clear. It is urged, however, that Sterba was entitled under the law to recover for the reasonable value of the services he rendered the city. With this we cannot agree. Such a rule would defeat the very purpose of the statute. Where authority to create liability exists, but is irregularly exercised, a recovery quantum meruit may be had. *Western Chemical Co. v. Board of County Commissioners,* 130 Neb. 550, 264 N. W. 699. But when the creation of liability is absolutely forbidden, as in the instant case, the quantum meruit rule can have no application.

The proper conclusion, it seems to us, is comparatively simple. If Sterba was employed by the Works Progress Administration, he must look to that agency for his pay. Certainly, the Works Progress Administration is without authority to hire employees to perform services for the village or to expend village funds. If the village attempted to employ a member of the village board of trustees, it violated the provisions of the statute hereinbefore men-

tioned. Sterba was incompetent under the statute to make such a contract, and the statutory penalty for so doing is the complete avoidance of the obligation on the part of the village. The statute contemplates that an officer of the village might not exercise his best judgment in the handling of the business of the village if even the hope of personal benefit exists. In accepting the position of trustee one is legally bound to forswear business transactions with the village. If after assuming the office it is discovered that the prohibition of the statute appears too severe, a resignation of the office will provide adequate relief from the burden of the statute. We think the purpose of the statute is to require unselfish and unbiased service from its duly elected officers. To construe the statute as contended for by defendants, and make applicable the relief urged by them, would in effect destroy the beneficent purposes of the law.

We think the trial court erred in failing to direct a verdict in favor of the village.

REVERSED.

GUSTAVIA LENNOX, APPELLANT, V. JENNIE ANDERSON ET AL., APPELLEES.

1 N. W. (2d) 912

FILED JANUARY 9, 1942. No. 31221.

1. **Specific Performance.** "Equity will grant specific performance of a parol contract to leave property to another, where the terms of the contract are established by evidence that is clear, convincing and satisfactory, and where it has been wholly performed by one party and its nonfulfilment would amount to a fraud on that party." *Craig v. Seebecker*, 135 Neb. 221, 280 N. W. 913.
2. ———. Evidence in the instant case examined and *held* sufficient to sustain the parol contract.
3. **Witnesses.** Where a person employs an attorney to prepare a will and sign it as one of the attesting witnesses, and subsequently revokes such will by making a new one, containing a

different distribution of his bounty, the scrivener of the will is not privileged to testify to conversations had with the testator with reference thereto, or to the contents of the will, nor is such will admissible in evidence in a suit by a third party to establish an oral agreement wherein the testator is one of the parties to such agreement, where proper objection is made to the admissibility of such evidence; and, likewise, a law partner of such attorney, who did not participate in preparing the will, but signed it as an attesting witness, is not privileged to testify to conversations had with the testator with reference to the will or to its contents, where proper objection is made to such testimony.

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

Charles E. Foster and *Harry C. DeLamatre,* for appellant.

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

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

MESSMORE, J.

Plaintiff seeks to establish fee simple title to real estate and certain personal property, based on an oral agreement that, in the event plaintiff would make her home with the owners thereof and care for them during their lifetime, she would receive all of such property. Plaintiff alleges performance of the oral agreement and prays for specific performance. From an adverse decision, plaintiff appeals, predicating error in that the judgment of the court is contrary to the law and the evidence.

The following facts are established without dispute by the pleadings: Hilma and Charles J. Sanders were husband and wife, the former a sister of the plaintiff. Hilma Sanders died June 26, 1937, leaving a last will and testament which was duly probated. Her husband, Charles J. Sanders, died February 20, 1940. Plaintiff's petition alleges that, by joint efforts and contributions of Hilma and Charles J. Sanders, they accumulated certain real estate which they

occupied as a homestead, fee simple title thereto being in Hilma during her lifetime, and she, by her will, devised such interest to her husband. Defendants' answer denies generally the allegations of plaintiff's petition and denies such devise of real estate; alleges that Charles J. Sanders had expended considerable sums of money in maintaining the premises and had treated the same as his real estate; that the plaintiff had full knowledge of Hilma's will. The object of the defendants in denying ownership of the real estate in Hilma Sanders was to compel the plaintiff to prove first such ownership. The answer pleads the contract is not in writing and, therefore, violative of the statute of frauds. An analysis of the pleadings warrants us in drawing the conclusion that ownership of the real estate was in Hilma Sanders during her lifetime and thereafter in Charles J. Sanders. He, by will, left all his property, real and personal, to his sister, Jennie Anderson, one of the defendants.

The oral contract, constituting the basis of this action, is as follows: Upon plaintiff's arrival in Omaha, Hilma and Charles J. Sanders orally agreed with her that, if she would make her home with them and care for Hilma during her lifetime and for Charles J. Sanders, the home occupied by them, together with its contents, would become the property of the plaintiff. In accordance with such agreement, plaintiff assumed the duties as provided therein by living in the home with the Sanders, taking care of them, performing the duties of a practical nurse, doing the housework, cooking the meals, and performing all things necessary to maintain the household. We hereafter set forth the substance of the competent testimony to establish the oral agreement. Due to the confusing nature of the testimony of the witness Mary E. Hinterlong, and in that the greater portion thereof constitutes conclusions and opinions of this witness, we purposely refrain from stating her testimony. The testimony of the following witnesses is pertinent.

Mrs. Robert Carlton, a close neighbor of the Sanders,

recalled that plaintiff came to the Sanders home in the fall or winter of 1936. One evening, three or four days prior to Hilma's death and during plaintiff's absence, this witness took care of Hilma, "fixed her for the night." Hilma told her she would not live much longer, "but that Gussie (plaintiff) would be taken care of, because everything they had would go to her;" that plaintiff "had given up a lot to come here and stay with them, and she felt it was the thing to do, that she should have all that was left."

Alfilda Nelson, who had known Hilma Sanders for 60 years and her husband for more than 50 years, visited their home frequently, and on several occasions, during Hilma's last illness, Hilma told this witness she wanted them to stay together and have Hans cared for; that if anything happened to them it would be plaintiff's home as long as she lived. The "Hans" referred to was one Hansen, who lived on the premises, worked about the place and kept up the yard. Three weeks after Hilma's death, this witness had a conversation with Charles J. Sanders in which she said: "I am so glad * * * you all stayed together," and Charles said: "Oh, yes," "That was Hilma's wish that we should all stay together and that Mrs. Lennox (plaintiff) should have a home here with us so long as she lived, and that Hans should be taken care of."

The witness Gertrude Kurtz, a neighbor, had known the Sanders 37 or 38 years, visited their home frequently and was there during Hilma's last illness. A month before Hilma's death she told this witness that "she wanted her (plaintiff) to have the things after, if anything happened to her," and wanted Mr. Sanders and the plaintiff "to be together as long as they lived." Ella Wright, a frequent visitor in the Sanders home, testified to a conversation she had with Hilma Sanders in the early part of 1937, wherein Hilma told this witness that the plaintiff should have all she owned, all of her property; that she "was going to fix it that she (plaintiff) got what she had."

Florence Workman, a neighbor of the Sanders, was frequently in the home, and during the last illness of Charles

J. Sanders on several occasions administered insulin to him, and at such times visited with him with reference to the plaintiff and the property. He told her that plaintiff "was very good to him, and he said that when he passed away, that he wanted her to have all the property * * * because she had worked so hard for him and stayed up nights, and had taken care of him." Other evidence appears in the record which we deem unnecessary to set out, except to say that evidence of performance of the oral agreement is sufficiently persuasive, in that it is not contradicted by the defendants.

The law is well established that a court of equity will grant specific performance of an oral contract to leave property to another, where the terms of the contract are established by evidence which is clear, convincing and satisfactory, and where it has been fully performed by one party, and its nonfulfilment would amount to a fraud upon that party. *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788; *Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042; *McNea v. Moran*, 101 Neb. 476, 163 N. W. 766; *Davis v. Murphy*, 105 Neb. 839, 182 N. W. 365; *Denesia v. Denesia*, 116 Neb. 789, 219 N. W. 142; *Weber v. Crabill*, 123 Neb. 88, 242 N. W. 267; *Craig v. Seebecker*, 135 Neb. 221, 280 N. W. 913.

In *Weber v. Crabill, supra*, it was held: "Courts will compel specific performance of an oral contract to convey specified real estate in consideration of personal care to be given to the owner during the remainder of his natural life, when the terms of the contract are fair and reasonable and the evidence to establish such contract and its performance is clear, satisfactory, and convincing."

In *Overlander v. Ware*, 102 Neb. 216, 166 N. W. 611, this court held: "In an action for specific performance of an oral agreement with a deceased person to convey land, *held*, that not only must the terms of the contract be established by evidence that is clear, satisfactory and unequivocal, but the work constituting the performance required under the statute of frauds must be such as is referable solely to the contract sought to be enforced, and not

such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed. Equity interferes only to prevent fraud or unconscionable advantage."

The law is well established that each case is to be determined from the facts, circumstances and conditions, as presented therein. *Damkroeger v. James,* 95 Neb. 784, 146 N. W. 936.

We turn our attention to the question: Whether the evidence is sufficient to establish, by clear, satisfactory and convincing evidence, that the oral agreement was made and that the plaintiff fulfilled her part of the agreement so as to entitle her to specific performance thereof? We have recited the evidence of the witnesses who testified as to statements made by Hilma Sanders and Charles J. Sanders that such agreement had been made. The evidence shows that the plaintiff remained in the Sanders home from the day that she arrived, supervised the housekeeping, cooked meals and waited on and nursed both Hilma and Charles J. Sanders during their last illness, up to the time of their death.

The defendants argue that the evidence in support of the parol contract is not clear and convincing, in that there is some testimony that the plaintiff was to have a life estate in the property. We are convinced that the greater weight thereof supports the contention of plaintiff that she was to have all of the property of the Sanders for the performance of services, as pleaded in her petition.

It is further argued by defendants that on account of the plaintiff's age of more than 80 years she had received adequate compensation, in that she had been furnished a home since the fall of 1936. We see no merit to this contention. There is no evidence of infirmity on the part of plaintiff, or that she desired to come to Omaha. On the contrary, she came at the request of the Sanders because they needed her services. She left a farm home in New York state.

From an analysis of the entire record and the facts and circumstances surrounding this case, we conclude that the trial court erred in denying to plaintiff performance of the oral contract.

Plaintiff offered testimony of conversations, with reference to the oral agreement, between Charles J. Sanders and an attorney employed by him to draft and witness a will, wherein he left all of his property to the plaintiff; likewise, evidence of another witness to the will, a law partner of the scrivener of the instrument. Objection to such offered testimony was made on the ground that the communication between the attorney and client was privileged.

Section 20-1206, Comp. St. 1929, provides in part: "No practicing attorney, counselor, * * * shall be allowed in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

Section 20-1201, Comp. St. Supp. 1939, provides in part: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: * * * Third: An attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court."

The general rule is: "Where a testator requests the attorney who drafted the will, and with whom he has consulted in regard thereto, to sign the will as an attesting witness, and the attorney does so, his testimony with reference to the transaction and communications between him and the testator at the time are not inadmissible as privileged." Annotation, 64 A. L. R. 192. The reason is that "The testator, by his act, has in effect consented that, whenever the will shall be offered for probate, the attorney may be

called as a witness and testify to any facts within his knowledge necessary to establish the validity of the will." By his act, the testator waives the privileged communication. The foregoing rule prevails, "notwithstanding statutory provisions that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him." 64 A. L. R. 192.

It will be noted that the foregoing rule applies to a situation distinctly different from that appearing in the instant case. Here, the conversation had by the attorney and client at the time of the execution of the will and the will itself are offered as corroborating evidence in an action by the beneficiary of the will to establish an oral contract. In the instant case the will offered in evidence had been revoked by the testator. When a person employs an attorney to have a will drawn and confides in the attorney as to the disposition of his property, it is the client's desire that during his lifetime the will be kept a secret, and a confidential relation exists. The attorney is not privileged to give the will publicity in any form. This confidential communication is temporary. After the testator's death, the attorney is at liberty to disclose all that affects the execution and contents of the will. The privilege has been waived by the testator, especially so when the scrivener of the will is a witness to it.

So, in the instant case, when Charles J. Sanders consulted counsel about the making of a will, he never intended it to be published. He subsequently revoked the will and made a different disposition of the property. The effect of this act is: "While a testator waives the seal of confidence by requesting his attorney to witness his will, it seems that he may annul such waiver by revoking the will, so that the attorney will not thereafter be permitted to testify as to its execution and instructions given by the testator respecting the will." Annotation, 64 A. L. R. 194. The reason for the above rule is that the right of secrecy belongs to the client, not to the lawyer who drafted the will. Under the circumstances as here existent, the case of

Brown v. Brown, 77 Neb. 125, 108 N. W. 180, cited by plaintiff, is inapplicable.

The case of *Robinette v. Olsen*, 114 Neb. 728, 209 N. W. 614, is called to our attention. In that case testimony of a witness who drafted the will was discussed at length in the opinion. We have scrutinized the record and the briefs of counsel in such case and do not find a specific objection to such testimony as a privileged communication. In addition, the will referred to was destroyed, and there was no evidence of another will having been made, which revoked the will offered or testified to. The situation in the *Robinette* case is entirely different from that in the instant case, and that case is no authority for the introduction of evidence of a scrivener of a will, who signed the same as a witness, as to communications had at the time of the execution of the will, when such will had been revoked.

We conclude on this point that the court properly sustained the objection to the admissibility of such evidence for the reason that the communication was privileged.

The judgment of the district court is reversed and the cause remanded, with instructions to enter judgment for the plaintiff, giving her the fee simple title to the real estate in question and the personal property of which Charles J. Sanders died seised, after deducting all expense incurred in the probate proceedings and debts allowed against his estate.

REVERSED.

YEAGER, J., not participating.

JAMES P. NEARY, APPELLANT, V. GENERAL AMERICAN LIFE INSURANCE COMPANY, APPELLEE.

1 N. W. (2d) 908

FILED JANUARY 9, 1942. No. 31235.

1. **Appeal.** In an action in equity, this court will take into consideration the fact that the trial court observed the witnesses and the manner in which they testified, and must have accepted one version rather than the other of disputed facts.

2. **Contracts:** REFORMATION. Equity will decree reformation of a contract only if the mistake is mutual, or for fraud or inequitable conduct.
3. **Insurance.** If by inadvertence, accident, or mistake the terms of a contract of insurance are not fully or correctly set forth in the policy, it may be reformed in equity so as to express the actual contract intended by the parties, if the mistake is mutual, or if there has been fraud or inequitable conduct by one of the parties to the contract.
4. **Contracts.** Carelessness or negligence of a person in signing a written contract does not estop one from afterwards asserting that the writing does not truly express the agreement of the parties, where the contract was obtained by fraud or entered into by mutual mistake.
5. **Insurance.** Where through clerical error a 20-payment life insurance policy provides for too great a cash settlement at the end of twenty years, the mistake is mutual in legal contemplation, and the insurer is entitled to reformation if reformation is sought as soon as recovery is attempted by the insured for the greater amount.
6. **Contracts:** REFORMATION. The right to reformation of a written instrument must be established by clear, convincing and satisfactory evidence, sufficient to overcome the strong presumption arising from the terms of the instrument that it correctly expresses the intention of the parties.

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

John J. Gross, for appellant.

Frederick M. Deutsch, contra.

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

YEAGER, J.

This is an action by James P. Neary, plaintiff and appellant, against General American Life Insurance Company, a corporation, defendant and appellee. The purpose of the action is to recover $1,867.81, claimed by plaintiff to be due on a policy of life insurance after, according to the terms of the policy, he had paid the 20 annual premiums. The $1,867.81 represents the difference between the claimed

face amount of the policy and a loan against it in the agreed amount of $132.19. There is a cross-action by the defendant, wherein the defendant set forth that there had been a mutual mistake in the writing of the insurance, and that in truth there was due and owing to the plaintiff the sum of $867.81, this being the difference between $1,000 and the agreed amount of the policy loan. The defendant prayed for reformation and judgment on the basis of reformation.

The trial court decreed reformation as prayed and rendered judgment in favor of the plaintiff and against the defendant for the sum of $867.81. From this decree and judgment the plaintiff has appealed.

On or about September 1, 1919, one H. H. Johnson, an agent of the International Life Insurance Company, called on plaintiff at his farm some miles from Ft. Pierre, South Dakota, and solicited him for life insurance. As a result a policy of life insurance was issued for $2,000, calling for annual premium of $60.24 for 20 years. The policy contained several options, among which were commuted value of $1,470 on proof of death, $100 a year to plaintiff during life after payment of premiums for 20 years, paid-up life insurance after 20 years in the amount of $1,452, loan and cash value of $928 at the end of 19 years, and by computation a loan and cash value of approximately $1,000 at the end of 20 years. As to the correctness of these provisions there is no question. There also appears the following provision: "On the 8th day of October 1939 (being the policy anniversary date on which the insured will have attained the age of sixty-five, nearest birthday) on surrender of this policy while in full force and effect, the company agrees to pay Two Thousand dollars in one sum to the insured or his assigns." The date and the words "Two Thousand" are typed in blank spaces, but the remaining words are a part of the printed form of the policy. It is the claim of the defendant that this obviously should have been one thousand rather than two thousand, and that in legal contemplation this was a mutual mistake.

As already indicated the policy was issued by the International Life Insurance Company. Later the Missouri State Life Insurance Company, a corporation, assumed liability on the policy, and still later the General American Life Insurance Company, a corporation, assumed liability thereon, hence the action against this defendant.

That a mistake was made by the insurance company is beyond question. It is inconceivable that the company intended a contract to pay to plaintiff $2,000 in cash at a time when it was shown by the plain computations on the policy that the cash or loan value was only one-half of that amount, that its commuted value at death was only $1,470, that its value as paid-up insurance was only $1,452, and that annual endowment payments to plaintiff, a man then of the age of 65 years, would be only $100 a year during life.

It is clear that the premium exacted was for a 20-payment policy of endowment insurance with endowment at the age of 65 years, with the options set forth in this policy, and with an agreement to pay $1,000 in one sum at the age of 65 years. In other words, plaintiff paid the regular rate of premium for a policy written as defendant contends this one should have been written.

The record indicates, though not conclusively, that no complete copy of the policy was retained by the company, but only a record of it which included a copy of the schedule of cash or loan values. It appears further that the error was never called to the attention of the company until after payment of the final premium when plaintiff made demand for payment of $2,000, less the loan against the policy.

The plaintiff contends as a matter of fact that it was understood by and between plaintiff and the agent of the International Life Insurance Company that he was to receive a policy of insurance that would require payment to him of $2,000 on payment of 20 annual premiums. This contention finds some support in the evidence. It is denied by the agent. On this question of fact it clearly appears

that the trial court found against the plaintiff. In this connection it is the rule that this court will, in an equity case, take into consideration the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version rather than the other of disputed facts. *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *Robinson v. Williams,* 136 Neb. 253, 285 N. W. 574. Independent of this rule it appears to us that, taking into consideration the testimony on this matter and coupling it with the things which are obvious in the policy itself, the defendant has sustained the burden of proof on this factual question.

In support of his assignments of error the plaintiff submits two important legal questions. First, he urges that an insurance policy will not be reformed for mistake if the period of incontestability has passed, and, second, that equity will not decree reformation of a contract on the ground of mistake, unless the mistake is shown to be mutual, and that the party seeking reformation was free from negligence.

In support of the first proposition plaintiff cites *Equitable Life Assurance Society v. Darr,* 64 S. Dak. 355, 266 N. W. 721. Just what was at issue in that case is not determinable from a reading of the two short paragraphs of that *per curiam* opinion, beyond the fact that the insurer sought to reform a policy on which premiums had been paid for eight years, for the reason that the policy involved was not the kind of policy the insured had applied for or the insurer had intended to sell. The question of reform after expiration of the period of incontestability was not discussed or referred to. If this case could be considered as determinative of the question presented, we would consider it binding here, since the contract of insurance being considered is a South Dakota contract.

On this question, in *Buck v. Equitable Life Assurance Society,* 96 Wash. 683, 165 Pac. 878, it was held: "'The amount due,' in the language of this clause, can mean no other sum than the amount due in law and fact." This rule appears sound and equitable. An adherence to it pre-

serves, and takes away none of, the rights which were in the contemplation of the parties at the time the policy was written.

On the second question it is a fixed principle of law that equity will decree reformation of a contract on the ground of mistake only if the mistake is mutual, or for fraud or inequitable conduct. The rule in its application to insurance policies is succinctly stated and supported by many authorities in 29 Am. Jur. 237, sec. 241, as follows: "Reformation of an insurance policy may be had, in general, where, by reason of fraud, inequitable conduct or mutual mistake, the policy as written does not express the actual and real agreement of the parties. More particularly, if by inadvertence, accident, or mistake the terms of a contract of insurance are not fully or correctly set forth in the policy, it may be reformed in equity so as to express the actual contract intended by the parties, if the mistake is mutual or if there has been fraud or inequitable conduct by one of the parties to the contract."

Plaintiff urges that, to entitle one to reformation, such one must be free from negligence. On this proposition he cites the case of *Galva First Nat. Bank v. Reed,* 205 Ia. 7, 215 N. W. 732. That was a case for reformation of a contract relating to the alienation of title to real estate. In the opinion it is stated: "Another rule of law is that, in order to justify a reformation of a written instrument, the party asking the reformation must be free from negligence." This is respectable authority, but it represents the minority opinion on the subject. No case cited from any other jurisdiction supports this view and we have found none directly supporting it. Furthermore, all of the Iowa cases deal with neglect to examine deed, lease or exchange contract before signing, to see whether or not the intention of the parties was correctly expressed. On the other side of the proposition in cases, some of which are insurance cases similar to the one being considered here, we find that mere negligence will not defeat reformation.

In *Story v. Gammell,* 68 Neb. 709, 94 N. W. 982, it is

stated: "The rule, that the carelessness or negligence of a person in signing a written contract estops him from afterwards asserting that the writing does not truly express the agreement of the parties, does not apply in an action for relief on the ground that the contract was obtained by fraud or entered into by mutual mistake."

In *Columbian Nat. Life Ins. Co. v. Black,* 35 Fed. (2d) 571, it is stated: "It is claimed that the company was negligent in failing to discover the error, and attention is called to a statement on the policy reading: 'Examined by J. M. S.' Apart from the question whether negligence must be accompanied by prejudice, it is sufficient to say that negligence is not in itself a defense, else there would be no ground for reformation for mistake, as mistakes nearly always presuppose negligence."

In *Skelton v. Federal Surety Co.,* 15 Fed. (2d) 756, the court said: "Mere negligence, not amounting to the violation of a positive legal duty, does not prevent reformation, and especially if it appears that the other party has not been prejudiced thereby."

In *Mutual Life Ins. Co. v. Metzger,* 167 Md. 27, 172 Atl. 610, is found the following: "In the making of the error in the office of the insurer there would seem to have been no such negligence as defeats an application for reformation. There could hardly be a less negligent error, and the existence of negligence in even the slightest degree does not prevent reformation."

We are impelled by the force of reason and legal precedent to determine the question of negligence adversely to plaintiff.

Was the mistake mutual in a legal sense, or was it grounded in fraud or in inequitable conduct? Consideration of the question of fraud is not required. The record does not suggest it in the issuance of the insurance policy.

On the definition of mutual mistake as applied to insurance policies we quote from some of the reported cases:

Columbian Nat. Life Ins. Co. v. Black, supra: "While courts are properly reluctant to alter the terms of a written

engagement, even in equity, and do not do so unless the proof is clear and convincing, we are of the opinion that the uncontradicted and indisputable facts in this case require the interposition of equity. It is true the defendant on the stand and in his letters denies any mistake on his part. But his actions speak louder than his words. He applied for an ordinary life policy; without any quibble, and in response to his application, he received a policy that manifestly was in error. He only paid for an ordinary life policy. When he received the policy he either did or did not notice the error. If he did not notice it, the mistake was mutual. If he did notice it and said nothing, he was guilty of such inequitable conduct as to amount to fraud."

Hibbard v. North American Life Ins. Co., 192 Wis. 315, 212 N. W. 779, from the syllabus: "Where an option for the cash surrender of such a policy was mistakenly written as exercisable at the end of ten instead of twenty years, so as to enable the insured to receive more than he paid in and more than double the amount printed in the table of cash surrender values for ten years, the option failed to express the intention of the parties and could not be enforced."

Berry v. Continental Life Ins. Co., 224 Mo. App. 1207, 33 S. W. (2d) 1016, from the syllabus: "Where, through a clerical error, a twenty payment life insurance policy provided for too great a cash value at the end of twenty years, the mistake *held* mutual, entitling the insurer to have the policy reformed to meet the real intention of the parties to the contract unless it was barred by laches."

To the same effect are *Buck v. Equitable Life Assurance Society, supra; Rougon v. Equitable Life Assurance Society*, 146 La. 132, 83 So. 434; *United States Fidelity & Guaranty Co. v. Beckman*, 278 Mich. 516, 270 N. W. 770; *Mutual Life Ins. Co. v. Metzger, supra; Gray v. Supreme Lodge, Knights of Honor*, 118 Ind. 293, 20 N. E. 833; *New England Mutual Life Ins. Co. v. Jones*, 1 Fed. Supp. 984; *Hemphill v. New York Life Ins. Co.*, 195 Ky. 783, 243 S. W. 1040, and many other cases.

In the light of these definitive decisions we conclude that the mistake complained of by the defendant in its cross-action was, within legal contemplation, a mutual mistake, and one against which equity will grant relief by reformation.

The defendant has established its right to have reformation by the weight of evidence required of it, that is, by clear, convincing and satisfactory evidence, sufficient to overcome the strong presumption arising from the terms of the instrument that it correctly expresses the intention of the parties. See *Home Fire Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941; *Jacobson v. Forster*, 138 Neb. 452, 293 N. W. 336; *Beideck v. National Fire Ins. Co.*, 139 Neb. 171, 296 N. W. 873; *Severson v. Home Ins. Co.*, 51 S. Dak. 293, 213 N. W. 726.

The decree and judgment of the district court are

AFFIRMED.

BESSIE J. NEILSON, APPELLANT, V. CHARLES A. LEACH, APPELLEE.

1 N. W. (2d) 822

FILED JANUARY 9, 1942. No. 31254.

1. **Easements.** "Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant to the land, and not an easement in gross." *Smith v. Garbe*, 86 Neb. 91, 124 N. W. 921.
2. ———. "It will not be presumed that the grant of an easement is in gross when the right can fairly be construed as appurtenant to some other estate." *Ballinger v. Kinney*, 87 Neb. 342, 127 N. W. 239.
3. ———. "An easement will pass by a deed or grant of conveyance, even if the word 'appurtenance,' or a similar expression, is not used in the instrument, if it is apparent to an ordinary observer, and naturally and necessarily belonged to the prem-

ises." *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N. W. 236.

4. ———. Where an ordinary observer cannot escape the conclusion that the right obtained by unrestricted conveyance to an alleyway and sewerage outlet is a valuable right and naturally belongs to certain premises, such right must be considered to be an appurtenance.

5. **Appeal.** In an equity case, this court will take into consideration the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version rather than the other of disputed facts.

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

Fred T. Hanson, for appellant.

Butler, James & McCarl, contra.

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

YEAGER, J.

This is an action by Bessie J. Neilson, plaintiff and appellant, against Charles A. Leach, defendant and appellee, for specific performance of a contract for the sale of real estate, in which action the defendant filed a cross-petition, seeking to recover back $300 paid by him at the time of the execution of the contract as part of the purchase price of the real estate in question.

Following this transaction the defendant failed and refused to perform the contract of purchase and the action indicated was commenced. The case was tried to the court and by decree specific performance was denied, and the defendant was given judgment for the amount as prayed by him in his cross-petition. From this decree and judgment the plaintiff has appealed.

The pertinent facts are the following: In September, 1924, Louis P. Neilson was the owner of a certain strip of real estate, 15 feet 9 inches in width, running 130 feet north and south across and near the center of lots 13, 14 and a part of lot 15, block 20, original town of McCook, Red Willow county, Nebraska. At the same time Charles D. Noble

owned a parallel strip, 20 feet in width, immediately to the west of the Neilson property, and also other property in the block. On September 10, 1924, an agreement was entered into between Neilson and Noble, whereby Neilson agreed to transfer by deed a parcel off the north end of his property, in dimensions 15 feet 9 inches east and west and 12 feet north and south, in consideration of being granted by Noble the privilege of sewerage across the property conveyed and other property owned by Noble in the block. On May 25, 1928, another agreement was entered into between the same parties. The second agreement had reference by specific recital to the first agreement, the real estate described therein and the consideration, and made provision for a contemplated party wall on the line between the two properties hereinbefore described. It also confirmed the right of Neilson to sewerage, and in addition granted an alleyway to him over the same property.

Later both Neilson and Noble died. The Neilson property passed to plaintiff here, and the Noble property came into the hands of the executors of his will.

On April 15, 1940, following a conversation between the defendant and John E. Kelley, real estate agent for plaintiff, the defendant agreed to purchase the Neilson property for $1,800 and he gave Kelley his check for $300. On April 16, 1940, Kelley gave defendant a receipt for the $300 on which receipt was noted the following: "15 ft. 9 in. by 130 feet part of lots 13 - 14 & 15 in blk. 20, O. T. McCook." Also on the receipt appeared the following: "Bal. $1,500 on execution of deed and approval of abst. within 6 days of furnishing same for examination." On April 17, 1940, the plaintiff executed a warranty deed to the property described in the receipt and delivered it and the abstract to the law firm of Cordeal, Colfer & Russell, as Kelley says, at the direction of the defendant.

On April 15, 1940, plaintiff executed a release of the agreements of September 10, 1924, and May 25, 1928, between Louis P. Neilson and Charles D. Noble, containing the provisions relating to sewerage and alleyway, and can-

celing the party wall agreement. In consideration of this release the executors of the estate of Charles D. Noble, deceased, on April 16, 1940, conveyed to plaintiff the small strip of ground which had been conveyed to Charles D. Noble as a part of the agreements of September 10, 1924, and May 25, 1928. This deed was placed of record on April 18, 1940.

The plaintiff urges as ground for reversal that the decree and judgment are contrary to the law and the evidence.

Briefly stated, plaintiff's right to have specific performance of the contract in question, if such right exists, must depend upon whether or not within the time provided by the contract she was able to and did tender conveyance of a merchantable title to the real estate which was within the contemplation of the parties when they entered into the contract.

That she was able to convey title to the full surface and bounds of the real estate is beyond question, but when the agreement was entered into there existed a party wall agreement which mutually attached to the west line of the property and to the east line of the property immediately adjacent to it on the west, also, at that time there existed an easement for sewerage and alleyway from the north end of this property to the east end of lot 15. After the execution of the agreement, and before the date for its consummation, the plaintiff had released the easement for sewerage and alleyway and also the obligation of the party wall agreement in so far as it attached to the property to the west, but did not obtain a release as against the property in question.

Were these easements valuable rights and appurtenances to which the defendant was entitled under his contract with the plaintiff? The defendant presented his defense on the theory that they were. While the finding of the district court is general it obviously held that the easements, or at least one of them, was a valuable right and an appurtenance to which defendant was entitled under the contract. This finding is supported by the facts and it responds to rules

of law as set forth in the decisions of this court. In *Smith v. Garbe,* 86 Neb. 91, 124 N. W. 921, the following is found: "Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant to the land, and not an easement in gross." In *Ballinger v. Kinney,* 87 Neb. 342, 127 N. W. 239, it was held: "It will not be presumed that the grant of an easement is in gross when the right can fairly be construed as appurtenant to some other estate."

As one of the incidents of the contract a deed was executed to the property and placed in the hands of Carson Russell, the attorney, as Kelley says, designated by defendant to examine the abstract. This deed contained no reservation with reference to any of the easements in question. It follows then under the terms of the proposed deed that, had they not been released, they would have passed with the dominant tenement.

In *Agnew v. City of Pawnee City,* 79 Neb. 603, 113 N. W. 236, this court held: "An easement will pass by a deed or grant of conveyance, even if the word 'appurtenance,' or a similar expression, is not used in the instrument, if it is apparent to an ordinary observer, and naturally and necessarily belonged to the premises." Again in *Smith v. Garbe, supra,* it was held: "An easement appurtenant to land will pass by a conveyance, although the words 'with the appurtenances' are not used."

In the light of these decisions it seems clear that an ordinary observer could not escape the conclusion that at least the alleyway, which was the only avenue of approach to the rear of the premises, and the right to sewerage outlet, even if the property wall agreement did not, naturally belonged to these premises.

The evidence indicates that the defendant knew of the

easements at the time of the execution of the contract. There also is evidence on the part of plaintiff which indicates that their release was discussed by defendant and Kelley. Defendant denies that any such discussion took place. The trial court resolved this question of fact in favor of the defendant. In this we think the court was right. It is difficult to believe that a prospective purchaser of real estate would consent to or acquiesce in the release of convenient and in fact reasonably necessary appurtenances of real estate he was seeking to purchase. In any event this is evidence on a material issue so conflicting that it cannot be reconciled. In these circumstances, this being an appeal in equity, this court will take into consideration that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *Robinson v. Williams,* 136 Neb. 253, 285 N. W. 574.

The defendant was entitled under his contract to a deed conveying title to the real estate with all appurtenances which were thereunto belonging at the time the contract was entered into. This the plaintiff was never able to give. It follows that the decree of the district court was correct. The plaintiff not being able to convey the title that the contract required of her, the defendant was entitled to a judgment against the plaintiff for the $300 he had paid as down payment on the contract of purchase.

The decree and judgment of the district court are

AFFIRMED.

IN RE ESTATE OF ETHEL DAVENPORT.
GEORGIA W. WHITTEN, APPELLANT, V. WILLIAM F. DAVENPORT, ADMINISTRATOR, APPELLEE.

2 N. W. (2d) 17

FILED JANUARY 16, 1942. No. 31192.

1. **Contracts.** "A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable." Restatement, Contracts, sec. 503.

2. ———. "To be remedial the mistake must relate to a fact which constitutes the very essence of the contract and is material in the sense that it is one of the things contracted about." 17 C. J. S. 497, sec. 144.
3. **Guardian and Ward.** "The general rule is that a third person who furnishes support or maintenance to a ward acquires no enforceable claim against the guardian or the ward's estate in the guardian's hands, for payment, compensation, or reimbursement, unless there was an expressed or implied agreement with the guardian therefor." 28 C. J. 1121.
4. ———. "A guardian is a trustee and is governed by the same rules that govern other trustees." 25 Am. Jur. 113, sec. 185.
5. **Contracts.** No contract may be implied where an enforceable express contract exists between the parties as to the same subject-matter and a conflict would thereby result; further, an express contract is the exclusive source of the legal rights and duties between the parties in regard to the matters to which that contract relates.
6. **Guardian and Ward.** The guardian's authority does not extend to the doing of any act detrimental to the ward; and the guardian cannot bind the ward by an admission contrary to the latter's interest, nor can he create an estoppel against the ward by his own acts or omissions.
7. **Trusts.** Where torts of a trustee to third persons are involved, the general rule is not one primarily of resort by the injured party in the absence of equitable considerations to the trust estate. In such case, "The trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be liable if he held the property free of trust." Restatement, Trusts, sec. 264.

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

Lloyd E. Peterson and *D. W. Livingston,* for appellant.

Frederic C. Kiechel and *Armstrong & McKnight, contra.*

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

EBERLY, J.

This is an appeal from a judgment on a verdict directed by the district court for Nemaha county, Nebraska, in favor

of William F. Davenport, administrator of the estate of Ethel Davenport, deceased, and against Georgia W. Whitten, claimant. This judgment was entered upon a claim originally filed by Whitten against that estate in the county court of Nemaha county for personal services rendered said deceased during her lifetime, which claim is, omitting formal parts, as follows:

"To: Feb. 26, 1937, thru June 25, 1939, for care, board and room for deceased, 120 weeks, and 2 days at $5.00 per day $4,210.00
of which amount has been paid 1,800.00
leaving a balance owing of ..... $2,410.00."

To this claim the administrator filed objections in writing, of which the following constitutes a part:

"Objector admits that the said Ethel Davenport was provided with board, lodging, and care during the period mentioned in said claim to wit, February 26, 1937, to June 22, 1939; but alleges the fact to be that during all of said time the said Ethel Davenport was under guardianship and that this objector was her guardian. That before the services were rendered by the claimant the claimant agreed to render such services for the sum of $15.00 per week, and that thereafter she was paid by said guardian said sum of $15.00 per week during all of said period except the time intervening between May 26 to June 27, 1939, or period of approximately four weeks for which she is entitled to the sum of $60.00." The administrator further alleged in such objections that the oral agreement above set forth had been approved and authorized by the county court before the making thereof.

The answer or reply of the claimant filed in said county court contained the following:

"Alleges the facts to be that at the time she accepted the care of the said deceased, the said deceased was insane and it was represented to claimant that the said deceased was without property or other means with which to pay for the care and attention required to meet her necessities, other

than $15.00 per week. That said services were, as claimant advised the friends and relatives of said deceased who negotiated with claimant, worth $5 00 per day or $35.00 per week, but they protested her inability to pay this amount and under the mistake of fact that deceased was unable to pay more, claimant accepted the employment and rendered said services and never learned that the deceased had means sufficient to pay the regular charge of $5.00 per day or $35.00 per week, until after decedent's death and after the said services had been rendered. That by reason of said mistake of fact this claimant is not bound by any agreement of $15.00 per week, but is entitled to the full amount of $35.00 per week during all of said time. * * *

"That when the said county court ordered the said guardian to pay her only $15.00 per week for said services the court was not informed of the mistake of fact under which said agreement was made, or the true value of said services, and claimant was not in court or a party in court when said order was made and she is not bound thereby and so far as she is concerned said order is void." This answer or reply contained the usual prayer.

These constituted the essential issues as made by the pleadings on which the case was tried.

Thereafter on November 6, 1939, the county court of Nemaha county disallowed the claim of Georgia W. Whitten except for the sum of $60 which was allowed claimant. Thereupon claimant appealed said cause to the district court for Nemaha county, where by agreement of parties the trial was had upon the pleadings filed in the county court, which trial resulted in judgment against claimant as entered in the county court. From this judgment, claimant appeals to this court.

It is an undisputed fact in this case that an oral agreement was made between the claimant and the guardian of Ethel Davenport, an insane person, for her custody and care at an agreed compensation of $15 a week. It also appears that this matter had been submitted to the court appointing the guardian and the contract had been by it

approved. Also, under the terms of this oral contract claimant received Ethel Davenport under her care on the 26th day of February, 1937, and said Ethel Davenport continued in claimant's custody until the death of this insane person on June 25, 1939. Claimant was paid as provided by the contract of employment to the 26th day of May, 1939. She accepted said compensation and receipted therefor so far as disclosed by the evidence, and voiced no protest or objection until after the death of Ethel Davenport.

This oral contract of employment, the claimant now, in effect, denounces as having no binding force and effect. The basis of this action, as stated in her pleadings, is solely that "It was represented to claimant that the said deceased was without property or other means with which to pay for the care and attention required to meet her necessities, other than $15.00 per week. That said services were, as claimant advised the friends and relatives of said deceased who negotiated with claimant, worth $5.00 per day or $35.00 per week, but they protested her inability to pay this amount and under the mistake of fact that deceased was unable to pay more, claimant accepted the employment and rendered said services."

