Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
06/06/2026 11:54 PM CDT

REPORTS OF CASES

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1939, AND JANUARY TERM, 1940

VOLUME CXXXVII

HENRY P. STODDART
OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
LINCOLN, NEBRASKA
1940

Copyright A. D. 1940
By HENRY P. STODDART, REPORTER OF THE SUPREME COURT,
For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

ROBERT G. SIMMONS, Chief Justice
WILLIAM B. ROSE, Associate Justice
GEORGE A. EBERLY, Associate Justice
BAYARD H. PAINE, Associate Justice
EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
HARVEY JOHNSEN, Associate Justice

HENRY P. STODDART.....Reporter
GEORGE H. TURNER.....Clerk
ELBERT M. WHITE.....Deputy Clerk
WALTER R. JOHNSON.....Attorney General
JOHN L. RIDDELL.....Assistant Attorney General
CLARENCE S. BECK.....Assistant Attorney General
RUSH C. CLARKE.....Assistant Attorney General
DON KELLEY.....Assistant Attorney General
H. EMERSON KOKJER.....Assistant Attorney General
EDWIN VAIL.....Assistant Attorney General
ROBERT A. NELSON.....Assistant Attorney General

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe and Sarpy.	Wilmer W. Wilson	Neb. City
Third	Lancaster.	Jefferson H. Broady Ellwood B. Chappell John L. Polk Frederick E. Shepherd	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas and Washington.	William A. Day Francis M. Dineen James M. Fitzgerald Charles Leslie Herbert Rhoades John A. Rine Willis G. Sears Arthur C. Thomsen John W. Yeager	Omaha Omaha Omaha Omaha Tekamah Omaha Omaha Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings Harry D. Landis	David City Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner Frederick L. Spear	Columbus Fremont
Seventh	Fillmore, Nuckolls, Saline and Thayer.	Robert M. Proudfit	Friend
Eighth	Cedar, Dakota, Dixon and Thurston.	Mark J. Ryan	Pender
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	Charles H. Stewart Adolph E. Wenke	Norfolk Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Lewis H. Blackledge Frank J. Munday	Hastings Red Cloud
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Edwin P. Clements Ernest G. Kroger	Ord Grand Island
Twelfth	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	Isaac J. Nisley J. Leonard Tewell	North Platte Sidney
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Robert R. Dickson	O'Neill
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

PRACTICING ATTORNEYS

Admitted since the Publication of Vol. 136

BAIRD, EDGAR ALLISON, JR.
BRENNAN, VIRGINIA
BURESH, JOHN G.
BURROUGHS, RAYMOND H.
BUSCHENFIELD, DONALD A.
CAMPAGNA, SEBASTIAN J.
CARTER, LESLIE DOUGLAS
CLINTON, LAWRENCE M.
CONROY, HAROLD WILLIAM
CRAFT, WILLIAM C.
CURTISS, DAVID W.
DALY, JOHN FRANCIS
DESMUL, LEONARD B.
DORT, DOUGLAS M.
DRULINER, ROSS D., JR.
DUDGEON, JOHN R.
ELIAS, WINFIELD TODD
EVANS, ROBERT M.
FARHAT, ALFRED P.
FAUQUET, PAUL E.
FINKELSTEIN, AARON J.
FLORANCE, RONALD K.
GILL, LYLE BENNETT
GOLDEN, THOMAS P.
GREEN, ERVINE J.
GRIMMINGER, MYRTLE ERICKSON
HAHN, LOWELL E.
HANSEN, HARLEY B.
HARDMAN, BOYCE P.
HARMON, PAUL ALEXANDER
HENRY, GORDON I.
HUTCHISON, GEORGE WILLIAM
JACOB, LEONARD H. H.
JOHNSON, CLARENCE G.
JOHNSON, FORREST A.
JOHNSON, KENNETH L.
KERRIGAN, JOHN FARRELL
KIECHEL, FREDERIC C.
KINGERY, HAZEL E.
KIOUS, ROBERT LEE
KIRCHNER, CHARLES E.
KRONEN, LEIF CHRISTIAN
KVASNICKA, GERALD A.
LANE, JAMES ANTHONY
LERNER, HARRY V.
LESHER, DEAN S.
LITTLE, JAMES DUFFIELD
MEYERS, HENRY F.
MORTIMORE, ALFRED G., JR.
NEILL, RICHARD E.
NESTOR, PHILIP F., JR.
O'BRIEN, BERNARD F.
O'MALLEY, JOHN A.
O'SULLIVAN, JOHN MICHAEL
PARKER, CECIL F.
PETERSEN, ERNEST M.
PHARES, CHARLES HEBER
POLSKY, HYMAN
PROKOP, JEROME
REID, CARROLL J.
ROACH, RALPH R.
ROHN, WILLIAM F.
ROTHKOP, GERTRUDE
SAWTELL, WILLIAM A., JR.
SHELDON, CHAUNCEY C.
SINKBEIL, R. FREDERICK
SMITH, ALLAN F.
SMITH, BERNARD B.
SMITH, BRYCE GILBERT
SMITH, GRAYDON WELLS
SOUCHEK, RUSSELL ANTONIN
SPIELHAGEN, HERBERT F.
SPIELHAGEN, OTTO GERHARD
SWANSON, ROBERT J.
TAVAREZ, ANTONIA F.
THOMPSON, GEORGE H.
TOLLEFSEN, ROBERT L.
TORPIN, R. STANLEY
TROIA, JOSEPH ANTHONY
VITAMVAS, GERALD S.
VROOMAN, LLOYD L.
WHITE, BERNARD S.
WILLMORE, WENDELL JAMES
WOLVINGTON, EARL A.
WOOLF, RALEIGH
YOUNGER, EVELLE J.