In the consideration of the pleadings, it will be remembered that what is usually understood, as a matter of law, by the term "under a mistake of fact" is confined to cases wherein, because of such mistake, the minds of the parties never met, and there was, therefore, no contract; and also to cases where the contract made was not correctly set out by the words, whether oral or written, by which it was expressed. Under the proof of facts herein, that there was an actual meeting of minds in this transaction is not questioned; and that the exact terms of an oral contract were actually and truly agreed upon between plaintiff and the guardian of the incompetent, and duly approved by the county court of competent jurisdiction, is not denied by the plaintiff. In fact, the basis of claimant's cause of action is not in any manner involved in the oral contract actually made, but exists, if at all, wholly collateral to the same. In this con-

nection it will be remembered that, "A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable." Restatement, Contracts, sec. 503. And, "It has been held that to be remedial the mistake must relate to a fact which constitutes the very essence of the contract and is material in the sense that it is one of the things contracted about." 17 C. J. S. 497, sec. 144.

It is to be noted that, as a matter of pleading, fraud or fraudulent representations is not charged by the claimant as against the duly appointed guardian. He is not named in claimant's pleading; but claimant relies on the statements of "friends and relatives," whom she does not name, and which statements are not alleged to have been fraudulently made. Unquestionably, "The general rule is that a third person who furnishes support or maintenance to a ward acquires no enforceable claim against the guardian or the ward's estate in the guardian's hands, for payment, compensation, or reimbursement, unless there was an expressed or implied agreement with the guardian therefor." 28 C. J. 1121. If neither an express nor an implied agreement exists, there can be no recovery in the instant case.

It, therefore, appears that there can be no recovery against the decedent's estate if relief granted be restricted to the limitations of claimant's pleading. However, if the failure of proper pleadings on the part of the claimant be waived, and the case be deemed to be submitted here on the theory that the question actually tried and determined by the district court was the issue of fraudulent representations by or on behalf of the guardian, believed and relied upon by claimant, which she claims were made, and which she further claims were binding upon the insane person and enforceable against her estate in the granting of the relief sought, we are again apparently surrounded by insuperable difficulties. To sustain such claim the fact that a relationship substantially identical with or quite similar to that of principal and agent between the makers of the representations relied upon and the ward or the ward's estate must

be established. Certainly the statements of those who occupied the relation of mere strangers would be wholly ineffective to create legal liability against either a general guardian or the estate by him represented. In a case involving a similar contention the supreme court of Utah in *Reams v. Taylor,* 31 Utah, 288, 87 Pac. 1089, in discussing the relation between an insane ward and her guardian, took occasion to state:

"In this case, however, the principle upon which the relation of principal and agent is based, wholly fails. There cannot be an agent unless there is a principal. In order to create the relation there must exist a person who is competent to select and appoint an agent to act for the principal. An agent can and does exercise delegated powers only, and an incompetent person cannot delegate powers arising, either directly or by implication of law. The doctrine of principal and agent, therefore, cannot apply between an insane person and his guardian, at least not where the insane person is sought to be held upon a default of the supposed agent's personal promise or undertaking."

In other words, "A guardian is a trustee and is governed by the same rules that govern other trustees." 25 Am. Jur. 113, sec. 185.

It would seem, therefore, that, if this estate of the ward is to be subjected to liability under the facts in this case, it must be based upon tort. Excluding from present consideration all that may be involved in the peculiar character of a general guardian, the making of an express oral contract to furnish services in suit must be and is admitted. Its essentials are competent parties, a subject-matter, a legal consideration, and mutuality of agreement. In its substance it is clearly an oral contract, of enforceable terms, which has been substantially performed by both of the parties thereto. None of its essentials embraces the question of the then value of the ward's estate, and that subject formed no part of the express agreement as originally made and which was never modified by the mutual assent of the parties thereto. There is no charge that there is

fraud in the factum of the contract or that the same was by the parties not intended to be made as actually orally agreed upon. But claimant, in effect, in her proof attempts to establish that she was induced by alleged collateral fraudulent representations of alleged "friends and relatives" of the incompetent, who negotiated the contract, to execute the very oral contract she intended to enter into. If we further assume (but do not determine) that these representations were material and establish actual fraud, it would amount to what is designated in modern texts as "fraud in the treaty." 17 C. J. S. 504, sec. 153. Such contracts so obtained are not void but voidable only at the election of the injured party, but otherwise enforceable by the parties thereto. It is also axiomatic that "No contract may be implied where an enforceable express contract exists between the parties as to the same subject-matter and a conflict would result." 17 C. J. S. 321, sec. 5.

In other words, "An express contract is the exclusive source of the legal rights and duties between the parties as regards the matters to which that contract pertains." *Benedict v. Pfunder,* 183 Minn. 396, 237 N. W. 2.

Briefly, the claimant in this case, assuming the truth of all possible contentions as to the facts in this transaction, is entitled only to such rights against the estate of this ward as the law vests in her because of this voidable express contract.

But its existence under the circumstances involved in this case precludes a recovery on an implied contract. This conclusion is reinforced by the terms of the representations which claimant relies upon, *i.e.,* that no more than $15 a week would be paid for the services desired. Besides, where the alleged fraudulent inducements relied upon constitute no part of the contract entered into but are merely collateral thereto, we are committed to the view that the remedy, if any, is for the fraud, recoverable in an action for damages. *Crook v. O'Shea,* 126 Neb. 67, 252 N. W. 456. Therefore, there can be no recovery in the instant case against the general guardian upon an implied contract,

but recovery against the makers of fraudulent representations, if such were made, must be in the nature of an action for tort. The controlling principles governing the relation of guardian and ward are as follows:

"A lawfully appointed general guardian or a guardian of the estate has general authority over the property and affairs of his ward and is entitled to represent him in all legal and business transactions. With respect to the property of the infant, the guardian is a trustee, and persons dealing with him are bound to know his powers and duties and the rules by which he is governed. * * * A natural guardian or one who has been appointed guardian of the person only has no general control over his ward's estate and no power to represent him with respect thereto." 28 C. J. 1123.

So also, "The authority of a guardian does not extend to the doing of any act detrimental to the ward. * * * A guardian cannot bind the ward by an admission contrary to the latter's interest; (or) create an estoppel against the ward by his own acts or omissions." 28 C. J. 1125, 1126.

So, even waiving the limitations imposed upon her by the terms of her pleading, claimant's demands substantially founded upon claimed fraudulent representations as to the value of the ward's properties, so made as to be chargeable against her guardian, are in total variance with the well-established theory of legal liability involved in the relation of guardian and ward, or, as otherwise stated, between a trustee and his trust estate.

The general rule, where torts of a trustee to third persons are involved, is not one primarily of resort by the injured party in the absence of equitable considerations (undisclosed in the present record) to the trust estate, but the legal remedy appears to be, "The trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be liable if he held the property free of trust." Restatement, Trusts, sec. 264.

Obviously, this must be the final conclusion when we consider the actual representations which plaintiff's evidence, viewed without reference to the countervailing proof, tends to establish as having been made. In the light of the circumstances surrounding this case these representations amounted to no more than a statement of motives of those making the offer. The claimant got what she bargained for whether the representations were true or false. Under these conditions it has long been the view of common-law courts that such representations could not be deemed material for any purpose. Thus, in *Vernon v. Keys*, 12 East (Eng.) 632, this matter was considered by the court. In that case plaintiff claimed to have been injured in the sale of his business and stock in trade by misrepresentations of defendant to the effect that he (defendant) was about to enter into partnership with other persons, and these would not consent to give plaintiff a larger price than L 4,500, while in fact these persons would give as much as L 5,200. Lord Ellenborough said the statement amounted only to a false reason for his limited offer; a false representation in a matter merely *gratis dictum* by the bidder, in respect to which the bidder was under no legal obligation or pledge to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely, and for the consequences of which reliance, therefore, he can maintain no action.

It seems that the course of centuries leaves these principles unchanged. *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099.

It follows, from a consideration of the entire record in this case, that the judgment of the trial court is correct, and it is

AFFIRMED.

PAINE, J., dissents.

OTTO OLSON, APPELLEE, V. RALPH F. LILLEY ET AL., APPELLANTS.

2 N. W. (2d) 15

FILED JANUARY 16, 1942. No. 31292.

1. **Evidence.** "Speed of an automobile is not a matter of exclusive expert knowledge or skill, but any one with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony." *Patterson v. Kerr*, 127 Neb. 73, 254 N. W. 704.
2. **Automobiles.** Where the evidence is in conflict as to which of two automobiles entered an intersection first, both approaching such intersection at approximately the same time, a question is presented where reasonable minds may arrive at different conclusions, and the question is one for the jury.
3. ———. Where the evidence discloses that a driver of an automobile, just before entering an intersection, looked to the right and saw an automobile approaching the intersection a distance of 250 feet, and then proceeded across such intersection, the question as to proper lookout of either motorist so approaching the intersection is one for the jury.

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

Brown, Crossman, West, Barton & Fitch and *Abbott, Dunlap & Abbott*, for appellants.

Robins & Yost, contra.

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

MESSMORE, J.

This is an appeal from a verdict and judgment in favor of plaintiff, for personal injuries suffered in an automobile collision at an intersection. The physical facts with reference to the place of the accident, briefly summarized, are as follows:

Broad street is a wide paved highway, running north and south through the center of the city of Fremont, Nebraska. Washington street runs east and west, intersecting Broad

street in the south part of the city. Washington street east of Broad is an oil mat, and west thereof a narrow graveled road. Highway No. 77 enters Fremont on the north and continues south through Broad street as far as Washington, the intersection where this accident occurred, then proceeds east on Washington two blocks to Main street and south out of Fremont.

Both cars involved in the accident were on main highway No. 77, approaching the intersection of Broad and Washington streets. Defendant Minard was driving the car of defendant Lilley south on Broad street, approaching the intersection from the north. Plaintiff was driving his Model T Ford west on Washington street, approaching such intersection. On the west side of Broad street between the paving and the sidewalk line and north of Washington street were certain highway signs: 88 feet north of Washington, a U. S. 77 sign, with an arrow pointing toward the east; 160 feet north of Washington, a "curve" sign, pointing east; 206 feet north of Washington, a speed limit sign of 25 miles an hour; 238 feet north of Washington, a "slow" sign on the west side of the south approach to the viaduct, which is north of Jackson street. Jackson street is the first street north of Washington, and about half-way up the approach of Jackson is another "slow" sign. One hundred and twenty feet east of the east line of Broad street, on the north shoulder of Washington, is a U. S. 77 sign. On exhibit B is placed an "x" near a picture of a tree, denoting the position of the plaintiff when he looked to the north and observed defendant Lilley's car 250 feet distant. This point is 66 feet east of the west edge of the Broad street pavement.

The first assignment of error is the admission of testimony of the witnesses Garrison and McIntosh with reference to the speed of defendant Lilley's car, on the ground that such evidence is incompetent.

The witness, Mrs. Garrison, testified she had ridden in and driven automobiles and was competent to judge the speed thereof. She lives on the northwest corner of the

intersection, facing Broad street, the front porch of her residence being approximately 50 feet west of the west line of Broad street. She was sitting on the north end of a davenport in her home, its back being against the window, and she was facing southeast. Defendants' contention is that she was looking down the highway, her back toward the north, or the viaduct, and therefore did not see defendant Minard coming from the north; consequently she had no reasonable opportunity, time, place or means to formulate an opinion as to the speed of the Lilley car; all she saw was a "flash." The record shows that this witness saw the Lilley car as it passed her window 50 feet north of the intersection down to the point of the collision, which occurred in the southwest quadrant of the intersection. She testified the Lilley car was traveling 50 miles an hour or better.

The witness McIntosh was standing approximately one and a half blocks north of the scene of the accident. He testified, as a guess, that six seconds elapsed from the time the Lilley car passed him until he heard the crash. When this witness arrived at the scene of the accident, the Lilley car was 75 to 100 feet south of the place of collision.

Defendants cite the cases of *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673; *Knoche v. Pease Grain & Seed Co.,* 134 Neb. 130, 277 N. W. 798; and *Mierendorf v. Saalfeld,* 138 Neb. 876, 295 N. W. 901.

In *Bergendahl v. Rabeler, supra,* this court held: "Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject."

On this question of speed, it is well settled that "A person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed at which an automobile was being operated at a given time." 3 Jones, Commentaries on Evidence (2d ed.) 2329, sec. 1264.

"Speed of an automobile is not a matter of exclusive ex-

pert knowledge or skill, but any one with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony." *Patterson v. Kerr,* 127 Neb. 73, 254 N. W. 704; *Serratore v. Miller,* 130 Neb. 908, 267 N. W. 159.

Under the circumstances in the instant case, the witnesses Garrison and McIntosh had reasonable time, means, distance and opportunity to formulate a basis for their opinion of the speed of defendant Lilley's car. The weight and credibility of their testimony are for the jury.

Defendants contend that the Lilley car entered the intersection first; this fact, coupled with the physical fact that the accident occurred in the southwest quadrant of the intersection, indicating defendant Minard drove at all times on his right side of the road. However, according to defendant Minard's testimony, the front end of his car was 12 feet north of the north edge of Washington street when he started to shift gears, which was after he saw plaintiff's car west of the east walk. This would place the plaintiff's car in the intersection first.

Section 39-1148, Comp. St. Supp. 1939, provides in part: "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right." See *Plotkin v. Checker Cab Co.,* 133 Neb. 1, 274 N. W. 198. In the instant case, defendant Lilley's car was to the right of the plaintiff's car, and plaintiff under the statute, was required to yield the right of way.

When the plaintiff arrived at the east edge of the sidewalk which crosses Washington street, he looked to the north and saw a car coming 250 feet north of the intersection of Broad and Washington streets. There is no dispute that both motorists were traveling on their own right side of the highway. Plaintiff at that time was 60 feet distant from the point where the cars came together. He was driving 15 miles an hour; he did not apply his brakes or slacken his speed. The speed to be observed by the driver

Minard was 25 miles an hour. Defendant saw the plaintiff when he was 150 feet from the intersection. Mrs. Garrison testified that plaintiff's car was half-way through the intersection at the time the Lilley car went by the window of her home. Plaintiff testified he was two-thirds through the intersection and proceeding straight west before defendant Minard entered the intersection. As he came into the intersection and approached plaintiff's car, the Lilley car swerved a little to the west, which permitted the front end of the car to pass directly in front of the plaintiff's car, which turned over and came to a stop in the southwest corner of the intersection. The Lilley car proceeded into a yard south and west of the intersection, and then back onto the street for at least 150 feet before coming to a stop. Under the circumstances, plaintiff could hardly have looked to the north at any later time and still have had time to look to the south and west.

It will be observed that which car entered the intersection first is a controverted issue of fact. In a situation such as in the present case, the question of negligence and contributory negligence, when reasonable minds may draw different conclusions, is for the jury. *Parks v. Metz, ante,* p. 235, 299 N. W. 643.

In cases where a driver has been held to be negligent for failure to keep a proper lookout at an intersection, the driver looked only when at some distance from the intersection, and then failed to look further as he approached, arrived at, or was about to enter, the intersection. As has been explained, such is not the situation that existed at the time of the accident in the instant case.

Other assignments of error are without merit and need not be discussed.

AFFIRMED.

UNITED STATES NATIONAL BANK OF OMAHA, APPELLEE, V. ADA E. ALEXANDER: BYRON G. BURBANK, APPELLANT.

1 N. W. (2d) 920

FILED JANUARY 16, 1942. No. 31228.

1. **Assignments.** As a general rule, assignments carry to the assignee all the rights and interests of the assignor, including a right of action against a trustee.
2. ———. In a case where prior to assignment the assignor has approved or accepted the acts of the trustee who has made full disclosure of his acts and doings, the assignee cannot be heard to question the regularity of the acts of the trustee taking place before approval by the assignor.
3. **Trusts.** In the absence of contractual relationship controlling the conduct and operation of a trust, the consideration of the report of the acts and doings of the trustee must primarily be based upon legality of expenditure, necessity, advisability and reasonableness of amounts.
4. ———. Where funds have admittedly been received by a trustee, the burden rests upon such trustee to sustain the reasonableness of the charges against the trust.
5. ———. Where a trust is administered under control and supervision of the court, the court has the right to take into consideration in determining the reasonableness of charges against the trust its knowledge gained during the period of administration.
6. ———. 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 the particular circumstances require.

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

Burbank & Burbank, for appellant.

Munger & Rhodes, contra.

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

YEAGER, J.

This is an appeal from the decree of the district court on

the final report and account of the United States National Bank of Omaha, Nebraska, trustee, plaintiff and appellee, against Byron G. Burbank, defendant and appellant. The report and account were approved, and the defendant has appealed, and asserts that certain of the items in the report were improper and should not have been allowed and approved.

A somewhat extended statement is necessary to an understanding and determination of the issues presented by the record in this case.

On and prior to August 20, 1924, Lake Deuel was the owner of certain real estate situated in Omaha, Douglas county, Nebraska. On this date Deuel executed and delivered to the Peters Trust Company, a corporation, a trust deed, whereby the Peters Trust Company became trustee of this real estate. The trust was for the purpose of securing payment of 191 certain bonds in the aggregate principal sum of $105,000, bearing the same date as the trust deed and maturing on various dates beginning October 1, 1925, and ending October 1, 1934. The bonds were interest-bearing at the rate of 6 per cent. per annum, payable semi-annually with 10 per cent. after maturity. Later, on December 9, 1924, a supplemental trust deed was executed and delivered which added to the original trust to secure the payment of bonds all tenements, hereditaments and appurtenances upon the real estate in question. It included also all fixtures, equipment and personal property employed in the use and operation of the building on the real estate, which building had been completed after the execution of the original trust deed.

On October 1, 1932, Deuel had paid $32,000 of the indebtedness and all of the interest to that date, but on April 1, 1933, he defaulted in the payment of interest.

In 1930 the Peters Trust Company failed, and agreeable to the terms of the trust indenture the United States National Bank of Omaha, Nebraska, became successor-trustee.

On November 13, 1933, foreclosure proceedings were instituted by the successor-trustee. On May 28, 1935, a

decree in foreclosure was entered, whereupon Deuel took a statutory nine-month stay.

Two months after the default in payment of interest by Deuel, a bondholders' protective committee, consisting of G. S. Cobb and William F. Milroy, bondholders, and Ellsworth Moser, vice-president of the United States Trust Company, was in some manner organized, purportedly for the purpose of protecting the interests of the bondholders.

Prior to foreclosure this committee conducted certain negotiations, the details of which are not sufficiently important to be set out here, looking to an adjustment of the difficulties attendant upon the default by Deuel, but nothing came of them.

After the foreclosure decree was entered, and stay had been taken by Deuel, the committee again became active and procured an offer from Deuel that he, having come into ownership by inheritance of $9,400 worth of bonds issued under the trust indenture, would withdraw his stay, surrender his bonds, and surrender title to the trustee to the property described in the original and supplemental trust indentures in consideration, in substance, of the release of any claim or right to deficiency judgment against him. On receipt of this offer the committee procured from all holders of outstanding bonds, which at that time amounted to $63,600, without considering those held by Lake Deuel himself, except from those holding $1,600 of bonds, consent to this arrangement.

Not having been able to secure the consent of all bondholders to this arrangement, the trustee instituted the action of which this is an outgrowth and a supplemental part, to which all bondholders, Lake Deuel and Eloise Deuel, his wife, and Ellsworth Moser were made parties, seeking directions as to what steps to take and what course to pursue. In the petition the facts summarized briefly here were fully detailed. All defendant bondholders except two entered voluntary appearances. The two were served by publication and defaulted. The decree recites that the Deuels answered, but the answer does not appear in the

transcript. The defendants Moser and Cobb filed an answer on behalf of the bondholders' committee, setting forth the activities of the committee. No other party answered the petition. On November 9, 1935, decree was entered authorizing and directing the consummation of the proposed deal with Deuel, and authorizing and directing the issuance of land trust certificates of beneficial ownership in Princeton apartments, Nineteenth and Dodge streets, Omaha, Nebraska, which certificates will be hereinafter referred to as land trust certificates, to the bondholders in place of and in amounts equal to the value of the bonds held, and the surrender of the bonds by the holders.

The decree confirms an accounting made by the trustee, and makes the following allowances: United States National Bank of Omaha, trustee, $195; Ellsworth Moser and G. S. Cobb as the bondholders' committee, $730; Brown, Fitch & West, attorneys for Lake Deuel and Eloise Deuel, $150; Crossman, Munger & Barton, attorneys for the bondholders' committee, $1,500; total $2,575.

There being a balance in the hands of the trustee after settlement of account and payment of allowances, it was ordered that this balance should be held until the issuance of the land trust certificates and then distributed *pro rata* to the certificate-holders.

The decree then concluded as follows: "That this court should, and hereby does retain jurisdiction of this cause of all of the parties to this suit and of the said trust estate for the purpose of supervising the management and control of the trust assets by the trustee, and, from time to time, giving instructions and directions to the said trustee concerning the trust, and particularly with reference to any proposed sale or sales of the trust assets, which shall be subject to the approval of this court."

In January, 1936, the trustee made a detailed report of its acts beginning April 13, 1933, and ending January 16, 1936, and made distribution of income from the trust to the bondholders. Following, or as a part of the same transaction, the directed exchange of bonds for land trust

certificates was made, and each receiver of a trust certificate, except Grant Lewis, Walker Lewis, C. J. McNamara, Alice Polian, Marie Polian and Marian Polian, executed an instrument in part in terms as follows: "The undersigned further acknowledges receipt of a letter from the trustee dated January 22, 1936, reporting in detail all receipts and disbursements of the trustee relative to the said Princeton apartments, and hereby ratifies, confirms, and approves all of the acts and doings of said trustee and the bondholders' committee concerning the Princeton apartments trust, to date as reported in said letter, and in said lawsuit, and agrees to the continuing jurisdiction of the court over said trustee, and the said trust estate, in the case of the United States National Bank of Omaha, plaintiff, vs. Ada E. Alexander, et al., defendants, doc. 313, No. 19, in the district court of Douglas county, Nebraska, in which case the undersigned has made a voluntary appearance, and is a party defendant."

This trust, authorized and under the control of the district court, existed until decree on the final report of the trustee was entered on March 21, 1941.

On April 17, 1940, Byron G. Burbank, now the sole defendant in this action by substitution, having become the owner of 70 land trust certificates, commenced action for partition of the trust property. In that action the trustee and a number of certificate-holders filed pleas in abatement. The pleas were argued and presented, but no ruling was ever had thereon, and in the course of time the action was dismissed at the request of plaintiff. The fact is of no significance except that it has a bearing upon an item of expense set up in the final report of the trustee, which item is objected to by the defendant.

After the dismissal of the partition action Byron G. Burbank acquired all of the outstanding land trust certificates by assignment, and on his application he was, by order of court, on November 19, 1940, substituted as party defendant and all others were dismissed from the action. On the same day, pursuant to order, the trustee executed and delivered

to Burbank a deed conveying to him the legal title to all the real and personal property standing in the name of the trustee and which was a part of this trust.

On or about November 29, 1940, the trustee filed its final report and account, and application for allowance for fees to the trustee and attorneys for the trustee. To this report Burbank filed exceptions, and to the extent that they are carried into and presented in the brief they are as follows: Fees and expense of trustee, disbursed, $1,669.50; fees of attorneys for trustee, disbursed, $2,100; profits on insurance, $739.59; fees to bondholders' committee paid out under decree of November 9, 1935, $730; attorneys for Lake Deuel, $150; receiver's fee, $150; final fee for trustee, not disbursed, $1,272; and final fee for attorneys for trustee, not disbursed, $600.

Also in his exceptions Burbank contends that the trustee should be charged with interest at 6 per cent. on rents claimed to have been withheld by the trustee, in the amount of $404.16, and for wages paid to Burnadette Connelly by a remission of rent at the rate of $20 a month for 41 months, or a total of $820.

The court ruled against Burbank on all of his exceptions except that the fee of the attorneys for the trustee was fixed at $600 instead of $1,000, the amount requested, and decree on final account was entered accordingly. It is from this decree on final account that Byron G. Burbank, the sole remaining defendant, has appealed.

It now becomes clear that we are dealing with two separate and distinct trusts instead of one. The first began with the execution and delivery of the original trust indenture, and it became extinct by decree of court in this case and the acts of the parties. With the death of the old, the new came into being. This transition came about on January 16, 1936, with the delivery up of the bonds and the issuance to the bondholders of the land trust certificates. Nothing remained of the trust except the obligation of the trustee to make an accounting of its stewardship. With the delivery of the land trust certificates a copy of this account-

ing was given to each bondholder. All of the bondholders accepted land trust certificates in lieu of their bonds. With the exception of Grant Lewis, Walker Lewis, C. J. McNamara, Alice Polian, Marie Polian and Marian Polian, who held bonds in the amounts of $2,500, $2,500, $2,000, $1,000, $200 and $100, respectively, all of them, on receipt of their land trust certificates, in writing in the following language, "The undersigned further acknowledges receipt of a letter from the trustee dated January 22, 1936, reporting in detail all receipts and disbursements of the trustee relative to the said Princeton apartments, and hereby ratifies, confirms, and approves all of the acts and doings of said trustee and the bondholders' committee concerning the Princeton apartments trust, to date as reported in said letter * * *," approved the accounting and the stewardship of the trustee, which included all expense of trustee management, trustee's litigation expense and fees, and attorneys' fees. As a part of the accounting the trustee made a *pro rata* distribution to the bondholders, or as they then became land trust certificate-holders, of the accumulation of rents from the trust property. This account was approved by the court in this case. The account included specifically of the amounts questioned here by the defendant, trustee's fees and expenses in the amount of $495, fees for attorneys for the trustee in the amount of $1,500, a fee to Brown, Fitch & West, attorneys for Lake Deuel the mortgagor in the foreclosure action, in the amount of $150, and a fee to the bondholders' committee in the sum of $730, which items total $2,875.

The record discloses that no bondholder and no original holder of a land trust certificate has ever questioned this transaction, or the order of court allowing and approving it, directly by appeal or by action to set it aside on the ground that approval was obtained by fraud, or on any other ground. Moreover, Byron G. Burbank, the substituted defendant and assignee of the land trust certificates, does not now seek to do so.

It may be that some of the items involved in this account

were, at the proper time and in a proper manner, open to question and to attack, but after affirmative individual acceptance of the transaction by the bondholders and by decree of court thereon, may the assignee of the land trust certificates be heard to question the transaction in the manner he seeks to attack it here? We think not. Whatever of irregularity, if any irregularity there was, appears conclusively to have been waived some four years before Burbank acquired an interest in the case or its subject-matter.

The appellant asserts the rule that the assignments of the several owners to the defendant carried with them all the rights and interests of the assignors, including a right of action against the trustee. In support of this rule he cites numerous cases, among which are the following: *Home Fire Ins. Co. v. Barber,* 67 Neb. 644, 93 N. W. 1024; *Luikart v. Massachusetts Bonding and Ins. Co.,* 129 Neb. 771, 263 N. W. 124; *Citizens Nat. Bank v. Rawley,* 131 Neb. 10, 267 N. W. 151; *Amy v. Mann,* 136 Neb. 677, 287 N. W. 84. With this rule as a general statement of law we find no fault, but it has no application to the case at bar.

The correct rule in a case such as this, where prior to assignment the assignor has specifically approved the acts of the trustee who has made full disclosure of his acts and doings, is that the assignee cannot be heard to question the regularity of the acts of the trustee taking place before approval by the assignor.

It becomes clear that on January 16, 1936, the trust relationship, which came into being by the execution and delivery of the trust indentures and the issuance of bonds, came to an end and that the instrument fixing the duties, obligations and relative rights of the parties had no further force and effect.

At the same time a new trust relationship came into being by virtue of a decree of court as to all land trust certificate-holders, which was consented to by them in the instruments which they executed on exchange of bonds for certificates. No part of the contractual relation or duty

contained in the trust indentures was carried over into this second trust, except possibly some of the mechanics of the transfer of bonds for certificates and distribution of funds.

This second trust was, as has been said, a trust originally created by decree of court. Whether or not, in the strict sense, it was a judicial trust need not be determined here. While the creation of the trust is criticized, it is not attacked by the defendant. The defendant does not seek to disturb the trust, but only to require certain exactions of the trustee with regard to the performance of its duties as such trustee. In other words, he questions only the accounting which was approved by the court in what has been termed the final decree. This he had the right to do.

There having been no contract remaining which controlled the conduct and operation of the trust, what must be the approach to a consideration of the report of the trustee under the facts outlined in the record? It would appear that the matters for primary consideration are (1) legality of expenditure, (2) necessity, (3) advisability and (4) reasonableness of amounts.

The first thing to be considered is the fees of the trustee charged against the trust from January 16, 1936, in the amount of $2,603.97. An examination shows that no item may be rejected as void because of illegality of the charge and allowance. The same thing may be said with reference to attorney's fees in the amount of $1,685.88, covering the same period of time. That the various services were advisable and even necessary for the preservation and protection of the trust and for the benefit of the land trust certificate-holders can hardly be questioned.

There having been no contractual relationship fixing fees for any service after January 16, 1936, it became the duty of the court to determine the question of whether or not the charge made for these various services was reasonable. The burden rested upon the trustee, there being no question about the receipt of the funds by the trustee, to sustain the reasonableness of the charges against the trust. *In re*

Estate of Mall, 80 Neb. 233, 114 N. W. 156; *In re Estate of Boschulte,* 130 Neb. 284, 264 N. W. 881; *Rotzin v. Miller,* 133 Neb. 4, 274 N. W. 190; *In re Estate of Marlin, ante,* p. 245, 299 N. W. 626.

On the question of the reasonableness of these various fees for the trustee and its attorneys, we observe that the evidence directly bearing thereon is somewhat fragmentary. In truth, the items are not all taken up separately, and the reasonableness inquired into, but there is some evidence bearing on the question. In addition to this, all of the service was performed under control and supervision of the trial court and the court had some knowledge of what service was performed under its supervision, and in consequence we have a right to assume that the trial court did, as was its right and duty, take this into consideration in approving the final report and in the making of allowances of fees for services. As we analyze the report in the light of the evidence, taking into consideration the period over which the service extended, the various services performed, and the results accomplished, we conclude that the amounts allowed for services of the trustee and its attorneys were reasonable.

This holding is in keeping with the recent holding of this court in *In re Estate of Linch,* 136 Neb. 705, 287 N. W. 88, where it was stated: "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."

We come now to the claim of overcharges for various kinds of insurance. The first item is a claimed overpayment of $113.13 on compensation insurance for the janitor of the building in question. This is obviously a just complaint since the evidence discloses without dispute that $113.13 was in excess of the actual cost of the insurance.

Next, defendant complains of an alleged overpayment of

$130.51 on boiler insurance, otherwise termed public liability insurance. His first theory is that the amount of insurance of this kind was fixed by the trust deed. This contention is without merit for two reasons: First, the trust deed did not require the trustee to provide boiler insurance, it required this of the first party who was Lake Deuel; and, second, the trust deed, as we have already pointed out, had no force and effect after January 16, 1936. We find actually that boiler insurance was carried under a blanket policy much in excess of the amount that defendant claims should have been carried, but was carried at a slightly lower rate than an individual policy could have been procured of the size and amount defendant contends for. This claim is without merit.

The next objection is to rent insurance in the amount of $12,000, with a premium thereon of $47.40. This was to guarantee rent in case of loss of rents occasioned by fire. Was this calculated to be beneficial to the trust? We are of the opinion that it was, on a property whose annual rental income amounted to approximately $14,000 a year, the loss of at least a part of which could be reasonably anticipated in case of fire in the building.

The next claim is that the trustee carried excessive fire and windstorm insurance, that is, that policies were carried for $75,000 whereas they should have been for $63,600, the amount of indebtedness against the trust estate. The claimed excess premium is $49. The basis of the claim is that the trust deed carried the provision that this type of insurance should equal the indebtedness. What we have said about the failure of application of trust deed to boiler insurance applies here. The record discloses further that the cost of the kind and amount of insurance procured was procured below the cost of straight fire and windstorm insurance without coinsurance for $63,600. Defendant cannot be heard to complain.

The next item is the payment of five premiums on fidelity bonds for Byron Reed Company, the rental and managing agent of the trust property for the trustee. The defendant

charges that this was unnecessary. It is urged on the other hand that this is a matter of good business judgment. We cannot say otherwise in view of the small charge of $30 a year to protect against possible defalcations running into thousands of dollars each year. He claims then that the actual cost of the bonds was $21 each instead of $30, the amount charged against the trust. The fact is that the premiums were $30 each, and $9 represented the commission of the agent. Byron Reed Company was the agent of the bonding company, hence only $21 was remitted to the company and the commission retained. We know of no rule of law which prevents this kind of practice.

The defendant contends that there was an overcharge on all insurance in the amount of $249.55. The insurance was procured by the Byron Reed Company, which company was, as has been said, the agent for the trustee and engaged in the writing of insurance. This amount of $249.55 appears to represent the agency commission, but was a part of the standard premium on such insurance. Nothing appears which justifies a holding that this represented an overcharge for insurance.

It appears that the trustee made distribution of net rentals semiannually. Instead of distributing all net rentals as they came in or at stated periods, the trustee retained a balance which varied at different times. The gross income from rentals was approximately $14,000 a year. The smallest amount withheld was $390.90, and the largest on any semiannual date was $2,285.56. However, on November 26, 1940, which was not a date for semiannual distribution there was a balance of $4,098.96. The defendant claims that interest at 6 per cent. should be charged against the trustee on these balances. In view of all of the facts and considering the trust, its character and operation, we can see nothing illegal and improper in holding a reasonably sufficient reserve on hand to meet possible contingencies and emergencies. The amounts withheld were not unreasonable.

There is another item of $150 which was the fee to the

receiver in the foreclosure action. This we may ignore entirely since it was allowed in that action. No discretion was lodged in the court in this action with reference to its allowance and approval.

The next and last complaint urged is that the trustee allowed one Burnadette Connelly, an employee of the trustee, to occupy an apartment in the building in question for 41 months, and to pay rent at $20 a month which was one-half of the regular rental rate for the apartment. That she did occupy the apartment at the rate mentioned is not denied, nor is it denied that this was one-half of the regular rate. The answer is that she was a resident agent with certain duties to perform with reference to showing tenants about and with reference to order in and orderliness of the apartment building. For the performance of these duties she obtained a reduction in rental on her apartment in the amount stated. The evidence indicates that this service was reasonably necessary and advisable, and that the compensation was not excessive for the service contemplated and performed.

Having discussed all of the objections of the defendant which were carried into his brief, by way of summary it is the finding of this court that the defendant is precluded from asserting any claim against or objection to the report and final disposition of the trust created by the trust deed and its supplement, which disposition was concluded on January 16, 1936.

We further find that the acts and doings of the trustee with relation to the trust which came into being by decree of the district court and was accepted by the holders of the land trust certificates were regular in all respects; that the final report of the trustee and the allowance of fees to the trustee and to its attorneys was reasonable and proper and properly approved and made by the district court, except as to an overcharge of $113.13 on premium for compensation insurance for the janitor of the apartment house which amount the trustee should be required to account to the defendant.

The decree of the district court is therefore affirmed except as to the item of $113.13. As to this item the case is reversed and remanded, with directions to the district court to enter judgment in favor of the defendant and against the plaintiff trustee.

AFFIRMED IN PART AND REVERSED IN PART, WITH DIRECTIONS.

RUEDY'S, INC., APPELLANT, V. NATIONAL NAMPEL, INC., APPELLEE.

2 N. W. (2d) 13

FILED JANUARY 16, 1942. No. 31247.

1. **Landlord and Tenant.** Where under the terms of a lease containing an option that the lessee may renew the lease for periods of one year for two years, and the lessee renews and occupies the premises for one year and thereafter continues in possession and performs under the terms of the lease, and such performance is accepted by the lessor, the extension agreement is effective for the year contemplated by the lease.
2. ———. Under the terms of an assignment providing for the payment of $1,000 within 30 days if a lease is extended to June 30, 1940, under the option of the lease, the extension is effective when the option is exercised by the lessee and recognized by the lessor.

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

Fred N. Hellner, for appellant.

Morsman & Maxwell, contra.

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

YEAGER, J.

This is an action by Ruedy's, Inc., a corporation, plaintiff and appellant, against National Nampel, Inc., a corporation, defendant and appellee. The action is for $1,000, claimed by plaintiff to be due under the terms of an assign-

ment of a lease. From a judgment rendered in favor of the defendant at the conclusion of all of the evidence, after motion of the defendant for a directed verdict or in the alternative that the jury be discharged and the action dismissed, the plaintiff has appealed.

A summary of the pertinent facts are as follows: On June 13, 1935, the plaintiff entered into a sublease with Virginia Dare Stores, Inc., of New York, lessee of premises at 214-216 South Sixteenth street, Omaha, Nebraska, the term of which sublease began July 1, 1935, and ended three years thereafter. It contained an option for renewal from year to year thereafter to June 30, 1940. It also contained a provision for assignment with written consent of the sublessor. The sublease permitted plaintiff to occupy part of the premises at this location and therein to conduct a millinery department. The business of the sublessor was conducted under the name of "Virginia Dare." Subsequently on February 25, 1937, with written consent of the lessee of the premises, the sublease was assigned to the defendant for an immediate consideration of $1,500 which was paid. The assignment contained the following provision: "It is further understood and agreed that if the Virginia Dare Stores, Inc. extend or grant to National Nampel, Inc. the right to operate said departments up and to June 30th, 1940, then within thirty (30) days from the granting of said extension, National Nampel, Inc. agrees to pay to Ruedy's, Inc. the further and additional sum of one thousand dollars ($1,000.00) in cash."

In its petition the plaintiff set forth these facts and further that extension was granted to June 30, 1940, but that the defendant failed to pay the $1,000. It prayed judgment for this sum of money with interest. The answer was a general denial.

On the issues presented by the pleadings the case was tried. Each party adduced its evidence in regular order, at the conclusion of which both parties rested, whereupon the alternative motion for directed verdict or dismissal was made. This motion was not joined in by the plaintiff.

Among the errors assigned is one that the court improperly sustained the motion and at least should have submitted the case to the jury, and that properly a judgment should have been rendered in favor of plaintiff.

From an examination of the evidence and the exhibits in the bill of exceptions, the contention of the plaintiff as to the claimed error in sustaining defendant's motion appears to be clearly correct. As to the question of failure to render judgment in favor of plaintiff, this is correct in principle, but no application for this relief was made by plaintiff.

The record shows that the lease from Virginia Dare Stores, Inc., to Ruedy's, Inc., by its terms expired on June 30, 1938, except as to the provisions for extension or renewal from year to year. These provisions were absolute and not subject to defeat in so far as Ruedy's, Inc., was concerned by Virginia Dare Stores, Inc., but were subject to defeat only by action of the owner of the premises by failure to extend the lease of Virginia Dare Stores, Inc. There is no evidence or suggestion that the tenancy of defendant was in any wise interfered with until about February 1, 1940. Obviously then the defendant remained in the premises under the terms of the extension agreement for the year beginning July 1, 1938, and ending June 30, 1939. Equally obviously it remained thereafter under the terms of the same agreement on an extension which did not expire until June 30, 1940. It is to this date that the provision relative to the payment of $1,000 by defendant to plaintiff refers.

The defendant having exercised its option as evidenced by its acts and the performance of the terms of the lease on and after July 1, 1939, and the Virginia Dare Stores, Inc., having recognized and by its acts accepted the exercise of the option by the defendant, the defendant became and was a tenant for one year, which year began on July 1, 1939, and ended on June 30, 1940. So it is that from July 1, 1939, the defendant actually did have an extension of its lease to the premises involved here to June 30, 1940, within the terms and meaning of the extension agreement

contained in the assignment from plaintiff to defendant, and in consequence 30 days after July 1, 1939, the plaintiff was entitled to receive from defendant the sum of $1,000.

There is evidence in the record to the effect that from about February 1, 1940, to March 13, 1940, the enjoyment of use and occupancy under the lease was interfered with or prevented, but this can avail nothing here. It is nowhere contended or suggested that the leasehold was terminated, but only that the use thereunder, by reason of financial difficulties of Virginia Dare Stores, Inc., was prevented or interfered with for a period of about six weeks.

Again it can make no difference that the defendant found it advantageous or even necessary to the continuance of its business to enter into a new lease for a term overlapping the term of the old lease by a few months, as was done on February 27, 1940, with a successor to Virginia Dare Stores, Inc. This was not necessary to a retention of the existence of the old leasehold.

Plainly on the pleadings and the facts as they appear in the record the plaintiff was entitled to judgment as prayed.

The plaintiff not having moved for judgment in its favor on the trial of the case in the district court, the judgment is reversed and the cause remanded for a new trial, with directions to proceed in accordance with this opinion.

REVERSED.

ELMER P. FOLKEN, APPELLEE, V. CLAYTON PETERSEN, DOING BUSINESS AS CLAYTON PETERSEN TRANSFER, APPELLANT.

1 N. W. (2d) 916

FILED JANUARY 16, 1942. No. 31191.

1. **Automobiles.** Under the law of this state, the lawfulness of the speed of a motor vehicle within the *prima facie* limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. Comp. St. Supp. 1939, sec. 39-11,101.
2. **Negligence.** The doctrine of the last clear chance is not applicable where the negligence of the party seeking to invoke it is active

and continuous as a contributing factor up to the time of injury, but its applicability is not avoided by the mere continuing existence of the consequences or peril resulting from prior but completed conduct.

3. **Appeal.** Where an instruction is substantially correct, a cause will not be reversed because it is possible to improve the phraseology thereof or because of mere inexactness in language, where the jury are not misled.

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

Robert M. Armstrong, Wiltse & Wiltse and *Hawxby & Griffiths,* for appellant.

John R. McCormack, G. F. Nye and *Paul P. Chaney, contra.*

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

ELLIS, District Judge.

This action arises out of a collision between two gasoline transports followed by fire which destroyed both transports and both cargoes. Both parties sought to recover their loss. Verdict was in favor of the plaintiff. Defendant appeals.

The accident happened on highway No. 75 south of Auburn at about 1 o'clock a. m., June 3, 1940. The road was dry and driving conditions otherwise normal. Plaintiff's truck was being driven by one Liles and defendant's truck by one Gibb. The plaintiff's truck was proceeding north and was being followed by defendant's truck and had been so followed for about six miles. The parties stipulated that the value of plaintiff's transport and cargo was $5,126.13 and the value of defendant's transport and cargo was $3,724.59. The amount of the verdict was $4,100.90.

It appears from the evidence that plaintiff's truck was carrying the greater load of gasoline and that the gross weight of plaintiff's loaded truck exceeded that of defendant's truck by some 4,900 pounds.

The plaintiff's evidence in substance is as follows: His truck outfit was new on April 12, 1940. It had several red lights on the rear and a red stop light turned on by pressure on brake pedal. The driver testified that just prior to the accident he heard a loud thumping noise, could not tell what it was by listening, but thought it indicated a flat tire, rear end trouble, a wheel bearing or something else; that he blinked his lights and put his brakes on lightly so that the stop light would come on; that he then rolled approximately 400 feet and came to a "slow rolling stop." After the truck stopped Liles testified that he set the brakes, got a flash light and stepped out on the running board to see what the trouble was and to examine the shoulder and see if it was safe to pull onto with his load. At that time his truck was on the pavement with right wheels on right edge. He estimated the width of the shoulder at 5 to 5½ feet; that in just a matter of two or three seconds the other truck struck his truck.

After the impact the defendant's truck traveled approximately 50 feet beyond plaintiff's truck.

The plaintiff's driver was aware of the other truck following and stated that it was approximately 400 feet behind when he first blinked his lights and started to slow up his truck to make the stop; that his braking was not continuous but by pushing on the pedal and letting it up several times, each of which operations would turn the stop light on and off. From the point where he first applied his brakes the road was up-grade for 300 feet and then leveled off. The collision occurred approximately 100 feet beyond the crest of the grade. After the collision plaintiff's driver observed that the other truck was on fire, so he got behind the wheel and drove his truck ahead 150 feet.

When he stepped out on the running-board after stopping the first time, the headlights of defendant's truck were headed straight north directly behind his truck, but when about 15 or 20 feet from his truck they swung off to the northwest.

That after the accident he had a conversation with Gibb,

in which the latter said he did not see Liles blinking his lights, did not see a thing until he was right on him and "it does look awful foolish for me to hit that now, doesn't it."

For the defendant the evidence is substantially as follows: The defendant testified that he had tested his truck's brakes and at a speed of 30 miles an hour on level concrete it could be stopped in a distance from 16 to 25 feet. The speed of this test should be noted in connection with testimony of his driver. That the earthen shoulder at the point involved was 5 or 6 feet wide, in good condition and hard and dry.

The defendant's driver testified that his truck was equipped with headlights and standard clearance lights on the front and that these lights were on. His headlights showed down the road 200 feet. With reference to his speed as compared with that of plaintiff's truck he said: "Q. Now, as you followed behind the Folken transport I believe you stated about thirty miles an hour, you said you were about three hundred feet behind it? A. Approximately. Q. Now, did you,—how was the speed of your transport at that time compared with the speed of the one in front of you? A. Well, it was all right, except when we were going up the hill; I would hold back and I had been trying to get around him, see? On a hill, I ran up on him and I didn't have to cut down in gear, see? I was trying to pass him. Q. Now, what was the reason why you gained on him going up the hill? A. Well, I had the lighter load than he did." As he came up the grade immediately beyond which the collision occurred, "A. Well, I was crowding,—I wanted to get around him, we was getting up right on top, but I couldn't get so we was clear yet and I hadn't pulled out or give him any signal that I was going to pass." At that time he was going 20 or 25 miles an hour and was within 30 or 40 feet of the transport ahead. He did not see any signals by the driver ahead, was looking ahead and was also looking behind in his mirror. Lights on front and rear of plaintiff's truck were lighted. He did not notice

any change of speed by the transport ahead that indicated that he was slowing up or stopping. When the other driver applied his brakes, "I knew I was right on him, I seen it wouldn't do any good to try to stop because I didn't have room, I just whirled it." His truck stopped about 30 feet beyond the point of collision. With reference to his conversation with Liles he said, "I recall making the statement that, I says, it probably looks foolish to us, somebody to us, the way it happened," and "that it probably looks foolish to bystanders."

He further testified that when he first saw any indication that the truck ahead was stopping it was 15 feet ahead of his truck. It was his desire and intention to pass the other truck. When he got to the crest just before the collision he was approximately 15 or 20 feet behind but had not yet given any signal of intention to pass.

In the light of the evidence as summarized above, the defendant makes assignment of some ten errors. Several of these are not discussed in the brief or otherwise urged. We have examined all of the assignments and find it unnecessary to discuss those not hereinafter mentioned.

The defendant urges error in the giving of instruction No. 9 which is as follows: "The violation of the law or rules of the road as to speed or operation of a motor vehicle in other respects, is not of itself negligence on the part of the violator, but is evidence to be considered by you, together with all other facts and circumstances in evidence in the case, to enable you to determine whether or not such violator, if you find from the evidence there was a violation, was guilty of negligence in and about the accident involved in the case."

The defendant contends that there was no evidence of excessive speed on the part of the driver of defendant's truck and, therefore, that the instruction submitted an issue not supported by any evidence. From an examination of the law of this state (see Comp. St. Supp. 1939, sec. 39-11,101) it is clear that miles an hour alone do not determine the lawfulness of a particular rate of speed.

Quoting from the statute: "No person shall drive * * * at a speed greater than is reasonable and prudent under the conditions then existing." Without quoting further, it will be noted that in this state no speed, including the *prima facie* maximum stated, shall be lawful when it appears that it is unsafe, and that it is made the duty of drivers to reduce any speed in the face of certain hazards. The statute is substantially a declaration of the general law of negligence to the effect that any speed is excessive when it is beyond that dictated by the existing circumstances and the duty of all persons to exercise due care.

In the light of the evidence that defendant's truck had been closing up on plaintiff's truck on the hills, the distance between them and the distance traveled by defendant's truck after the impact, we cannot say that there was no basis for a finding by the jury of excessive speed. We find no error in the giving of instruction No. 9.

The defendant assigns as separate errors the giving of instruction No. 13—that the court erred in submitting the last clear chance doctrine—and that the court erred in the language used in the instruction. It is apparent that the defendant relies chiefly upon these assignments for reversal and they will be discussed together.

Instruction No. 13 is in the following language: "You are instructed that when any person is in a place of danger, whether negligent or not, one who knows or might know under all the circumstances at the time, must use reasonable ordinary care to avoid the injury. Therefore you are instructed that if you find that the plaintiff car was in a position of danger, from which it could not be extricated and if the defendant's driver observed the plaintiff's car position of peril, or by the exercise of reasonable care could have observed it, then it was the duty of defendant's driver to use reasonable and ordinary care, under the circumstances, to avoid the collision."

The defendant contends that the doctrine was not applicable to the situation because, as defendant contends, the plaintiff's driver was negligent in stopping under the cir-

cumstances, and in not pulling off the pavement and onto the shoulder, and that his negligence continued up to the time of the actual collision. Defendant cites from 4 Blashfield, Cyclopedia of Automobile Law, 559, sec. 2814, as follows: "If plaintiff's negligence is still active and a contributing factor in causing the injury, he cannot recover under the last clear chance doctrine." Defendant also cites *Long v. Guilliatt,* 137 Neb. 199, 288 N. W. 689. In that case the action was for personal injuries only and the court decided that there was a basis in the evidence for a finding that up to the very moment of collision the plaintiff had an opportunity to get out of his stalled car and thus avoid injury to his person.

There can be no doubt as to the correctness of the proposition that, where the negligence of the injured party is contemporaneous and active up to the very moment of injury, and thus contributes to cause the injury, the doctrine of last clear chance does not apply.

It appears that the defendant is confusing the continuing consequences of the contended negligence of the plaintiff with continuing active negligence. When plaintiff's driver had brought his truck to a stop, and even though he was negligent in doing so under the circumstances, his action thereupon ceased and his active negligence likewise ceased, although the consequences or perilous situation resulting from his negligence continued.

The doctrine in its name and application generally involves an assumption that the injured party has negligently exposed himself to an injury.

The plaintiff's driver testified that he blinked his lights, operated his stop light signal, slowed down gradually, came to a full stop, set the brakes, got a flash light, stepped out on the running-board, and then in a matter of two or three seconds the collision occurred. If the jury believed this testimony, it constituted ample basis for a finding that there was time for defendant's driver to discover the dangerous situation if he had been exercising due care. This evidence, coupled with defendant's testimony that at 30

miles an hour his truck could be stopped within 16 to 25 feet and the testimony of his driver that he was driving 20 to 25 miles an hour and was 30 to 40 feet behind plaintiff's truck, plus the fact of the unobstructed left half of the highway, constituted a basis for a finding that the defendant's driver had an opportunity to avoid the collision.

"The doctrine of the last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the injury." *Parsons v. Berry,* 130 Neb. 264, 264 N. W. 742.

We therefore conclude that the trial court did not err in submitting the issue based upon the doctrine of the last clear chance.

Turning now to the language and substance of instruction No. 13, which is vigorously criticized by the defendant, we may say that the instruction might have been improved in the language used and by some amplification.

"Mere inexactness in the language of an instruction is not ground for reversal, where the jury were not misled." *In re Estate of Noren,* 119 Neb. 653, 230 N. W. 495.

"Where an instruction is substantially correct, a case will not be reversed because it is possible to improve the phraseology thereof." *Kelso v. Seward County,* 117 Neb. 136, 219 N. W. 843.

A comparison of the instruction here under fire with the one examined in *Parsons v. Berry, supra,* will show that there is no essential difference in the substance of the two instructions, except that in the *Parsons* case the instruction ended with an affirmative direction that upon a finding that the defendant failed to use due care the verdict should be in favor of the plaintiff. In the instant case there was no such affirmative direction but merely advice that, if the defendant's driver was or should have been aware of the dangerous situation, it was his duty to exercise ordinary care under the circumstances to avoid the collision. In instruction No. 16 the court correctly defined "ordinary care" as "that amount or degree of care which common,

prudent and proper regard for one's own safety and the safety of others require under the circumstances shown by the evidence." To the extent that the instruction did not contain an affirmative direction, it was more favorable to the defendant than the instruction in the *Parsons* case which was approved.

It is apparent that defendant's dissatisfaction goes more to the credibility of the evidence given by plaintiff's driver than to the form of the instruction criticized, since the defendant in his brief says: "If there was anything about the movement or actions of the plaintiff's truck that would make it obvious to a following driver, by the exercise of the ordinary powers of observation, that plaintiff's truck was going to stop, then it would, of course, be the duty of the defendant's driver to observe that situation and drive his truck accordingly." The credibility of the witnesses and the weight to be given their testimony were for the jury.

We find no prejudicial error in instruction No. 13. The judgment is amply sustained by the evidence and is

AFFIRMED.

IRA D. PHILLEO, APPELLANT, V. JACOB HEFNIDER ET AL., APPELLEES.

2 N. W. (2d) 31

FILED JANUARY 23, 1942. No. 31258.

1. **Automobiles.** "To hold the owner of an automobile liable for an accident which occurred when his car was being driven by an employee, it must ordinarily be shown that the employee was, at the time, engaged in his employer's business, with the employer's knowledge and consent." *Harrell v. People's City Mission Home*, 131 Neb. 138, 267 N. W. 344.
2. ———. "The presumption that an employee, driving employer's automobile when accident occurs, is acting within his employment is rebutted, where the evidence shows employee was engaged on his personal affairs." *Harrell v. People's City Mission Home*, 131 Neb. 138, 267 N. W. 344.
3. **Negligence.** In an action to recover damages for personal injuries, the refusal of the trial court to submit the case to the

jury is not erroneous, where the evidence is insufficient to support a verdict in favor of plaintiff.

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

J. E. Willits, for appellant.

Stiner, Boslaugh & Stiner, contra.

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

ROSE, J.

This is an action to recover $14,800 in damages for alleged negligence of Jacob Hefnider and Hazel M. Hefnider, husband and wife, defendants, in so operating an automobile December 9, 1939, at the intersection of Denver avenue and South street in Hastings, as to collide with a car in which Ira D. Philleo, plaintiff, was riding, thus injuring him. At the time of the collision Jerry Hill, who is not a party to the action, was driving defendants' car, a Graham sedan, and plaintiff was riding in a Ford sedan.

In the petition it is alleged that defendants, at the time stated, were engaged in the business of operating a barber shop and a beauty parlor on West Second street in Hastings; that the Graham sedan was used by them and Hill in connection with such business; that it was kept in the street in front of or near their shops; that Hill was in their employ from April, 1938, until the time of the collision; that he took the car from the street in front of defendants' place of business in the evening, December 9, 1939, was returning with it the same evening during business hours at the time of the collision, and was then engaged in the duties of his employment; that plaintiff was severely injured as a result of the negligence of defendants in causing the collision. The facts summarized were pleaded in minute detail and the negligence of Hill was attributed to defendants, his employers.

In an answer defendants admitted they were husband and wife, and that on December 9, 1939, they owned and

operated their barber shop and beauty parlor on West Second street, and denied all other allegations of the petition.

At the trial plaintiff proved negligence of Hill and resulting injury to plaintiff, but, when the latter rested, the district court excused the jury and dismissed the action on the ground that plaintiff failed to prove that Hill was engaged in any duty of his employment or that he was performing any service for defendants at the time of the collision. Plaintiff appealed.

Was the nonsuit erroneously entered? The answer depends on the sufficiency of the evidence adduced by plaintiff to sustain a verdict in his favor on the issue of negligence on the part of defendants. There was proof of actionable negligence of Hill who is not a party to the action and of resulting injury to plaintiff. There is also evidence tending to prove that Hill was employed by defendants as a porter and that his duties required him to clean the shops of his employers and their Graham sedan and to perform other duties connected with their business. Witnesses testified that Hill frequently had been seen driving defendants' automobile from and to the defendants' place of business, and in the public streets of Hastings, at times with packages in it. From the evidence as a whole, from inferences therefrom and from circumstances, it is ably argued by counsel that Hill was authorized to use the Graham car in connection with the business of his employers and also for his own purposes. The evidence, however, will not support a finding that the employee had a right to use his employers' car for his own purposes. Hill himself testified in substance, referring to the trip on which the accident occurred, that the car, without the key, was in front of the beauty parlor; had not asked for permission to take the key; did not say anything to defendants about it; took it from the barber's coat pocket in the wrap room of the barber shop; did not have permission from either employer at the time to take the car; had not been asked by either to take the car; went to the street, took the car and drove

to 818 South Colorado avenue, Hastings; was there about 20 minutes; accident occurred on the way back to the shops; so far as Hill knew his employers did not know he was using the car; from the time he left until he returned, did nothing for either employer; made the trip for purpose of his own.

Direct evidence of this nature, uncontradicted as it is, rebuts any presumption or inference that Hill, as an employee, at the time of the collision or on this trip, was using the car owned by his employers for them or in connection with their business. The law applicable has been stated as follows:

"To hold the owner of an automobile liable for an accident which occurred when his car was being driven by an employee, it must ordinarily be shown that the employee was, at the time, engaged in his employer's business, with the employer's knowledge and consent.

"The presumption that an employee, driving employer's automobile when accident occurs, is acting within his employment is rebutted, where the evidence shows employee was engaged on his personal affairs." *Harrell v. People's City Mission Home,* 131 Neb. 138, 267 N. W. 344.

Under these rules of law, there was no proper view of the evidence in which it would support a verdict in favor of plaintiff. The nonsuit therefore was not erroneous.

Rulings that sustained numerous objections to questions propounded to the witness Hill are challenged as erroneous, but a critical examination of the record for review does not disclose a sufficient ground for a reversal of the judgment below.

AFFIRMED.

MAYE C. COLE, APPELLEE, V. H. C. MADISON, APPELLANT.
2 N. W. (2d) 115

FILED JANUARY 23, 1942. No. 31289.

Mortgages. "An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Equitable Life Assurance Society v. Buck*, 138 Neb. 203, 292 N. W. 605.

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

Frank M. Johnson, for appellant.

York & York, contra.

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

ROSE, J.

This is a suit in equity to foreclose a mortgage for $4,081.23 on a quarter-section of land in Dawson county, on which there is a railroad and a public highway. The district court for Dawson county found there was due from defendant to plaintiff the sum of $4,339.09 and decreed foreclosure of the mortgage October 11, 1939. Under the decree the sheriff of Dawson county sold the mortgaged real estate to plaintiff December 30, 1940, for $4,656.56, being the amount of the debt, interest and costs. Defendant objected to confirmation of the sale, among other grounds, for inadequacy of the sale price. In ruling on the objections to confirmation, the district court found that the sale was conducted in all respects in conformity to the law, that the mortgaged real estate was sold for a fair price under the existing circumstances and conditions, and that the evidence fails to show a greater amount could be realized at a subsequent sale. From an order confirming the sale, defendant appealed.

Inadequacy of price is urged as a ground for reversal, but a thorough consideration of the record leads to the conclusion that the appeal falls directly within the following rule:

"An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Equitable Life Assurance Society v. Buck,* 138 Neb. 203, 292 N. W. 605.

The judgment below is affirmed, but with permission to defendant, before issuance of the mandate herein, to redeem the mortgaged real estate by payment of the debt, interest, costs in both courts and taxes paid by plaintiff.

AFFIRMED.

JOHN SBARRA, APPELLANT, V. MIDDLE STATES CREAMERIES, INC., APPELLEE.

2 N. W. (2d) 26

FILED JANUARY 23, 1942. No. 31211.

1. **Workmen's Compensation.** "In a proceeding under the workmen's compensation law, where the evidence is conflicting, the supreme court upon a trial *de novo* may consider the fact that the district court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses." *Sherman v. Great Western Sugar Co.,* 127 Neb. 505, 255 N. W. 772.
2. ———. "The request of the plaintiff, who has closed the evidence in chief after the introduction of rebuttal evidence has been reached and is in progress, to be allowed to return to the evidence in chief, open that branch of the trial, and adduce further evidence therein, is within discretion of the trial court, and unless its ruling thereon is accompanied by an abuse of such discretion, it can furnish no reason for a reversal of the judgment." *McClellan v. Hein,* 56 Neb. 600, 77 N. W. 120.

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

Frank C. Yates and *Frank A. Dutton,* for appellant.

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

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

PAINE, J.

This is an appeal from a dismissal by the district court of a compensation case.

Plaintiff filed a petition for a hearing before the compensation commissioner on December 7, 1934, alleging that on May 14, 1934, while employed as an ice cream maker by the defendant, the plaintiff received personal injuries by slipping on some spilt milk and falling to the cement floor on his right hand and right side, causing a sacroiliac joint injury.

A hearing was had, and on March 12, 1935, the compensation commissioner awarded the sum of $12.80 a week from February 1, 1935, until such disability shall cease, but not to exceed 300 weeks, and that in addition defendant shall provide plaintiff with necessary and reasonable medical treatment and expense. From such award, each of the parties took an appeal to the district court for Douglas county.

The transcript discloses that the trial ended in the district court on July 17, 1935, and a decree was thereupon entered, reversing the award of the compensation commissioner, and dismissing the claim of the plaintiff.

On July 20, 1935, a motion for a new trial was filed by the plaintiff, and the case remained dormant for over five years. On March 11, 1941, the motion for a new trial was called up, and was overruled by the court, and an appeal taken to this court. The errors relied upon for reversal are that the judgment of the district court is contrary to the evidence and not supported by the record.

The facts in the case may be briefly stated as follows: The plaintiff was a seasonal ice cream worker, 41 years of age, who went to work in the spring and would continue at work until September each year. His work was heavy work, consisting principally of handling ten-gallon cans full of cream, weighing about 125 pounds each, from the cooler to the freezer room.

Plaintiff testifies that on May 14, 1934, in walking on an inclined platform, the floor being greasy and slippery, his feet went out from under him and he fell to the floor. He felt a pain in his back right away, and after a few minutes he was told by superintendent Hemingway to go see Dr. Conlin at his office. The engineer took him in a car. He waited in the office about an hour, and Dr. Conlin came in and strapped up his back with adhesive tape, and he was off work about three days. He testified that he stayed at home in bed and kept a hot water bottle on his back; that he made a trip to the doctor's office and he put electric heat on him over the adhesive tape. The third day he went back to work; they gave him a helper, and he continued working steadily until August 28, 1934.

He was then given two and a half day's work in September and on September 22 plaintiff made a complaint that he had more money coming according to the federal code, and he was given a check for $35 for back time in full for all labor claims to date.

In this case Drs. E. C. Henry, Lyman J. Cook, Claude W. Mason and Arthur L. Smith testified for the plaintiff. Drs. Roy W. Fouts, Frank Conlin and James W. Martin testified for the defendant. There is a sharp conflict in this medical testimony, for that of the defendant indicates that falling forward on the hands is not the kind of a fall that places a strain on the sacroiliac joint at all. They explained that ordinarily injury comes to this joint only when a heavy weight is lifted and there is a short torsion or twist in the backbone, and therefore that the fall in the manner testified to by the plaintiff could not bring about any substantial stress or injury to the sacroiliac joint.

It is brought out by the testimony of Dr. Conlin for the defendant company that, when plaintiff came to him for treatment on the day of the fall, he had him stripped down to his waist and found marks over his back where a belladonna plaster had been attached, and plaintiff told him at that time that he had previously had a pain in his back, and it had been weak. Dr. Conlin testified that the plaintiff was tender to the touch over the lumbar region on both sides, particularly the left side. He strapped up his back and applied heat, and he saw him again on May 15 and May 17, and did not see him again until December 7, 1934, after he had been laid off at the end of the work in the fall. He complained at that time of pain over the lumbar muscles, but had no disturbance in walking, and the X-ray examination was negative. Dr. Conlin testified that he saw the plaintiff again on December 9, 11 and 18, and reached the opinion that plaintiff was suffering from lumbago. He said that plaintiff's condition cleared up and he had not seen him since that time.

Dr. Henry, the first medical witness called for the plaintiff, testified that he is a surgeon, and that he had examined the plaintiff twice, and that, except for some bad teeth and his tonsils, his general physical condition was negative. He said there seemed to be a small nodule over his sacroiliac joint that was quite sensitive, and the source of his distress. On cross-examination Dr. Henry testified that the teeth and tonsils were badly infected, and might possibly alone be the cause of a rheumatic or arthritic condition, and he said he recommended the removal of the teeth and tonsils. He testified that the spot which was tender was caused by a bursa sac entirely outside of the joint. Dr. Henry advised that he wear a sacroiliac belt, and said that he would not get well until the focal infection of his teeth and tonsils was cleared up.

Other medical evidence of the plaintiff was to the effect that exhibit No. 2, an X-ray picture, would show a tipping fracture of the fourth lumbar vertebra. Evidence was offered that injury to the sacroiliac joint might be caused if

a body twisted when falling. Certain demonstrations were made in the court chambers upon plaintiff's back when he was stripped to the waist.

The case before us presents simply a disputed question of fact. The fall forward on his hands, as described by the plaintiff, could not produce an injury to the sacroiliac joint, according to the defendant's medical testimony, and it might be so produced according to one of plaintiff's witnesses.

The exhibits are not before this court, as the affidavit of the court reporter then serving shows that they had been lost in the interim of five years between the trial and the ruling on the motion for new trial.

The fact that, when the plaintiff went to the company doctor for first aid treatment and stripped down to his waist, he admitted that his back had been weak prior to this injury, and that he had endeavored to remedy this by wearing belladonna plasters, would indicate that he had been suffering from lumbago in the exact spot in which he claims the injury affected him. Another fact, that he went back to work in three days and worked steadily all through the season until he was laid off about the 1st of September, and then went back and drew additional compensation for his overtime, and did not make any complaint to the company doctor until along in December, is evidence of considerable weight against the allowance of a recovery in this case.

There is no dispute that the plaintiff had a fall, but that the injury for which the plaintiff claims compensation was due to the slipping on the floor is disputed by credible medical testimony.

We have here a disputed question of fact which must be determined in the light of the evidence. There is admittedly credible testimony on both sides, and the question to be decided is whether the plaintiff proved his case.

"In a proceeding under the workmen's compensation law, where the evidence is conflicting, the supreme court upon a trial *de novo* may consider the fact that the district

court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses." *Sherman v. Great Western Sugar Co.*, 127 Neb. 505, 255 N. W. 772. See, also, *Hudson v. City of Lincoln*, 128 Neb. 202, 258 N. W. 398; *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178; *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393.

Another point presented for reversal is the refusal of the trial court to allow the plaintiff to reopen his main case after a recess of some days had occurred. The law in our state has often been stated that "The request of the plaintiff, who has closed the evidence in chief after the introduction of rebuttal evidence has been reached and is in progress, to be allowed to return to the evidence in chief, open that branch of the trial, and adduce further evidence therein, is within discretion of the trial court, and unless its ruling thereon is accompanied by an abuse of such discretion, it can furnish no reason for a reversal of the judgment." *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120.

We have examined the evidence *de novo* and find that, while the evidence is in sharp conflict, there is evidence sufficient to support the action of the trial court in dismissing the action on the ground that plaintiff was not entitled to an award.

AFFIRMED.

MONROE W. NEIHART, APPELLANT, V. MARSHAL W. INGRAHAM ET AL., APPELLEES.

2 N. W. (2d) 28

FILED JANUARY 23, 1942. No. 31202.

1. **Appeal.** In an action in equity, this court will take into consideration the fact that the trial court observed the witnesses and the manner in which they testified, and must have accepted one version, rather than the other, of disputed facts.
2. **Cancelation of Instruments.** "Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of

witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome. *Peterson v. Estate of Bauer*, 76 Neb. 652." *Bingaman v. Bingaman*, 85 Neb. 248, 122 N. W. 981.

3. **Evidence.** Where a witness has known a grantor for a number of years, has transacted business with him and had opportunity to observe his conduct and demeanor, he is competent to testify to an opinion of the grantor's ability to transact business when the deed is executed and acknowledged, and after giving the facts upon which his opinion is based.
4. **Deeds.** Where a grantee relinquishes the grantor from a promise to convey certain real estate to him, and, in keeping with such promise, the grantor conveys other real estate to the grantee, the relinquishment constitutes an adequate and valid consideration for the conveyance.
5. ———. Evidence in the instant case examined and *held*, that it fails to affirmatively prove fraud on the part of the defendants, or either of them, or to prove lack of consideration for the conveyance of the real estate.

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

Thomas E. Dunbar, for appellant.

Tyler & Frerichs, contra.

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

MESSMORE, J.

This is an action to set aside and cancel a deed to one-half interest in certain real property located in Nebraska City, Nebraska. The court found against the plaintiff and for the defendants. Plaintiff appeals.

Plaintiff's action is based on fraud, in that the deed was secured from him at a time when he was mentally and physically unaware of what he was doing; that, consequently, the deed was without consideration and there was

no actual delivery. The principal assignment of error is that the evidence is insufficient to sustain the decree and judgment of the district court.

The plaintiff, 87 years of age, a resident of Otoe county, Nebraska, since 1876, formerly a photographer, and for the past 12 years police magistrate, owned certain real estate in Nebraska City. The real estate in question in this action consists of a small residence property, owned by Grace Neihart Ingraham, daughter of the plaintiff and wife of defendant Marshal W. Ingraham, whom she married in 1914. The Ingrahams lived at various places in Iowa where he worked as a carpenter. In August, 1924, plaintiff's wife died, and in the fall of the same year the Ingrahams rented and moved into a house in Nebraska City for the purpose of making a home for the plaintiff. Marshal W. Ingraham remained at his work in Iowa and made occasional trips to Nebraska City. In 1925 Grace Neihart Ingraham owned the lot involved in this case and built a house on it, the construction being supervised by her husband, and the plaintiff furnished some money and paid taxes thereon.

Plaintiff owned two properties, one an acreage and the other referred to as the Singer house. In 1929 he expressed a desire to live on the acreage property and promised defendant Marshal W. Ingraham that if he would come to Nebraska City and make the family home there the acreage would be the property of the Ingrahams upon his death. Pursuant to this promise and agreement, the Ingrahams removed to the acreage and Marshal W. Ingraham moved permanently to Nebraska City in the fall of 1929. On the acreage premises he performed some labor and planted trees to improve the acreage. They resided there until the death of Grace Neihart Ingraham April 24, 1938. Subsequent to the death of his daughter plaintiff advised Marshal W. Ingraham that he was going to make a different disposition of the acreage. Marshal expressed the view that he should be given the property involved in this action and the Singer place, whereupon it was agreed that the plaintiff

would give him the property herein involved, which would constitute a half-interest therein. Subsequently, on October 19, 1940, two and one-half years after the deed was executed, Marshal W. Ingraham married Anna Houlihan, a niece of the plaintiff, who kept house for plaintiff until just prior to her marriage. A half-interest in the real estate in question was sold by defendant Marshal W. Ingraham to Anna before her marriage. Immediately after the marriage, the Ingrahams moved into the residence property involved in this action.

An action was brought in 1940 by Marshal W. Ingraham in the county court, seeking a determination of heirship. Notice of publication was had in September, 1940. Plaintiff contends that this was the first knowledge that he had of the conveyance of the real estate, and proceeded to attack the proceedings in the county court, resulting finally in this action to set aside the deed.

The testimony with reference to the deed is, in substance, as follows: It was prepared by an attorney and at his request taken by his law partner to the plaintiff's office, where it was explained to the plaintiff that the deed was one to the property involved in this action in favor of Marshal W. Ingraham and the deed about which the attorney had called by telephone. The deed was handed to plaintiff, he looked it over, and the city clerk, who had an office close to that of the plaintiff, was called in as a notary public to acknowledge the deed. The plaintiff was asked by the notary if his signature to the deed was his voluntary act and deed, and he acknowledged that it was. The deed was then handed to the attorney, who took it and left the office.

There is evidence in the record that at the time of the death of Grace Neihart Ingraham plaintiff felt the shock so severely that he lost all of his powers of reasoning and business competence. There is no doubt that his loss was a very grievous one, but the evidence is not persuasive that fraud was practiced by defendants in this case. The plaintiff was and is an active, energetic and intelligent man.

While he may have been incapacitated for a period of time for carrying on his duties as a police magistrate, he had on various occasions discussed with persons the disposition of his real estate and, to all appearances, was perfectly satisfied with the disposition of the property to defendant Marshal W. Ingraham. It also appears in the record that, following the publication of the notice of determination of heirship in the county court, other influences, which we deem unnecessary to discuss, persuaded and prompted the plaintiff to contest this conveyance to the defendant Marshal Ingraham.

"Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of the validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome. *Peterson v. Estate of Bauer,* 76 Neb. 652." *Bingaman v. Bingaman,* 85 Neb. 248, 122 N. W. 981.

The testimony of the notary public who had known the plaintiff and had an office close to him for some considerable time, who had transacted business with him and talked to him on occasions about the disposition of his real estate, and who took the acknowledgment of the deed in suit, establishes that she had ample opportunity to observe the plaintiff prior to the acknowledgment of the deed, at the time of taking such acknowledgment, and prior thereto, and had known him for years. Under such circumstances, such a witness is competent to testify as to her opinion respecting the mental soundness and mental capacity of the maker of the deed. See *Burgedorff v. Hamer,* 95 Neb. 113, 145 N. W. 250; 20 Am. Jur. 323, sec. 348.

We conclude in the instant case that the deed was not procured by fraud and was given in consideration of the

relinquishment by the grantee of the grantor's promise to convey the acreage property to the grantee and the grantee's former wife. Under such circumstances, the consideration is adequate and valid. See 18 C. J. 163.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

ROBERT W. BALDWIN ET AL., APPELLEES, V. RONALD G. BALDWIN, APPELLANT.

2 N. W. (2d) 23

FILED JANUARY 23, 1942. No. 31259.

1. Wills. "In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law, and in this connection circumstances relating to the will may be considered." *Lehman v. Wagner*, 136 Neb. 131, 285 N. W. 124.
2. ———. The second paragraph of the will discloses the intention of the testator to be that the widow shall have a life estate in the event she does not remarry. Should she remarry, then she is to participate in the estate as provided for by the law of descent. The grandson, who is bequeathed the sum of $200, is excepted from any further participation in the estate. Special bequest designated in the third paragraph of the will, to be made prior to the distribution on a *pro rata* basis to certain heirs named therein, and eliminating from such *pro rata* shares the name of the widow, but containing the language, "in the event of the marriage or death of Mary A. Baldwin," discloses the intention of the testator to dispose of the entire estate in either event,—the remarriage or death of the widow.
3. ———. Where there are two provisions in a will relating to the disposition of the same property, the relative positions of the provisions in the will are not important where the intention of the testator can be ascertained by construing the provisions together.
4. ———. Where it can be reasonably done, a court will harmonize ambiguous expressions with the plain provisions of the will, to effectuate the testator's intent.

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

Thomas J. Keenan, guardian *ad litem, Sloans, Keenan & Corbitt* and *Braden C. Johnston,* for appellant.

Kelly & Deming and *Preston T. McAvoy, contra.*

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

MESSMORE, J.

This is an action to construe a will and to quiet title in the appellees to 1,720 acres of land in Blaine county, Nebraska. The facts are not in dispute. It is admitted that Beecher B. Baldwin, the testator, died and that his will was properly admitted to probate in Nebraska; that his widow, Mary A. Baldwin, died without remarrying; that the appellant, Ronald G. Baldwin, is a minor, a resident of Kansas, and the only child of a predeceased son of the testator; that, in the absence of a will, he would inherit, as an heir, a one-sixth interest in the real estate described in the plaintiffs' petition. The parts of the will necessary for consideration in the instant case are as follows:

"Second: I give, devise and bequeath unto my beloved wife, Mary A. Baldwin, for her use and benefit during her lifetime, or so long as she remains single, all the property of which I may be possessed at the time of my decease, including real estate, personal and mixed, but in case she should again marry the above bequest is to terminate and become void, and in that event I direct that all of the properties belonging to my said estate consisting of real estate, personal and mixed, be distributed among my heirs as provided in the Compiled Statutes of Nebraska for the year 1922 with the exception of my grandchild, Ronald G. Baldwin, who is to receive but Two Hundred ($200) Dollars, all others to participate under the provisions of this (will) are as follows, to wit: Mary A. Baldwin, Mollie A. Sterricker, Robert W. Baldwin, Cedric M. Baldwin, John C. Baldwin and Desdamona Chapin.

"Third: I further request and direct that One Thousand

($1,000) Dollars be paid to Roma Baldwin out of any moneys on hand before the final distribution and payment of the *pro rata* interest of the following heirs: Mollie A. Sterricker, Robert W. Baldwin, Cedric M. Baldwin, John C. Baldwin and Desdamona Chapin; in the event of the marriage or death of Mary A. Baldwin."

The district court decreed that Ronald G. Baldwin had no interest in the real estate and quieted title in the appellees; also that the appellant was entitled to the sum of $200 as provided in the will, in any event, and no more. The appeal is from the judgment of the court in so construing the will.

Section 76-109, Comp. St. 1929, provides in part: "In the construction of every instrument * * * or conveyance of any real estate, * * * it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law."

The rule applicable in this state in construing a will, as stated by numerous decisions, is as follows: "In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law, and in this connection circumstances relating to the will may be considered." *Lehman v. Wagner*, 136 Neb. 131, 285 N. W. 124.

The appellant contends that the second paragraph of the will is not ambiguous; that the testator's intention as to the disposition of his property was to dispose of it in a certain manner, in the event his widow remarried, but made no provision in the event that she died without remarrying, and consequently the property would descend to the heirs as provided for by law in an intestate estate; in other words, the testator failed to make complete disposition of his property, and he having failed to do so, the court cannot now, by construction, add such provision to his will, or make a will for him.

It is apparent from the will that the testator intended to give to his wife, Mary A. Baldwin, all of his property, real, personal or mixed, as long as she did not marry. She had a life estate under the imposed condition. He likewise expresses his intention, as far as his heirs at law are concerned, in the event his widow remarried. He specifically names each of them and each is to have his interest in the estate vested. Note the language: "And in that event I direct that all of the properties belonging to my said estate consisting of real estate, personal and mixed, be distributed among my heirs as provided in the Compiled Statutes of Nebraska for the year 1922 (he then makes an exception) with the exception of my grandchild, Ronald G. Baldwin, who is to receive but Two Hundred ($200) Dollars." This exception clearly indicates that the testator intended Ronald G. Baldwin to have $200 and no more; otherwise, it is clear, his name would have been included with the other heirs named in the distribution of the testator's property of every kind, in the event his wife, Mary A. Baldwin, remarried. In so naming his heirs, the testator includes the name of Mary A. Baldwin, his wife. This means: If she does remarry she receives an interest in the testator's estate, but her life interest in all of his property ceases.