TABLE OF CASES REPORTED

Abboud v. Boock 652
Alexander v. O'Grady 645
Alexander v. Oman 495
Ansbacher-Siegle Corporation v. Miller Chemical Co. 142
Anstine v. State 148
Araho, The, State v. 389
Arehart v. School District 369
Arnold, Hawley v. 238
Ashbrook v. Briner 104
Associated Asphalt Contractors, Dobesh v. 1, 342

Baack, Gleason v. 272
Badgett, Searcey v. 185
Baker Steel & Machinery Co. v. Ferguson 578
Balis v. State 835
Batth v. Metropolitan Life Ins. Co. 676
Beatrice Restaurant Co., Dolen v. 247
Bethscheider v. City of Hebron 909
Blank v. Omaha & C. B. Street R. Co. 632
Bocian v. Union P. R. Co. 318
Boock, Abboud v. 652
Brainard v. Hall 491
Briner, Ashbrook v. 104
Brown, Spangler v. 510
Bruntz v. State 565
Buffalo County, Shambaugh v. 434
Burke v. Western Union Telegraph Co. 878
Burkhardt, Wood v. 685
Burlage v. Lefebure Corporation 671

Callen v. State 192
Carlson, Fouts v. 402
Carlson, In re Adoption of 402
Carnes v. DeKlotz 787
Carpenter, Frank v. 357
Carr, Reithmiller v. 284
Chappell v. Wantz 307
Christenson v. Union P. R. Co. 538

City of Curtis v. Maywood Light Co. 119
City of David City, Wrede v. 194
City of Geneva, Jewel Tea Co. v. 768
City of Hebron, Bethscheider v. 909
City of Lincoln, Nebraska State Bldg. Corporation v. 535
City of Lincoln, Schmidt v. 546
City of Lincoln, State v. 97
Clayton v. Evans 574
Clements, Hilton v. 791
Coates v. Platte Valley Public Power and Irrigation District 313
Conrad v. Kaup 900
Corey, Hadley v. 204
Corkle v. Fenton 54
Cosmopolitan Old Line Life Ins. Co., State v. 742
County Fire Ins. Co., Parish v. 385
Cover, Union Central Life Ins. Co. v. 260
Cramb, Federal Farm Mtg. Corporation v. 553
Crandall v. Luhnow 13
Curtis, City of, v. Maywood Light Co. 119

David City, City of, Wrede v. 194
Davis v. O'Grady 708
Degele, State v. 810
DeKlotz, Carnes v. 787
Department of Roads and Irrigation, Peterson v. 354
Deuel County, Steward v. 516
Dierks, Farmers State Bank of Ewing v. 442
Dill v. Hamilton 723
Dobesh v. Associated Asphalt Contractors 1, 342
Dolen v. Beatrice Restaurant Co. 247
Donohue v. Sheerer 374
Douglas County v. Estate of Meyers 60
Drainage District, Ritter v. 866
Drake v. Ralston 72
Dunham v. O'Grady 649

Estate of Meyers, Douglas County v. 60
Evans, Clayton v. 574

Falk, Welch v. 764
Fallis v. Vogel 598
Farmers State Bank of Ewing v. Dierks 442
Federal Farm Mtg. Corporation v. Cramb 553
Federal Farm Mtg. Corporation v. Fischer 559
Federal Farm Mtg. Corporation v. Hughes 454

Federal Farm Mtg. Corporation v. Hughes 820
Federal Farm Mtg. Corporation v. Popham 529
Federal Farm Mtg. Corporation v. Thiele 626
Federal Land Bank v. Price 188
Fenton, Corkle v. 54
Ferguson, Baker Steel & Machinery Co. v. 578
Fischer, Federal Farm Mtg. Corporation v. 559
Fouts v. Carlson 402
Frank v. Carpenter 357
Fremont Joint Stock Land Bank v. Morse 659

Geil, Ricketts v. 531
Geneva, City of, Jewel Tea Co. v. 768
Getsey, Kelkenney v. 416
Glassmeyer, Markel v. 243
Gleason v. Baack 272
Goldberg, Horn v. 813
Goodrich Co., Hompes v. 84
Gugelman v. Kansas City Life Ins. Co. 411
Guilliatt, Long v. 199

Hadley v. Corey 204
Hall, Brainard v. 491
Hamilton, Dill v. 723
Hampton v. Westover 695
Harris v. Heeter 905
Hart, In re Estate of 843
Hart v. White 843
Hauser, State v. 138
Hawk v. O'Grady 639
Hawley v. Arnold 238
Haynes v. State 69
Hebron, City of, Bethscheider v. 909
Heeter, Harris v. 905
Henderson v. Wilson 693
Hill v. Interstate Transit Lines 110
Hilton v. Clements 791
Hinckle, State v. 735
Holberg v. McDonald 405
Home Savings & Loan Ass'n, State v. 231
Hompes v. Goodrich Co. 84
Horn v. Goldberg 813
Housing Authority of City of Omaha, Lennox v. 582
Hughes, Federal Farm Mtg. Corporation v. 454
Hughes, Federal Farm Mtg. Corporation v. 820

In re Adoption of Carlson 402
In re Estate of Hart 843
In re Estate of Lee 567
In re Estate of Luce 846
In re Estate of Meyers 60
In re Estate of Sheerer 374
In re Estate of Wantz 307
In re Guardianship of Warner 25
In re Platte Valley Public Power and Irrigation District 313
Interstate Transit Lines, Hill v. 110
Iowa-Nebraska Light & Power Co., Maul v. 128, 137

Jackson, Live Stock Nat. Bank v. 161
Jewel Tea Co. v. City of Geneva 768
Johnson, Terry v. 567
Jones, Miller v. 605

Kansas City Life Ins. Co., Gugelman v. 411
Kaup, Conrad v. 900
Kelkenney v. Getsey 416
Kinyoun v. Reinsh 325
Kuhns v. Live Stock Nat. Bank 459

Larson v. Storm 420
Lee, In re Estate of 567
Lefebure Corporation, Burlage v. 671
Lennox v. Housing Authority of City of Omaha 582
Lincoln, City of, Nebraska State Bldg. Corporation v. 535
Lincoln, City of, Schmidt v. 546
Lincoln, City of, State v. 97
Live Stock Nat. Bank v. Jackson 161
Live Stock Nat. Bank, Kuhns v. 459
Long v. Guilliatt 199
Loup River Public Power District, Pearse v. 611
Luce, In re Estate of 846
Luce Estate, Nebraska Wesleyan University v. 846
Luhnow, Crandall v. 13
Lund v. Woodward 689

McCown v. Schram 498
McDonald, Holberg v. 405
Macomber v. State 882
Markel v. Glassmeyer 243
Marker v. Scotts Bluff County 360

Martindale v. Panter 522
Maul v. Iowa-Nebraska Light & Power Co. 128, 137
Maywood Light Co., City of Curtis v. 119
Metropolitan Life Ins. Co., Batth v. 676
Metropolitan Utilities District, Nelson-Johnston & Doudna v. 871
Meyer v. Nielsen Chevrolet Co. 6
Meyer v. Platt 714
Meyers, In re Estate of 60
Meyers v. Neeld 428
Midwest Studios, Vanderlippe v. 289
Miller v. Jones 605
Miller Chemical Co., Ansbacher-Siegle Corporation v. 142
Millslagle v. State 664
Morris v. Morris 660
Morse, Fremont Joint Stock Land Bank v. 659

Nebraska State Bldg. Corporation v. City of Lincoln 535
Nebraska Wesleyan University v. Luce Estate 846
Neeld, Meyers v. 428
Nelsen v. Tilley 327
Nelson-Johnston & Doudna v. Metropolitan Utilities District 871
Nicholas, Reils v. 19
Nielsen Chevrolet Co., Meyer v. 6

O'Grady, Alexander v. 645
O'Grady, Davis v. 708
O'Grady, Dunham v. 649
O'Grady, Hawk v. 639
O'Grady, State v. 824
O'Grady, Thompson v. 641
Olson v. Omaha & C. B. Street R. Co. 216
Omaha & C. B. Street R. Co., Blank v. 632
Omaha & C. B. Street R. Co., Olson v. 216
Omaha & C. B. Street R. Co., Redwelski v. 681
Omaha & C. B. Street R. Co., Travinsky v. 168
Omaha & C. B. Street R. Co., Whittaker v. 800
Oman, Alexander v. 495

Panter, Martindale v. 522
Parish v. County Fire Ins. Co. 385
Pearse v. Loup River Public Power District 611
Peony Park v. Security Ins. Co. 504
Peterson v. Department of Roads and Irrigation 354
Platt, Meyer v. 714
Platte Valley Public Power and Irrigation District, Coates v. 313
Platte Valley Public Power and Irrigation District, Thies v. 344

Popham, Federal Farm Mtg. Corporation v. 529
Price, Federal Land Bank v. 188
Pringle v. Smith 903

Ralston, Drake v. 72
Redwelski v. Omaha & C. B. Street R. Co. 681
Reils v. Nicholas 19
Reinsh, Kinyoun v. 325
Reithmiller v. Carr 284
Resnick v. Resnick 256
Richardson v. Warner 25
Ricketts v. Geil 531
Ritter v. Drainage District 866
Ruzicka v. State 473

Searcey v. Badgett 185
Security Ins. Co., Peony Park v. 504
Schmidt v. City of Lincoln 546
School District, Arehart v. 369
Schram, McCown v. 498
Scott v. State 348
Scotts Bluff County, Marker v. 360
Shambaugh v. Buffalo County 434
Sheerer, Donohue v. 374
Sheerer, In re Estate of 374
Sheldon Co., Thomas v. 181
Shellenbarger v. Shellenbarger 762
Smith, Pringle v. 903
Spangler v. Brown 510
State, Anstine v. 148
State, Balis v. 835
State, Bruntz v. 565
State, Callen v. 192
State v. Degele 810
State v. Hauser 138
State, Haynes v. 69
State, Macomber v. 882
State, Millslagle v. 664
State, Ruzicka v. 473
State, Scott v. 348
State, Vallas v. 250
State Bank of Jansen v. Thiessen 426
State, ex rel. Burkett, v. Swanson 704
State, ex rel. Fischer, v. City of Lincoln 97
State, ex rel. Gossett, v. O'Grady 824

State, ex rel. Hunter, v. Home Savings & Loan Ass'n 231
State, ex rel. Hunter, v. The Araho 389
State, ex rel. Johnson, v. Tilley 173
State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co. 742
State, ex rel. Wright, v. Hinckle 735
Steward v. Deuel County 516
Storm, Larson v. 420
Swanson, State v. 704
Swanson v. Swanson 699

Terry v. Johnson 567
Thiele, Federal Farm Mtg. Corporation v. 626
Thies v. Platte Valley Public Power and Irrigation District 344
Thiessen, State Bank of Jansen v. 426
Thomas v. Sheldon Co. 181
Thompson v. O'Grady 641
Tilley, Nelsen v. 327
Tilley, State v. 173
Travinsky v. Omaha & C. B. Street R. Co. 168

Union Central Life Ins. Co. v. Cover 260
Union P. R. Co., Bocian v. 318
Union P. R. Co., Christenson v. 538

Vallas v. State 250
Vanderlippe v. Midwest Studios 289
Vogel, Fallis v. 598

Wantz, Chappell v. 307
Wantz, In re Estate of 307
Warner, In re Guardianship of 25
Warner, Richardson v. 25
Welch v. Falk 764
Western Union Telegraph Co., Burke v. 878
Westover, Hampton v. 695
White, Hart v. 843
Whittaker v. Omaha & C. B. Street R. Co. 800
Wilson, Henderson v. 693
Wood v. Burkhardt 685
Woodward, Lund v. 689
Wrede v. City of David City 194

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1939

MELVIN DOBESH, APPELLEE, V. ASSOCIATED ASPHALT CONTRACTORS, INC., ET AL.: VILLAGE OF ANSLEY ET AL., APPELLANTS.

288 N. W. 32

FILED OCTOBER 20, 1939. No. 30741.

Appeal. "The supreme court has no power to exercise appellate jurisdiction in proceedings to review the judgments of the district court, unless a transcript is filed with the clerk of this court within the time prescribed by law for taking appeals." *State v. Amsberry*, 104 Neb. 279, 178 N. W. 822.

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

Chambers, Holland & Locke and *Evans & Lee*, for appellants.

Allan F. Black and *Perry, Van Pelt & Marti, contra.*

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

PER CURIAM.

This is a compensation case. It arises out of an injury sustained by plaintiff on June 16, 1937, in an accident which arose out of and in the course of his then employment. In the hearing or rehearing in the compensation court, he received an award of compensation against the

defendants Associated Asphalt Contractors, Incorporated, the Village of Ansley, Custer county, Nebraska, and the Travelers Insurance Company, a corporation, from which the defendants above named prosecuted an appeal to the district court for Custer county. From a judgment of affirmance as to defendants Associated Asphalt Contractors, Incorporated, the Village of Ansley, Nebraska, and the Travelers Insurance Company, a corporation, made and entered in the district court for Custer county on May 8, 1939, jointly and severally against the defendants last named, the defendants Village of Ansley, Nebraska, and the Travelers Insurance Company now appeal to this court.