In the third paragraph of the will, the 1,000-dollar bequest to Roma Baldwin is a specific bequest. The testator intended such devisee should have this bequest "out of any moneys on hand before the final distribution and payment of the *pro rata* interest of the following heirs:" He then specifically names them. In so doing he eliminates and omits the name of his wife, Mary A. Baldwin. In naming those to receive his property, he uses the language: "All others to participate under the provisions of this (will) are as follows:" etc.

Analyzed, the third paragraph, in omitting the name of the testator's wife, Mary, makes clear that the testator was providing for the disposition of his property in the event of Mary A. Baldwin's death; otherwise, her name would not have been specifically omitted. His intention expressed in the will obviously is as follows:

(1) Mary A. Baldwin, his wife, to have a life estate in all of his property, real, personal or mixed, as long as she does not remarry.

(2) Ronald G. Baldwin, his grandson, to have $200 in any event, and he is excepted from any participation in any other property of the testator's estate.

(3) Mary A. Baldwin to have an interest in all of his property, devoid of the life estate, in the event she remarried, as provided for by the statutory provisions controlling descent.

(4) Roma Baldwin to have $1,000 before *pro rata* distribution is made to certain heirs, which the testator specifically names. He uses the language: "In the event of the marriage or death of Mary A. Baldwin." It is clear that the testator, in using the language "or death" and omitting the name of Mary A. Baldwin, his wife, in the third paragraph, intended to and did dispose of the whole of his estate under either contingency,—the remarriage or death of Mary A. Baldwin.

We have carefully reviewed the cases of *Hunter v. Miller*, 109 Neb. 219, 190 N. W. 583, *Graff v. Graff*, 136 Neb. 543, 286 N. W. 788, and other cases cited by appellant. While we recognize the similarity of the situation in the two cited cases to the case at bar, the language of the will in the instant case is different, and this court is required to abide by the paramount rule in construing wills,—that a will must be construed from the intent of the testator expressed therein, and this intention must be given effect, if possible. In obedience thereto, we conclude that the trial court placed the proper construction on the will in the instant case.

AFFIRMED.

FLOYD ROBERT MCMASTER, APPELLEE, V. VELMA GRACE MCMASTER, APPELLANT.

2 N. W. (2d) 326

FILED JANUARY 30, 1942. No. 31255.

Divorce. Where a wife is appellant and a husband, as appellee in a divorce case, is ordered by this court to pay certain costs for expenditures necessary and incident to the wife's appeal and the husband fails to comply with this court's order and thereby denies the wife the means of securing and prevents a review of the findings and decree of the trial court, that decree will be reversed as to the part from which the wife appeals and the cause will be remanded to the district court for further proceedings.

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

J. Jay Marx, for appellant.

O. K. Perrin and *L. R. Doyle, contra.*

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

SIMMONS, C. J.

January 5, 1939, the plaintiff filed his petition for divorce from the defendant on the ground of extreme cruelty and praying for the custody of three minor children. Defendant by answer admitted the marriage, the birth of the children; denied generally; and by cross-petition prayed for a divorce on the ground of extreme cruelty, for the custody of the children and alimony.

Trial was had and on January 14, 1941, the trial court made findings and decreed that the plaintiff was entitled to a divorce from the defendant; and that neither of the parties was a proper person to have the care, custody and control of the children; awarded their custody to the superintendent of the Tabitha Home; charged their support and maintenance primarily to the plaintiff and secondarily to the defendant; and denied defendant any relief upon

her cross-petition and awarded defendant an attorney's fee.

Defendant by motion for a new trial assailed the decree as erroneous. The motion for a new trial was overruled March 17, 1941. Defendant perfected her appeal to this court.

June 2, 1941, upon motion, this court awarded defendant $150 to cover the cost of the bill of exceptions and briefs and ordered the same paid by plaintiff within thirty days. It now appears that plaintiff failed to comply with that order. By affidavit he asserts his inability to pay the amount fixed by this court. The time for the preparation and settling of the bill of exceptions has expired.

Defendant now moves, among other things, for a decree reversing the judgment of the district court. This court was presented with a similar situation in *Bonzo v. Bonzo,* 138 Neb. 92, 292 N. W. 61. The holding there was that the wife, without fault on her part, could not be deprived of a hearing in this court by the failure or refusal of the husband to pay costs of appeal awarded the wife, and that the husband should not secure an affirmance in this court by denying the wife the means to enable her to present her appeal.

Where a wife is appellant and a husband, as appellee in a divorce case, is ordered by this court to pay certain costs for expenditures necessary and incident to the wife's appeal and the husband fails to comply with this court's order and thereby denies the wife the means of securing and prevents a review of the findings and decree of the trial court, that decree will be reversed as to the part from which the wife appeals and the cause will be remanded to the district court for further proceedings.

The decree of the district court is reversed and the cause remanded.

REVERSED.

A. F. STURM, APPELLANT, V. ROY L. KLAURENS, EXECUTOR, APPELLEE.

2 N. W. (2d) 319

FILED JANUARY 30, 1942. No. 31220.

1. **Evidence.** A copy of a lost promissory note as evidence in an action to recover the unpaid debt should be such as to serve the purposes of the original if presented in court with the genuine signatures of the makers properly shown.
2. **Lost Instruments.** In an action to recover the amount due on a lost promissory joint and several note bearing the names of two persons as makers, each charging his personal estate for payment, it is incumbent on plaintiff who produces a copy in lieu of the original to prove as a condition of recovery the genuine signatures of both makers as their names appeared on the note itself.

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

J. C. Travis, for appellant.

Lloyd E. Peterson and *W. A. Robertson, contra.*

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

ROSE, J.

This is an action to recover the amount due on a lost promissory note dated July 28, 1925. The names of the makers as they appear on a copy of the note are James Miller and Henry Gruber. A. F. Sturm was named as payee and on March 29, 1940, he presented to the county court of Cass county for allowance his claim against the estate of Henry Gruber, deceased, for the unpaid debt due on the note. The claim, for want of proof to support it, was disallowed by the county court on objections by the legal representative of the Gruber estate and Sturm appealed to the district court wherein, as plaintiff, he alleged in his petition among other things:

"That during his lifetime Henry Gruber, now deceased, for valuable consideration, made, executed and delivered to

plaintiff a certain promissory note in words and figures as follows:

" 'Nehawka, Nebraska, July 28, 1925.

" 'One year after date, we, or either of us, promise to pay to A. F. Sturm, or order, $753.34, Seven Hundred Fifty Three & 34/100 Dollars for value received, payable at Nehawka, Nebraska, with interest at the rate of 8 per cent. per annum, payable annually, from date and 8 per cent. after maturity until paid.

" 'The makers and endorsers hereby severally waive presentment, demand, protest, and notice of nonpayment, and each hereby agrees that any holder may extend the time of payment for any or all of said makers or endorsers, and each of us hereby personally charge our own separate estate with the payment of this note.

" 'James Miller
" 'Henry Gruber.'

"That the said Henry Gruber during his lifetime made the following payments upon said note, said payments being endorsed upon said note, as follows:

" 'Paid Jan. 18, 1927	$60.24	by Miller & Gruber
" 'Paid Dec. 26, 1928	145.00	" " " "
" 'Paid Oct. 9, 1933	5.00	" James Miller
" 'Paid Oct. 5, 1935	5.00	" Henry Gruber'

"Plaintiff is the owner and holder of said note.

"That there is due and owing plaintiff from defendant upon said note the sum of $1,416.18 as of March 28, 1940, together with interest at the rate of 8 per cent. per annum since said last named date."

The cause was tried before a jury in the district court on issues raised by a general denial in an answer to the petition. At the close of plaintiff's evidence both sides moved for a peremptory instruction. The trial court nevertheless submitted the case to the jury and on a verdict in favor of defendant the action was dismissed.

Counsel for plaintiff contends and confidently argues that every fact essential to plaintiff's right to recover the amount due on the note was proved by undisputed evidence, that

a verdict for plaintiff should have been directed, that the case was erroneously submitted to the jury, that the dismissal should be set aside and judgment entered in favor of plaintiff.

Counsel for the Gruber estate insist that it was incumbent on plaintiff as a condition of recovery under the issues to prove that James Miller executed the note, that there was no evidence that he did so and that consequently there was in plaintiff's proofs a fatal defect which prevented a recovery in any event and required the dismissal from which the appeal was taken.

The note was dated July 28, 1925. It was payable one year thereafter. Plaintiff waited until after the death of Miller and Gruber before filing his claim March 29, 1940. Neither the estate of Miller nor a legal representative thereof was a party to the action. The obligation pleaded in the petition was joint and several. In addition, as indicated by a copy of the note, each purported maker charged his separate estate with payment. A. L. Tidd, an attorney, testified he received the note for collection, that it was lost in his office and that the instrument offered and admitted in evidence in lieu of the original note was a true copy thereof. There is, however, no competent or sufficient evidence to prove that James Miller executed the lost note. The copy is in a form permitting either maker, if compelled to pay the debt, to resort to the estate of the other for contribution. The note was not lost through fault of Miller or Gruber. The misfortune of payee should not be visited on those whose names appear as makers. A copy of a lost promissory note as evidence in an action to recover the unpaid debt should be such as to serve the purposes of the original if presented in court with the genuine signatures of the makers properly shown. *Jefferson v. Bowers*, 33 Ga. 452; 2 Jones, Commentaries on Evidence (2d ed.) 1492; 8 Ency. of Evidence, 362, sec. 4; *Cohen v. Swanson Petroleum Co.*, 133 Neb. 581, 276 N. W. 190; 38 C. J. 260. The rule applicable has been explained as follows:

"Surely, in the case of a paper which purports to have been executed by several persons, the fact that it was executed by each and every one of them is vitally essential; and where a copy is produced having affixed thereto the names of several persons as makers, and there is no satisfactory proof of the due execution of the alleged original, save as to one only of the makers, that copy cannot be established so as to take the place of the original. The cases of *Bond v. Whitfield*, 28 Ga. 537, and 32 Ga. 215, and *Jefferson v. Bowers*, 33 Ga. 452, may be cited as directly in point." *Neely v. Carter*, 96 Ga. 197, 23 S.E. 313.

The petition did not allege and plaintiff did not prove that the name of James Miller on the original note as maker was his genuine signature. It follows that plaintiff did not make a case and that the county court, the district court, and the jury, reached the right conclusion. The dismissal is

AFFIRMED.

ARTHUR B. DUNBAR, APPELLEE, V. NATIONAL SURETY CORPORATION, APPELLANT.

2 N. W. (2d) 116

FILED JANUARY 30, 1942. No. 31280.

Insurance. Where a fidelity policy insuring an employer against losses resulting from dishonesty of an employee contains a valid provision limiting the time for discovery of the losses, compliance with the provision is essential to recovery in an action on the policy, and a petition alleging noncompliance is demurrable.

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

Smith & Schall and *Gerald M. Vasak*, for appellant.

Dressler & Neely, contra.

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

ROSE, J.

This is an action on a fidelity bond or policy in which the National Surety Corporation, defendant, for annual premiums received by it from Arthur B. Dunbar, plaintiff, agreed to pay him, under the terms of the contract, any loss sustained by him through "any act of personal dishonesty, forgery, theft, larceny, embezzlement, wrongful conversion, abstraction or misapplication" of Emma L. Koch, bookkeeper and cashier employed by plaintiff, who was engaged in the business of writing insurance.

The bond or policy was kept in force from year to year by annual payments of premiums, the defendant assuming liability to the extent of $2,000 a year for yearly losses if caused by employee's wrongful acts as enumerated in the bond.

A copy of the bond is attached to the petition which, in the form of three causes of action, alleges that the employee, during annual periods covered by the bond, in violation of her duties as employee and in breach of her trust, wrongfully and fraudulently abstracted funds of plaintiff as follows: During the annual period beginning February 9, 1933, $128.99; during the annual period beginning February 9, 1934, $3,093.61; during the annual period beginning February 9, 1935, and ending February 9, 1936, $2,446.34.

The limit of defendant's liability for losses each year being $2,000, the entire claim of plaintiff consists of three items—$128.99, $2,000 and $2,000, or $4,128.99. Plaintiff, however, to prevent removal of the cause to the federal court, waived his right to recover more than $2,000.

Referring to liability for losses, the bond provides that such liability is "subject to the following express conditions, which shall be conditions precedent to any recovery hereunder: * * *

"Any loss for which a claim is made hereunder must be discovered during the term of this bond or within fifteen months after the date of any termination of the surety's liability hereunder as to the employee involved, and no

action or proceeding shall be brought against the surety hereunder before the expiration of two months nor after the expiration of twelve months from the date of filing such statement of claim with the surety. Should any limitation set forth herein be void under the law of any place governing the construction hereof, then such limitation shall be the shortest period permitted by such law."

The bond terminated February 9, 1936. The period of 15 months thereafter for plaintiff to discover losses, therefore, expired in May, 1937. In the petition plaintiff alleged:

"Said conduct of Emma L. Koch constituted a fraud on the plaintiff, and plaintiff did not and could not discover said fraud until July, 1939, after a complete audit of his books and accounts."

The facts outlined and notice and proofs of loss were pleaded at length by plaintiff.

Defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action in favor of plaintiff against defendant. The district court overruled the demurrer. Defendant elected to stand on it and refused to plead further. Judgment was entered in favor of plaintiff for $2,000. Defendant appealed.

Defendant contends that the petition shows on its face in connection with the surety bond or policy that the surety is not liable for any loss pleaded by plaintiff because he did not discover any loss within the time limited by the contract of the parties—a condition precedent to recovery; that questions involving the statute of limitations are immaterial since plaintiff did not state a cause of action; that the demurrer was erroneously overruled.

Plaintiff pleaded the fraud of his own employee to extend the time for discovering his losses to that fixed by the statute of limitations, which is four years from the discovery of fraud. Comp. St. 1929, sec. 20-207. The position of plaintiff is that the 15-month limitation in the contract on which he sued, in connection with other provisions of the bond, is void because it violates public policy as declared by statute, and he insists that the demurrer was

properly overruled and that the judgment should be affirmed.

The propositions thus summarized were elaborately argued on both sides with references to cases and textbooks, but the determining question is narrowed to the validity of the following provision of the surety bond as it appears in the paragraph herein quoted from the bond itself:

"Any loss for which a claim is made hereunder must be discovered during the term of this bond or within fifteen months after the date of any termination of the surety's liability hereunder as to the employee involved."

This provision relates alone to the time for discovering losses suffered by employer through wrongful acts of the employee and is a proper subject of contract. It requires of the employer vigilance and performance of obligations at the source of knowledge and at the place for acquiring necessary information. The employer had supervisory authority to direct his bookkeeper and cashier in the duties of her employment. He had the means of discovering peculations and the obligation to do so was imposed on him. The books of account that recorded his business transactions were open to him. In the fidelity bond the time limit for the discovery of losses occasioned by the dishonesty of the employee was a reasonable and valid provision affecting the extent of liability of the surety, the amount of premiums required for fidelity or insurance risks and lessening the expenses of investigating losses. The law applicable to this provision of the bond has been stated as follows:

"It is well settled that where the liability of the insurer is expressly limited in an indemnity or fidelity contract to losses discovered within a specified time, there is no liability unless the fraud, dishonesty or negligence causing the loss not only occurs but is discovered within the time limit, and the mere fact that the discovery of a fraud during that period is prevented by the concealment thereof by the defaulter will not extend the period of indemnity. The insured is bound to discover the loss during the

prescribed period, and if he fails to do so the insurance company is not liable." 14 R. C. L. 1267, sec. 443.

On the face of the petition in which the bond is included, the following facts are clearly shown: The bond or policy terminated February 9, 1936. The 15-month period thereafter for discovery of the losses expired in May, 1937. The losses were not discovered by plaintiff until July, 1939. In view of these facts the petition was demurrable because it shows on its face that plaintiff did not discover his losses within the 15-month period limited by the contract—a condition precedent to recovery.

If the bond pleaded by plaintiff contained a void provision relating to the time in which he was required to begin the action, a question not determined, the valid 15-month limitation for discovery of the losses was not thus nullified. The two provisions, though in the same paragraph of the contract, applied to different subjects. Since a cause of action was not stated, it is immaterial for the purposes of the demurrer when recovery for losses would be barred by statute. Plaintiff is not seeking relief for any fraud of defendant. The surety is not charged with fraud. Plaintiff brought this action on the fidelity bond and is bound by its lawful terms. The fraud of the employee, who is not a party to the action, did not destroy the obligation of plaintiff, as a condition of recovery, to discover his losses within the time limited by the fidelity bond.

The demurrer to the petition was erroneously overruled. The ruling thereon and the judgment below are reversed, the demurrer sustained and the action dismissed.

REVERSED AND DISMISSED.

FLOYD L. COWAN V. STATE OF NEBRASKA.

2 N. W. (2d) 111

FILED JANUARY 30, 1942. No. 31173.

1. **Indictment and Information.** An information meets constitutional requirements if it describes a crime which the court has power

to punish and alleges that it was committed within the territorial jurisdiction of the court, if it informs the accused of the nature of the charge against him, and if it constitutes a record which may be pleaded as a bar to a subsequent prosecution for the same offense.

2. ———. The Criminal Code of this state does not require that detailed particulars of the crime be set forth in the information in the meticulous manner prescribed by the common law.
3. ———: CONSTITUTIONAL LAW. The statute prescribing a short form information for charging the crime of manslaughter (Comp. St. 1929, sec. 29-1512) *held* constitutional, and an information drawn in the language of such statute *held* sufficient to properly charge the crime of manslaughter.
4. Evidence reviewed and *held* sufficient to sustain the conviction of the defendant on the charge of manslaughter.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Eugene D. O'Sullivan, William P. Welch and *Marjorie E. Welch,* for plaintiff in error.

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

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

CARTER, J.

Plaintiff in error was convicted of the crime of manslaughter and sentenced to serve one year in the penitentiary.

The information charged the crime in the following language: "That the Floyd L. Cowan, then and there being, then and there on or about the 23d day of April, 1940, in said city, county and state, then and there being, did then and there one Ralph W. Sandell, then and there being, unlawfully and feloniously kill and slay." It is contended that this information is insufficient to sustain a conviction, for the reason that it does not apprise the accused of the nature and cause of the charge against him, and is therefore violative of sections 3, 10, 11, article I of the Constitution of the state of Nebraska.

The information was drawn in accordance with the provisions of section 29-1512, Comp. St. 1929, which provides: "In any indictment for manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death was caused; but it shall be sufficient to charge that the defendant did unlawfully kill and slay the deceased." The question is whether the information in the case at bar, charging the crime in accordance with and in the language of this statute, is sufficient to sustain the conviction. It is a question which does not appear to have been passed on previously by this court.

Constitutional provisions require that a defendant be convicted by due process of law, that he be charged in writing either by indictment or information, and that the accused shall have the right to demand the nature and cause of accusation and to have a copy thereof. This does not mean that detailed particulars of the crime must be stated in the information or indictment in the meticulous manner prescribed by the common law. The trend is in the direction of simplification of statement and the elimination of technical formalities. A proper administration of justice does not require our adherence to outmoded methods or the retention of legal fictions and absurdities. The legislature has the power to determine what constitutes a crime, and when it has performed this function it may likewise determine within constitutional limits what information must be included in the written charge to sufficiently advise the accused of the nature of the offense for which he must answer. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. The information in the instant case charges that on or about the 23d day of April, 1940, Floyd L. Cowan, in the county of Douglas and state of Nebraska, did then and there one Ralph W. Sandell unlawfully and feloniously kill and slay. Any person with a reasonable amount of intelligence would have no difficulty in knowing the nature and

cause of the accusation against him. There is no sound argument against a simple and plain statement of the charge. Justice ought not to be sacrificed on the altar of formalism. While we are not willing to say, before the precise question is presented, that the simple words "A unlawfully killed B" are sufficient to charge the crime of manslaughter (see American Law Institute Code of Criminal Procedure, sec. 188), yet we are likewise unwilling to condemn it at this time, for the reason that natural progress under modern conditions may cause us to revise any views we may now have. The worship of form in charging a crime is fast giving way to considerations of content. Prolixity of language is likewise giving way to simplicity and terseness of statement. We do not intend to hamper this trend so long as constitutional requirements are met. See *Nichols v. State,* 109 Neb. 335, 191 N. W. 333.

We have come to the conclusion that an indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish, and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication. And to the third requirement, it cannot be said that the indictment or information alone must be full protection against double jeopardy, for the reason that in many cases, such as where several acts constitute a single crime, the defendant is often required to allege facts outside the record to support his plea of former adjudication. If the information or indictment apprises the dedefendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements. *Bergemann v. Backer,* 157 U. S. 655, 15 S. Ct. 727;

Bartell v. United States, 227 U. S. 427, 33 S. Ct. 383; *People v. Bogdanoff,* 254 N. Y. 16, 171 N. E. 890; *Commonwealth v. Jordan,* 207 Mass. 259, 93 N. E. 809.

We think the information filed in the instant case meets all the requirements of a valid charge, and that the enactment of the statute authorizing the form of information used was a proper exercise of legislative power.

The record in this case shows that on April 23, 1940, at approximately 6:30 p. m., plaintiff in error was proceeding north out of Omaha on North River Drive. North River Drive is a paved street about 30 feet in width. It is crossed by railroad tracks at a point a short distance south of the point where the accident occurred. As plaintiff in error came over the crest of the hill some 700 feet south of the railroad tracks, the deceased, Ralph W. Sandell, was proceeding north on a pair of roller skates on the east half of the paving. About 50 feet north of the tracks there was a patch in the paving 25 feet long and 11 feet wide where the pavement had been taken out and later filled in and surfaced with cinders and broken stone. The evidence, including the pictures in the record, show that traffic had been moving across the patch in complete safety, although it appears that it would be difficult to cross on roller skates. The patch extended into the east half of the pavement to a point about four feet from the white center line of the street.

Two eyewitnesses testified that Sandell skated across the tracks and proceeded north on his right-hand side. As he approached the patch, he turned to the left, went around the patch and resumed his position in the center of the east half of the street. About 75 feet north of the patch he was struck by plaintiff in error's car. The eyewitnesses estimate the speed of the car at 60 miles an hour and describe the accident about as follows: Sandell was struck by the left front headlight and fender of the car, thrown ten feet in the air by the impact, struck and depressed the hood of the car when he came down, crashed into the windshield, slid up over the front of the top and dropped to

the pavement about 105 feet from the point of contact. The evidence of one of the eyewitnesses is that the car traveled another 120 feet after Sandell dropped to the pavement, that plaintiff in error opened the door and looked back, closed the door and started on and was stopped by the witness and escorted back to the scene of the accident.

Plaintiff in error says he came over the crest of the hill at a speed of 25 or 30 miles an hour and saw the boy all the time from that point on. He says he turned out for the patch in the pavement and returned immediately to the center of the right-hand lane. He says that Sandell was skating in the left-hand lane facing traffic and that Sandell darted to the right-hand side of the street unexpectedly, and that he was unable to avoid the accident. He denies that he intended to leave the scene of the accident and says that he was merely driving to a point where he could turn his car and return to the scene of the accident when he was intercepted and escorted back by the witness Anderson.

Plaintiff in error admits drinking a pint bottle of beer about 3:30 p. m. of the day of the accident and another about 6 p. m. of said day. Witnesses, including the police officers who arrived at the scene of the accident shortly after it occurred, testified that he was unsteady on his feet and that he was unable to walk straight. Plaintiff in error attributed this condition to nervous shock and a previously existing heart condition which he was unable to corroborate. The policemen testified that plaintiff in error said immediately following the accident that the boy darted in front of him on a bicycle from a side street. There was no side street at the scene of the accident and it is admitted that Sandell was traveling on roller skates. On another occasion plaintiff in error told the police that he never saw Sandell at all and did not know where he came from.

We think this evidence is amply sufficient to sustain a conviction for manslaughter. The testimony of two eyewitnesses and the mute evidence of every circumstantial fact lead to the conclusion that the car was being driven

at a high rate of speed. There is ample evidence in the record from which the jury could well conclude that too much beer or other intoxicating liquor played its part in causing the death of this 17-year-old boy. The conflicting statements made by plaintiff in error soon after the accident are ample justification for the jury to disregard his testimony tending to support his claim of innocence. Our conclusion is that the evidence is sufficient to sustain the finding of the jury that plaintiff in error was guilty of such gross negligence as to indicate a wanton disregard of human life. Such negligence is criminal in its character, and where it results in a death will sustain a conviction for manslaughter.

AFFIRMED.

CHARLES L. MCBRIDE, APPELLANT, V. MARTIN G. HELMRICKS ET AL., APPELLEES.

2 N. W. (2d) 118

FILED JANUARY 30, 1942. No. 31238.

1. **Fraudulent Conveyances.** A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction.
2. ———. Where the grantee, at the time the conveyance was made, had knowledge of the intent of the grantor to hinder and delay his creditors by the conveyance of his property, the conveyance is void as to existing creditors whether or not an adequate consideration was paid.
3. ———. If a grantee makes payment of any part of the consideration after receiving notice of the fraudulent character of the transfer, to the extent of the payment so made he is not a purchaser in good faith.
4. **Creditors' Bill.** Where a creditor has exhausted his remedy at law without avail, he may reach the property of the debtor on which an execution at law cannot be levied by a creditor's bill in equity.

APPEAL from the district court for Antelope county: CHARLES H. STEWART, JUDGE. *Reversed, with directions.*

Ginsburg & Ginsburg, for appellant.

Jackson & Rice, contra.

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

CARTER, J.

This is a suit by a judgment creditor who seeks to have the conveyance of certain real estate and the transfer of certain personal property by the judgment debtor set aside on the ground of fraud, and to reach certain other personal property belonging to the judgment debtor which cannot be reached by execution for the purpose of applying it to the satisfaction of plaintiff's judgment. The district court found for the defendants and plaintiff appeals.

The record shows that on November 16, 1935, Charles L. McBride, the plaintiff, obtained a judgment against Martin G. Helmricks in the amount of $1,343.42 with interest and costs. Executions were issued and returned unsatisfied. No part of the judgment had been paid at the time the present suit was commenced.

The record further shows that as the result of the death of his father on March 27, 1935, and of his mother on June 25, 1935, Martin G. Helmricks became the owner of a one-half interest in the 160 acres of land involved in this suit. He also became the owner of a one-twelfth interest in a real estate mortgage in the amount of $4,260, of which $2,800 remained due and unpaid, on certain lands in Furnas county, Nebraska, which said mortgage will hereinafter be referred to as the Hambridge note and mortgage.

On November 13, 1935, Martin G. Helmricks and wife executed a deed to Arthur Helmricks purporting to convey an undivided one-half interest in the lands herein involved for a consideration of $900. The $900 was paid by the delivery of an unsecured note for that amount to Martin G. Helmricks. Checks totaling $794.93 were offered in

evidence which constituted payments made on the note. The note itself was credited with payments totaling $812.80. The balance of the principal and all the interest were "discounted" and forgiven. The evidence of defendants is to the effect that there was a $3,500 first mortgage on the land, the estimated value of the land being $7,500. The equity in the land above the first mortgage was therefore $4,000, of which Martin G. Helmricks owned one-half. He had mortgaged his undivided interest to Juna Jackson for $1,100, which mortgage was conceded to be valid. The interest of Martin G. Helmricks, according to the evidence of defendants, was $900, the amount for which he deeded his interest to his brother, Arthur Helmricks. The only other evidence as to the value of the land was that of plaintiff, who estimated it from $7,200 to $8,000. On the evidence adduced we are of the opinion that the equity of Martin G. Helmricks in the land was of the approximate value of $900.

The record shows, however, that Martin G. Helmricks informed his brother Arthur of the pendency of the action on which judgment was subsequently obtained against him by McBride prior to the execution of the deed. The deed recited a consideration of $900, but the evidence is undisputed that the grantor received an unsecured note for that amount. The evidence establishes beyond question that Arthur Helmricks, the grantee, had full knowledge of the action of Martin G. Helmricks in stripping himself of all his property before any amount was paid on the note. Martin G. Helmricks gave very unsatisfactory evidence. He was unable to answer the most simple questions regarding the whole transaction. The record is replete with evidence that Martin G. Helmricks engaged in a systematic scheme to divest himself of all his property for the purpose of defrauding the plaintiff. Just three days before plaintiff obtained his judgment the deed was executed and delivered to Arthur Helmricks under circumstances revealing the fraudulent character of the transfer. The grantee of the deed admits that he knew of the nature of the transaction

before any payments were made on the $900 note. We think the case is determined by the following rules of law:

A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is persumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction by a preponderance of the evidence. *Lincoln Savings & Loan Ass'n v. Mann,* 129 Neb. 26, 260 N. W. 559.

A person who purchases with notice, though for a valuable consideration, is not protected. To constitute a *bona fide* purchase for a valuable consideration, it must be without notice and with the consideration actually paid. *Savage v. Hazard,* 11 Neb. 323, 9 N. W. 83.

If a vendee makes payment of any part of the consideration after receiving notice of the fraudulent character of the transfer, to that extent he is not a *bona fide* purchaser for value. *Birdsall v. Cropsey,* 29 Neb. 672, 44 N. W. 857.

A conveyance of real estate, whether founded on a valuable consideration or not, if entered into by the parties for the purpose of hindering or delaying a creditor, is void as to such creditor. It is not enough that such transfer be made for a valuable consideration, it also must have been made in good faith. In the instant case the transfer was presumptively fraudulent and the evidence is not sufficient to show that it was made in good faith. The payment of a valuable consideration for the transfer of property is not inconsistent with an intent to defraud. It is merely a circumstance in determining the question of intent. But in the case before us the accepted consideration was an unsecured note given three days before plaintiff obtained his judgment. The history of the case and the previous transactions pertaining to Martin G. Helmricks' interest in the personal property clearly indicate a course of conduct incompatible with the existence of good faith. The law will not permit one man to assist another in defrauding a third person where it appears that they were actuated by motives

denounced by the statute (Comp. St. 1929, secs. 36-401, 36-405, 36-406). It having been determined that the grantee in the deed had full knowledge of the fraud before any of the consideration actually moved to the grantor, the deed will be set aside and the property subjected to the rights of the judgment creditor. The question whether the consideration was adequate is unimportant under such circumstances.

It is not disputed that Martin G. Helmricks had a one-twelfth interest in the Hambridge note and mortgage. An execution having been issued and returned unsatisfied, and the interest of Martin G. Helmricks not being one that could be reached by an action at law, plaintiff was clearly entitled to a decree for an accounting of the judgment debtor's interest and an order applying the proceeds of such interest to the payment of the judgment. *State Bank of Ceresco v. Belk,* 68 Neb. 517, 94 N. W. 617.

The decree of the district court is reversed, with directions to the trial court to enter a decree setting aside the deed executed and delivered by Martin G. Helmricks and wife to Arthur Helmricks, for the reason that it was made for the purpose of defrauding plaintiff. The trial court is further directed to determine the interest of Martin G. Helmricks in the Hambridge note and mortgage and to enter an order subjecting such interest to the payment of plaintiff's judgment.

REVERSED.

MARGARET O'BRIEN, APPELLEE, V. J. I. CASE COMPANY ET AL., APPELLANTS.

2 N. W. (2d) 107

FILED JANUARY 30, 1942. No. 31240.

1. **Damages.** In consideration of the medical evidence and disabilities suffered by the plaintiff, the verdict is excessive and appears to be the result of passion and prejudice, such as to require a new trial.

2. **Automobiles.** The law imposes duties on drivers of motor vehicles on public highways where automobiles are following each other. It is the duty of the driver of an automobile following another to remain at such distance as is reasonable and prudent, having regard for the speed of vehicles and the condition of the highway, and to indicate, by proper signals, his intention to turn and pass the car ahead of him. It is likewise the duty of the driver of the car in front, if he desires to turn to the left, or to the right, or to stop, to indicate, by proper signals, such desire and intention. The failure of either driver to properly observe the duties placed upon him may be taken into consideration by the jury, together with all other circumstances in the case, to determine the negligence of such driver or drivers, as to which one, if either, was guilty of negligence, constituting the proximate cause of the collision and resulting injuries to the plaintiff.
3. **Trial.** Under the evidence in the instant case, the question of negligence is one for the jury.

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

Hall, Cline & Williams and *Flavel A. Wright*, for appellants.

Max G. Towle and *Archie C. O'Brien, contra.*

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

MESSMORE, J.

This is an action for damages for personal injuries received by the plaintiff while riding as a guest in an automobile, driven by her brother, which collided with an automobile, driven by an employee of the defendant corporation. Plaintiff recovered the amount of $10,000. From this verdict and judgment thereon, defendants appeal.

The occurrence of the collision and the parties involved therein are not in dispute. Plaintiff's amended petition is proper in form to state a cause of action for negligence. The pleadings are hereinafter briefly summarized:

Defendant Waite negligently and unlawfully, by applying his brakes, without proper warning or signaling of any kind, as required by law, and without due regard for life

or property of others on the highway, suddenly stopped his car on the highway directly in the line of traffic to assist two women hitchhikers, causing the automobile in which plaintiff was riding to hit the rear end of defendant driver's car. Further, the defendant driver failed to have his car under proper control. Defendants' answer contained a general denial and affirmative allegations of negligence as against the driver of the car in which plaintiff was riding, and that any damages sustained by the plaintiff were caused directly and proximately by the driver of such car in operating it at a rate of speed greater than was reasonable and proper under the circumstances, in failing to keep a proper lookout, and in not seeing the car which he was following, or, if he did see it, in disregarding such knowledge and failing to reduce his speed to avoid running into the car ahead of him, and in failing to turn to the left or right to avoid a collision. The answer contains a further charge of contributory negligence in that the plaintiff failed to keep a proper lookout and to warn the driver of his negligence. The reply was a general denial. The record reflects the following:

The plaintiff, a young lady, 27 years of age, a competent employee of the Lincoln Telephone and Telegraph Company, left Lincoln at about 3:30 p. m. on August 19, 1939, in a Chevrolet automobile, operated by her brother, James J. O'Brien, for Norfolk, Nebraska, to visit a sister. O'Brien was driving at a speed of not to exceed 45 miles an hour till he reached the place of the accident, which was about 20 miles distant from Lincoln, three miles north of Ceresco, and approximately nine miles south of Wahoo. Just prior to the accident they passed two cars. O'Brien first saw the Waite car, some distance ahead of him, when three-fourths of a mile to a mile south of the place of collision. Standing near an intersection, 90 to 100 feet south of that point, were two young ladies, seeking a ride to Mead. The defendant driver, operating a 1939 Plymouth coupé, noticed the girls when he was approximately one-fourth of a mile south of the intersection. The width of the oil mat at the

scene of the accident is 27 feet; the distance from the middle of the intersection, three miles north of Ceresco, to the top of the hill south is 975 feet, and from the middle of the intersection to the top of the hill to the north 1,280 feet. A No. 77 highway sign is 113 feet south of the intersection from the middle thereof. The grade to the south is practically level for approximately 900 feet; then slopes to the south and down over the top of the hill for 200 feet where it is fairly level, then rises to the north.

The defendant driver testified that, as he came over the crest of the small hill south of the intersection he took his foot off the accelerator; the girls waved; his car was coasting as he approached the intersection; he then applied his brakes "just a little bit and slowed down to probably 20 miles an hour," stopping somewhere near the No. 77 highway sign on the east side of the road, and then came to a complete stop, with the front end of his car "a little farther over than the the back end of the car, and the right front wheel was down off on to the rough part of the slab;" that there was sufficient room on his left to permit a car to pass; that as he stopped he turned around and "looked back to see what the girls were doing;" that he saw a car approaching at a distance of from 50 to 75 feet away and he heard the sound of the brakes at the same time; that he shut his eyes; there was a sudden impact, and his car was knocked to the north of the highway into a ditch, facing east. The O'Brien car had been following the defendant driver for at least a mile at a distance of 50 to 100 feet behind him. When the defendant driver stopped, the plaintiff's brother applied the brakes of the Chevrolet, turned to the left in an attempt to avoid a collision, but was unable to accomplish his purpose.

O'Brien testified that he noticed the girls when he was 100 to 300 feet south of the intersection; that they were indicating they wanted a ride; that the point of impact when the two cars collided was 40 to 50 feet north of the No. 77 sign and approximately 140 to 160 feet north of the intersection; that defendant driver, without putting out

his hand or signaling that he was going to stop, slammed on his brakes and stopped suddenly, directly in the line of traffic, in front of the O'Brien car; that he gave no signals from his lights. The speed of the two cars remained about the same until the defendant driver's car stopped and O'Brien applied the brakes on his car. After the accident the plaintiff was removed to a hospital in Wahoo, and her brother remained at the scene of the accident to clear the highway.

The testimony of the two girls corroborated the defendant driver to a marked extent, with some variation as to distances; that is, when the driver stopped the O'Brien car was a half-block to a block distant from him; that no car was coming from the north at the time; that the tire marks of the O'Brien car ran from the south side of the crossroad, "kittycornered over the white line of the road" in a northwesterly direction, beginning on the south side of the intersection. The deputy sheriff testified that he saw skid marks east of the center line of the highway, and that the left wheels were two feet east of the center line, which controverts the testimony of the two girls on this point. O'Brien testified that at or about the time of the accident a Ford Model T car, with some boys in it, was approaching from the north, creating a condition which might have involved such car in the accident as O'Brien turned to the left.

Much expert testimony was introduced regarding tests made with respect to the speed and the stopping of automobiles. It was shown that the stopping distance of a 1939 Chevrolet, being driven by a normal person of the age of O'Brien, with a specified reaction to automobile equipment, traveling at 40 miles an hour, would be 109 feet; at 45 miles an hour, 149 feet. The testimony with reference to skid marks is that there were no such marks evident on the pavement, beginning where the skid marks of the O'Brien car stopped, with the exception of a distance of 8 to 10 feet, supposedly made by the Waite car when it was struck, while the O'Brien car proceeded 57 feet, as shown by the skid marks attributed

to it, and such marks being evidenced on the highway for that distance. O'Brien testified that he drove on an average of 50,000 miles a year, was an inspector of trucks and automobile equipment for the state railway commission, and had been trained in the state patrol. We deem a further recital of the testimony unnecessary.

The defendants contend that the trial court should have directed a verdict in their behalf on the physical facts as shown by the expert testimony, coupled with the distances, as testified to, and the testimony with respect to the speed of the respective cars. Many provisions of the statute are cited, which we have considered, together with section 39-1145, Comp. St. Supp. 1935, which provides: "(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicles and the traffic upon and condition of the highway."