The controlling statute governing the procedure on appeals to the supreme court in compensation cases is included in section 48-174, Comp. St. Supp. 1937, viz.:

"Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law except that such appeal shall be perfected within thirty days from the entry of judgment by the district court and the cause shall be advanced for argument before the supreme court within thirty days from the filing of said appeal, and the supreme court shall render its judgment and write an opinion in such cases within thirty days after submission; Provided, that a judgment, order, or award of the district court may be modified or set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the judgment, order or award was procured by fraud. (3) That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record. (4) That the findings of fact by the court do not support the order or award."

"The general laws of the state regulating appeals," employed in the statute quoted, by necessary implication adopt the language of section 20-1912, Comp. St. 1929, reducing, however, the time of perfecting such appeal by filing the transcript certified to by the clerk in this court from "with-

in three months" to "within thirty days" from the entry of the judgment in the district court.

The condition of the record presented on this appeal challenges our attention to certain defects which we will now consider.

We are committed to the view, viz.: "The supreme court has no power to exercise appellate jurisdiction in proceedings to review the judgments of the district court, unless a transcript is filed with the clerk of this court within the time prescribed by law for taking appeals." *State v. Amsberry,* 104 Neb. 279, 178 N. W. 822. See, also, *State v. Amsberry,* 104 Neb. 769, 178 N. W. 828.

One of the essential requirements for perfecting an appeal, as stated by this court, is: "In order to affect an appeal from the district to the supreme court, it is necessary to file with the clerk of this court, within the time prescribed by statute, a transcript of the proceedings, authenticated by the certificate of the clerk of the district court. Such requirement is jurisdictional, and the stipulation of the parties or their attorneys stating that the transcript contains all the proceedings will not supply the omission of the certificate of the clerk of the trial court." *McDonald v. Grabow,* 46 Neb. 406, 64 N. W. 1093. See, also, *Fromholz v. McGahey,* 85 Neb. 205, 122 N. W. 879.

In the instant case there is a clerk's certificate to the transcript. It is in the following form:

"The state of Nebraska }
Custer County } ss.

"I, H. J. Copsey, Clerk of the District Court, Twelfth Judicial District of Nebraska, within and for the County of Custer, do hereby certify that the within and aforegoing is a true and correct copy of.....
.....in a cause in said Court wherein Melvin Dobesh, a minor et al., is plaintiff, and Associated Asphalt Contractors, Inc., et al., are defendants, as the same appears in the files and upon the records of said Court now in my charge as Clerk aforesaid.

"In testimony whereof, I have hereunto set my hand officially and affixed seal of said Court at Broken Bow, Custer County, Nebraska, this 9th day of June, 193.....
"(Seal) H. J. Copsey, Clerk. By.....Deputy."

This is manifestly incomplete. Is it sufficient? Waiving this question for the present, and, for the purpose of the decision only, treating it as sufficient, and as conferring absolute verity on the record to which it is attached, we note that the judgment appealed from, as set forth in the journal entry, was made and entered on the 8th day of May, 1939. This is followed by a motion for a new trial which the record recites was filed on the 15th day of May, 1939. If a motion for a new trial is necessary, it is obvious in this case that it was filed out of time, and is wholly null and void for every possible purpose. Comp. St. 1929, sec. 20-1143.

"A motion for a new trial, to be of any avail, must be filed at the term of court the verdict or decision is entered, and, except for newly-discovered evidence, within three days after the rendition of such verdict or decision.

"The delay of the clerk of the court in spreading the verdict or decision on the court journal will not have the effect to extend the time within which to file a motion for a new trial." *Nebraska Nat. Bank v. Pennock,* 59 Neb. 61, 80 N. W. 255.

See, also, *Hoover v. State,* 126 Neb. 277, 253 N. W. 359; *Heeter v. Nisi,* 134 Neb. 209, 278 N. W. 271; *Weber v. Allen,* 121 Neb. 833, 238 N. W. 740; *Young v. Estate of Young,* 103 Neb. 418, 172 N. W. 49.

We note that the journal entry of May 8, 1939, contains the following, viz.: "Said cause came on further to be heard upon the motion of the Village of Ansley and the Travelers Insurance Company for a new trial and on consideration thereof and the court being fully advised in the premises, said motion for new trial is taken under advisement, on this 8 day of May, 1939."

However, the transcript discloses that the written motion for a new trial had not been filed when this order

taking the same under advisement was entered. Oral motions for new trial are unavailing for every purpose.

"A court has no authority to rule on a motion for a new trial which has not been filed and is not before it, in anticipation that such motion may be subsequently filed.

"A motion for a new trial, filed out of time and not coming within any of the exceptions of the statute, is of no avail for the purposes of a review of errors in this court." *Carmack v. Erdenberger,* 77 Neb. 592, 110 N. W. 315.

See, also, *In re Estate of Swan,* 82 Neb. 742, 118 N. W. 478.

It is obvious, therefore, that we must wholly disregard the motion for a new trial filed on May 15, 1939, as well as the ruling thereon, both as to challenging the attention of this court to errors occurring at the trial and as to fixing the time for perfecting the appeal.

Now, the judgment was rendered on May 8, 1939. There is no evidence that it was actually journalized at a later date. The transcript was not filed in this court until June 12, 1939. This was not within the thirty days prescribed by the workmen's compensation act. It is noted that the præcipe in this case filed by appellants recites that the appeal is "from a judgment rendered on the 11th day of May, 1939." This statement finds no support in the record. But, if it were true, Saturday the 10th day of June, 1939, would be the last day on which the appeal could have been filed in this court. *In re Estate of Getchell,* 98 Neb. 788, 154 N. W. 537; *Frazier v. Alexander,* 111 Neb. 294, 196 N. W. 322.

It follows, therefore, that the transcript on appeal having been filed out of time, this court has no jurisdiction to review the judgment appealed from, and such appeal is accordingly dismissed.

APPEAL DISMISSED.

MARLINE JOY MEYER, APPELLANT, V. NIELSEN CHEVROLET COMPANY, APPELLEE.

287 N. W. 849

FILED OCTOBER 20, 1939. No. 30713.

Workmen's Compensation: DEPENDENTS. This is a case under the workmen's compensation act involving the question of whether or not the plaintiff is entitled to compensation as a dependent child. The facts of the case are reviewed, and the holding of this court in the case of *Palmer v. Hamer*, 133 Neb. 362, 275 N. W. 322, is adhered to and applied.

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

Joseph L. Jiranek and *George S. Reeder*, for appellant.

Frederick M. Deutsch, contra.

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

SIMMONS, C. J.

This is a workmen's compensation case involving the question of whether or not the plaintiff is entitled to compensation as the dependent child of Melvin E. Meyer.

That Meyer died from injuries arising out of and in the course of his employment with the defendant as an automobile salesman is not in dispute here. The matter was heard before a single judge of the compensation court, next on rehearing, before the compensation court with three judges sitting, and on appeal, by the district court. Compensation has been denied the plaintiff by each of said courts. Plaintiff appeals from that decision.

Plaintiff was born February 3, 1936, the daughter of Arline Lentz. The mother and Melvin E. Meyer, the deceased, were married April 2, 1936. Prior to the marriage, plaintiff and her mother were living with Effie M. Lentz, mother of Arline. After the marriage, Meyer went to live with his wife, the plaintiff, and the grandmother at the grandmother's home. On June 6, 1936, Arline brought suit for divorce, and thereafter Melvin and Arline did not live

together. However, Meyer did continue to board and room at the grandmother's home until about July 1. Arline Meyer in the divorce petition alleged:

"That the defendant, regardless of his marital duties and obligations as a husband, ever since said marriage, without any just cause or provocation whatsoever on the part of the plaintiff, although he was and is of sufficient ability so to do, has grossly, wantonly and cruelly failed, neglected and refused to support and maintain plaintiff and their minor child with necessaries of life; that the defendant, without any just cause or provocation whatever, on the part of the plaintiff, has been guilty of such conduct which in law amounts to extreme cruelty toward the plaintiff and has on several occasions struck and beat plaintiff violently."

The divorce action was not contested. The divorce was granted September 5, 1936. The material part of the decree provided that "the exclusive care, custody, control and education of their minor child, Marline Joy Meyer, be, and she hereby is, awarded to the plaintiff; that the plaintiff have and recover judgment against the defendant, in the sum of $30 for unpaid temporary alimony for the maintenance and support of said minor child and $25 for unpaid suit money and attorney fee; that the defendant pay to the Clerk of the District Court of Platte County, Nebraska, the sum of $15 per month permanent alimony for the maintenance and support of said minor child aforesaid, commencing on the 5th day of September, 1936, and monthly thereafter until further order of this court."

After the divorce, Arline and plaintiff continued to live at the grandmother's home. On March 14, 1937, Arline Meyer remarried and her second husband came to live with her at the grandmother's home. They were living there when the evidence was taken herein. So, at all times, material here, the physical place of abode of the plaintiff and her mother has been at the home of the grandmother.

Prior to the marriage, Melvin contributed nothing to the support of the plaintiff and her mother. After the mar-

riage, and while living at the grandmother's home, he paid grocery bills amounting to about $20 a month, a sum not equivalent to the value of his board and room. Plaintiff was a bottle baby. The testimony is specific that Melvin did not pay for the milk which the plaintiff required. From June to September he contributed nothing to the family in any way. Pursuant to the decree, in September, 1936, he made one payment of $15, and thereafter made no payments or contributions to the support of the plaintiff. Plaintiff's mother was unemployed. The grandmother contributed to their support. After the second marriage, the new husband contributed his limited earnings to their support.

Plaintiff's mother testified that the deceased wanted to have plaintiff supported; that he said "he could afford to pay $15 a month;" that after the payment of the $15 into court, he said "he wasn't earning enough to support himself properly and could not give any to the baby." Court process was not issued to compel payment pursuant to the divorce decree.

The deceased worked for the defendant as a salesman on commission for seventeen weeks preceding his death. He earned $170.68 in commissions during that time. His earnings otherwise are not shown with the exception of the statement of Arline that at the time he was living with the grandmother his earnings approximated $65 a month. After the divorce decree, Melvin went "out west," where it appeared he had some employment. He returned about January 1, 1937.

Plaintiff's mother testified that the deceased asked her to marry him and give the plaintiff his name; that he admitted the paternity of the plaintiff and called her his daughter in conversation with relatives and others. It does not appear that there was a written acknowledgment of the paternity. The grandmother testified that Melvin thought "a lot" of the plaintiff. However, after the divorce was granted, he did not have plaintiff in his custody and never called to see her or gave her anything. While he was absent from Columbus for several months after the di-

vorce, he did not communicate with plaintiff's mother or grandmother, and they knew only approximately when he went away and when he returned.

Claimants have only the rights created by the compensation law. The legislature has the power to say who shall receive compensation and in what amounts.

Courts do not have the power to extend the benefits of the act beyond the limits fixed by the legislature no matter how unjust the statute may appear to operate in particular cases. The purpose of the act is to compensate an employee for the loss of his earning power, and in case of the death of the employee, to compensate his dependents for the loss of support which they have been receiving and which, but for the injury to the employee, they had a reasonable right to expect would probably continue. In case of death, the payment of compensation is not made for the purpose of enriching the estate of the deceased, nor does it go to his heirs under the laws of descent.

The amount of compensation to be paid bears direct relation to the loss of earnings and to the deprivation of support flowing from wages theretofore received by the employee. In case of the death of an employee, the compensation to be paid to those partially dependent upon his earnings for support is further based upon the proportion that the amount contributed by the deceased to his partial dependents bears to the total wages received by the deceased.

Section 48-124, Comp. St. 1929, provides: "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a). A wife upon a husband with whom she is living at the time of his death; (b). Husband upon a wife with whom he is living at the time of her death; (c). Child or children under the age of eighteen years * * * upon the parent with whom he is or they are living at the time of death of such parent, there being no surviving parent. * * * (d). * * * The terms 'child' and 'children' shall include step-children and adopted children if members of the deceased's household at the time of his death, and shall include posthumous children.

* * * (e). In all other cases, questions of dependency, in whole of (or) in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; * * * (f). No person shall be considered a dependent, unless he or she be a member of the family of the deceased employee, or bears to him the relation of widow or widower, or lineal descendant, or ancestor, or brother, or sister. (g). Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee."

This section of the statute divides dependents covered by the act into two groups: First, those who are conclusively presumed to be dependent; and, second, those who are dependent in fact.