The contention of defendants is that the negligence of the driver of the automobile in which plaintiff was riding constituted the proximate cause of the accident, and that the plaintiff is barred from recovering from a third person. In support of this contention, defendants cite two Louisiana cases from the court of appeals of that state, which are similar in fact to the case at bar. *Fuld v. Maryland Casualty Co.*, 178 So. (La. App.) 201; *Session v. Kinchen*, 178 So. (La. App.) 635. In the former case the distinction between it and the case at bar is that the driver of the truck, which was proceeding ahead of the Fuld car at a rate of 35 miles an hour, suddenly found that he was out of gas, compelling him to coast along the line of traffic, slowing down his truck considerably. The Fuld car had been traveling at 40 miles an hour, within 150 to 170 feet of the truck, and ran into it. In the instant case there is evidence that the defendant driver suddenly stopped without signaling. In the *Fuld* case the court stated it did not think "the truck driver came to such a sudden stop as to require him to give the signal;" rather, that the excessive speed of the Fuld car was the proximate cause of the accident, and that it

was the duty of the driver of the Fuld car to keep a proper lookout and keep his car under control. There is a distinction between a sudden stop and the coasting of a car, both with reference to the time to act and the distance within which a person might keep a proper lookout. In the case of *Session v. Kinchen, supra,* while there was a controverted question as to the stop made by Kinchen, the testimony is that he came to a stop gradually. In the instant case there is definite evidence that Waite came to a sudden and abrupt stop.

Without detailing the law set forth in the two Louisiana cases, we conclude that the testimony in the instant case is of such a controversial nature, and conflicting, as a question of fact, as to which driver was guilty of negligence, constituting the proximate cause of the accident, as to render it a question for the jury. We are not convinced that the physical facts in the instant case are such as would bar the submission of the case to the jury.

Our law places duties on drivers of motor vehicles traveling on the public highway. The duty of the driver of a car proceeding in front of another car is to indicate by proper signals his intention to turn to the left or right, or to stop, or to give any other signal that may be of assistance to the driver of the car following, and the driver of the car following has, likewise, certain statutory duties and must give certain signals in the event he desires to turn out and pass the car in front of him. Whether or not the proper signals were given and whether or not the driver of either car, under the circumstances, was negligent are, ordinarily, jury questions. The distances between cars, one following the other, and the ability of the driver to stop under given circumstances differ. The driver of an automobile following another, while he must obey the law, as heretofore cited (Comp. St. Supp. 1935, sec. 39-1145), is not bound to anticipate that the driver of the car ahead is going to come to a sudden and abrupt stop for the purpose of picking up hitchhikers.

The two automobiles, in the instant case, were proceed-

ing along an almost level, dry highway, with good visibility, with nothing to interrupt their driving or make it difficult. The Waite car had been proceeding at 50 miles an hour; the O'Brien car at 40 to 45 miles. Obviously, as long as the cars retained their respective speeds, there would be no collision, but if the car ahead stopped suddenly or abruptly or slowed down instantly, without the driver thereof giving any signals, as required by law, the driver of the car following would be confronted with an emergency. We believe O'Brien acted as an ordinary, prudent person would act under like or similar circumstances. He immediately applied his brakes in an endeavor to stop his car and tried to turn to the left and avoid the Waite car. He could not turn to the right; the girls were in that vicinity.

In consideration of the entire record, we conclude that the negligence of the defendant driver and the negligence of the driver of the car in which the plaintiff was riding presented a jury question under proper instructions.

Defendants contend that the plaintiff was guilty of contributory negligence in that she failed to notify the driver of the car in which she was riding of the danger that might be apparent, and for her failure to keep a proper lookout for any danger that might arise. The situation was not of an unusual nature, or out of the ordinary, such as to require the plaintiff to warn her brother with reference to his driving. We find no evidence of contributory negligence.

Defendants complain that the verdict is grossly excessive, is the result of passion and prejudice, and should be set aside. We have examined the evidence with reference to the personal injuries and disabilities received by the plaintiff, as given by the attending physicians and medical experts. The plaintiff received an injury to her right elbow, diagnosed as a a contusion of the periosteum of the right medial condyle. This injury caused her some considerable pain, but the medical experts testified that her elbow would become normal with the lapse of time. She has a scar, caused by a deep cut on her right brow just below the hair line, about three and a half inches long, the cut extend-

ing down to the skull. This scar is permanent. Other scars she has, according to the medical testimony, will in time more or less diminish. Her total medical expenses and care amounted to $398.35. There is no evidence of any other permanent disability. She complained of headaches and especially of pain in her right elbow and of irritability. She did receive a moderate degree of shock and anemia. All of this seems to have been greatly relieved with the lapse of time. She lost no wages in her employment and is still competent to perform the duties required of her by her employer. The cases cited with reference to verdicts are of little value. We are bound by the record before us in each case.

In consideration of the medical evidence, in that the plaintiff will regain normalcy in every respect with the lapse of time, we are driven to the conclusion that the verdict of the jury is excessive and resulted from passion and prejudice. The court erred in overruling defendants' motion for a new trial.

The judgment is reversed and the cause remanded.

REVERSED.

EARL L. CORYELL, APPELLEE, V. ROBINSON OUTDOOR ADVERTISING COMPANY OF NEBRASKA, APPELLANT.

2 N. W. (2d) 106

FILED JANUARY 30, 1942. No. 31263.

Appeal. In a law action tried to a jury on substantially conflicting evidence and under proper instructions, the verdict of the jury will not be disturbed.

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

Max G. Towle and *C. Russell Mattson*, for appellant.

Chambers, Holland & Locke, contra.

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

YEAGER, J.

The action here by Earl L. Coryell, plaintiff and appellee, is for rent and damages against Robinson Outdoor Advertising Company of Nebraska, a corporation, defendant and appellant. In the action the defendant filed a cross-petition for return of rent. The case was tried to a jury and verdict was returned in favor of plaintiff for $500 rent, and damages in the amount of $50. From this judgment the defendant has appealed.

The record discloses that on August 26, 1936, Earl Coryell Company, a corporation, was lessee in possession of premises on the northwest corner of Fourteenth and N streets in Lincoln, Nebraska. The premises were bounded on the west by a building known as the Freadrich building, and on the north by an alley. On this date a written lease was entered into between Earl Coryell Company and Waller Signs which gave Waller Signs the right to erect and maintain advertising structures and signs on a portion of the north and west sides of the premises in question. The terms of the lease were modified slightly by letters passing between the parties. The lease as modified became effective for a term of five years at an annual rental of $250 a year, payable on September 1 of each year. In 1937 Earl Coryell Company assigned its interest to Earl L. Coryell, and in the same year Waller Signs assigned its lease to the defendant herein. The rent was paid for all except the last two years of the term. On the premises the plaintiff operated a filling station and parking lot.

For his cause of action the plaintiff alleged the failure to pay rent in the amount of $500 according to the terms of the agreement, and further the amount of $50 damages on account of use and occupancy of space in the parking lot without right on the part of the defendant.

The defendant by answer set up the affirmative defense that it was under no obligation to pay the rent for the reason that the plaintiff in March, 1939, prevented the defendant from going upon the premises leased and refused to permit the erection of signs in accordance with the lease

and thus violated the terms thereof, all of which amounted to an eviction. For cross-petition the defendant alleged that it had paid the year's rent which began on September 1, 1938, and ended September 1, 1939, and that by reason of the claimed eviction it is entitled to recover back the rent for one-half of said period or $125.

The pertinent evidence on the claim of plaintiff is not greatly in dispute. The final lease agreement permitted the defendant to use and occupy for its purposes a strip of ground two feet in width on the west side of the premises, extending northward to the alley from a point twelve feet north of the south line. Early in March of 1939, the defendant sent certain of its employees onto the premises to dig holes in which were to be placed concrete anchors, the purpose of which anchors was to hold steel footings for advertising structures to parallel the west line of the premises. Three holes were dug and each extended eastward from the west line approximately 37 inches, which was 13 inches farther east than was allowable under the lease agreement. On his attention being called to the matter the plaintiff refused to permit the employees of defendant to continue with their work. The next day the employees of defendant came back to resume operations. They found that the holes were covered by trucks and automobiles. This was done at the behest of plaintiff to prevent completion of the anchors. Plaintiff refused to allow these vehicles to be removed. Thereupon the defendant abandoned the premises claiming breach of lease and eviction by the plaintiff.

Evidence of the plaintiff is to the effect that he was informed by a representative of the defendant that the structures to be placed on these footings would extend more than two feet from the west line, and that his sole purpose in doing what he did was to prevent erection of structures in violation of the lease agreement. On this point the evidence of the defendant was to the effect that, notwithstanding the width of the anchor holes, and anchors which would have been flush with the ground if completed,

there was no purpose to extend the structures beyond the two-foot limit, and that plaintiff was so informed, but notwithstanding such information he refused permission to continue.

This presented an issue of fact on substantially conflicting evidence. This court has repeatedly held that in a law action tried to a jury, issues of fact on substantially conflicting evidence are triable to a jury under proper instructions. *Doyle v. Franek,* 82 Neb. 606, 118 N. W. 468; *Dworak v. Shire,* 126 Neb. 474, 253 N. W. 655; *Stevens v. Fall,* 133 Neb. 610, 276 N. W. 401. The verdict on this phase of the case finding substantial support in the evidence, and there being no error in the instructions, no reason appears for disturbing the action of the trial court.

It necessarily follows that this disposition of plaintiff's action for rent disposes of defendant's cross-action for refund adversely to it.

We now direct our attention to plaintiff's claim for damages. The plaintiff claims that the defendant dismantled certain of its structures on the north side of the premises and left the material in plaintiff's parking lot where it covered a space sufficient for the parking of four automobiles, and that it remained for a period of eight or ten weeks, and that the rental value of the space was 80 cents a day. The defendant does not question the area covered nor the measure of damage. It only questions the length of time this equipment was allowed to remain. Again this presented an issue of fact on substantially conflicting evidence, so also in this connection the verdict and judgment may not be disturbed.

The judgment of the district court is

AFFIRMED.

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT, V. ETHEL STOUT, EXECUTRIX, ET AL., APPELLEES.
2 N. W. (2d) 315

FILED FEBRUARY 6, 1942. No. 31281.

Executors and Administrators. A devisee of specific real property was also named as executor of the will with power to sell real property; qualified as executor; sold real property from the residuary estate; during the administration of the estate applied estate funds to his own use, for which he was surcharged by the court; became insolvent; his surety paid the amount of the surcharge and was subrogated to the rights of the estate. *Held*, that the surety was not entitled to a lien upon the devise for the amount of funds so used and was limited to the ordinary legal remedies to enforce payment.

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

Hall, Cline & Williams, for appellant.

John S. Bishop and *Harry R. Ankeny, contra.*

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

SIMMONS, C. J.

Plaintiff filed its petition in the district court seeking to have a lien declared upon certain real property. Defendants demurred separately. The trial court sustained the demurrers. Plaintiff elected to stand on its petition. Its action was dismissed. Plaintiff appeals.

For the purpose of this decision, the following facts, alleged in the petition, are taken to be true.

Nellie K. Rector, by will admitted to probate June 13, 1935, made nine specific cash bequests totaling $9,400; five specific bequests of personal property; and devised certain real estate in Lancaster county to Richard F. Stout; devised the remainder of her estate, real, personal, and mixed, to a residuary devisee; nominated Stout as executor of her will "and empower him to sell any real property of which

I may die seised without obtaining the license of any court for such sale."

June 13, 1935, Stout qualified as executor by filing his oath, together with his bond in the sum of $5,000 upon which the plaintiff was surety.

April 17, 1937, the First Trust Company of Lincoln obtained a judgment against Stout for $360.92 which became a lien against the property devised to Stout by Mrs. Rector.

Under the authority in the Rector will, Stout sold the real estate for more than $2,000.

Stout died October 15, 1939, having been the executor of said estate from his appointment until his death. Under Stout's will, admitted to probate, Ethel Stout is the sole devisee and also the administratrix with the will annexed of the Stout estate.

After Stout's death, Ethel Stout filed a report for him as executor of the Rector estate, to which objections were filed by the residuary devisee and legatee. Upon hearing, the county court on July 3, 1940, entered an order surcharging the account of Stout as executor in the sum of $1,349.21 for moneys received and not accounted for. This sum was paid by the plaintiff to the administrator *de bonis non* of the Rector estate, and it thereby became subrogated to all rights of such administrator against the Stout estate.

The only asset in the Stout estate is the real estate devised to him by Mrs. Rector, which has a value of less than $2,000 after deducting unpaid taxes. Claims allowed against Stout's estate, exclusive of this claim, are in excess of $5,000. The Stout estate is insolvent.

On April 30, 1940, and within time, plaintiff filed a contingent claim against the Stout estate and on July 5, 1940, filed its "absolute claim or set-off" against the devise to Stout under the Rector will.

Plaintiff alleges that, by reason of the fact that Stout, as executor, applied to his own use funds belonging to the Rector estate, he thereby elected to receive to that extent payment of his devise in moneys instead of property, and

that said sum of $1,349.21 is a first lien or claim upon the real estate superior to the claim of Ethel Stout as devisee and as administratrix with the will annexed, and to the judgment of the First Trust Company. Plaintiff prayed for a decree that the sum of $1,349.21 is a first lien upon the real estate and for equitable relief.

Ethel Stout personally and as administratrix demurred for the reasons that the petition does not state facts sufficient to constitute a cause of action and that the court has no jurisdiction of the subject-matter. Defendant First Trust Company demurred on the grounds that the petition did not state a cause of action and that plaintiff had an adequate remedy at law.

The petition recognizes that title to the real estate passed to Stout under the Rector will and to Ethel Stout under the Stout will. Plaintiff alleges that Stout, by applying to his own use funds belonging to the Rector estate, "elected to receive to that extent payment of his devise in moneys instead of property," and by reason thereof the sum so used becomes a lien superior to the claim of Ethel Stout as devisee and as administratrix. It necessarily follows that plaintiff claims that the election to take money and not property and the creation of the lien by the taking occurred during Stout's lifetime. It further follows that Stout's death did not change this situation, for had Stout lived, had he reported his doings as executor and had his account been surcharged for the amount here involved and had his surety paid the amount, the problem would have been the same.

It may be pointed out here that the petition is silent on three matters of fact: First, when did Stout sell the Rector real estate? second, when did he apply estate funds to his own use? and, third, when did he become insolvent?

We have then this situation as presented by the plaintiff. Title to this real estate vested in Stout personally at the date of Mrs. Rector's death, a date not disclosed by this record, but obviously prior to the probate of her will on June 13, 1935. He held that title, free from any lien or

claim until April 17, 1937, when the lien of the First Trust Company judgment attached. No lien or claim thereafter attached to that title during his lifetime, unless it is determined that a lien attached thereto when he applied estate funds to his own use. This date is not set out in the petition. We cannot determine when that application of funds occurred prior to the date of his death October 15, 1939. Neither can we say that the misuse of estate funds in 1939 establishes as a fact that he then elected to take money instead of the real estate, title to which vested in him in 1935.

The plaintiff stands in the position of a creditor of the Stout estate. As such it has filed a claim against the Stout estate. As such a creditor, should it be given a preferred status, due to the source of Stout's title to the real estate?

We have not been cited to a statute that makes a specific devise to an executor subject to a lien in favor of the estate for the improper administration of estate funds. The will of Mrs. Rector places no such charge upon the devise. The necessary conclusion is that Stout held title to the property subject only to such claims as are established by the ordinary legal remedies to enforce payment, unless it should be determined that an equity court should intercept the devise and attach a lien thereto because of the facts here recited.

Plaintiff's contention is that Stout was empowered to sell the real estate, that he sold other real estate, that this power extended to his specific devise, and that, because of the power to sell, the real estate here involved passed under his dominion as executor and not to him as an individual.

We do not so construe the power of sale. The power was obviously given for the purpose of avoiding the requirement of "obtaining the license of any court" should it become necessary to sell property. This is a power which Stout could exercise consistent with his duties as executor for the purposes for which a court license could be obtained, to wit, to pay debts of the estate and costs of administration. The will did not direct Stout to sell real estate. He

did exercise that power in the sale of real estate, obviously from the residuary estate, and thereby converted real property into personal property. Why he sold real estate is not disclosed. No question is presented as to the legality of the exercise of that power. There is no showing that the money used by Stout, involved in this proceeding, came from the sale of the real estate. Clearly Stout, as devisee, had the power to convey the title to the real estate here involved at any time after title vested in him, and that without the consent of the court. We do not consider that the power given Stout as executor to sell real estate is in any wise a controlling element in this case.

By the devise this real estate was taken out of the residuary estate. It does not appear that it was necessary that it be used to pay debts or costs of administration or that it be used for any estate purpose. Every allegation of the petition points to Stout's holding as personal owner. There is no fact recited from which it can be determined that Stout either retained possession or should have retained possession or control of this real property for estate purposes. On the contrary, the only conclusion to be drawn is that at no time was it necessary that this estate be possessed or sold by Stout as executor for any purpose connected with the estate or the proper administration of the provisions of the will. The devise to Stout is in no wise connected with or contingent upon the performance of his duties as executor. He could have accepted the devise and declined to act as executor. He could have acted as executor and declined the devise. No act of the executor was necessary to vest title in Stout. The estate that vested in Stout under the Rector will was not a part of the Rector estate which it was Stout's duty to administer as executor.

We have reviewed the decisions from other jurisdictions relied upon by the plaintiff in the light of the facts of those cases, the principles announced and our own decisions upon the questions there presented. Those cases are not considered to be controlling of the question here presented.

Three of them will be mentioned herein for the purpose of showing the difference between the cases relied upon and the case at bar.

In *Stanley v. United States Nat. Bank*, 110 Or. 648, 224 Pac. 835, the executor was directed to take, and did take, exclusive and complete control of all the assets of the estate with power to hold, to invest, to sell, and to convey any of the estate property as to him seemed best. The will clearly contemplated that the executor should manage the estate and keep it largely intact for a period of years. Specific devises of real property were not made. Residuary devises and legacies were included. After seven years of such service as executor, approximately one-half of the estate was dissipated, and the executor was insolvent. The case involved a contest between a judgment creditor of the executor-devisee and the other devisees. The court held that the executor occupied the position and possessed the powers of an ordinary trustee charged with the duty of paying over the trust property to the beneficiaries of the trust. The court further held that the executor was required to set aside the proceeds of any sale for the benefit of the legatees and devisees of whom he was one. He exercised his powers, disposed of assets, and took more than his share of the estate. His rights being satisfied, it was held that his title to the estate property was extinguished. In the body of the opinion the court makes this significant distinction: "The Maryland cases above cited, and the English cases referred to therein, hold that a legal estate owned or acquired by a trustee, and not a part of the trust estate to which he owes the duties of a trustee, is not liable to be intercepted by a court of equity to make good trust funds misappropriated by the trustee. That principle does not operate to prevent a court of equity from reaching the beneficial interest of Stanley in the real property of the estate for the purpose of satisfying, so far as it will, his *devastavit*, for the reason that in the instant case the legal title to the realty which vested in Stanley, at the death of the testator, constituted a part

of the estate which it was his duty to administer, as executor."

Devries v. Hiss, 72 Md. 560, 20 Atl. 131, is distinguishable on the facts. There the legal title vested in five trustees. One of the trustees was also a beneficiary of the trust. The trustees were empowered to sell a part or the whole of the estate in order to make a division required by the will. While the legal title was in the trustees and before his share was ascertained by partition, the one trustee misappropriated trust funds. The amount of the misappropriation was deducted from his equitable share.

The case of *Gosnell v. Flack*, 76 Md. 423, 25 Atl. 411, is not like the case at bar in its facts. It states that "A legal estate owned or acquired by a trustee is not liable to be intercepted by a court of equity to make good trust funds misappropriated by the trustee."

The decision in *Stanton v. Stanton*, 134 Neb. 660, 279 N. W. 336, did not present a situation identical with the one at bar, but certain conclusions there reached point the way to a solution of this problem.

In the *Stanton* case the devisee was, prior to the execution of the will, indebted to the testator on certain promissory notes. The will was silent as to this indebtedness. The question there was, should the indebtedness to the estate be satisfied from the devise ahead of a judgment lien against the devisee that attached to the devise at the time of the testator's death? In the instant case, there was no indebtedness due from Stout to Mrs. Rector at the time of her death, and none to her estate so far as this record discloses for over four years thereafter.

Following previous decisions of this court, the *Stanton* case redeclared: "The title to real estate under a devise in a will is vested in the devisee at the instant of testator's death." Plaintiff's petition is clearly drawn in recognition of the above rule. As stated in the *Stanton* case, the title so vested in the devisee is "subject to the right of the executor to sell the land to pay debts duly allowed against the estate and the expenses of administration." Neither of those conditions is here involved.

Under these circumstances, as was held in the *Stanton* case, the only remedy of the plaintiff is to invoke the ordinary legal remedies to enforce payment.

The judgment of the trial court is

AFFIRMED.

DRAINAGE DISTRICT NO. 2 OF DAWSON COUNTY, APPELLEE, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT.
2 N. W. (2d) 321

FILED FEBRUARY 6, 1942. No. 31291.

1. **Appeal.** Where a jury is waived in a law action, the case is tried to the court, and the final judgment rests upon findings by the court, in order that errors of law occurring at the trial may be considered by this court, the district court's attention must have been called to them by a motion for a new trial.
2. **Contracts.** Where, in consideration of money payments to be made to it, one party to a contract has fully performed and the other has fully received all that it contracted to receive, the latter party cannot avoid liability for payment because, in the light of subsequent events, it considers it has made a poor bargain.
3. **Corporations.** "Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers." *Fremont Nat. Bank v. Ferguson & Co.*, 127 Neb. 307, 322, 255 N. W. 39.
4. **Principal and Agent.** "'An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind his principal.' Such apparent authority of the agent cannot be extended or restricted by by-laws or other instructions to the agent by its principal, in the absence of actual notice thereof." *Sindelar v. Hord Grain Co.*, 116 Neb. 776, 219 N. W. 145.
5. **Corporations.** "The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have

ratified it." *Citizens Savings Trust Co. v. Independent Lumber Co.*, 104 Neb. 631, 178 N. W. 270.

6. ———. "A corporation may not, in violation of its charter, enter into a contract, whereby it receives and retains the benefit of its illegal contract, and then shield itself from liability for benefits received by pleading *ultra vires* as a defense." *Simmons v. Farmers Union Cooperative Ass'n*, 114 Neb. 463, 208 N. W. 144.

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

Lyman M. Stuckey, for appellant.

York & York, contra.

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

SIMMONS, C. J.

This is an action to recover the amount due upon a written contract. The cause was tried, by stipulation, to the court without a jury. Defendant appeals from a judgment against it.

Plaintiff's petition alleged that it was a corporation and political subdivision of the state existing by virtue of the laws relative to drains and drainage; that defendant is a private corporation existing by state law; that September 30, 1930, plaintiff and defendant entered into a written agreement, set out in full in the petition, whereby in consideration of plaintiff's agreeing to place a 36-inch-diameter vitrified clay pipe under defendant's main canal, of the reclaiming "of other lands" within the drainage district and of draining lands of the defendant, and "other valuable consideration," the defendant agreed to pay the plaintiff the sum of $2,639.75 in instalments over a period of twenty years. The agreement recited that the contract was in full settlement and in lieu of assessments and apportionment of benefits that have been or might be made against defendant's real estate within the boundaries of plaintiff's district. The plaintiff alleged that it had

fully performed its part of the contract; that defendant on November 2, 1937, had paid $395.97 on said contract; that it was in default on all other payments up to and including May 1, 1940, for which plaintiff prayed judgment.

Defendant by answer admitted the corporate capacities of the parties, the demand for payment of the sums alleged to be due and that they had not been paid, and denied generally. Defendant affirmatively alleged that it was incorporated for the purpose of constructing and maintaining a system of irrigation canals and laterals and doing acts necessary to the proper conveyance of irrigation water to lands under its system and set up five separate defenses as follows: (1) That there was no consideration for the contract; (2) that the plaintiff drainage district had no power to assess taxes against defendant's right of way; (3) that the contract is beyond the corporate power of the defendant corporation and is therefore *ultra vires*; (4) that the president of the defendant company had no authority either express or implied to enter into this contract; (5) that the debt created exceeded the statutory and charter debt limit of the defendant company and is therefore void.

Plaintiff by reply denied affirmative allegations of the answer, and alleged that defendant had retained the benefits of the contract; had ratified it by the payment; and was estopped to interpose the defense of *ultra vires* of the corporation or of its president.

The record sustains the following statement of facts: The defendant and its predecessors in title have operated an irrigation canal and lateral system for a number of years. It was organized in 1913 with Roy F. Stuckey, its principal stockholder, as president and managing official. He was in charge of its office, directed its affairs and made all decisions so far as dealings with other parties were concerned. In 1930 and prior thereto land in the area served by defendant needed drainage. Land to the north of it was seeped, and percolating waters and flood waters accumulated on the north side of defendant's ditch

and damaged land adjacent thereto. At least one action for seepage damage had been instituted. Plaintiff district was formed to drain the land south of the ditch. Its drainage ditch commenced at the south line of defendant's right of way and ran to the river. Plaintiff had apportioned benefits and proposed to assess defendant for the sum of $639.75. Verbal negotiations were conducted resulting in the contract in suit. Plaintiff did not assess defendant for benefits.

Plaintiff built the drain under defendant's ditch so that flood waters and seepage waters to the north of defendant's ditch could be drained into plaintiff's ditch. There is dispute in the record as to whether this was made of vitrified clay pipe or corrugated iron, and it appears to have been 48 inches in diameter. Apparently no complaint was made until the trial in January, 1941, as to the material used and none as to the size of the drain. That the drain served the purpose for which it was constructed is established by the evidence.

Defendant at no time questioned or denied its liability under the contract until about the beginning of this litigation in April, 1940. Repeated efforts made by plaintiff to collect the payments due failed because the defendant claimed to be short of money. Defendant, however, in November, 1937, did pay the plaintiff the sum of $395.97 to apply on this contract. This is the sum of the first three payments provided in the contract, without penalty interest. This payment was made by the defendant on direction of Roy F. Stuckey and later reported to defendant's board of directors at the annual meeting and approved by it. As late as the spring of 1940 Mr. Stuckey told plaintiff's attorney that the defendant "was short on operating money;" that it could pay $500. Mr. Stuckey further testified upon cross-examination: "Q. The truth is, if the Defendant Company had been in good shape, had plenty of cash on hand, and their finances were running along all right, the amount would have been paid to date today, isn't that right? A. It would have been paid, yes, that was the understanding."

Full payment of the amount then due was required and refused and this action instituted, resulting in a judgment for the plaintiff.

The defendant's assignments of error must be considered in the light of the rule that, where a jury is waived in a law action and the case tried to the court, the court's findings have the effect of a jury's verdict and will not be set aside on appeal unless clearly wrong. *Helleberg v. City of Kearney,* 139 Neb. 413, 297 N. W. 672; 2 Neb. Digest, Appeal & Error, sec. 1008 (2).

Defendant's third assignment of error, presented first in its argument, is "That the court erred in overruling defendant's motion to dismiss plaintiff's petition at the close of the plaintiff's evidence." This is based upon an alleged failure to prove a consideration. "A motion for a new trial is just as essential as the basis of proceedings in error where the final judgment or order rests upon findings by the court as upon the verdict of a jury." *Weber v. Kirkendall,* 44 Neb. 766, 63 N. W. 35. "In order that 'error of law occurring at the trial' may be considered by this court, it is necessary, under our uniform holding, that the district court's attention must have been called to the same by way of a motion for a new trial." *State v. Citizens State Bank,* 115 Neb. 271, 212 N. W. 616. Here a motion for a new trial was filed. However, the correctness of the ruling of the trial court in overruling defendant's motion to dismiss was not presented in the motion for a new trial and is not properly before us. It may be said, however, that a consideration for the contract was proved and performance by plaintiff established in its case in chief.

Defendant next contends that the finding for plaintiff was erroneous "as the evidence shows no consideration for the contract, shows no benefit to the defendant, and no detriment to the plaintiff, but does conclusively show that the plaintiff was doing nothing more than it was already bound by law to do." It appears that the original plans for the drainage of this area contemplated one district to build a drain ditch on both sides of defendant's canal and that

its plans included the construction of the underdrain involved in this contract. However, that district was not created. Plaintiff was organized and, apparently following those plans in part, constructed its drain, beginning, however, at the south line of defendant's canal. This contract was then entered into and the underdrain built by plaintiff as a result of the contract. Subsequently a drainage district was organized north of defendant's canal and emptied into the head end of plaintiff's drainage ditch at the underdrain. The latter district is not a party to this litigation and its organization and construction are not shown to have altered the terms of the contract here in suit. It may be that, in the light of subsequent events, the defendant did not receive all of the benefits it had hoped would flow from this contract and that some of the benefits it received as a result of the contract might have come to it as a result of the construcion of the latter district. But those events do not release it from liability under this contract. Hindsight is often more illuminating than foresight. Defendant received what it contracted to receive and cannot avoid liability because, ten years after plaintiff executed the contract, defendant considers that it made a poor bargain.

Defendant next contends that plaintiff had no power to assess benefits to defendant. The legality of any assessment of benefits or a tax is not presented. Plaintiff is not trying to collect any such an assessment. As stated herein plaintiff did apportion benefits to the defendant in the sum of $639.75 and that amount was used in arriving at the total of the obligation of the defendant under the contract here involved. A question was raised before the contract was entered into as to whether or not the defendant was subject to such an assessment. By the contract defendant accepted that amount as a part of the consideration which it agreed to pay. Further, in its motion to dismiss, defendant stated that it was "not going to raise any objections to the assessment at this time" and apparently conceded its liability to pay the $639.75, for it stated that, "so

far as this $2,000 above the $639, there has been no consideration whatsoever shown and I think this thing should be dismissed as to the $2,000, and the Ditch Company demand to pay $639 with interest at the date of the assessment." We find no merit in this contention of defendant.

Defendant next contends that the contract is *ultra vires* of the corporation in that under its articles it had no authority to enter into the business of draining lands. The question of its corporate powers to enter into the contract was not raised by it when the contract was made. This, like its other defenses, is raised years after the execution of the contract and full performance by plaintiff. The defendant had power by its articles "To build, construct, use and operate and maintain one or more ditches or canals * * *." It does not appear that there was a specific prohibition upon such a contract. It does appear that defendant's ditch caused flood and seepage waters to accumulate on the north side thereof; that defendant thought it to its advantage to remove the same and avoid damage to its own property and liability to others; and that the construction of the underdrain accomplished those purposes; and also that defendant used plaintiff's ditch to dispose of excess waters. The following holding of this court seems to dispose of this contention: "Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers." *Fremont Nat. Bank v. Ferguson & Co.*, 127 Neb. 307, 322, 255 N. W. 39.

Defendant's next contention is that the contract was *ultra vires* of its president. Mr. Stuckey testified that he did not have authority to enter into this contract. It appears from this record that Mr. Stuckey had sole management of the defendant's affairs. He testified as to contracts which he says were submitted to the board of directors, but apparently that was done after and not before the contracts were made. He entered into this contract for the de-

fendant, signing it as president, without questioning his authority to do so or advising plaintiff of any lack of power in himself. He made the payment in 1937 without the prior sanction of the board of directors, but with their approval when he reported it to them. Defendant does not now question that payment. The extent to which he submitted matters to the board may be illustrated by the fact that he could not name all the members of the board as of the date of the trial. It appears that throughout this transaction the action of Mr. Stuckey was to all intents and purposes the action of the defendant, and that Mr. Stuckey with the consent of the board was in sole responsible charge of defendant's property and business and was authorized to carry on the business for which the defendant was organized. Under these circumstances the following rules are applicable. " 'An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind his principal.' Such apparent authority of the agent cannot be extended or restricted by by-laws or other instructions to the agent by its principal, in the absence of actual notice thereof." *Sindelar v. Hord Grain Co.*, 116 Neb. 776, 219 N. W. 145.

But assuming that Mr. Stuckey acted without actual authority when this contract was entered into in 1930, certainly the corporation had knowledge of the unauthorized act when Mr. Stuckey reported to the board that he had paid the money to the plaintiff in 1937. The board of directors did not question his authority to enter into the contract when it was called to their attention. It affirmed that payment and of necessity thereby affirmed the contract. The following rule then becomes applicable. "The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed

to have ratified it:" *Citizens Savings Trust Co. v. Independent Lumber Co.*, 104 Neb. 631, 178 N. W. 270.

Defendant next contends that the contract is *ultra vires* of the corporation and void because at the time of its execution the corporation was in debt in an amount in excess of two-thirds of its capital stock. This contention is answered by the following holdings of this court: "Excessive indebtedness does not necessarily invalidate contract obligations, unless the statute so declares, and legislation to that effect has not been pointed out." *Nebraska Nat. Bank v. Parsons*, 115 Neb. 770, 215 N. W. 102. "The violation of the law in this respect does not avoid the transaction." *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444, 63 N. W. 796. "A corporation may not, in violation of its charter, enter into a contract, whereby it receives and retains the benefit of its illegal contract, and then shield itself from liability for benefits received by pleading *ultra vires* as a defense." *Simmons v. Farmers Union Cooperative Ass'n*, 114 Neb. 463, 208 N. W. 144.

The judgment of the trial court is

AFFIRMED.

J. L. HAND, APPELLANT, V. SCHOOL DISTRICT OF THE CITY OF SIDNEY, APPELLEE.

2 N. W. (2d) 313

FILED FEBRUARY 6, 1942. No. 31190.

1. **Schools and School Districts.** A statutory provision that no school property of a school district shall be sold by the board of education, without an affirmative recorded vote of at least two-thirds of all the members of the board at a regular meeting, is mandatory.
2. **Specific Performance.** A petition for specific performance of a contract allegedly obligating defendant, a school district, to sell and plaintiff to purchase a school building and grounds, *held* demurrable, where he did not plead a record showing that the school board entered into the contract by an affirmative recorded vote of at least two-thirds of all the members of the board in compliance with a mandatory statute.

3. **Schools and School Districts.** Liberal interpretation of school-board proceedings does not do away with mandatory provisions of the statute.
4. **Pleading.** Where plaintiff in equity pleads a defense in his petition, it is demurrable without a statement of facts negativing such defense at the time he seeks equitable relief.

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

R. P. Kepler, Rodman & Kuns and *Allen, Requartte & Wood,* for appellant.

Beatty, Maupin, Murphy & Davis and *Paul L. Martin, contra.*

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

ROSE, J.

This is a suit in equity for the specific performance of a contract allegedly obligating the School District of the city of Sidney, defendant, to sell, and J. L. Hand, plaintiff, to purchase a block of ground and the public school building thereon. The cause was heard on a demurrer to the petition. The district court for Cheyenne county sustained the demurrer and dismissed the suit. Plaintiff appealed.

The sufficiency of the petition to state a cause of action for specific performance of the alleged contract is the question for determination on appeal.

As pleaded in the petition the contract consisted of two separate instruments, both in writing and dated March 1, 1937. The first instrument was a signed offer by plaintiff to purchase the school property for $5,000, directed to the board of education and containing the following terms:

"I enclose herewith and attach hereto certified check on American National Bank, of Sidney, Nebraska, in the sum of Five Hundred Dollars ($500.00), as a guarantee of good faith of this offer, to be retained by you in event I fail and refuse to complete the purchase of said premises. Full consideration as above named to be paid by me, and conveyance to be made by you, on May 15, 1937."

The second instrument of the same date was the record of a regular meeting of the board of education in the following form:

"A regular meeting of the Sidney board of education was held at the school office with the following present: President N. W. Ladegard, Vice-President O. A. Olson, Glen Bales, C. W. Smith, R. F. Dedrick, Secretary K. S. Agnew. Absent, none. President Ladegard called the meeting to order at 8:30 p. m.

"After much discussion, it was moved by Mr. Bales and seconded by Mr. Olson that we accept Mr. Hand's bid and that the president and secretary be hereby authorized to sign all necessary papers—this acceptance being subject to a written legal opinion showing the board's legal right to sell or dispose of such school property at a regular meeting. On roll call, the motion carried unanimously."

Summarized, the petition further alleged: After acceptance of the bid, defendant procured from its attorney an opinion to the effect that the acceptance of plaintiff's bid was legal and within the power of the school board, and that its president and secretary orally permitted plaintiff to enter into possession of the school building to clean it and to make measurements for the purposes of remodeling it; that, notwithstanding plaintiff was in partial possession of the premises, the building was totally destroyed by fire April 25, 1937, without the fault of either plaintiff or defendant; that plaintiff tendered to defendant May 14, 1937, $4,500, the balance due on the contract; that defendant then refused to complete the sale for the reason pending litigation prevented the school board from doing so; that defendant on May 15, 1937, refused the tender of $4,500 and on February 7, 1938, refused to complete the sale and directed its officers to return to plaintiff the earnest money, $500, and to refuse to convey title to plaintiff; that plaintiff declined to accept the return of the earnest money; that, prior to March 1, 1937, defendant procured insurance on the school building, furnished insurers proofs of the loss and settled it for, and received, about $8,000; that plain-

tiff is entitled to be subrogated to the rights of defendant in the insurance policies and to an accounting for the proceeds thereof; that the grounds and buildings have not been used for school purposes since April 25, 1937.

Counsel for plaintiff argued at length that the demurrer was erroneously sustained because, in their view of the petition, the offer of plaintiff, the acceptance thereof by the board of education and the opinion of its attorney to the effect that the acceptance was legal and within the power of the board constituted a complete, valid and enforceable contract. On the contrary, defendant contended that the school property could not be sold by the school board except at a regular meeting and not then without an affirmative recorded vote of at least two-thirds of all members of the board; action not shown by the petition to have been taken.

What is alleged in the petition and the law applicable thereto are of course the determining factors in the controversy. It will be observed that plaintiff himself fixed May 15, 1937, as the date for defendant's conveyance to him. On that date the principal part of the property which plaintiff offered to buy could not be transferred to him because the school building had been destroyed by fire April 25, 1937, without fault of either party to the contract. Defendant was then the owner of the fee and held the title to the public school property. Plaintiff was never in possession of it as owner. Such possession as he pleaded was permissive, oral and partial and, for anything stated in the petition, remained so until after the fire. The acceptance of plaintiff's offer was on its face conditional and did not become absolute when recorded in the minutes of the board meeting March 1, 1937. The petition does not state when the "written legal opinion showing the board's legal right to sell or dispose of such school property" was delivered or received nor allege compliance with that condition before the school building was destroyed by fire while it was possible for the board to convey to plaintiff the property he offered to purchase. An

unconditional acceptance therefore, while the board could comply with the strict terms of plaintiff's offer, is not stated in the petition.

The board of education had only such powers as were conferred by statute or necessarily implied therefrom. The statute provides:

"No school property of any kind belonging to any school district shall be sold by the board of education, except at a regular meeting of the same, and not then without an affirmative recorded vote of at least two-thirds of all the members of the board." Comp. St. 1929, sec. 79-2520.

These provisions of the statute are mandatory. The conditional acceptance quoted from the petition does not comply with the mandatory statute declaring that no school property shall be sold "without an affirmative recorded vote of at least two-thirds of all the members of the board." Though the record of the board meeting recites that, with no member absent, a motion for a conditional acceptance was unanimously adopted, there was no affirmative record vote of members shown. Reasons for holding such a record insufficient to comply with the statutory requirement are stated in *Steckert v. City of East Saginaw,* 22 Mich. 104. Liberal interpretation of school-board proceedings does not do away with mandatory provisions of statute. See *Swink's Case,* 132 Pa. Super. 107, 200 Atl. 200; *Payne v. Ryan,* 79 Neb. 414, 112 N. W. 599; 43 C. J. 515, 516. For the reasons given, the school district of the city of Sidney was not bound by the conditional acceptance of the school board and the trial court did not err in sustaining the demurrer.

The same conclusion is reached on another view of the petition. Plaintiff pleaded that defendant, the school district, refused to complete the sale for the reason that pending litigation prevented the school board from doing so. With this defense pleaded in the petition, it was incumbent on plaintiff, in stating a cause of action, to allege facts showing that the school board was not prevented by litigation from conveying the school property to him when

he sought relief in equity. He did not plead such facts and for that reason the petition was demurrable. *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N. W. 630.