In the first classification, dependency is conclusively presumed as a matter of law; in the second group, dependency must be proved.

Plaintiff, contending that she is conclusively presumed to be a dependent within subdivision (c) relies on the proposition that as a matter of law she was "living" with her father at the time of his death, and cites *Harrison v. Cargill Commission Co.*, 126 Neb. 185, 252 N. W. 899. Plaintiff further contends that the clause "there being no surviving parent" must be construed to mean no surviving parent capable of receiving compensation. The latter proposition we need not decide.

Harrison v. Cargill Commission Co., supra, was a case where a woman was confined to a hospital for the insane. Her husband was killed. The widow was held to be "living" with her husband at the time of the accident. The case clearly turned upon the proposition that there had been no change in the legal status of the parties. There was no estrangement or divorce or purpose to separate, or agreement to live apart, or wrong-doing or violation of the marital relations or duties. The wife, had she been restored to mental competency, would have returned to her place of abode with the husband. This court there specifically said (quoting from *Northwestern Iron Co. v. Industrial Commis-*

sion, 154 Wis. 97, 142 N. W. 271): "The 'living together' contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words 'living together.' There must be a legal separation or an actual separation in the nature of an estrangement, else there is a 'living together' within the meaning of the statute." The distinctions are clear between the *Harrison* case and the instant case. It would do great violence to the English language and to the plain meaning of the statute to hold that the plaintiff, under the facts of this case, was, as a matter of fact or law, living with the deceased at the time of his death.

Plaintiff contends that in any event she is entitled to compensation under subdivision (e); that she was by virtue of the divorce decree legally dependent upon the deceased, and that that is sufficient.

It is the loss of the support, the loss of the financial contributions of the employee, which determines the right of the dependent to compensation—not the mere existence of some legal right to support. That the statute means that there must be proof of dependency in fact and not mere legal dependency is established by section 48-122, Comp. St. Supp. 1937, which provides: "(2) If at the time of the accident which resulted in his death the deceased employee leaves no persons wholly dependent, but leaves persons partially dependent upon his earnings for support, compensation shall be paid on account of the benefits provided in subdivision 1 of this section for persons wholly dependent, *in the proportion that the average amount regularly contributed by the deceased from his wages for a reasonable time immediately prior to the accident, to such persons who were partially dependent, bears to the total wages of the deceased during the time.*"

If we were to assume in this case that legal dependency were sufficient and if we found that the dependency of the plaintiff was partial, then upon what basis could the com-

pensation be figured? The deceased had contributed nothing to the support of the plaintiff from his wages for a reasonable time immediately prior to the accident. There is no contribution upon which compensation could be figured. That provision establishes the fact that the legislature contemplated that dependency under subdivision (e) meant actual and not a naked legal dependency.

It clearly appears that in the instant case the plaintiff's mother did not rely for the plaintiff's support upon the payment of the amount awarded in the divorce decree; that the deceased had made no contributions to the support of the plaintiff from his earnings for a reasonable time immediately prior to the accident; that he did not intend to make contributions from his earnings to the support of the plaintiff; and that the death of Meyer did not deprive the plaintiff of any support that she had been receiving or had any reasonable expectancy of receiving.

The courts below decided the case upon the authority of *Palmer v. Hamer,* 133 Neb. 362, 275 N. W. 322. Plaintiff vigorously assails the rule there announced. This court there held that legal dependency was insufficient, under our statute, to support a claim for compensation, and where children are living with a stepfather, in order to establish dependency of the children upon the father, that actual support by the father must be shown.

We have reexamined the rule there announced and adhere thereto. It is fully supported by an analysis of the statute and by the authorities. See 71 C. J. 250, 527, 529, 531; *Utah Fuel Co. v. Industrial Commission,* 80 Utah, 301, 15 Pac. (2d) 297, 86 A. L. R. 858; *Weliska's Case,* 125 Me. 147, 131 Atl. 860; *Roberts v. Whaley,* 192 Mich. 133, 158 N. W. 209; *Ocean Accident & Guarantee Corporation v. Industrial Commission,* 32 Ariz. 54, 255 Pac. 598; *Sweet v. Sherwood Ice Co.,* 40 R. I. 203, 100 Atl. 316; *Glaze v. Hart,* 225 Mo. App. 1205, 36 S. W. (2d) 684; *Franklin Fluorspar Co. v. Bell,* 247 Ky. 507, 57 S. W. (2d) 481; *Lloyd-McAlpine Logging Co. v. Industrial Commission,* 188 Wis. 642, 206 N. W. 914; *Ahmed's Case,* 278 Mass. 180, 179 N. E. 684, 79

A. L. R. 669; *Gossen v. Township of Borgholm*, 174 Minn. 227, 218 N. W. 882; *Kral v. Lincoln Steel Works*, 136 Neb. 31, 284 N. W. 761; *Colorado Fuel & Iron Co. v. Industrial Commission*, 90 Colo. 330, 9 Pac. (2d) 285.

Anything to the contrary in the opinion of this court in *Parson v. Murphy*, 101 Neb. 542, 163 N. W. 847, is overruled.

The decree of the district court is

AFFIRMED.

ARDEN CRANDALL, APPELLANT, V. MARIE LUHNOW: ARTHUR E. SCHRAM ET AL., APPELLEES.
288 N. W. 29

FILED OCTOBER 20, 1939. No. 30663.

1. **Divorce**: CUSTODY OF CHILDREN. "In considering the custody of a child, the matter of primary concern is the welfare and best interests of such child. This is paramount to the wishes of parents or grandparents." *Hobza v. Hobza*, 128 Neb. 598, 259 N. W. 516.
2. ———: ———. It is usually best for the court to keep minor children in a divorce case within the jurisdiction of the court, for it is impossible to anticipate, at the time of trial, changes which may occur in the habits, character, fitness, or financial condition of either parent.

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

John E. Newton, for appellant.

Carlos W. Goltz and *Kingsbury & Kingsbury*, *contra.*

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

PAINE, J.

Plaintiff husband granted divorce from wife for cruelty, and given custody of six-year-old daughter. Husband, los-

ing the farm he had rented, and doing odd farm jobs, turns his daughter over to his parents. Mother of daughter, having remarried, files application to take daughter to her home in San Diego, California. Arthur E. Schram, maternal grandparent, also asks court for custody of the little girl. Father resists all such applications, but court awards custody of child to said Arthur E. Schram and Edith Schram, his wife. Plaintiff filed motion for new trial, supported by affidavits. Motion overruled, but order of execution to sheriff to place child in custody of maternal grandparents stayed pending appeal.

As the determination of the issues involved rests upon the evidence offered, a rather full statement of the facts will be made.

On August 15, 1936, Arden Crandall filed petition for divorce against Marie Crandall, now Marie Luhnow, alleging that the parties were married at Sioux City, Iowa, September 29, 1924, but always lived in Dixon county, Nebraska. Plaintiff charged defendant with cruelty, in that she disliked the hard work required of a farmer's life, and this led to frequent quarrels, and on one occasion she slapped the plaintiff in a public dance hall, to his great embarrassment and humiliation, and finally she picked up her personal effects and left, saying that she would never return.

Plaintiff alleged that on August 28, 1930, a daughter, Mona Joyce Crandall, was born as the issue of said marriage, and he alleges that he is a proper and fit person to have the care, custody, and maintenance of said child. He asks for a divorce and the custody of the daughter.

The defendant in her amended answer denied each and every allegation contained in said petition.

Trial was had and a decree entered, and the allegations of the petition found true, and that defendant has been guilty of cruel and inhuman treatment of plaintiff. It was held that plaintiff was entitled to the custody of Mona Joyce Crandall, subject to the right of the defendant and defendant's parents, Mr. and Mrs. Arthur E. Schram, to visit said minor child at any reasonable time. The decree

also gives to the defendant the piano, rug, bed, bedding, dresser, chairs, pictures, books, and alimony of $200, payable $50 cash and three payments of $50 each at the dates set out in the decree.

On August 11, 1938, the defendant, under her new name of Marie Luhnow, filed application for modification of the decree, and asked that she be given the sole custody of the daughter, Mona Joyce Crandall. The reasons alleged for such change in custody are that the plaintiff was formerly a fairly prosperous farmer, but that he is now hardly able to maintain himself, doing odd jobs as a farm hand; that he has turned the care, custody, and control of the child over to his parents, who are farm renters, who, it is charged, profess no religion and are both uneducated persons, and have stated that they do not believe in the education of children.

It is further set out in said application that the circumstances of the defendant have also changed, in that she has married Lester Luhnow, who is permanently employed by the gas and electric company in San Diego, California, and that as a result of such remarriage there has been born to her a child; that they have a modern home in a nice community, close to a public school and a Christian church, which home is located at 3888 Beta street, San Diego, California. That Lester Luhnow is willing and able to assume towards Mona Joyce Crandall the relationship of a father, to give her many advantages, and to care for said child as his own.

On January 30, 1939, a revised decree was entered, setting out that evidence had been taken at Ponca, Dixon county, and at Pender, Thurston county, the plaintiff appearing and resisting the application for a change in the decree.

Arthur E. Schram, maternal grandparent of Mona Joyce Crandall, asked the court on its own motion to revise the decree and award to him and his wife the care, custody, and maintenance of said granddaughter.

The decree recites that, after listening to all of the testi-

mony and observing the demeanor of each of the witnesses, and having heard arguments of counsel and taken the matter under advisement, the court finds that the plaintiff did not pay the full sum of $200 awarded in the former decree until an application was filed to cite and punish him for contempt of court, whereupon he paid the balance; that the plaintiff did place the said Mona Joyce Crandall in the home of his parents in Cedar county, Nebraska, and by reason of the small size of the home, and the large number of people living therein, it was not an adequate place for the rearing of the child, and the court finds that it is not for the best interests of Mona Joyce Crandall that she longer remain therein.

The court further refuses to entertain the application of the mother to remove the child from its jurisdiction to California, but finds that it is now for the best interests of the child that Mona Joyce Crandall be given into the care, custody, control, and maintenance of Arthur E. Schram and his wife, Edith Schram, the maternal grandparents, and the sheriff is directed to forthwith execute the order, and take said child, wherever found, and deliver the child to Mr. and Mrs. Schram. It is further ordered that the plaintiff and the defendant shall each have the right to see and visit said minor child in the home of Mr. and Mrs. Schram at reasonable times.

In September, at the hearing on the application of the defendant, the plaintiff testified that he had had the custody of his daughter since it was awarded to him in the original case; that he and his brother ran a filling station in Walthill, the brother being married, and they all lived together, and that the little girl remained there until school was out, when he took her to the home of his parents, where she then attended a country school, taught by Elizabeth Bracht, and that also she attended Sunday School when living with his parents, and that his parents went to church. He testified that he planned to keep the daughter himself next year, as he was planning on getting married to the school-teacher who had taught his daughter in the country school. He

claimed that she had a one-fourth interest in 160 acres of clear land, that she had some money, and that her parents were both dead, and that he expected to be married by December and rent a farm and move onto it.

A neighbor testified that her children went to the same school with the plaintiff's daughter, Mona Joyce; that she was clothed warmly in the winter-time; that she was a polite, well-behaved child; that her grandparents took her to Sunday School whenever the roads were passable; that the little girl was in good health, and neat and clean, and seemed to have plenty to eat.

Immediately after the decree granting the custody of the minor to the maternal grandparents, the plaintiff filed a motion for a new trial, setting out that the judgment and decree is contrary to law, not sustained by sufficient evidence, is not confined to the issues presented by the pleadings, but goes far beyond said pleadings, and that said evidence fails to show that the plaintiff is an unfit person to have the care, custody, and control of said child, and for newly-discovered evidence caused by the change in circumstances of the plaintiff.

Several affidavits in support of said motion for rehearing were filed, one of said affidavits being filed by the new wife of the plaintiff, Mrs. Arden Crandall, formerly Miss Elizabeth Bracht, setting up her marriage to the plaintiff on September 29, 1938, and that for six years prior thereto she has been a school-teacher; that she and her husband have established a new home on a farm just west of Hartington, Cedar county, Nebraska; that the lease they have runs until 1940; that the farm is 153 acres, and a good, productive farm, and that they are now fully equipped and financially able to properly farm the same; that they have a good consolidated public school, and church and Sunday School facilities near-by, and that Mona Joyce Crandall is now eight and a half years old, and has been making her home with them since their marriage, and receiving every care and attention required and necessary for a child of her years; that she is regularly attending school, and is

receiving proper religious training, both in the home and in the near-by church; that she is also receiving training in music and other accomplishments, and that the stepmother is willing and anxious to assume the custody and help her husband raise his daughter, and will raise her as though the child were her own.