AFFIRMED.

THOMAS C. AMES, APPELLEE, V. SANITARY DISTRICT NO. 1 OF LANCASTER COUNTY ET AL., APPELLANTS.
2 N. W. (2d) 530

FILED FEBRUARY 6, 1942. No. 31250.

1. **Workmen's Compensation.** Our workmen's compensation law does not provide that the loss of the use of an eye shall be compensated by an award based upon the amount of vision which existed previous to the accident. It awards specific compensation for the loss of an eye. The obvious intent thereof is to compensate and indemnify the owner of an eye capable of industrial use and injured in industry to the full extent of his industrial loss occasioned thereby.
2. ———. "Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo* in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393.

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

Baylor, Tou Velle & Healey, for appellants.

T. R. P. Stocker and *Bruce Fullerton, contra.*

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

EBERLY, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161, inclusive. Thomas C. Ames is plaintiff; Sanitary District Number One of Lancaster county, Nebraska, and the Continental Cas-

ualty Company, as its insurance carrier, are the defendants. In his petition the plaintiff states, in part: "That while in the employ of Sanitary District Number One of Lancaster county, Nebraska, on or about the 7th day of September, 1939, the above named plaintiff received personal injuries arising out of and in the course of employment by the above named defendant, as chemist. * * * The nature and extent of injury consists of the total loss of the sight of his left eye * * * and that said injury is permanent." The defendants by their pleading put in issue the allegations of plaintiff's petition. On an appeal from a decision of a one-judge compensation court in favor of plaintiff, there was a trial *de novo* in the district court for Lancaster county, wherein there was a finding for plaintiff and against defendants, and in substance the further determination that on September 7, 1939, "while in the course of his employment a foreign substance accidentally struck the eye of the plaintiff resulting in injury and laceration thereto and permanently impairing the vision of his left eye;" and that "the employee was a chemist for said Sanitary District Number 1 of Lancaster county, Nebraska, was of the age of sixty-five (65) years and said injury so received by the employee resulted in permanent industrial blindness to his left eye due to the accident of September 7, 1939," which entitled him to $15 a week for a period of 125 weeks, for which amount judgment was duly entered. On this appeal and trial *de novo* the defendants challenge the award decreed by the district court both as to being contrary to the evidence and also to the law.

Section 48-121, Comp. St. 1929, as amended, provides, in part: "The following schedule of compensation is hereby established for injuries resulting in disability: * * * (3) For disability resulting from permanent injury of the following classes, the compensation shall be in addition to amount paid for temporary disability; * * * For the loss of an eye, sixty-six and two-thirds per centum of the daily wages during one hundred and twenty-five weeks. * * * Permanent total loss of the use of a * * * or eye shall be

considered as the equivalent of the loss of such * * * or eye. In all cases involving a permanent partial loss of the use or function of any of the members mentioned in subdivision 3 of section 3662 (48-121) the compensation shall bear such relation to the amounts named in said subdivision 3 of section 3662 as the disabilities bear to those produced by the injuries named therein."

It is to be observed that our statutes nowhere define the characteristics and powers of the normal eye. The obvious intent thereof is to compensate and indemnify the owner of an eye capable of industrial use and injured in industry to the full extent of his industrial loss occasioned thereby. This seems in accord with the better reasoned cases.

Thus, in *Hobertis v. Columbia Shirt Co.*, 186 App. Div. 397, 173 N. Y. Supp. 606, a case involving facts which disclosed that the claimant lost the use of an eye, and that she had at all times been nearsighted, having not to exceed 50 per cent. vision, and where appellant's claim was that such claimant should only be allowed for the loss of one-half vision, the New York court answered the appellant's contention thus: "The statute does not provide that the loss of the use of an eye shall be compensated by an award based upon the amount of vision which existed previous to the accident, whether it be 50 per cent. or 80 per cent. of vision lost. It awards specific compensation for the loss of an eye. It is matter of common knowledge that very few persons have complete and perfect vision. The claimant was working with defective vision. So far as appears her work was entirely satisfactory to her employer, at least so far as the wages she received. The wages received by her must be considered her wage-earning capacity with defective vision. She lost the use of her eye, such as she had, and is entitled to compensation therefor based upon her earning capacity."

In the instant case the conclusion is that, if claimant Ames has lost the industrial use of his eye by accident arising out of, and in the course of, his employment, he is entitled to the statutory indemnity therefor, to be measured by his

weekly wage, without reference to the question of normal sight.

This record presents a question of fact to be determined on conflicting evidence. This proof, according to the testimony of the plaintiff, includes the following: On September 7, 1939, he was in the employ of the defendant Sanitary District. He had occupied that relation for 17 years. As such employee he performed the duties of chemist, pump operator of the sewage disposal plant of the defendant, and in addition performed practically all of the mechanical work which was required in its operation. He was born on July 9, 1876. His salary was $135 a month. His duties required the daily making of certain chemical tests and for that purpose as a daily routine he would select samples of sewage and make a chemical examination thereof. In connection with this test very fine iron filings were employed. These filings were piled on a platform near the building of the disposal plant. September 7, 1939, was an exceedingly windy day. On that day he secured the sewage samples for examination, and as he approached this pile of iron filings to secure a quantity thereof for the purpose of completing the test, the heavy wind then prevailing blew iron filings as a cloud of dust into his left eye. He, however, finished securing the necessary materials for making this chemical test, though he "couldn't see anything for, oh, till noon." One of the men employed at this plant then examined the injured eye and informed plaintiff that "that has got something in it." The "boss," plaintiff's superior, was away from the plant and, not returning, about 3 o'clock in the afternoon plaintiff went to Dr. Paul Black of Lincoln, Nebraska, for treatment. It seems Dr. Black was the doctor employed by the defendant district. At least it appears the doctor's charges for this service were paid by it. Dr. Black put drops in plaintiff's eye to kill the pain; then examined the left eye through a strong glass. The eye was "washed out" and bandaged and claimant was informed that there was a bad "scar" or injury in the sight of the eye. The doctor depicted the

injury to him by a drawing made at the time. During the course of treatment that followed, this doctor prescribed a new set of glasses. Subsequent to September 7, 1939, claimant states he could not read anything with his left eye, "that is, figures or close stuff"; he "can see objects but can't distinguish what they are." Objects look blurred like something was over it. He is not now able to do ordinary reading with the right eye covered and the left eye open, a power which he previously possessed. Dr. Black gave him new glasses before he was discharged because the vision in the left eye did not come up as he thought it should.

On being recalled by the defendant for cross-examination, the plaintiff testified that he had never had an operation on either eye, nor any ulcer trouble in connection therewith. Further, that Dr. Ballard at one time removed an enlargement or growth on the outside of the eyelid.

The record discloses a stipulation that, if Dr. Paul Black were called as a witness on behalf of plaintiff, with reference to the fact of accident to the left eye of claimant, he would testify that plaintiff "injured his left eye September 7, 1939, by getting something in it. It was a rather deep laceration of the cornea, part of which was in the pupillary area. Healing eventually occurred but a certain amount of scarring remained."

Another witness appearing on behalf of plaintiff as an eye, ear and throat specialist, who has practiced as such since 1919 and whose qualifications as an expert witness are unchallenged, testified in substance as follows: "Q. Had he ever been a patient of yours before? A. Yes; I treated him for tear duct seepage of his eyes, I think it was in 1938 and 1939. Q. Now you may give us, if you will, what observations you made as a result of your examination the first time when you examined him with reference to this injury. A. Well, on February 22, 1940, the examination was something like this. The right eye, there is nothing abnormal about the right eye, the vision being 20/30 without glasses and 20/20 or normal with

glasses. In the left eye there is a scar presenting the appearance of a corneal scar, several months standing, reaching the entire length of the cornea from left to right about midway from the upper and lower border of the cornea. The scar is deep and has all but penetrated the entire thickness of the corneal structure. The cut has been filled in with scar tissue and is not likely to become painful or inflammed. Vision in the left eye is, without glasses, 20/200. There is no improvement with glasses. This means Mr. Ames reads at 20 feet letters that he should read at 200 feet. He is not able to read any ordinary type at reading distance either with or without glasses. There is a possibility that the lens is injured which may in time result in cataract. It seems that the other eye is normal. There is no possibility that the vision in this eye will ever improve. Q. Now when you speak of filling in with scar tissue over the cornea or in the cornea of the eye, is scar tissue such a material as there will be vision through it as a dark lens of the eye? A. I don't understand. Q. The scar tissue you mentioned filling in in the eye where a cut was, what is the possibility of seeing through that scar tissue? A. You mean in general terms? Q. Yes, and then in particular as applies to Mr. Ames. Both in general and as you have found it in his case. A. Of course the vision is bound to be obstructed through the scar because of the fact that when nature fills in the scar tissue it is not the same tissue as was injured and she does that all over the body. Wherever scar tissue is filled in, if it is in the kidney it is not functioning tissue, it is just as makeshift. If it is in the heart it is the same thing and in the eye it is the same thing, so, of course, they cannot see through the scar nothing like they should with a normal cornea. * * * Q. What is the effect so far as the individual is concerned? Is it a blurring effect? Is that what it makes? A. Yes, bound to have a blurring effect. * * * Q. I want to ask you another question about the scar. I think I was present at one examination where you showed how you could see the scar on the eye. A.

Yes, sir. Q. What instrument were you using at that time? Would you describe that to us? A. It is what we call a opthalmoscope. * * * Q. Now, Doctor, I want you to describe for us whether or not this scar is connected with the outside in any way or whether that scar tissue is separate pieces there? A. They are not all connected; no. Q. Are they connected with what is sometimes called the arcus senilis? A. No. Q. Does Mr. Ames have an arcus senilis in his left eye? A. Yes, most men of his age. Q. About what age does it come? A. Fifty, even earlier than that, but most common after the fifth decade. Q. Tell us what an arcus senilis is. A. It is a deposit of fat granules around the periphery of the eye, fat granules and hylin deposits and sometimes a little lime deposits. Q. Now in this case are these pieces of scar tissue you have described as being on this cornea, are they directly connected with the arcus senilis in Mr. Ames' left eye? A. No. Q. Do you have an opinion in this case whether or not they are an outgrowth or part of the arcus senilis or could they be accounted for by reason of an injury and trauma such as Mr. Ames described to you at the time of his examination? A. They are not an arcus senilis. Q. Are they such a scar tissue as would develop from some type of laceration in the eye there? A. Yes. Q. Can you tell, as a specialist, whether or not with those pieces of scar tissue in the location where they are whether they would of necessity impede his vision, interfere with it perhaps I should say? A. Oh, yes, of course they would. * * * Q. And the effect of that is it blurs the object you are trying to see? A. It blurs and interferes with what we call binocular vision and fusion. It interferes with deep perspection, what we call stereoscopic vision and sometimes interferes with distinguishing of colors and gives what we call a diffusion of light. * * * Q. What I mean is this, Doctor, if a man comes into your office and claims he has had some dirt or particles go into his eye and you examine it and find a laceration there, would you then be in position to tell whether that laceration or that condition was the result

of a trauma or the result of some old previous ulcer? A. Yes, sir. Q. What evidence would there be as to its being the result of an ulcer and what evidence would there be of a trauma or laceration? A. There would be a difference in the appearance of the tissue. A fresh wound has quite a different appearance than an old one or a scar tissue. * * * Q. Would you have any difficulty yourself in ascertaining whether it was the result of a previous ulcer or present laceration or trauma? A. No."

Two medical witnesses testified in behalf of defendants as experts. One, Dr. Clarence R. Carlson, had examined plaintiff's eyes in March, 1939, prior to the accident and then again in December, 1939. This doctor gives a technical description as to the defects exhibited by the claimant's eyes. These are not in complete accord with the evidence given by other professional witnesses, however. The following testimony given by this witness represents his conclusions: "Q. Did you furnish him with glasses in March, 1939, with which he was able to read with his left eye? A. Yes; I did. Q. Was he able to do ordinary reading with that left eye? A. If it was not too small. Q. Would you say ordinary newspaper reading he could read with his left eye? A. Just about that, not any smaller than that. * * * Q. So far as your examination disclosed then from the ability to read ordinary newspaper with glasses in March, 1939, prior to the accident as compared to December, 1939, after the accident, he had changed from reading newspaper to not being able to read at all with glasses? A. That is right. * * * Q. And of course you took his word on every examination? A. Certainly, I had no reason to discount it. Q. And you fitted glasses on his statement? A. Yes. With the aid of the instrument, not his word alone. Q. You had the same instrument one time that you did the other, did you not? A. That is right."

The other medical witness presented on behalf of defendants has specialized in eye, ear, nose and throat since July, 1925, and his qualifications as an expert are likewise unchallenged. He examined the claimant on April 15,

1940, and on April 17, 1940, the results of which appear to be confirmed by an examination on December 17, 1940. This witness substantially disagrees with the conclusions testified to by plaintiff's witnesses both as to the facts and proper deductions to be made therefrom. He accepts as his working hypothesis that the accident as described by plaintiff's witnesses never occurred, and that the conditions that obtain in plaintiff's left eye are not the result of accident or trauma occasioned thereby, but are due wholly to the development of natural conditions. After detailing the examination made by him and his technical deductions therefrom, he states his conclusions as follows: "Q. Now as a result of the examinations which you made April 15th and April 17th of which you have just recited findings, tell us what conclusion you came to as to whether or not the man was suffering from a defective vision as the result of accident to which he referred as having occurred on September 29, 1939? A. My opinion of this situation, based on my examination, was that the defect of vision from which Mr. Ames is suffering is the result of two things, the chorioretinitis which he has in both eyes and the change in the structure of the cornea which is degenerative in type and in my opinion is not connected with trauma. Q. Now let's go to your later examination. When was it that you made that? A. The date of it was December 17, 1940." The witness then, on the basis that there has been no accidental injury to plaintiff's left eye, testified in clear contradiction to the statements of plaintiff and of the expert witnesses testifying for plaintiff. Obviously, both lines of this testimony cannot be true. It would seem that Dr. Black, whose testimony as stipulated is that he treated plaintiff's left eye on September 7, 1939, on the day of its injury, for a "rather deep laceration of the cornea, part of which was in the pupillary area," and whose integrity is not attacked, should be regarded as a witness amply corroborating plaintiff's testimony on that point. Further, that the testimony of plaintiff's experts who accepted as foundational the theory of accident, should pre-

vail over the proof presented by defendants' expert who testifies on the basis that the accident never occurred and that plaintiff's left eye now evidences no results of trauma. The defendants' expert witness on this question testifies as follows: "Q. Could you by either the slit lamp or otherwise,—If he had had a rather deep laceration of the cornea in the pupillary area, would that not leave a scar? A. Yes, in my opinion. Q. And you found no scar? A. I found no scar. Q. Therefore you deduct that he did not have this laceration that he claims he had? A. I am forced to conclude from my findings that no laceration was present. Q. And if Dr. Black had him within the day of the accident and he made such a report that he did receive such a laceration, a rather deep laceration in the eye, he must have been mistaken about the injury when he examined him, is that right? A. I think the answer to that is that the description of Dr. Black and the opinion which I might hold as to a certain injury might differ materially and in either case either of us might be right, that is true. Q. He would have a better opportunity to know of the laceration if he looked at it within a day of the injury, wouldn't he? A. Yes, of course. Q. And naturally such an opinion would be perhaps more authentic than making an examination at some later date? A. That would be true in the case of an injury."

The writer of this opinion is not inclined to attack the good faith of any of the expert witnesses in this case. The evidence of the plaintiff, a layman, is plain and simple, and, if believed, entitles him to a recovery. Further, the record furnishes corroborative evidence. True, the evidence is plainly conflicting and cannot be reconciled. In the consideration and evaluation of such testimony this court will consider the fact that the district court gave credence to the testimony of some witness or witnesses rather than the contradictory testimony of others. *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393; *Shafer v. Beatrice State Bank*, 99 Neb. 317, 156 N. W. 632; *Greusel v. Payne*, 107 Neb. 84, 185 N. W. 336; *Donker v.*

Central West Public Service Co., 134 Neb. 892, 280 N. W. 168; *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178.

From a careful consideration of all the evidence in the record, in the light of the fact that the district judge who heard this case *de novo* and observed the witnesses as they testified, from such proof rejected the theory of the defendants and accepted the theory of the occurrence of an accident, arising out of, and in the course of, plaintiff's employment, as the proximate cause which inflicted on plaintiff total permanent industrial blindness of his left eye, we arrive at the conclusion that the case was correctly decided by the trial judge and that his award is right and should be affirmed.

AFFIRMED.

DESHLER BROOM FACTORY, APPELLEE, V. V. B. KINNEY, STATE LABOR COMMISSIONER, ET AL., APPELLANTS.
2 N. W. (2d) 332

FILED FEBRUARY 6, 1942. No. 31225.

1. **New Trial.** A trial *de novo* in a court of general jurisdiction, in the absence of statutory language restricting its scope, means a trial in the commonly accepted sense of that term in such a court.
2. **Workmen's Compensation.** The trial *de novo* provided for in the unemployment compensation law (Comp. St. Supp. 1939, sec. 48-706) means a trial conducted in the same manner as if the action had originated there.
3. ———. Where there is no agreement to the contrary, an employer's failure to pay wages when due is good cause for quitting, and previous acquiescence in delay of payment does not ordinarily constitute a waiver of prompt payment.
4. ———. Under such circumstances, if employees quit work, singly or collectively, without intention to return to the employment, it does not constitute a labor dispute regardless of what their motivating reasons may have been.
5. ———. But where employees walk out, maintain picket lines, and induce a shut-down of employer's business for the purpose of coercing the prompt payment of past-due wages by collective

action, it constitutes a labor dispute within the meaning of the unemployment compensation law.

6. ———. The term "stoppage of work," as used in our unemployment compensation law, means a substantial curtailment of work in an employing establishment.

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

John E. Sidner, Ray W. McNamara and *Allen Wilson,* for appellants.

Perry, Van Pelt & Marti and *J. P. O'Gara, contra.*

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

CARTER, J.

This is an action brought under the provisions of the Nebraska unemployment compensation law. The claims of 212 employees of the Deshler Broom Factory were filed in three separate actions and consolidated for purposes of trial. The district court found against the claimants for benefits under the unemployment compensation act, and the claimants, together with the state labor commissioner, have appealed.

The evidence shows that the 212 claimants involved herein were employed by the Deshler Broom Factory and on October 11, 1939, became unemployed and filed claims for benefits under the unemployment compensation act. It is the contention of the employer that claimants are disqualified from receiving benefits for the reason that the unemployment was caused by a stoppage of work due to a labor dispute, a disqualification set out in the act (Comp. St. Supp. 1939, sec. 48-705).

The claims were first heard by a deputy commissioner, who found for the claimants. An appeal was lodged with the appeal tribunal provided for in the act, which sustained the decision of the deputy commissioner. The employer thereupon petitioned the district court for a review of this finding in accordance with the provisions of section

48-706, Comp. St. Supp. 1939. On the trial of the case in the district court, the court permitted the introduction of additional and new evidence, to which objection was timely made on the ground that the case, under the unemployment compensation act, was required to be heard on the record made before the appeal tribunal. Subsection (h) of section 48-706, Comp. St. Supp. 1939, states in part: "In any judicial proceeding under this section, trial *de novo* shall be had to the judge of such court." There is no other language restricting the scope of the investigation to be made by the district court. The district courts of this state are courts of general jurisdiction, and in the absence of specific statutory restriction a provision of statute providing for an appeal to and a trial *de novo* in the district court contemplates a trial in the commonly accepted sense of that term in a court of general jurisdiction, including the right to produce evidence in the same manner as if the action had originated in the district court.

The undisputed evidence shows that on October 11, 1939, claimants had back wages due and unpaid for September, 1939, and approximately $6,000 due for wages earned prior to September 1, 1939. On the morning of October 11, 1939, a written notice was given to the manager of the factory to the effect that employees would cease work at 3 p. m., unless September wages were paid in bankable checks before that time. The notice was not signed, but the name "International Broom & Whisk Makers Union, Local #20" was typed at the bottom. The manager called in the officers of the union and informed them that the conditions could not be met. At 3 p. m. of said day practically all of the employees quit work and left the plant. There is evidence that arguments, persuasive in character, were used to induce reluctant employees to join in the walkout. Picket lines were established, but there is no evidence of force or coercion being used by picketing employees. In fact, the conduct of all the employees seems to have been very commendable.

The record further discloses that a meeting of employees

was held on the evening of October 10, 1939. Both union and nonunion employees attended and participated in the meeting. The officers of the union presided and apparently produced and offered for consideration the letter which was subsequently presented to the manager of the factory. There is much evidence produced in an effort to determine whether or not the walkout was union inspired. For reasons to follow, we do not think that it is important whether the trouble was the result of union activity or not.

It is shown by the evidence that the negotiation of a wage and hour contract was underway at the time of the occurrences herein recited. Meetings had been held in August and September which had resulted in tentative agreements on most of the matters in dispute. The contract was finally executed on October 21, 1939. The argument is advanced that the real purpose of the walkout was to coerce the employer into making a satisfactory wage and hour agreement. We think there is some basis for this contention, but we do not think that it is a controlling issue in this case.

The question is: Was the unemployment caused by a stoppage of work due to a labor dispute? In the consideration of this question we conclude at the outset that employees may quit their employment and seek employment elsewhere without intention of returning, without subjecting themselves to the charge of carrying out a strike. A strike, in the common acceptance of the term, is the act of quitting work by a group of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused. *Uden v. Schaefer*, 110 Wash. 391, 188 Pac. 395. But it is not a strike, nor does it constitute a labor dispute, for employees to quit work, singly or collectively, when they quit without any intention to return to the employment, whatever their motivating reason for so doing may have been. But such was not the case here. Conceding for the sake of argument that the claimants in this case stopped work because they had not been paid their past-due wages, that fact does not

necessarily preclude a finding that a labor dispute existed. If the employees had quit with the purpose of seeking other employment and of enforcing their claims for wages in the courts, there would have been no labor dispute within the meaning of the law. But this they did not do. They attempted to enforce collection by concerted, coercive action against the employer. They attempted to force collection by closing down the factory and to gain their desired ends by producing in the mind of the employer a fear of subsequent losses that would naturally result from a sudden stoppage of business. The formation of picket lines shows the intention of claimants to coerce the employer by attempting to keep the factory from operating after they had quit. Their conduct and actions indicate clearly that they retained an expectation to return to work when the object of the walkout was successfully completed. The fact that the purpose of the walkout may have been the collection of past-due wages makes it no less a labor dispute under the circumstances shown. The means employed were identical with those ordinarily used to obtain a closed shop, better wages, shorter hours or better working conditions. It was simply a labor dispute involving past-due wages instead of future wages. In brief, disqualification under the act depends upon the fact of voluntary action and not the motives which brought it about. Clearly, it was a labor dispute within the meaning of section 48-705, Comp. St. Supp. 1939.

The evidence shows that more than 90 *per centum* of the employees quit work at the appointed hour on October 11, 1939. The factory was not able to continue operation. There being a substantial curtailment of work in the factory, it constituted a stoppage of work within the unemployment compensation law.

The trial court, in an able opinion appearing in the record, summarized the evidence showing that a labor dispute existed, in the following language: "On the issue of whether the unemployment of the claimants was due to a stoppage of work which existed because of a labor dispute,

the record shows the following: (1) Formal notice of the meeting of employees of October 10th was posted in the factory for the notice of *all* employees. (2) This notice was posted and signed not by individuals but by the representatives of an organized group. (3) All employees, whether members of the organized group or not, were invited. (4) At the meeting discussion and deliberation took place. (5) Formal action by motion was taken. (6) A formal vote was taken. (The fundamental theory of the ballot is that the judgment and will of the majority shall be substituted for the judgment and will of the individual and shall override the judgment and will of those in the minority.) (7) Representatives of the group were designated and instructed. (8) A formal demand was made upon the employer and a very limited time was allowed for compliance. (This action indicates an opinion of at least part of the employees that the employer could pay if inclined to do so. In other words, that there was a dispute over the time of payment of wages as distinguished from ability of employer to pay. That the time and manner of payment may be the basis of a labor dispute and the reason for a strike, as well as rates of pay, working conditions, and so forth, is generally known and is illustrated by the record in the case of negotiations leading up to and the contract finally consummated between the employees and employer.) (9) Almost all the employees walked out at an hour different from the usual quitting time and at a preconcerted time. (10) Some sought to and did influence others to walk out by persuasion, threats and shutting off of power and light. (11) A picket line was established which was none the less a picket line with the usual purpose because it was creditably peaceful and nonviolent. (12) The management was advised that unless all were taken back none would go back. (13) The record shows affirmatively that some were influenced to walk out by others, another to quit who had not walked out on October 11th and another who was on his way to work was influenced to go fishing instead. (14) Words were used and conduct re-

sorted to which could have had no other design than to influence employees to become or remain idle.. (15) Mr. Brewer was notified by wire that 'walkout' was in effect. (If the action represented the coincidental decision of employees acting individually, there would seem to be no occasion to advise any one of it.) (16) All the while these things were happening there was hanging fire the matter of a labor contract between the local union and the employer. In the face of these facts the action of October 11 can hardly be said to represent the simple determination by individuals to exercise the clear right of an employee to quit because of nonpayment of wages. It cannot be questioned that an unknown number of claimants were influenced to render themselves unemployed by the concerted action of those who called, attended and participated in the meeting of October 10 and the follow up of that meeting and that an unknown number were forced into idleness by the stoppage of work which resulted." We think these facts, amply borne out by the record, show that a labor dispute caused the stoppage of work.

In *Bodinson Mfg. Co. v. California Employment Commission,* 101 Pac. (2d) 165 (Cal. District Court of Appeal), the court said: "The law recognizes the right of peaceable picketing but not of the use of force and violence. It is conceded that workmen belonging to another labor group passed through the picket line and continued to perform their usual labor in the plant throughout the period of time which is here involved. Those men exercised their personal volition to work and continued to do so without personal violence or harm. It follows that the correspondents exercised their volition not to pass through the picket line or to work in the plant while the trade dispute and strike were in progress. * * * This trust fund was not created to be used as a weapon to coerce employers to submit to the demands of striking employees by paying the maintenance of workmen while they engage in prosecuting a strike. Nor was it intended to be used as an instrument to aid strike-breaking. On the contrary, it was enacted

for the avowed purpose of assisting workmen while they are out of employment through no fault of their own. It is specifically provided that they may not recover benefits if they leave their work on account of an existing labor dispute in the plant where they are employed. The record is undisputed that the correspondents left their work at the petitioner's plant solely because of the existence of a labor dispute in that establishment."

The unemployment compensation act does not purport to grant benefits to workmen who leave their work voluntarily; neither does it intend for an employee to benefit from the act while his bargaining agents are attempting to adjust their differences with the employer. That is not the ordinary conception of unemployment. Voluntary idleness under such conditions is not unemployment. It would be extremely difficult for us to reach the conclusion that claimants could voluntarily bring about a cessation of work and then claim they were unemployed within the provisions of the act. The fact is that claimants quit work in an attempt to secure a satisfactory agreement as to the payment of past-due wages. The terms of the adjustment were controversial, due in a large part to the inability of the employer to pay. Claimants were voluntarily out of work because they elected to use this method of coercing payment. That makes it a labor dispute. *Department of Industrial Relations v. Pesnell,* 29 Ala. App. 528, 199 So. 720. See, also, *Barnes v. Hall,* 285 Ky. 160, 146 S. W. (2d) 929.

We conclude that the unemployment for which compensation is claimed resulted from a stoppage of work caused by a labor dispute and is not compensable. The trial court was therefore correct in holding that appellants could not recover.

AFFIRMED.

RACHAEL I. SNYDER, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

2 N. W. (2d) 327

FILED FEBRUARY 6, 1942. No. 31208.

1. **Eminent Domain.** The final award in condemnation proceedings for the acquisition of a right of way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated.
2. ———. For all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings.
3. ———. In condemnation proceedings, the owner of property taken or damaged is entitled to have all proper elements of damage considered by the commissioners, and, if they fail to do so, he cannot afterwards maintain an action to recover damages thus omitted, which were necessarily involved in the issues in the condemnation proceedings.
4. ———. In condemnation proceedings, it is presumed that the owner of damaged lands received or had opportunity to receive compensation for the injury to such lands.
5. ———. The purchase of lands for a right of way in lieu of condemnation carries with it all of the incidents of eminent domain or condemnation in so far as damages by reason of construction are concerned.
6. ———. In case of a sale of right of way in lieu of condemnation proceedings, the presumption obtains that for damaged lands the seller received compensation for the injury to such lands.

APPEAL from the district court for Keith county: ISAAC J. NISLEY, JUDGE. *Reversed and remanded in part and reversed and dismissed in part.*

Beeler, Crosby & Baskins, Robert B. Crosby and *Horace E. Crosby,* for appellant.

Hoagland, Carr & Hoagland, contra.

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

YEAGER, J.

This is an action for damages in two causes of action, instituted by Rachael I. Snyder, plaintiff and appellee, against

the Platte Valley Public Power and Irrigation District, a corporation, defendant and appellant. From a verdict in favor of plaintiff and against the defendant in the amount of $3,555, and judgment for $3,866.62, on the first cause, and from a verdict in the amount of $1,345, and judgment in the amount of $1,448.38, in favor of plaintiff and against the said defendant on the second cause, the defendant has appealed. The difference between the respective verdicts and judgments is represented by interest computed by the court rather than by the jury.

The plaintiff is the owner of certain lands in Keith county, Nebraska, described as follows: West half of the northeast quarter (W½ of NE¼), and east half of the northwest quarter (E½ of NW¼), of section twenty-eight (28); all of section twenty-one (21), and all of fractional section sixteen (16) lying south of the North Platte river, all located in township fourteen (14) north, range thirty-six (36) west of the sixth P. M. The entire tract consists of approximately 1,000 acres. The defendant, a public corporation organized under chapter 86, Laws 1933, sections 70-701 to 70-715, Comp. St. Supp. 1941, obtained, on January 31, 1935, from the plaintiff options for a right of way across the two described portions of section 21, and later, on May 4, 1935, obtained warranty deeds for the right of way described in the option agreements, for which defendant paid an agreed consideration of $2,100. The right of way was 250 feet in width and totaled approximately 23.22 acres. The right of way began at the west line of section 21 at a point not far north of the southwest corner of the section, and from that point extended eastward and slightly south, and at a point about a quarter of a mile west of the southeast corner of section 21 it crossed in a southeasterly direction into and across the east half of the northeast quarter of section 28, which land belonged to one Elizabeth Bassett. The right of way was along the foot of the hills which were to the south and it crossed the outlets of three canyons, two of which were on the lands of plaintiff and one on the lands of Elizabeth Bassett. This last

crossing was to the south of plaintiff's land and was across the outlet to a canyon which normally drained onto lands of plaintiff in section 21.

The defendant obtained the right of way for the purpose of constructing thereon an inlet or supply canal to carry water for its corporate purposes from points west to points east of the lands of plaintiff. According to plan a canal was constructed on the right of way prior to the crop year of 1936, and it has been maintained henceforth.

One of the canyons is near the west side of section 21. This canyon has a drainage area of about 390 acres. In the gravel bed of this canyon, at the time of the construction of the canal, the defendant constructed two 5-foot by 5-foot openings, culverts or underdrains under the canal and generally from south to north to carry away the drain-off water from the drainage area mentioned. The water was carried across to the lands north of the right of way. Farther east is another canyon with a drainage area of 118 acres. On the gravel bed of this canyon, and for the same purpose, a concrete box culvert or underdrain, 5 feet by 4 feet in dimension, was constructed. At the right of way crossing on the Bassett land, and for the same purposes as culverts were constructed, an overdrain or flume was constructed. This overdrain or flume emptied onto the Bassett land, but the water flowed onto the lands of plaintiff in section 21. It took care of a drainage area of 580 acres. The flume was 15-6/10 feet wide and 5-5/10 feet high.

The plaintiff's first cause of action is for damages to her land on account of claimed negligence in the construction and maintenance of the two culverts and the flume. Her second is for damages to crops upon these same lands for the years 1936, 1937 and 1938. Her two sons were tenants and owners of the crops, but they have assigned their cause of action to the plaintiff.

Among the many errors assigned by the defendant as ground for reversal is the motion made at the conclusion of the introduction of plaintiff's evidence, and renewed at

the conclusion of all of the evidence, for directed verdicts in favor of the defendant. Among the reasons given as to why this motion should have been sustained is the assertion that there was a total failure of any evidence from which the jury could find that the defendant had been guilty of negligence in the construction, operation or maintenance of its siphon and flume structures or its inlet canal. It is considered advisable to discuss this assignment first.

To begin with there is no contention that the inlet or canal on the right of way was not constructed properly and in accordance with the best engineering principles and practices. It is not contended that the drains are insufficient to take care of the drainage flow for which they were designed. It is sufficiently shown that the bottoms of the two underdrains are in and not above the level of the gravel beds in the outlets from the two canyons, and that they follow the direction of the gravel beds. The evidence shows that the overdrain is at the level of the gravel bed in the outlet of the other canyon. There, however, is a dispute as to whether or not it follows the exact direction of the old outlet. The evidence indicates that the gravel beds of the canyons marked the lowest points in the old outlets.

Before the construction of the inlet canal and the three drains in question, the water coming out of the canyons was not confined to narrow passages as it came down from the canyons. Of course it spread out to widths which depended upon the amount of water coming down at any given time.

The plaintiff alleges that prior to the incidents complained of the water came down and spread out over her lands north of the right of way, and irrigated large areas beneficially to her. She says that by reason of what was done the water was concentrated in narrow channels, which caused its velocity in passage to be so great that channels were cut in her lands, which channels interfered with farming operations, the spread of waters for irrigation purposes was prevented, crops were destroyed by flood waters and other crops failed in part on account of lack of the previous man-

ner of irrigation, since the waters flowed across instead of spreading out over the lands.

The negligence claimed is that the defendant failed either to retard the flow of the flood waters above or to the south of the right of way, or to place retards below or to the north which would cause the water to spread or fan out over the lands of plaintiff as it had done before the construction of the inlet canal and the drains thereunder and thereover.

As has already been pointed out, the right of way over section 21 was purchased by the defendant. The defendant contends that the purchase carried with it all of the incidents of taking by eminent domain or condemnation, and hence an action for damages is not maintainable because all of the damages complained of were of the kind and character properly determinable in condemnation proceedings. It is conceded by the plaintiff that the purchase of the right of way did carry all of the incidents of taking by eminent domain in so far as the question of damages by reason of construction is concerned. We then turn to the issues determinable under eminent domain.

It is well settled by the decisions of this court that the final award in a condemnation proceeding for the acquisition of a right of way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated. *Atchison & N. R. Co. v. Forney,* 35 Neb. 607, 53 N. W. 585; *Churchill v. Beethe,* 48 Neb. 87, 66 N. W. 992; *Bunting v. Oak Creek Drainage District,* 99 Neb. 843, 157 N. W. 1028; *Psota v. Sherman County,* 124 Neb. 154, 245 N. W. 405.

The only issue contemplated by eminent domain which is important here is the issue of damages, or more properly the incidents of damage which are properly and conclusively presumed to have been before the court in condemnation proceedings, and which may not be considered later in an action for damages.

This matter has been before this court previously in other cases. In *Churchill v. Beethe, supra,* it is stated: "It is

now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings."

In *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842, it is stated: "In such case the damages are to be appraised by commissioners appointed by the county judge for that purpose, and if either party is dissatisfied with the award, an appeal may be taken to the district court. Boerner was entitled to have all proper elements of damage considered by the commissioners, and, if they failed to do so, he cannot afterwards maintain an action to recover damages thus omitted, which were necessarily involved in the issues in the condemnation proceedings, and which he was bound to present for their consideration therein." Other cases holding likewise are: *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281, 56 N. W. 875; *Omaha S. R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289; *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. 959; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326; *Psota v. Sherman County, supra.*

These cases state the rule. The question of whether or not the situation and incidents here complained of come within the rule must now be answered. The evidence clearly indicates that the passages provided for the water were constructed with skill, and that they were sufficient to take care of the anticipated flow of water, so that the requirements of law with reference to proper construction were complied with. The evidence further clearly indicates that there was at the time of construction a necessity to provide for the flow of these waters across the right of way not only that outlets might be provided, but also that the structure on the right of way should be put to its contemplated use and preserved in serviceable condition. This was of necessity within the contemplation of the parties. The evidence further shows that provision was made for the waters to cross at or substantially at the places they formerly crossed but in narrowed channels, and that when

the volume was great they crossed with increased velocity. Would the matter of damage caused by narrowed channels and increased velocity of water have been a matter for proper consideration in condemnation proceedings?

No case precisely in point on this question has been found, but some significant statements have been found in cases dealing with this subject.

In *Churchill v. Beethe, supra,* which is a highway condemnation case, the court said: "The owner of adjoining lands is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance. Applying these principles to the present case, it would seem that the fill and culvert are not only a proper, but apparently a necessary improvement, for the purpose of properly maintaining the highway; and while, if plaintiff's lands will suffer an injury thereby, he was entitled to compensation therefor, it must be presumed that he received such compensation, or at least had an opportunity to receive it, when the highway was originally constructed." This statement is quoted with approval in *Psota v. Sherman County, supra.*

The reasoning of these cases appears to be peculiarly applicable here. It is difficult to understand how any other conclusion could be reached. Only casual observation without resort to technical engineering principles pointed to the fact that attached to the contemplated use of the right of way was the construction of the inlet canal, and that with its construction the law of gravity required that outlets should be provided over or under the canal to provide outlets for drainage for the drainage areas to the south, and that necessarily this flow would empty onto the lands of plaintiff to the north of the right of way. Otherwise the right of way would have been useless.

In addition to the presumption which must be indulged in favor of the defendant under the rule announced in *Churchill v. Beethe, supra,* the record here discloses certain evidence indicating that the question of damage of some kind or character to plaintiff's land was in the minds of the parties at the time of purchase of the right of way. Two vouchers (exhibits G and I), each in part payment of the purchase price, were issued to plaintiff and endorsed by her. The following appears on the face of exhibit G: "Purchase price including damages to the remaining property," and the following appears on the face of exhibit I: "Total purchase price including damages to the remaining property."

As to the damage sustained by the plaintiff, if any, by reason of the drains crossing the right of way which was purchased from plaintiff by the defendant, we hold that no action will now lie therefor, since this matter must be presumed to have been in the minds of the parties and to have been compensated for at the time of the purchase. This holding applies only to the outlets which cross the right of way through the lands of the plaintiff. Only two of the outlets are on the lands of plaintiff. They are the two underdrains. The overdrain or flume, which is the eastermost of the three outlets of which complaint is made, is not on the right of way or lands sold or owned by plaintiff, but is across the canal of defendant and at a designated point on the lands of Elizabeth Bassett.

With reference to the outlet on the Bassett land, it is not suggested that plaintiff had anything to do with this either by way of right of way sale or in condemnation proceedings to which she was a party, nor is any rule of law set forth which would bar a right of recovery by plaintiff for damage to lands or crops, if any was sustained, by reason of negligent construction or maintenance of this structure. No reason, therefore, is apparent why she should not have her day in court on proper pleadings to determine the question of whether or not she has been damaged by reason of this structure.

The verdicts and judgments here cannot be allowed to stand in whole or in part, since the proof of damage was entire as to all three of the drainage outlets, both as to lands and crops. There is no means or method whereby a separation can be made on the record presented.

Since this case may be returned to the district court for a new trial on the phase indicated, it seems advisable for the guidance of the district court to discuss another assigned error. The defendant complains that the trial court did not submit the proper rule to the jury for assessment of damages to growing crops.

This has always been a troublesome question and is one not capable of exact definition. There is a general rule of law coupled with two rules of evidence which should always be borne in mind in cases involving this question. In the case of *Gledhill v. State,* 123 Neb. 726, 243 N. W. 909, the authorities are collected and the rules discussed. It is indicated in the opinion there that the rule is that the measure of damage to matured crops destroyed is the actual value. This rule is followed by a rule of evidence that actual value may be proved by evidence of actual value of other matured crops of a like kind grown during the same period on portions of the same or adjoining land under similar conditions. This rule of evidence is also made applicable to unmatured crops where a reasonably certain comparison can be made. It is further observed in the opinion, by quotation from 17 C. J. 785: "Damages based upon the value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured." We would add that within these rules if the evidence is insufficient to prove value of growing crops to a reasonable certainty it must be rejected by the court as speculative.

The judgment of the district court is reversed and the

plaintiff's petition dismissed as to that portion wherein she seeks damages by reason of the two drainage outlets on the right of way across her lands, and reversed and remanded without prejudice, and with leave to amend and to have a new trial on issues involving damages to lands and crops by reason of the drainage outlet in question which was constructed on the lands of Elizabeth Bassett.

REVERSED AND REMANDED IN PART AND
REVERSED AND DISMISSED IN PART.

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17. The presence of smoke, snow, fog, mist, blinding headlights, or other similar elements, materially impairing or wholly destroying visibility, are not intervening causes absolving motorist for death of pedestrian, but conditions imposing exercise of a degree of care commensurate with such circumstances. *Nichols v. Havlat* 723
18. Where the evidence was conflicting, which of two automobiles entered an intersection first was a question for the jury. *Olson v. Lilley* 779
19. Under Nebraska law, lawfulness of speed of a motor

vehicle within the *prima facie* limits fixed by statute is determined by the further test of whether the speed was greater than was reasonable and prudent under existing conditions. *Folken v. Petersen* 800

20. To hold the owner of an automobile liable for an accident which occurred when automobile was being driven by an employee, it must ordinarily be shown that employee was at the time engaged in his employer's business, with the employer's knowledge and consent. *Philleo v. Hefnider* 808

21. The presumption that an employee driving employer's automobile when accident occurs is acting within his employment is rebutted where the evidence shows employee was engaged on his personal affairs. *Philleo v. Hefnider* 808

22. In trial for manslaughter, evidence *held* to sustain finding that defendant was guilty of gross negligence in operating automobile while intoxicated. *Cowan v. State* 837

23. In trial by guest for injury sustained in collision of automobiles, failure of either driver to properly observe duties placed on him by law may be considered by the jury in determining which driver, if either, was guilty of negligence constituting proximate cause of the collision. *O'Brien v. J. I. Case Co.* 847

Banks and Banking.

The statute making deposits in name of two or more persons payable to either or to their survivors is intended for the protection of the bank and also to fix the property rights of the persons named, unless the contrary appears from the terms of the deposit. *First Trust Co. v. Hammond* 330

Bills and Notes.

The amount of consideration paid by purchaser of note is a matter of material inquiry in determining whether he acted in good faith. *Linch v. Thorpe* 478

Burglary.

No presumption of guilt of burglary arises from mere possession of stolen personal property. *Bassinger v. State* 63

Cancelation of Instruments.

A written instrument, especially one which has been signed in presence of witnesses and acknowledged, will not be set aside on account of fraud unless presumptions of validity and regularity attaching to the document are

overcome by clear and convincing evidence. *Neihart v. Ingraham* 818

Carriers.

Evidence in action by passenger against taxicab company for injuries sustained judgment for defendant. *Barker v. Safeway Cab Co.* 368

Charities.

An equity court has inherent jurisdiction over the administration of charitable trusts. *John A. Creighton Home v. Waltman* 3

Commerce.

The states have constitutional authority to exact reasonable fees for use of their highways by vehicles moving interstate. *Rocky Mountain Lines v. Cochran* 378

Conspiracy.

In prosecution against stockholder for embezzlement of funds of a corporation, evidence sustained conviction for conspiracy to commit a felony. *Escher v. State* 633

Constitutional Law.

1. The legislature has no power to limit or control an equity court's jurisdiction over the administration of charitable trusts. *John A. Creighton Home v. Waltman* 3
2. Classification of motor vehicle traffic for purposes of regulation and fixing fees is a legislative function and is not to be rejected merely because weight of evidence in court appears to favor a different standard. *Rocky Mountain Lines v. Cochran* 378
3. In passing on validity of statutory classification, legislature's determination is presumed to be supported by facts known to it, unless facts judicially known or proved preclude such possibility. *Rocky Mountain Lines v. Cochran* 378
4. In passing on validity of classification in statute imposing equalization fees on motor vehicles, it is not the court's province to hear evidence for the purpose of deciding the merits of the classification, but its function is only to determine whether the legislative decision is without rational basis, though the classification is applied to vehicles using state highways in interstate commerce. *Rocky Mountain Lines v. Cochran* 378
5. Where the state had given a contract to sell school-land, and to give a deed in fee simple when the contract was paid in full, subsequent amendment of the Constitution

making it illegal to deed away mineral rights in schoolland would not prevent the state from conveying the land under the original contract. *Reavis v. State* 442

Contracts.

1. A contract for the benefit of a third person made with his knowledge and assent cannot ordinarily be changed without his approval. *Richards v. Estate of Gilmore* 165
2. Every contract is made with reference to existing law, and every law affecting such contract becomes a part of the contract. *Reinsch v. Pacific Mutual Life Ins. Co.* 225
3. A contract of employment may constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business. *Swingle & Co. v. Reynolds* 693
4. Partial restraints on the exercise of any business are not unreasonable when they are ancillary to a valid contract affecting the business of the party in whose favor they are imposed, if made in good faith and are apparently necessary to afford reasonable protection to such party. *Swingle & Co. v. Reynolds* 693
5. An agreement by the seller of a rendering plant that he would not engage in such business in certain territory for five years was, under terms of contract and evidence, a reasonable limitation, and not an unreasonable restraint of trade or an unlawful attempt to create a trust or monopoly. *Swingle & Co. v. Reynolds* 693
6. Written portions of a contract control printed portions if the two are inconsistent. *Mack Investment Co. v. Dominy* 709
7. "Typewriting" is "writing" within contemplation of statute providing that written portions of a contract control printed portions if the two are inconsistent. *Mack Investment Co. v. Dominy* 709
8. Evidence showed that brokerage fees on loan with interest violated the statute and forfeited right of lender to collect principal. *Mack Investment Co. v. Dominy* 709
9. The right to reformation of a written instrument must be established by clear and satisfactory evidence, sufficient to overcome the strong presumption arising from terms of instrument that it correctly expresses intention of parties. *Neary v. General American Life Ins. Co.* 756
10. Equity will decree reformation of a contract for mistake

only if the mistake is mutual, or for fraud or inequitable conduct. *Neary v. General American Life Ins. Co.* 756

11. Carelessness or negligence of a person in signing a written contract does not estop him from afterwards asserting that the writing does not truly express the agreement of the parties, where the contract was obtained by fraud or entered into by mutual mistake. *Neary v. General American Life Ins. Co.* 756
12. No contract may be implied where an enforceable express contract exists between parties as to the same subject-matter, since an express contract is the exclusive source of legal rights and duties between the parties with relation to matters covered by the contract. *In re Estate of Davenport* 769
13. A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable. *In re Estate of Davenport* 769
14. A mistake to be remedial must relate to a fact which constitutes the essence of a contract and is material in the sense of being an essential element of the contract. *In re Estate of Davenport* 769
15. Where, in consideration of money payments to be made to it, one party to a contract has fully performed, the other party cannot avoid liability for payment because it considers it has made a poor bargain. *Drainage District v. Dawson County Irrigation Co.* 866

Conversion.

1. Generally, where a testator directs the sale of specific land to pay certain bequests, equity will consider that the conversion took place at testator's death, though the time of sale is postponed for a definite term. *May v. American Red Cross* 43
2. When the owner of real estate enters into a valid contract for the sale thereof, equity regards the real estate as converted into personal property, and it is so treated if the vendor dies. *Richards v. Estate of Gilmore* 165

Coroners.

1. Jurisdiction to hold an inquest is conferred on a county attorney by the finding and custody in his county of the body of a person who has apparently come to his death by violent, mysterious or unknown means. *Sturgeon v. Crosby Mortuary* 82
2. An autopsy is required and justified when necessary to determine that the cause of death of a human being did

not involve unlawful means, and when necessary to secure information that will aid the county attorney. *Sturgeon v. Crosby Mortuary* 82

3. The county attorney may legally order an autopsy to ascertain the cause of death of a person who apparently has died by unlawful means, and this he may do without consent of members of the family. *Sturgeon v. Crosby Mortuary* 82

4. Where county attorney's assistants found death of a man was caused by carbon monoxide gas, *held* that an inquest without the intervention of a jury was proper, and that the acts of the assistants were legally performed and required by the public policy of the state. *Sturgeon v. Crosby Mortuary* 82

Corporations.

1. The wisdom of corporate business policies and methods of executing them are left to the discretion of the board of directors, and in absence of usurpation, fraud, gross negligence, or transgression of statutory limitations, courts will not interfere at suit of dissatisfied stockholders merely to overrule the discretion of directors on questions of corporate management, policy or business. *Royal Highlanders v. Wiseman* 28

2. The secretary of state is not empowered to levy occupation taxes against a corporation which he previously has dissolved. *Nebraska Central Bldg. & Loan Ass'n v. Yellowstone* 422

3. The secretary of state has statutory authority to dissolve a domestic corporation for nonpayment of occupation taxes due the state. *Nebraska Central Bldg. & Loan Ass'n v. Yellowstone* 422

4. The term "corporate dissolution" signifies the termination of corporate existence in law and in fact, ending its capacity to act as a body corporate and necessitating liquidation. *Nebraska Central Bldg. & Loan Ass'n v. Yellowstone* 422

5. Where a foreign corporation enters the state to transact business therein and fails to designate an agent on whom legal process may be served as provided by statute, valid service may be made against the corporation on the state auditor without special appointment of such officer as its agent, and such service extends to all actions relating to any transactions by the corporation while in the state, though it may have ceased to do business in or may have withdrawn from the state prior

to the bringing of the action. *Yoder v. Nu-Enamel Corporation* 585
6. Provisions of constitution of a corporation, holding the stock of four subordinate companies, providing that any sale of stock should first be offered to one of the companies was valid and enforceable. *Elson v. Schmidt* 646
7. Whatever transactions are fairly incidental or auxiliary to a corporation's main business and necessary or expedient in care and management of its property may be undertaken by it and are within scope of its corporate powers. *Drainage District v. Dawson County Irrigation Co.* 866
8. Unauthorized acts of officer of a corporation may be ratified by the corporation by conduct implying approval, or by silence. *Drainage District v. Dawson County Irrigation Co.* 866
9. A corporation may not, in violation of its charter, enter into a contract whereby it receives the benefit of its illegal contract and then shield itself from liability by pleading *ultra vires* as a defense. *Drainage District v. Dawson County Irrigation Co.* 866

Courts.

1. A decision of the supreme court of the United States on a federal constitutional question is conclusive on the state courts. *Anglim v. Anglim* 133
2. Nebraska courts need not recognize rights as valid because they are so declared by courts of another state, where Nebraska courts had already declared that such rights do not exist. *Anglim v. City of Omaha* 147
3. Objection to jurisdiction of the court over the person is waived by filing a motion to strike part of the petition and to make parts thereof more definite. *Richards v. Estate of Gilmore* 165
4. The municipal court of Omaha has jurisdiction of an action to recover earnest money paid on a contract to purchase realty, notwithstanding provision of the city charter that the municipal court should not have cognizance of any action involving title to land. *Campagna v. Home Owners Loan Corporation* 572
5. A case is not authority for any point not necessary to be passed on in order to decide the cause. *Yoder v. Nu-Enamel Corporation* 585
6. For a court's opinion to be binding as a precedent, there must have been application of judicial mind to precise question necessary to determine in order to fix parties' rights. *Yoder v. Nu-Enamel Corporation* 585

Creditors' Bill.

Where a judgment creditor has exhausted his remedy at law without avail, he may reach debtor's property on which an execution cannot be levied by a creditor's bill in equity. *McBride v. Helmricks* 843

Criminal Law.

1. The giving of an instruction which in effect peremptorily directs the jury to return a verdict when a disagreement by the jury is imminent is a form of importunity and coercion which invades the province of the jury and constitutes an invasion of defendant's constitutional right to a speedy, public trial by an impartial jury. *Potard v. State* 116
2. Where defense of insanity is properly raised by accused's evidence, the burden is on the state to prove the sanity of accused beyond a reasonable doubt as one of the elements necessary to establish guilt. *Fisher v. State* 216
3. Insanity of accused is not recognized as a defense to a criminal action, unless it affects the mind of accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed. *Fisher v. State* 216
4. Evidence of commitment of accused to hospital for insane raises no presumption that accused at time of commission of offense was insane in the sense that he was not accountable for the act charged. *Fisher v. State* 216
5. It is error to require accused or his attorney to produce incriminating documents which are the basis of a criminal prosecution, and to conduct proceedings to compel their production in the presence of the jury. *Fisher v. State* 216
6. The holding of an accused for trial in district court after preliminary examination on a valid complaint gives district court jurisdiction until accused is discharged by due course of law. *Dobrusky v. State* 360
7. The right of a *de facto* deputy county attorney to act as such is not triable under a plea in abatement in a criminal action. *Morrow v. State* 592
8. A criminal action is commenced by filing a criminal complaint. *Morrow v. State* 592
9. To confer jurisdiction on a magistrate, a complaint must be filed in compliance with statute requiring complaint in writing under oath. *Morrow v. State* 592
10. In Nebraska all public offenses are statutory, no act is criminal unless the legislature has in express terms

declared it to be so, and no person can be punished for any act or omission not made penal by the plain import of written law. *Behrens v. State* 671

Damages.

Verdict of $10,000 for injuries sustained in automobile collision *held* excessive. *O'Brien v. J. I. Case Co* 847

Dead Bodies.

Where coroner's physician performed autopsy lawfully, mortuary company was not liable to deceased's wife for permitting dissection of the body. *Sturgeon v. Crosby Mortuary* 82

Death.

A verdict of $5,500 in an action under Lord Campbell's Act was not excessive. *Moslander v. Carroll* 358

Deeds.

The relinquishment by grantee of grantor's promise to convey land to grantee was sufficient consideration for deed of other land. *Neihart v. Ingraham* 818

Descent and Distribution.

An heir acquires through inheritance no greater right or title to realty than the ancestor from whom the realty descends. *Clements v. Doak* 265

Divorce.

1. State courts are not bound, under the full faith and credit clause of the federal Constitution, to recognize, as against citizens of the state, divorces obtained in other states by constructive service, where the matrimonial domicile of the innocent party remains in the first state, and where courts of such state have determined the other spouse the wrong-doer, but courts of such state may determine for themselves what effect they will give such foreign decrees. *Anglim v. Anglim* 133
2. Where wife secured decree for separate maintenance in Nebraska on personal service, and husband, subsequently in another jurisdiction on constructive service, without bringing former decree to attention of the latter court, secured a divorce and never paid the maintenance decreed, the maintenance decree continued in full force until directly modified, and on death of husband before such modification, all instalments due and unpaid and other rights thereunder could be enforced against the estate of the deceased husband in Nebraska. *Anglim v. Anglim* 133

3. Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. *Wetenkamp v. Wetenkamp* 392
4. Forgiveness sufficient for condonation is complete if there is a voluntary resumption of the marital relations. *Wetenkamp v. Wetenkamp* 392
5. If condonation occurs and the offense is not repeated, it deprives one thereafter of seeking a divorce for the condoned offense. *Wetenkamp v. Wetenkamp* 392
6. Ordinarily, condonation of a known offense does not warrant an inference that all offenses have been forgiven, and does not bar divorce for an offense not known to the injured pary at time of condonation. *Wetenkamp v. Wetenkamp* 392
7. Condonation as applied to acts of cruelty stands upon a different basis than cohabitation after knowledge of adultery, since repetition of the same cruel acts, showing resumption of the former course of conduct, revokes condonation and the original cause of divorce is revived. *Wetenkamp v. Wetenkamp* 392
8. Where the husband fails to comply with the court's order to pay costs incident to the wife's appeal in a divorce suit, the decree will be reversed as to the part from which the wife appeals. *McMaster v. McMaster* 828

Easements.

1. Whether an easement is appurtenant or in gross is to be determined mainly from the nature of the right and the intention of the parties creating it, and if it is an appropriate and useful adjunct of the land conveyed, and there is nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant to the land and not an easement in gross. *Neilson v. Leach* 764
2. It will not be presumed that the grant of an easement is in gross when the right can fairly be construed as appurtenant to some other estate. *Neilson v. Leach* 764
3. An easement will pass by a deed even if the word "appurtenance" is not used in the instrument, if it naturally and necessarily belonged to the premises. *Neilson v. Leach* 764
4. Where an ordinary observer cannot escape the conclusion that the right obtained by unrestricted conveyance to an alleyway and sewerage outlet is a valuable right and naturally belongs to certain premises, such right must be considered to be an "appurtenance." *Neilson v. Leach* 764

Eminent Domain.

1. Increase in value of land not taken by eminent domain *held* a general benefit which could not be deducted from consequential damages. *Moss v. Central Nebraska Public Power and Irrigation District* 1
2. A public power district is liable for damages caused by seepage from its irrigation works, regardless of whether the district was guilty of negligence in the construction and operation of such works. *Luchsinger v. Loup River Public Power District* 179
3. A public power district which, by constructing and maintaining a tailrace, destroys by drainage the subirrigation of farm lands of others is liable for resulting damages. *Luchsinger v. Loup River Public Power District* 179
4. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to the owner. *Luchsinger v. Loup River Public Power District* 179
5. In action to recover from a public power district damages for destroying by drainage subirrigation of farm lands, evidence sustained verdict of $4,500. *Luchsinger v. Loup River Public Power District* 179
6. The necessity for the taking of property for a public use is a legislative question, and the time when a public utility requires use of property condemned rests with the condemner. *Central Nebraska Public Power and Irrigation District v. Walston* 190
7. The final award in condemnation proceedings for acquisition of a right of way is conclusive on parties thereto as to all matters necessarily within the issues joined, although not formally litigated. *Snyder v. Platte Valley Public Power and Irrigation District* 897
8. For all injuries which may arise on account of proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. *Snyder v. Platte Valley Public Power and Irrigation District* 897
9. In condemnation proceedings, the owner of property taken or damaged may have all proper elements of damage considered by the commissioners, and if they fail to do so, he cannot afterwards maintain an action to recover damages thus omitted which were necessarily involved in the issues in the proceedings. *Snyder v. Platte Valley Public Power and Irrigation District* 897
10. In condemnation proceedings, it is presumed that the

owner of damaged lands received or had opportunity to receive compensation for injury to such lands. *Snyder v. Platte Valley Public Power and Irrigation District*.... 897

11. The purchase of lands for a right of way in lieu of condemnation carries with it all the incidents of eminent domain in so far as damages by reason of construction are concerned. *Snyder v. Platte Valley Public Power and Irrigation District* 897
12. In case of a sale of right of way in lieu of condemnation, the presumption obtains that the seller received compensation for injury to damaged lands. *Snyder v. Platte Valley Public Power and Irrigation District*..... 897

Evidence.

1. Generally, although a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. *Witzenburg v. State* 171
2. Where a case before a trial court was interwoven with a controversy which had been determined by the court in a former proceeding involving one of the parties, the court had the right to examine its own records and to take judicial notice of its own proceedings and judgment in the former action. *Witzenburg v. State*..... 171
3. In action by automobile occupant for injuries sustained in collision with a road roller, the fact that there was testimony of one or more witnesses that they did not see a red light on the road roller would not prevail against positive testimony of several witnesses that a red light was displayed. *Miller v. Abel Construction Co*..... 482
4. The statute which sets out certain elements to be considered in valuing realty for purpose of taxation does not require that each witness must expressly state that he has taken each of such elements into consideration before he is permitted to express his opinion as to its actual value. *Edgerton v. Board of Equalization*..... 493
5. The declarations of a party to an action against interest are admissible as substantive evidence. *Brown v. Mulready* 500
6. A notary public and shorthand reporter, who has taken plaintiff's deposition some months before the trial, may testify from his original shorthand notes regarding different answers made upon material matters in order to prove plaintiff's declarations against interest. *Brown v. Mulready* 500
7. In a compensation case, cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in

issue may determine the issue. *Holtzendorff v. Eppley Hotels Co.* 525

8. If a party to a suit makes a written statement which is prepared by a third person and the party denies the authenticity of the statement, the party preparing it, or some one cognizant with the facts, should be called to lay a proper foundation for its admission in evidence. *Gorman v. Bratka* 575
9. The admission of *res gestæ* statements is designed to bring out all reasonable means of ascertaining the truth, and while such statements are hearsay, they are properly admitted, since they are so closely connected with the main transaction as to be a part of it. *Bowers v. Kugler* 684
10. *Res gestæ* declarations are regarded as verbal acts, and are as competent as any other evidence when relevant to the issues. *Bowers v. Kugler* 684
11. The fact that declarant dies shortly after utterance has no weight of itself in determining the admissibility of the utterance. *Bowers v. Kugler* 684
12. One with knowledge of time and distance is competent to testify as to rate of speed of an automobile, and the opportunity for and extent of one's observation goes to the weight of the testimony. *Olson v. Lilley* 779
13. In suit to set aside deed, a witness who had known grantor for a number of years and transacted business with him was competent to testify to his opinion of grantor's mental capacity. *Neihart v. Ingraham* 818
14. A copy of lost note as evidence in action to recover unpaid debt should be such as to serve purposes of original if presented in court with genuine signatures of makers properly shown. *Sturm v. Klaurens* 830

Executors and Administrators.

1. A petition for an order directing an executor to pay a share of an estate to an assignee pursuant to a conditional assignment was fatally defective, where it did not allege that the assignor failed to comply with the condition. *In re Estate of Beachler* 293
2. A homestead valued at less than $2,000 cannot be disposed of at administrator's sale for payment of decedent's debts, and a license therefor is void. *Gordon v. Gordon* 400
3. When a claim has been allowed by the probate court, the creditor is in position of judgment creditor. *Card v. George* 426
4. Where administrator who had an interest as heir in

realty contracted as an individual for an irrigation pump and well on the realty, he was personally liable to the seller for the price, and the seller was entitled to a mechanic's lien on administrator's interest in the realty. *Hollingsworth v. McLean* 568

5. Where a devise of specific realty was made to an executor and he was surcharged for misapplied estate funds, his surety who paid amount of surcharge and was subrogated to the rights of the estate was not entitled to a lien on the devise for amount of funds so used. *Hartford Accident & Indemnity Co. v. Stout* 859

False Pretenses.

1. One of the elements of the crime of obtaining money by false pretense is that the false pretense must be a misrepresentation of a past event or existing fact which was relied on by a party defrauded. *Potard v. State* 116
2. Where there is sufficient evidence adduced to establish a misrepresentation of a past event or an existing fact on which a defrauded party relies, the issue is for the jury, even though false representations as to future transactions were also made and relied on by the person defrauded. *Potard v. State* 116
3. A representation, assurance or promise made in relation to a future transaction, and however false, does not constitute an element of the offense of obtaining money by false pretenses. *Brennan v. State* 277
4. Reliance by the owner of property on a promise by an accused to do something in the future does not constitute the crime of obtaining money by false pretenses. *Brennan v. State* 277

Fraud.

Restatements of a fraudulent representation do not constitute concealment, and a party cannot avoid the consequences of his constructive knowledge of fraud nor fulfil his duty to investigate by going to the party he suspects of fraud. *Burchmore v. Byllesby & Co.* 603

Fraudulent Conveyances.

1. A creditor whose claim has not been reduced to judgment and who has neither a general nor specific lien is not entitled to attack a transfer of property as being fraudulent as to creditors. *Card v. George* 426
2. A conveyance between relatives which has the effect of hindering or delaying a creditor in collection of his claim is presumptively fraudulent, and, in litigation

between creditor and parties to conveyance over its invalidity, burden is on parties to conveyance to establish good faith of transaction. *McBride v. Helmricks*.... 843
3. Where grantee, when conveyance was made, had knowledge of intent of grantor to hinder and delay his creditors by the conveyance, the conveyance was void as to existing creditors regardless of whether an adequate consideration was paid. *McBride v. Helmricks*..... 843
4. If a grantee makes payment of any part of the consideration after notice of fraudulent character of transfer, to extent of payment so made he is not a purchaser in good faith. *McBride v. Helmricks*..... 843

Garnishment.

1. In garnishment prcceedings, where a third person, claimant of the fund, interpleads, the court can hear and determine such person's right thereto. *Richards v. Estate of Gilmore*..... 165
2. The county court has jurisdiction in garnishment proceedings to determine ownership between rival claimants of an undisputed amount owing on a real estate contract. *Richards v. Estate of Gilmore*..... 165

Gifts.

To make a valid gift *inter vivos*, there must be intention to transfer title to property and delivery by donor and acceptance by donee. *First Trust Co. v. Hammond*..... 330

Good-Will.

The purchase of business property is a sufficient consideration for a contract by the seller that, for a reasonable time in a limited territory, he will not engage in the buyer's business. *Swingle & Co. v. Reynolds*..... 693

Guardian and Ward.

1. A guardian cannot bind the ward by an admission contrary to the ward's interest and cannot create an estoppel against the ward by his own acts or omissions. *In re Estate of Davenport*..... 769
2. A third person who furnishes maintenance to a ward acquires no enforceable claim against the guardian or the ward's estate, unless there was an expressed or implied agreement with the guardian therefor. *In re Estate of Davenport*..... 769
3. A guardian is a trustee and is governed by the same rules that govern other trustees. *In re Estate of Davenport*..... 769

Habeas Corpus.

1. Where 21-month-old child was the subject of habeas corpus proceeding, it was proper for the trial court to direct on what occasions during trial the child should be brought into court. *Kaufmann v. Kaufmann* 299
2. In habeas corpus proceeding involving custody of a child, the child's welfare is paramount. *Kaufmann v. Kaufmann* 299

Highways.

1. Where a highway undergoing construction has not been completed by the contractor or accepted by proper authorities and is being used permissively by local residents, it is only required that the highway be maintained in a reasonably safe condition for those traveling thereon who exercise reasonable care. *Miller v. Abel Construction Co.* 482
2. A highway contractor is not required in the exercise of reasonable care to place signals or flares at intermediate places on a highway under construction in order to give notice that machinery is being used thereon, where warning signals and barricades are placed at the termini thereof. *Miller v. Abel Construction Co.* 482

Homestead.

1. The county court has jurisdiction to set aside to a widow for life the homestead of her deceased husband. *In re Estate of Kopac* 346
2. Evidence, on application to county court to set aside to a widow for life a homestead estate in a 160-acre farm, *held* sufficient to prove that the farm, unencumbered, was owned by the husband and occupied by husband and applicant at time of his death. *In re Estate of Kopac* 346
3. A provision in a will for payment of testator's debts, burial expenses and costs of administration *held* not such an unequivocal statement as the law requires to impress a lien for such debts on a homestead. *Gordon v. Gordon* 400
4. An allowance made by the probate court to the widow is a debt against decedent's estate, but cannot be satisfied out of the homestead. *Gordon v. Gordon* 400

Husband and Wife.

1. A married woman who permits her husband to mortgage her property or permits title thereto to remain in his name is estopped to claim that he is not owner thereof. *Clements v. Doak* 265

2. Where parties are husband and wife, there is a presumption that transfer of title to personalty by one spouse to the other was intended as a gift. *First Trust Co. v. Hammond* 330
3. Where a husband deposits money in a bank payable to himself or wife as joint tenants with right of survivorship, and not as tenants in common, the deposit is presumed to have been made with donative intent and for the benefit of the wife with intention of giving her, if she survives, complete title to the fund. *First Trust Co. v. Hammond* 330
4. Additions to joint checking account made by wife out of income from or sale of property of husband created no title to such additions in wife. *First Trust Co. v. Hammond* 330

Indictment and Information.

1. An order sustaining motion to quash information not accompanied by judgment dismissing the proceedings or discharging defendant does not operate to terminate the proceedings or discharge defendant "by due course of law." *Dobrusky v. State* 360
2. Defects in information which might have been attacked by a motion to quash or a plea in abatement are waived where defendant voluntarily pleads to the general issue. *Dobrusky v. State* 360
3. An information meets constitutional requirements if it describes a crime which the court has power to punish and alleges that it was committed within the court's territorial jurisdiction, informs accused of nature of charge, and constitutes a record which is a bar to a subsequent prosecution for the same offense. *Cowan v. State* 837
4. The Criminal Code does not require that detailed particulars of a crime be set forth in an information in the meticulous manner prescribed by the common law. *Cowan v. State* 837
5. The statute providing that an indictment for manslaughter need not set forth manner in which or means by which death was caused, but that it shall be sufficient to charge that defendant did unlawfully kill and slay the deceased, *held* constitutional. *Cowan v. State* 837

Injunction.

1. To authorize a court to interfere by injunction, the facts averred in the petition and established by proof or admission must show that if the injunction be denied

the complainant will suffer an irreparable injury for which he has no adequate remedy at law. *Golden v. Bartholomew* 65

2. In a suit by a labor union to enjoin an employer from retaining in his employ members of the union in arrears in payment of union dues, employees in arrears are indispensable parties defendant. *Local Union v. Western Public Service Co.* 186

Innkeepers.

The maintenance of a low circular platform in front of the door leading from a hotel lobby into a coffee shop did not constitute negligence rendering operator of hotel liable for injuries sustained by guest who fell in passing from the lobby into the coffee shop. *Kelley v. Luke* 283

Insane Persons.

1. Ordinarily, one who is indebted to an incompetent, or who has interests adverse to such person, should not be selected as guardian, even though such a status does not by statute constitute a legal bar to such an appointment. *In re Guardianship of Lyon* 159
2. Subject to statutory restriction, the selection of a guardian for an incompetent is within the discretion of the court, and, generally, the selection will not be changed on appeal except for abuse of discretion. *In re Guardianship of Lyon* 159
3. In the selection of a guardian for an incompetent, the paramount consideration is the interest of the ward, both as to his mental happiness and the proper use of his estate. *In re Guardianship of Lyon* 159

Insurance.

1. A company's legal existence as a mutual legal reserve life insurance company is not subject to collateral attack by private individuals or by the state, and it can be questioned on direct attack only by the state. *Royal Highlanders v. Wiseman* 28
2. The decision of the department of trade and commerce remains in full force until reversed by final judgment of the district court or on appeal from that tribunal. *Royal Highlanders v. Wiseman* 28
3. Where there has been a *bona fide* attempt by a fraternal insurance company to comply with the statute in changing its corporate form to that of a mutual company, including notice, and the proceedings in accomplishing the

proposed transformation have been approved by the state director of insurance, and thereafter the company openly and continuously exercises the corporate powers evidenced thereby, the company is thereby constituted at least a corporation *de facto* under its new form of organization, and presumptively a corporation *de jure*. *Royal Highlanders v. Wiseman* 28

4. The board of directors of a mutual legal reserve life insurance company is its governing body, lawfully vested with management of its ordinary corporate affairs, and possessing full discretionary powers which, in the lawful exercise thereof, are not subject to control by stockholders, or by courts at the instance of stockholders. *Royal Highlanders v. Wiseman* 28
5. The identity of a fraternal insurance company was not changed by mutualization, and title to assets continued in the same company and it was not relieved from its liabilities. *Royal Highlanders v. Wiseman* 28
6. The right of a policyholder to participate in distribution of insurance company's surplus depends entirely upon the contract between policyholder and company. *Royal Highlanders v. Wiseman* 28
7. The powers and duties of the state insurance commissioner are limited to those defined by statute. *Royal Highlanders v. Wiseman* 28
8. Where the board of directors of a mutual reserve life insurance company is vested with power, either generally or by specific provision, to determine the time, amount or method of distribution of surplus to policyholders entitled thereto, the court will not ordinarily interfere, in absence of showing of fraud, bad faith, or clear transgression of a legislative mandate. *Royal Highlanders v. Wiseman* 28
9. The statute authorizes the department of insurance to direct distribution of any existing or future surplus of an insurance company as a condition precedent to approval of a change of its articles of incorporation and methods of doing business, but such order of distribution must be approved by the members of the company in order to become effective. *Brown v. Royal Highlanders* 54
10. The decision of the department of insurance directing distribution of surplus of an insurance company under section 44-415, Comp. St. Supp. 1939, remains in full force until reversed by a final judgment of the district court or by final judgment on an appeal. *Brown v. Royal Highlanders* 54

11. In absence of fraud, gross negligence or transgression of statutory limitations, equity will not interfere at suit of dissatisfied policyholders with the judgment and discretion of a board of directors on questions of corporate management, policy or business. *Brown v. Royal Highlanders* 54
12. The right of policyholders to participate in distribution of surplus of a mutual reserve life insurance company depends entirely upon contract between policyholder and company, and where it appears that the board of directors is clothed with power to determine the time, amount and method of distribution of surplus to participating policyholders, the courts will not interfere, in absence of fraud, gross negligence or violation of statutory restraints. *Brown v. Royal Highlanders* 54
13. Where an insurance contract provides that accretions to a fund derived from suspensions and lapsed or surrendered policies shall be transferred to the general fund to be used for the best interests of the company and expenses, such accretions cannot be treated as accumulated surplus of any other fund. *Brown v. Royal Highlanders* 54
14. After approval of amended articles of incorporation by board of directors of insurance company and state department of insurance and policyholders, the board of directors alone may direct distribution of divisible surplus in accordance with participating provisions of the insurance contract. *Brown v. Royal Highlanders* 54
15. Under statute authorizing state insurance department to operate insurance companies, the state determines the source of funds which may be used in payment of compensation for services rendered and expenses incurred in administration of the affairs of an insurance company by the department of insurance. *Witzenburg v. State* 171
16. Under statute authorizing state insurance department to operate insurance companies, the state does not underwrite items of compensation and expenses and does not authorize its officials to contract to save employees harmless in the handling of such funds. *Witzenburg v. State* 171
17. Under statute authorizing state insurance department to operate insurance companies, contract whereby insurance department agreed to hold agent harmless from liability for his acts and to underwrite his compensation was void. *Witzenburg v. State* 171

18. Inability to do any of the material acts necessary for the transaction of an insured's usual vocation, so as to prevent substantial and practical conduct of his vocation, is equivalent to inability to do all substantial and material acts necessary to prosecution of the vocation in his customary and usual manner. *Reinsch v. Pacific Mutual Life Ins. Co.* 225
19. Policyholders of a mutual life insurance company may sue to require its officers and directors to account for misappropriated insurance funds in which the policyholders have an interest, and to recover judgment therefor in favor of the company, where the company and insurance department fail to sue. *Pathfinder Life Ins. Co. v. Livingston* 354
20. A hay grinder mounted on four wheels while being drawn by a truck is a "trailer" or "vehicle" within the provision of an insurance contract excluding liability when the truck is being used for towing or propelling any trailer or vehicle. *Moffitt v. State Automobile Ins. Ass'n* 578
21. Whether insured's failure to answer completely in application for life policy questions concerning consultations with physicians constituted misrepresentation sufficient to avoid liability on the policy was for the jury under the evidence. *Scott v. Metropolitan Life Ins. Co.* 581
22. In order to defeat recovery on an insurance policy on the ground of misrepresentations in application, insurer must show that the representations were false, that they were made knowingly by insured with intent to deceive, that they were material to the risk, and relied on by insurer. *Scott v. Metropolitan Life Ins. Co.* 581
23. An insurance policy must be considered as containing provisions required by statute to be included in it. *Burstein v. State Mutual Life Assurance Co.* 624
24. A loan agreement in an insurance policy *held* to mean that interest on the policy loan is chargeable only to the premium due date, since, under express terms, interest can be collected only to the date of default, which refers to the date when the premium was due. *Burstein v. State Mutual Life Assurance Co.* 624
25. Interest to date of default, as applied to a loan in an insurance policy, *held* to mean that interest was payable on the policy loan to and including the premium due date and not during the grace period allowed in the policy. *Burstein v. State Mutual Life Assurance Co.* 624

26. The "grace period" in an insurance contract *held* not to contemplate free insurance, but grace was allowed to permit insured to have extension of opportunity within which to pay another premium and thus avoid forfeiture for nonpayment on the date fixed for payment. *Burstein v. State Mutual Life Assurance Co.* 624
27. Under the terms of an insurance contract, the loan agreement and the statutes, and in consideration of the nonforfeiture provisions of the policy and selection by insured of automatic extended insurance, *held*, the settlement date of the insurance contract for all purposes was the premium due date and not at the expiration of the grace period. *Burstein v. State Mutual Life Assurance Co.* 624
28. If by inadvertence, accident, or mistake the terms of a contract of insurance are not fully or correctly set forth in the policy, it may be reformed in equity, if the mistake is mutual, or if there has been fraud or inequitable conduct by one party to the contract. *Neary v. General American Life Ins. Co.* 756
29. Where through clerical error a 20-payment life insurance policy provides for too great a cash settlement, the mistake is a mutual mistake in legal contemplation, and insurer is entitled to reformation of the policy if the reformation is sought as soon as recovery for the greater amount is attempted. *Neary v. General American Life Ins. Co.* 756
30. Where a fidelity policy insuring an employer against losses resulting from dishonesty of an employee contains a valid provision limiting the time for discovery of losses, compliance with provision is essential to recovery in action on policy, and a petition alleging noncompliance is demurrable. *Dunbar v. National Surety Corporation* 833

Joint Adventures.

1. A joint adventure exists when persons engage in a common enterprise for their mutual benefit. *Soulek v. City of Omaha* 151
2. The principal distinction between partnership and joint adventure is that joint adventure may relate to a single transaction. *Soulek v. City of Omaha* 151
3. To constitute joint adventure, parties must agree to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each much have equal voice

in manner of performance and control over agencies used therein, though one party may entrust performance to another. *Soulek v. City of Omaha* 151

4. Relationship of joint adventure did not exist between city and Works Progress Administration in carrying out of city sponsored projects to construct a fire barn and extension and repair of a garage. *Soulek v. City of Omaha* 151

Judgment.

1. In a subsequent action on an accident and health insurance policy, judgment of a court of competent jurisdiction on a question directly involved in the first action is conclusive as to that question in the second action between the same parties. *Reinsch v. Pacific Mutual Life Ins. Co.* 225
2. Confirmation of a partition sale disposes of all interests of every one in the suit to the purchaser from time of confirmation by relation back to date of sale. *Drake v. Morrow* 258
3. In a judgment by consent, the court does not inquire into the merits of the case, but the only questions to be determined by it are whether the parties are capable of binding themselves by consent and whether they have done so. *McArthur v. Thompson* 408
4. A judgment by consent being agreement of parties, and made a matter of record by the court, the act of the parties imposes restrictions on the right to amend, and on the right to appeal. *McArthur v. Thompson* 408
5. A "consent judgment" is treated as an agreement of parties and given greater force than an ordinary judgment, and the court is ordinarily without power to open or modify same over objection of one party thereto. *McArthur v. Thompson* 408
6. Where persons not made nominal parties to actions are represented by parties thereto lawfully authorized to institute and prosecute the same, such persons are, in absence of collusion, bound by the judgment ultimately entered therein, and they have no absolute right to intervene. *Drainage District v. Kirkpatrick-Pettis Co.* 530

Judicial Sales.

A purchaser at a judicial sale becomes a party thereto, and may both be compelled to complete his purchase, and is entitled to an order directing the sheriff to make the deed. *Travelers Ins. Co. v. Thompson* 109

Landlord and Tenant.

1. Lessor of premises leased for a public or semipublic purpose, who knows at time of leasing that a dangerous condition exists thereon, is liable for injuries sustained by patrons of lessee resulting from such dangerous condition. *Nelson v. Hokuf* 290
2. Where under a sublease containing an option that the sublessee might renew from year to year, the sublessee occupies the premises for one year and thereafter continues in possession, the extension agreement is effective to continue the lease. *Ruedy's v. National Nampel* 797
3. Under assignment of a lease providing for payment of $1,000 within 30 days if lease is extended, the extension is effective when the option is exercised by the lessee and recognized by the lessor. *Ruedy's v. National Nampel* 797

Licenses.

1. A rule of an administrative agency which requires that a funeral director must carry a certain number of caskets in stock in his place of business is arbitrary and unreasonable and an unconstitutional exercise of the police power. *Golden v. Bartholomew* 65
2. Any interpretation of the statute which would require a funeral director to carry a certain number of caskets in stock in his place of business would be abitrary and an unreasonable and unconstitutional exercise of the police power. *Golden v. Bartholomew* 65

Life Estates.

As between a life tenant and the owner of the fee, it is the life tenant's duty, ordinarily, to pay all taxes charged against the land. *Annable v. Ricedorff* 93

Limitation of Actions.

1. An action for fraud must be commenced within four years after discovery of facts constituting fraud, or of facts sufficient to put a person of ordinary intelligence on inquiry which, if pursued, would lead to such discovery. *Burchmore v. Byllesby & Co.* 603
2. One cannot excuse delay in instituting an action for fraud if his failure to discover the fraud is attributable to his own lack of diligence. *Burchmore v. Byllesby & Co.* 603
3. The statute of limitations does not commence to run against an action for malpractice until the treatment ends. *Williams v. Elias* 656

Lost Instruments.

In action to recover amount due on lost joint and several note bearing names of two persons as makers, each charging his personal estate for payment, plaintiff producing copy in lieu of original must prove as condition of recovery the genuine signatures of both makers as their names appeared on the note itself. *Sturm v. Klaurens* 830

Mandamus.

1. In enforcement of judgments against a county, a writ of mandamus is a substitute for a writ of execution and may properly be used. *State, ex rel. Warren, v. Raabe* 16
2. A judgment for a debt secured in a court of competent jurisdiction is a condition precedent to the issuance of a writ of mandamus to compel the proper officers of a county to proceed to collect the necessary amount of money to pay such adjudicated indebtedness. *State, ex rel. Warren, v. Raabe* 16

Master and Servant.

1. One who employs an uninsured contractor becomes, by virtue of the compensation act, a statutory contractor, and is entitled to the protection of the act. *Wilbur v. Adams Lumber Co.* 48
2. A statutory contractor within the compensation act can only be held liable for compensation if accident occurs while the claimant is rendering service to the contractor at time of accident. *Wilbur v. Adams Lumber Co.* 48
3. One employed with his team who was injured while going home after working hours was not entitled to workmen's compensation. *Wilbur v. Adams Lumber Co.* 48
4. To sustain a claim under the compensation act, the employee has the burden of establishing by a preponderance of evidence that he has incurred a disability arising out of and in the course of his employment, and the proof must be made by evidence leading either to direct conclusion or to legitimate inference that such is the fact. *Feeney v. City of Omaha* 497
5. An award of compensation cannot be sustained if based on possibilities, probabilities, conjectural or speculative evidence. *Feeney v. City of Omaha* 497
6. A city is not liable for injuries to an employee on a Works Progress Administration project in the city, where the administration controls details of the work and directs the mode and manner of doing it. *Glantz v. City of Lincoln* 515

7. In compensation proceedings, the burden is on claimant to prove by a preponderance of evidence that the injury she sustained was caused by an accident arising out of and in the course of her employment. *Holtzendorff v. Eppley Hotels Co.* 525
8. A compensation award cannot be based on speculation or conjecture. *Holtzendorff v. Eppley Hotels Co.* 525
9. A compensation claimant has the burden of establishing by a preponderance of evidence a right to compensation. *Rose v. City of Fairmont* 550
10. Right to compensation must be established by sufficient legal evidence leading to the direct conclusion, or a legitimate legal inference, that an accidental injury occurred which caused the disability. *Rose v. City of Fairmont* 550
11. Exertion incidental to cranking an automobile, which when combined with existing arteriosclerosis served to produce coronary thrombosis, did not result in a compensable accidental injury. *Rose v. City of Fairmont* 550
12. The compensation law covers only workmen while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at time of the injury, and during hours of service as such workmen. *Luke v. St. Paul Mercury Indemnity Co.* 557
13. Where an employee leaves the place where his duties are to be performed, to engage in a personal objective not incident to his employment, the relation of employer and employee does not exist until he returns to a place where, by the terms of his employment, he is required to perform service. *Luke v. St. Paul Mercury Indemnity Co.* 557
14. The dual purpose doctrine that recovery may be had under the compensation law if a servant, on a trip where his own and his master's business are combined, is injured, is applicable only when there is a combination of purposes of the master and servant to be performed on the same trip. *Luke v. St. Paul Mercury Indemnity Co.* 557
15. A compensation claimant has the burden of proving by a preponderance of evidence that his claim comes within the provisions of the compensation law. *Burkholder v. Clark* 590
16. Evidence *held* insufficient to show that compensation claimant's injury occurred in the regular trade, business, profession or vocation of his employer. *Burkholder v. Clark* 590

17. An employee who has established rights to benefits under the unemployment compensation act before the deputy and appeal tribunal is a necessary party to an action to review the decision of the appeal tribunal. *Brown v. Haith* 717
18. In order to secure service of notice of action to review decision of the appeal tribunal under the unemployment compensation act on a defendant other than commissioner of labor, a copy of petition for review must be left with the commissioner for each defendant and mailed to each by the commissioner. *Brown v. Haith*.... 717
19. The rights of an employee to receive the benefits provided by the unemployment compensation act cannot be redetermined in a proceeding for judicial review to which such employee is not a party. *Brown v. Haith*.... 717
20. In a compensation case, the supreme court, on trial *de novo*, may consider the fact that the trial court gave credence to testimony of some witnesses rather than to contradictory testimony of others. *Sbarra v. Middle States Creameries* 813
21. It is the intent of the compensation law to compensate the owner of an eye capable of industrial use and injured in industry to the full extent of industrial loss occasioned thereby. *Ames v. Sanitary District*..... 879
22. Where evidence in a compensation case is conflicting, a reviewing court will consider the fact that the district court observed the demeanor of witnesses. *Ames v. Sanitary District*..... 879
23. The trial *de novo* in district court provided for in the unemployment compensation law means a trial conducted in same manner as if action had originated in district court. *Deshler Broom Factory v. Kinney*..... 889
24. Where there is no agreement to the contrary, an employer's failure to pay wages when due is good cause for quitting employment, as regards right of employees to benefits under unemployment compensation law, and previous acquiescence in delay of payment does not ordinarily constitute a waiver of prompt payment. *Deshler Broom Factory v. Kinney*..... 889
25. Quitting work by employees, singly or collectively, without intention to return to the employment, does not constitute a "labor dispute" whatever their motivating reasons may have been. *Deshler Broom Factory v. Kinney* 889
26. Where employees walk out, maintain picket lines, and induce a shut-down of employer's business for the pur-

pose of coercing prompt payment of past-due wages by collective action, it constitutes a labor dispute, disqualifying employees from receiving benefits under the unemployment compensation law. *Deshler Broom Factory v. Kinney* 889

27. The term "stoppage of work," as used in the unemployment compensation law, means a substantial curtailment of work in an employing establishment. *Deshler Broom Factory v. Kinney* 889

Mechanics' Liens.

The interest of a part owner of realty may be subject to a mechanic's lien for improvements thereon, made at his instance, though it does not affect the interest of the other coowners. *Hollingsworth v. McLean* 568

Monopolies.

Anti-trust laws, laws forbidding unreasonable restraint of trade and laws relating to monopolies were enacted primarily for protection of the public and not for the purpose of interfering with the right to make private contracts growing out of legitimate business transactions. *Swingle & Co. v. Reynolds* 693

Mortgages.

1. By the acceptance of his bid at a mortgage foreclosure sale, a bidder becomes subject to the jurisdiction of the court and concluded by its orders, and he may be compelled to perform his bid, and if he fails, a resale may be ordered at his risk and he may be held for a loss if the resale is for a less amount. *Travelers Ins. Co. v. Thompson* 109
2. The rule *caveat emptor* does not give validity to a void deed. *Clements v. Doak* 265
3. The buyer of land at a foreclosure sale acquires title and equitable rights of parties to the suit. *Clements v. Doak* 265
4. In mortgage foreclosure suit, only the mortgagor and mortgagee and those who acquired any interest from either of them after execution of the mortgage are necessary parties. *Clements v. Doak* 265
5. An unrecorded deed is void as to mortgagees whose mortgages are placed of record before recording of deed, of which they are without knowledge. *Clements v. Doak* 265
6. An unrecorded deed void as to a mortgagee has no validity as to such mortgagee though later recorded. *Clements v. Doak* 265

7. A mortgagee is a "purchaser" within the recording act (Comp. St. 1929, sec. 76-218). *Clements v. Doak* 265
8. Decree confirming sale of realty, over objection of inadequacy of price, affirmed. *Prudential Ins. Co. v. Norall* 431
9. Where a trust agreement disclosed circumstances under which a first mortgage was due and payable and duties of the trustee to collect, no duties in conflict with the trust agreement would be implied. *Refshauge v. Sesostris Temple* 706
10. A mortgage foreclosure sale of realty will not be set aside 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. *Cole v. Madison* 812

Municipal Corporations.

1. A widow, recognized as such by Nebraska courts, is entitled to the same pension as was obtained, in his lifetime, by her deceased husband as a metropolitan fireman. *Anglim v. City of Omaha* 147
2. The police relief and pension fund of the city of Omaha, as evidenced by statutes respecting police department in cities of the metropolitan class, constitutes part of the home rule charter. *Munch v. Tusa* 457
3. The charter of a city, having a population of more than 100,000, may be amended by a proposal therefor, made by the law-making body of such city, and the proposal may be submitted to the electors. *Munch v. Tusa* 457
4. Where an ordinance submitted to electors permits an elector to vote for or against a definite proposition, and where an elector, by voting, decides the plan shall or shall not be adopted and whether the plan shall constitute an amendment to the city charter, such proposed ordinance does not contain a dual conception. *Munch v. Tusa* 457
5. Where an amendment to a city charter embraces two subjects which are germane to the general subject of the amendment, such amendment is valid and may be submitted to the electors as a single proposition. *Munch v. Tusa* 457
6. The police relief and pension fund of the city of Omaha, as set forth in statutes, may be amended by ordinance adopted by the city council and submitted to the electors, where the ordinance affects merely the form of the law and does not destroy the purpose for which the fund was created. *Munch v. Tusa* 457

7. An ordinance proposing an amendment to the Omaha city charter by placing firemen and policemen on same pension basis was germane to charter provisions sought to be amended and transgressed no constitutional limitations. *Munch v. Tusa* 457
8. Where a statute prohibits a village officer from having an interest in any contract with the village, such a contract is void and money paid thereunder may be recovered at suit of the village or a taxpayer suing in village's behalf. *Village of Bellevue v. Sterba* 744
9. Where a village has authority to make a contract, but such contract is unenforceable because irregularly made, recovery quantum meruit may be had against the village for benefits received thereunder. *Village of Bellevue v. Sterba* 744
10. Recovery quantum meruit cannot be had against a village on a contract prohibited by statute. *Village of Bellevue v. Sterba* 744

Negligence.
1. Where evidence is in conflict, questions of negligence and comparative negligence are for the jury. *Parks v. Metz* 235
2. The existence of a slight difference in floor levels in different parts of a hotel which the public are invited to enter does not in itself constitute negligence. *Kelley v. Luke* 283
3. In an action for negligence, the burden is on plaintiff to show that there was a negligent act or omission by defendant, and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. *Miller v. Abel Construction Co.* 482
4. In an action for negligence where plaintiff has failed to sustain the burden of proof of negligence, it is the court's duty to direct a verdict for defendant. *Miller v. Abel Construction Co.* 482
5. A motorist who sees something abnormal on the highway at night, but takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negligence, which bars his recovery for damage contributed to by his lack of care. *Stocker v. Roach* 561
6. Where evidence in action for injuries establishes that a cross-petitioner was guilty of negligence more than slight, the court should direct a verdict against defendant on his cross-petition. *Stocker v. Roach* 561

7. Where an inference of negligence arises from the uncontradicted established facts, the trial court need not submit the question of negligence to the jury. *Hickey v. Omaha & C. B. Street R. Co* 665
8. The mere happening of an accident is not evidence of negligence. *Bowers v. Kugler* 684
9. The burden of proving a cause of action for negligence is not sustained by evidence from which negligence can only be conjectured. *Bowers v. Kugler* 684
10. The burden of proving contributory negligence as an affirmative defense is on the party pleading it. *Nichols v. Havlat* 723
11. Where intoxication is not a contributory cause of injury to an intoxicated person, he may recover for all damages he would have suffered if sober. *Nichols v. Havlat* 723
12. The doctrine of the last clear chance is not applicable where negligence of party seeking to invoke it is a continuous contributing factor up to time of injury, but its applicability is not avoided by the mere continuing existence of the consequences or peril resulting from prior but completed conduct. *Folken v. Petersen* 800
13. In an action for personal injuries, refusal to submit the case to the jury is not erroneous, where evidence is insufficient to support a verdict for plaintiff. *Philleo v. Hefnider* 808

New Trial.

1. Application for new trial on ground of newly discovered evidence is addressed to the discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown. *Reinsch v. Pacific Mutual Life Ins. Co* 225
2. A trial *de novo* in a court of general jurisdiction means a trial in the commonly accepted sense of that term in such a court. *Deshler Broom Factory v. Kinney* 889

Oath.

An oath to be valid must be an outward pledge by the person taking it that his attestation or promise is made under an immediate sense of responsibility to God. *Morrow v. State* 592

Officers.

1. Every person must ascertain, at his peril, the extent of power of a public officer in performance of ministerial duties. *Witzenburg v. State* 171

2. The authority of a public officer is a matter of public law, of which every person interested is bound to take notice. *Witzenburg v. State* 171
3. In performing ministerial duties, acts of a public officer which are beyond the powers authorized by law are void. *Witzenburg v. State* 171

Parent and Child.
1. Under early English law, the father had paramount right to guardianship of his child, but now the child's welfare is the controlling question. *Kaufmann v. Kaufmann* 299
2. The legal inference arising from the advancements of money by a parent to a child, when unexplained by evidence, is that they were by way of gift and not by way of loan. *Fischer v. Wilhelm* 448

Parties.
1. Indispensable parties to a suit are those whose interest is such that final decree cannot be made without affecting their interests, or leaving the controversy in such condition that its final determination may be inconsistent with equity. *Local Union v. Western Public Service Co.* 186
2. Intervention is a creature of statute ancillary to existing litigation. *Drainage District v. Kirkpatrick-Pettis Co.* 530
3. Every litigant is entitled to access to courts without interference from interveners who have no interest in the matters in litigation. *Drainage District v. Kirkpatrick-Pettis Co.* 530
4. An intervener who has an interest in matter in litigation may join either plaintiff or defendant, or he may oppose both when his interest requires it, but he cannot without consent of plaintiff substitute himself for the defendant. *Drainage District v. Kirkpatrick-Pettis Co.* 530
5. An intervener must plead some interest in the subject-matter of the litigation; a mere denial of plaintiff's right is not sufficient. *Drainage District v. Kirkpatrick-Pettis Co.* 530
6. Where an intervener who has come in to defend an action fails to sustain the material allegations of his petition in intervention, it is proper for the court to refuse to permit him to continue. *Drainage District v. Kirkpatrick-Pettis Co.* 530
7. To entitle a party to intervene in an action, he must

have a direct interest in or lien on the matter in controversy in the suit. *Drainage District v. Kirkpatrick-Pettis Co.* 530
8. Ordinarily, an intervener must take the suit as he finds it, and is bound by previous proceedings in the case, and cannot complain of the form of the action, or of informalities or defects in proceedings between the original parties. *Drainage District v. Kirkpatrick-Pettis Co.* 530
9. Whether pleadings or pleadings and proof establish that a party seeking to intervene has an actual interest in the subject of the controversy entitling him to participate therein is a necessary preliminary question for the trial court's decision and is determinable when the action is finally decided. *Drainage District v. Kirkpatrick-Pettis Co.* 530
10. A mere creditor, although he may have an indirect interest in the result of an action, has no right to intervene therein. *Drainage District v. Kirkpatrick-Pettis Co.* 530
11. A third person claiming an interest in or lien on property on which an attachment has been levied cannot intervene in the attachment suit to question the grounds for issuance of the writ or the validity of the demand on which it is based. *Drainage District v. Kirkpatrick-Pettis Co.* 530
12. Intervention is restricted to those claiming an interest in the "legal event" of any suit pending or to be brought. *Drainage District v. Kirkpatrick-Pettis Co.* 530
13. A decision as to the right to intervene does not turn on the question as to the merits of plaintiff's case. *Drainage District v. Kirkpatrick-Pettis Co.* 530
14. One seeking to intervene must bring himself within the terms of the applicable statutes, or within the rules of law defining the right to intervene. *Drainage District v. Kirkpatrick-Pettis Co.* 530

Partition.

1. In a partition action, the district court has authority to take an account of rents and profits arising out of the premises partitioned therein. *Annable v. Ricedorff* 93
2. In an action of partition, the district court has jurisdiction to construe a clause in a will determining the rights of parties to realty under the will. *Annable v. Ricedorff* 93
3. A court acquiring jurisdiction of property for partition acquires complete jurisdiction thereof and will

afford complete justice to all parties to the suit with respect to the subject-matter. *Drake v. Morrow* 258

Paupers.

1. Valid claims by a physician against a county for treating poor residents at the expense of the county are such claims only as are authorized by statute. *Neill v. Dakota County* 26
2. A physician relying on county funds raised by taxation for payment of compensation for services performed for poor residents must ascertain at his peril the power of county officers to bind the county for such compensation. *Neill v. Dakota County* 26
3. In action by physician against county to recover compensation for services performed for poor residents, physician had burden to prove that services were authorized by statute to be performed at county's expense. *Neill v. Dakota County* 26

Pawnbrokers.

The regulation of interest under the small loan act is within the police power of the state. *Mack Investment Co. v. Dominy* 709

Pleading.

1. A motion for judgment on the pleadings admits the truth of well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. *Brown v. Royal Highlanders* 54
2. A party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations in so far as they have been controverted. *Brown v. Royal Highlanders* 54
3. Where plaintiffs, in suit to compel insurance company to distribute surplus, by moving for judgment on the pleadings, in effect admit that the divisible surplus allocated by the board of directors for distribution is the result of sound business judgment and is in accord with the insurance contract after a valid change of its articles had been completed, the motion should be overruled. *Brown v. Royal Highlanders* 54
4. Matters judicially noticed in an action were properly considered in determining questions presented by a demurrer in a subsequent action involving one of the parties. *Witzenburg v. State* 171
5. When objections stated in a demurrer are not those provided by statute, the demurrer can only be con-

sidered as a general demurrer. *Central Nebraska Public Power and Irrigation District v. Walston* 190
6. A party may demur to a pleading only upon such grounds as are specified in statutes. *Central Nebraska Public Power and Irrigation District v. Walston* 190
7. A general demurrer tests substantive legal rights of parties upon admitted facts including proper inferences of law and fact which may be drawn from facts pleaded, and if the complaint states facts which entitle plaintiff to relief, whether legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. *Central Nebraska Public Power and Irrigation District v. Walston* 190
8. A party who stands upon his general demurrer to a pleading thereby admits material facts averred, and must take all consequences which result from such admission. *Central Nebraska Public Power and Irrigation District v. Walston* 190
9. Though the prayer for relief is part of the petition, it is no portion of statement of facts required to constitute a cause of action, and entire omission of any demand for judgment would not subject the petition to a general demurrer. *Central Nebraska Public Power and Irrigation District v. Walston* 190
10. If it appears from facts stated in the petition that plaintiff is entitled to any relief, a general demurrer will not lie. *Central Nebraska Public Power and Irrigation District v. Walston* 190
11. Where plaintiff is entitled to some relief, objection to the relief asked for or to the particular remedy incorporated in the prayer cannot be raised by demurrer, either at common law or under statute. *Central Nebraska Public Power and Irrigation District v. Walston* 190
12. Pleading affirmative matters in an answer which amount to no more than a denial of plaintiff's cause of action does not necessitate a reply. *Traill v. Ostermeier* 432
13. A petition in equity pleading a defense is demurrable without a statement of facts negativing such defense at time plaintiff seeks equitable relief. *Hand v. School District of City of Sidney* 874

Principal and Agent.
1. An agent's statement is not binding on his principal as an admission unless it is made within the scope of his real or apparent authority, during the continuance of his agency. *Burchmore v. Byllesby & Co* 603

2. A principal is liable to third persons for the torts of his agent when committed in the course and within the scope of the agency, though the principal never authorized, participated in or ratified the tort, but he is not liable where the tortious act was committed for a purpose personal to the agent. *Burchmore v. Byllesby & Co.* 603
3. An act of an agent, without actual authority, may be with such apparent authority as to bind the principal. *Drainage District v. Dawson County Irrigation Co.* 866
4. Apparent authority of agent to bind principal cannot be extended or restricted by by-laws or other instructions to the agent, in absence of actual notice thereof. *Drainage District v. Dawson County Irrigation Co.* 866

Public Lands.

1. Declaration of forfeiture for failure to pay interest on contract for sale of school-land is mandatory, and when no such forfeiture is declared, the contract remains in full force. *Mulhall v. State* 341
2. The board of educational lands and funds has no power in conveying land to add restrictions not contained in the original contract for sale of the land. *Mulhall v. State* 341
3. Description in contract for sale of school-land, as containing forty acres "more or less," was sufficient to include accretions. *Mulhall v. State* 341

Railroads.

1. A railroad company blocking a highway with a train at night has right to assume that one driving an automobile along highway will adopt such lights and speed that he can stop his machine within distance that he can plainly see the obstruction, and therefore is not negligent in failing to give warning of presence of train. *Sailors v. Lowden* 206
2. An automobile guest, in order to recover for injuries received when host's automobile struck freight car blocking highway crossing, would be required to adduce evidence tending to prove that railroad company was negligent and that such negligence was the proximate cause of his injury. *Sailors v. Lowden* 206
3. A railroad company has the right, in its reasonable and ordinary course of business, to stop its trains on crossings at highways, even though it temporarily blocks traffic. *Sailors v. Lowden* 206
4. A railroad company is not obliged under the law to

maintain flagmen, or install signal devices, under all conditions, at ordinary highway crossing, even though such highway be an arterial one. *Sailors v. Lowden* 206

Schools and School Districts.

1. Liberal interpretation of school-board proceedings does not do away with mandatory provisions of the statute. *Hand v. School District of City of Sidney* 874
2. A statutory provision that no school property of a school district shall be sold by the board of education without an affirmative recorded vote of at least two-thirds of all members of the board at a regular meeting is mandatory. *Hand v. School District of City of Sidney* 874

Specific Performance.

1. Specific performance of an oral agreement to make a will will be enforced only where one party has wholly performed the agreement and the other party has partly performed it, and its nonfulfillment would amount to a fraud on the party who has fully performed. *Gilgren v. Price* 124
2. Specific performance of an oral agreement to make a will will not be enforced where there has been a substantial failure of performance by the party seeking enforcement of the agreement. *Gilgren v. Price* 124
3. Where there has been a substantial failure of consideration for an oral agreement to make a will, the agreement will not be enforced in an action by the party obligated to supply the consideration. *Gilgren v. Price* 124
4. Where in accordance with oral agreements childless husband and wife possessing separate estates executed reciprocal wills, each leaving his estate to the other and providing that the heirs of both should share alike in the residue, but the wife after the husband's death willed the property to her own heirs, the husband's administratrix was entitled in action against wife's executor to show the oral contract notwithstanding statute of frauds and to have it specifically performed. *Mack v. Swanson* 295
5. Equity will grant specific performance of a parol contract to will property to another, where the terms of the contract are established by evidence that is clear, convincing and satisfactory, and the contract is wholly performed by one party so that nonfulfillment would amount to a fraud on that party. *Lennox v. Anderson* 748
6. A petition for specific performance of contract allegedly

obligating defendant school district to sell a school building and grounds was demurrable for failure to plead a record showing that school board entered into contract by affirmative recorded vote of at least two-thirds of all members of the board. *Hand v. School District of City of Sidney* 874

Statute of Frauds.

1. Agreement to pay part of attorney's fees for services previously rendered a third person *held* void under the statute of frauds. *Johnson v. Anderson* 78
2. An entire contract, partly oral and partly written, and fully performed by one of the parties, is not within the statute of frauds. *Mack v. Swanson* 295

Statutes.

1. An independent act may incorporate by reference provisions of another existing act, and the effect thereof is the same as though the statute or part adopted was written into the adopting statute, but such procedure does not constitute such adopting statute an amendatory enactment. *Rocky Mountain Lines v. Cochran* 378
2. Acts of the legislature must be construed with reference to, and their scope may not be extended beyond, the limitations of their constitutional title. *Drainage District v. Kirkpatrick-Pettis Co* 530
3. In construing a statute, the legislative intent is to be determined from consideration of the whole act, and the intent as deduced from the whole will prevail over that of a particular part considered separately. *Drainage District v. Kirkpatrick-Pettis Co* 530
   Behrens v. State 671
4. In construing provisions of the revenue law of the state, all parts of it must be construed together. *Drainage District v. Kirkpatrick-Pettis Co* 530
5. The section of an act properly amended should be construed as though it had been originally enacted in its amended form. *Drainage District v. Kirkpatrick-Pettis Co.* 530
6. The statute providing that all provisions of the revenue law in force with reference to collection of taxes shall apply with equal force to all taxes and special assessments levied by county, municipality, drainage district, or other political subdivision of the state, includes within its purview all provisions of the revenue laws of the state. *Drainage District v. Kirkpatrick-Pettis Co.* 530

7. All parts of an act relating to the same subject should be considered together. *Behrens v. State* 671
8. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. *Behrens v. State* 671

Stipulations.
1. Parties may, by stipulation, dispense with such pleadings as are therein designated. *Traill v. Ostermeier* 432
2. Where the effect of a stipulation was to dispense with a reply, no objections could thereafter be based on its absence. *Traill v. Ostermeier* 432

Taxation.
1. The party appealing from the action of a county board of equalization in fixing the value of realty for purposes of taxation has the burden to establish *prima facie* the value of the realty. *Aurora Hotel v. Board of Equalization* 511
2. Where, on appeal by taxpayer from the action of a county board of equalization in fixing value of realty for purposes of taxation, the county board adduces no proof as to its value, all facts which the evidence on behalf of the taxpayer tends to prove will be treated as established for the purpose of a *prima facie* case in favor of the taxpayer. *Aurora Hotel v. Board of Equalization* 511
3. The assessment of realty for purposes of taxation as ultimately fixed by a board of equalization is final, except on appeal to the district court, and on appeal should not be disturbed unless it appears from clear and convincing proof that it is erroneous. *Aurora Hotel v. Board of Equalization* 511
4. Under statute, property for taxation purposes is to be valued and assessed at its actual value, and actual value means its value in the market in the ordinary course of trade. *Wilson & Co. v. Otoe County* 518
5. An erroneous and excessive valuation of property for taxation purposes by the county board of equalization may, on complaint of the owner, be corrected on appeal to the district court. *Wilson & Co. v. Otoe County* 518
6. Assessments by an irrigation district for maintenance and operation of its canal or ditch are special assessments, even though made in proportion to valuation and not by acreage or frontage, and are clearly embraced within the statute providing that all special assessments shall be a lien on the realty on which assessed, but shall

be subject to general taxes. *Drainage District v. Kirkpatrick-Pettis Co.* 530

Telegraphs and Telephones.

1. Where a telephone company continued to transact business after expiration of its charter by lapse of time, and later the executive officers undertook to reincorporate for the purpose of conducting the same business in the same corporate name and continued to do so, the new telephone company was a *de facto* corporation. *Brown v. Price* 644
2. Where four independent corporations incorporate a fifth, each of the four receiving an equal share of the stock therein, and one sells out to one of the other corporations, and, after the charter expires, the central board of directors vote to extend the corporate life thereof and it continues to function, it is a *de facto* corporation. *Elson v. Schmidt* 646

Time.

Where a statute provides that it shall take effect from and after its passage and approval, in computing the time it takes effect, the day of its passage is excluded, and it goes into effect the day after its passage. *Wilson & Co. v. Otoe County* 518

Trial. SEE APPEAL. CRIMINAL LAW.

1. Refusal to submit to jury defense not supported by evidence *held* proper. *Soulek v. City of Omaha* 151
2. It is not error for a trial court not to charge a jury on a question not relevant to an issue under the pleadings in the case. *Reinsch v. Pacific Mutual Life Ins. Co.* 225
3. Remarks of counsel in argument to jury were not prejudicial where the court instructed the jury to disregard the remarks. *Reinsch v. Pacific Mutual Life Ins. Co.* 225
4. A motion for a directed verdict must be treated as an admission of all material evidence of mover's adversary and entitles him to have every controverted fact resolved in his favor and to the benefit of inferences that can reasonably be deducible from the evidence. *Parks v. Metz* 235
5. In automobile accident case, refusal to give an instruction tendered by defendants was not error where the law applicable to the case had been given by the court in its instructions. *Parks v. Metz* 235
6. A trial court should direct a verdict at close of evi-

dence, where the evidence is undisputed, or where evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict. *Burchmore v. Byllesby & Co.* 603

7. It is within the discretion of the trial court to permit plaintiff to adduce further evidence in chief after he introduced rebuttal evidence. *Sbarra v. Middle States Creameries* 813

Trover and Conversion.

1. To maintain an action for conversion of chattels, a party must have actual possession of the property, or the right to immediate possession. *Burchmore v. Byllesby & Co.* 603
2. Conversion in law is unauthorized dealing with goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or whereby one having right of possession is deprived of all substantial use of his goods, temporarily or permanently. *Burchmore v. Byllesby & Co.* 603
3. An action for conversion will not lie for the disposition of property which the plaintiff has authorized, but if he has an action, it is for the value of the property. *Burchmore v. Byllesby & Co.* 603

Trusts.

1. An equity court should act in the granting of remedial orders, necessary for the proper accomplishment of the purposes of a trust, so as to prevent the purposes of the trust being defeated. *John A. Creighton Home v. Waltman* 3
2. When necessary to accomplish the primary purpose of a trust, secondary restrictions on investments that may be made with trust funds may be altered by an equity court. *John A. Creighton Home v. Waltman* 3
3. If at any time powers granted to a trustee by the court are shown to be improper or the trustee fails in the proper performance of its duties, the powers of the trustee may be changed by the court and the trustee may also be changed. *John A. Creighton Home v. Waltman* 3
4. An equity court may authorize the investment of trust funds in common and preferred stocks under conditions that safeguard the investment and an adequate income return consistent with that safety, in order that the primary purpose of the trust may be more effectively secured, although such investments are not authorized

in the instrument creating the trust. *John A. Creighton Home v. Waltman* 3

5. A corporation, organized under the provisions of chapter 24, art. 6, Comp. St. 1929, is not restricted by the provisions of section 24-605, Comp. St. 1929, to the lawful investments named in the section, when other securities in which its funds may be invested are specified in its articles. *John A. Creighton Home v. Waltman* 3
6. Rule as to liability of plaintiff's board of trustees as established by the district court, approved, subject to its being construed in the light of decisions of this court and applicable established principles. *John A. Creighton Home v. Waltman* 3
7. A trustee who advanced funds for purposes of the trust was not required to account for reimbursements therefor. *In re Estate of Marlin* 245
8. Where a trustee took possession of pasture land and used it for himself, he was chargeable with reasonable rental value thereof. *In re Estate of Marlin* 245
9. Where a trustee with power to sell property to produce funds for trust purpose elected to forego that power and advanced funds which were applied to the trust purpose, he would not be charged with reimbursements, where he charged no interest and no damage or loss to the beneficiaries was shown. *In re Estate of Marlin* 245
10. A testamentary trustee's failure to furnish statutory bond does not prevent him from becoming trustee on testator's death, but amounts only to declination of trust twenty days after receiving notice that bond is required. *In re Estate of Camp* 272
11. When a testamentary trustee resigns, and there is no provision in the will for perpetuating the trust, the county court may appoint a trustee. *In re Estate of Camp* 272
12. A testamentary trustee, turning all trust assets to a successor-trustee within twenty days after such successor's appointment, is not liable to the trust beneficiary for assets lost because of successor's failure to give bond. *In re Estate of Camp* 272
13. Where a beneficiary met the terms of a trust agreement while the testamentary trustee still had substantial duties to perform with reference to the trust, the trust remained an active trust. *Beals v. Croughwell* 320
14. In action by husband's guardian to declare wife constructive trustee of property received from husband, rights as to savings account and checking account

having been fixed, as of its condition on August 5, 1938, the court, on the issues tendered, was without right to interfere in relation thereto. *First Trust Co. v. Hammond* 330

15. The remedy of a third person injured by torts of a trustee is not primarily against the trust estate, but the trustee is subject to personal liability for torts committed in course of administration of the trust to the same extent as if he held the property free of trust. *In re Estate of Davenport* 769
16. In absence of contractual relationship controlling conduct and operation of a trust, consideration of report of acts and doings of trustee must primarily be based on legality of expenditure and necessity and reasonableness of amounts. *United States Nat. Bank v. Alexander* 784
17. Where funds have admittedly been received by a trustee, the burden rests on trustee to sustain reasonableness of charges against the trust. *United States Nat. Bank v. Alexander* 784
18. Where a trust is administered under supervision of the court, the court has the right to take into consideration, in determining reasonableness of charges against the trust, its knowledge gained during administration of the trust. *United States Nat. Bank v. Alexander* 784
19. The allowance of compensation to a trustee is addressed to the sound discretion of the court. *United States Nat. Bank v. Alexander* 784

Vendor and Purchaser.

1. Testatrix' attempted change of beneficiary to part of fund to be paid by debtor after her demise *held* ineffectual, being contrary to her original intent when contract with debtor was made. *Richards v. Estate of Gilmore* 165
2. Occupancy of property by both husband and wife does not import notice of wife's ownership thereof, or claim of title thereto, other than as spouse, when record title is in the husband. *Clements v. Doak* 265
3. In a covenant to convey land free from liens and encumbrances, the word "encumbrances" may include whatever prevents or impedes its transfer, and an unpaid and uncanceled judgment may be an encumbrance, though the lien expired by lapse of time and by death of the judgment debtor. *Campagna v. Home Owners Loan Corporation* 572

Venue.

The venue of landowner's action in mandamus to compel an irrigation district to build a bridge across district's canal was properly laid in county where the land was located, even though the irrigation district's principal place of business was in another county. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 471

Waters.

1. Subirrigation in the natural condition of land used for farming is a valuable property right attached to the land itself. *Luchsinger v. Loup River Public Power District* 179
2. In suit by irrigation district to quiet title to realty obtained by condemnation, admitted statement of facts in petition was inconsistent with retention of possession of the premises by defendants, and petition was sufficient as against a general demurrer. *Central Nebraska Public Power and Irrigation District v. Walston* 190
3. In an action for damages to growing crops alleged to have been caused by seepage resulting from operation of an irrigation canal, it is necessary to establish a causal relationship between the water in the canal and that causing the seeped condition on plaintiff's lands, and proof which merely leaves the matter in the realm of conjecture is insufficient to sustain a judgment. *Lincoln Joint Stock Land Bank v. Platte Valley Public Power and Irrigation District* 316
4. Accretions must be expressly excepted or reserved in a conveyance of land to avoid a transfer thereof. *Mulhall v. State* 341

Wills.

1. A devise to my wife, "to her own use and benefit *forever,*" with remainder to two children, *held* to convey only a life estate to the wife, and deeds of conveyance made by the widow were effective to convey only her life estate. *Annable v. Ricedorff* 93
2. Construction of a will in a probate court is for the information of the executor only, in order to advise him what course to pursue, and the decree adjudicates nothing beyond the executor's rights and liabilities in the execution of his office, and controversies between adverse claimants under a devise or between the executor and persons claiming adversely to the estate are not affected thereby. *Annable v. Ricedorff* 93

3. A testator is not guilty of fraud or any act against public policy, if he suggests in his will that the beneficiary may resort to bankruptcy to free himself of personal debt, in order to receive the benefits of the will. *Beals v. Croughwell* 320
4. Where testatrix left property to her nephew under a spendthrift trust, providing that none of the property should be used to pay the nephew's debts, and providing that the property should be paid to the nephew whenever he should pay his just debts from other sources, and the nephew secured his discharge in bankruptcy, he was entitled to the property. *Beals v. Croughwell* 320
5. The right of election of a surviving spouse to take under decedent's will or by inheritance is statutory, and the statute must be strictly followed to avail a survivor of the right of election. *Gordon v. Gordon* 400
6. 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. *Baldwin v. Baldwin* 823
7. Special bequest in will containing the language, "in the event of the marriage or death of" widow, *held* to disclose testator's intention to dispose of entire estate in event of remarriage or death of widow. *Baldwin v. Baldwin* 823
8. Where there are two provisions in a will relating to disposition of the same property, the relative positions of the provisions in the will are not important where the intention of the testator can be ascertained by construing the provisions together. *Baldwin v. Baldwin* 823
9. Where it can be reasonably done, a court will harmonize ambiguous expressions with the plain provisions of the will to effectuate the testator's intent. *Baldwin v. Baldwin* 823

Witnesses. SEE APPEAL, 17-19.
1. One claiming as heir is the representative of a deceased person, within the statute. *Fischer v. Wilhelm* 448
2. The plaintiff may be impeached by evidence tending to prove that she made statements out of court contrary to those made by her at the trial in respect to matters material to the issues. *Brown v. Mulready* 500
3. Defendant is entitled to reasonable latitude on cross-examination of plaintiff when attempting to show inconsistent statements made some months before. *Brown v. Mulready* 500

4. The introduction in evidence of certificate of death by the insured's physician does not waive provisions of the statute against physicians testifying concerning professional communications. *Scott v. Metropolitan Life Ins. Co.* 581
5. An attorney employed to prepare a will and his partner who attested it were disqualified under the statute to testify to conversations had with the testator with reference thereto. *Lennox v. Anderson* 748