On February 4, 1939, the cause came on for hearing upon the motion of plaintiff to reopen said case and introduce this new evidence arising since his marriage and the establishment of a home. The court denies said motion for the reason that the plaintiff had remarried more than a month prior to the opening of the term at which the decree was announced, "and if plaintiff desired to rely upon said change in circumstances, and to urge the same as a reason for his being granted custody of the minor Mona Joyce Crandall, he had ample time to apply to the court for leave to reopen the case and present such testimony."

The court further says in its order: "The court does not see fit at this time to alter its order entered January 16, 1939, but will do so, of (if) and when the plaintiff can satisfy the court that his home, resulting from his second marital venture, is of a stable character and a proper home for his minor child. * * * It appearing further to the court that an appeal is contemplated, it is further ordered that execution of the order of January 16, 1939, be withheld pending said appeal, provided it is lodged in the supreme court within 30 days."

The decree hereinabove set out was dated January 30, 1939, and a bond for appeal was given nine days thereafter, and the transcript was filed in the supreme court on March 4, 1939.

The result of the court withholding the order to the sheriff to put the minor in the possession of her maternal grandparents has been to leave the minor with the plaintiff and his present wife for over a year.

The father is generally entitled to the custody of his children because of his obligation to maintain and educate them. 17 Am. Jur. 511, sec. 673. But our court has said

those of tender age are usually awarded to the mother. *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771.

However, in the case at bar, the mother abandoned her child and remarried, and lives in California. It is usually best for the court to keep children within its custody, for it is impossible to anticipate changes which may occur in the habits, character, fitness, or financial condition of the parents. 17 Am. Jur. 518, sec. 684. The matter of primary concern is the welfare and best interests of the child.

This court has said: "The father is entitled to the custody of the daughter, rather than the maternal grandparents, where he is an entirely proper person, and has a satisfactory place to keep her, considering all facts relating to her age, care, education, and maintenance." *Hobza v. Hobza,* 128 Neb. 598, 259 N. W. 516. See, also, *Voboril v. Voboril,* 115 Neb. 615, 214 N. W. 254.

In view of the time that has now elapsed since the previous order of the trial court, we believe the interests of the child would be best served by reexamination of the entire situation of the parties. The cause is accordingly remanded to the trial court for this purpose.

REVERSED.

EDWIN A. REILS ET AL., APPELLANTS, V. ALFRED NICHOLAS ET AL., APPELLEES.

287 N. W. 853

FILED OCTOBER 20, 1939. No. 30642.

1. **Corporations.** "Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation." *Home Fire Ins. Co. v. Barber,* 67 Neb. 644, 93 N. W. 1024.
2. ———. The right of a stockholder to sue exists because of special injury to him for which, otherwise, he is without redress. If his interest is trifling and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation. *MeHenry v. New York, P. & O. R. Co.,* 22 Fed. 130.
3. **Charities.** Where the evidence discloses that a stockholder's suit is not brought in good faith in the interests of the cor-

poration, and such stock was acquired only for the purpose of bringing suit, the complainant is a mere interloper and entitled to no consideration.

4. ———. Courts of equity exercise extensive supervisory jurisdiction over charitable trusts to protect them and enforce their execution. However, where the evidence discloses that the trustees have reasonably, fairly and honestly exercised their discretion in attempting to comply with the terms of the trust, a court of equity will not interfere and substitute its own discretion for that of the trustees.

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

C. A. Sorensen and *Homer L. Kyle,* for appellants.

Walter R. Raecke and *Harold A. Prince, contra.*

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

MESSMORE, J.

Edwin A. Reils, a minority stockholder, instituted this action in equity for himself and all stockholders similarly situated, and included the Coolidge Hospital and Sanitarium, a corporation, as plaintiff, against the trustees and secretary and treasurer of such corporation, to compel them to properly perform the obligations of a charitable trust.

The corporation was organized for charitable purposes under article 6, ch. 24, Comp. St. 1929. The articles of incorporation contain the following: "The objects and purposes of this Institution are, and shall be to assist those suffering with physical and mental disease or infirmity and no worthy person shall be excluded from the privileges and benefits thereof because of poverty."

The trial court dismissed the plaintiffs' cause of action, and from such order of dismissal the plaintiff Reils appeals, alleging as error the trial court's failure to order and direct the defendants, as trustees of the corporation, to operate and maintain its hospital in accordance with the articles of incorporation.

The Coolidge Hospital and Sanitarium was organized in 1917 and was the inspiration of Charles L. Coolidge, one

of the incorporators and for whom the hospital was named. The hospital is situated in Palmer, Nebraska, a town with a population of 600. Mr. Coolidge donated three farms to the corporation. The proceeds of the sale of two of the farms were sufficient to cover the cost of erecting the buildings and equipping the hospital, which accommodates 10 beds. There remained a 10,000-dollar endowment fund and a working capital of a few hundred dollars. The income of the corporation has been limited to the interest on the endowment fund, now invested in government securities, and rents received from a quarter-section of land, the total amount of which has not exceeded $1,000 a year in recent years.

At the outset the trustees endeavored to keep the hospital open by employing help for such purpose. The income from all sources was insufficient to keep the hospital in operation. Another and different means of operating it was found to be necessary. The matter was taken up with Mr. Coolidge, and the difficulties affecting the hospital were explained to him. The trustees attempted to comply with Mr. Coolidge's wishes and leased the hospital to different doctors who paid no cash rent of any kind. Mr. Coolidge knew of this arrangement and approved it. He died in 1923 or 1924. The hospital was leased in 1929 by the trustees to plaintiff, who occupied the premises until May 1, 1937. He was to care for and keep up the lawn and building. Material expenditures were taken over by the corporation. Reils was to permit other doctors to use the hospital, and in the operation thereof he was permitted to receive the profits. In 1935 difficulties arose between the trustees and Doctor Reils over his alleged refusal to cooperate with other doctors by permitting them to use the hospital as agreed upon. He was permitted to remain in the hospital through the year 1935 without a lease and until September, 1936, when a new lease was executed, expiring May 1, 1937. The dispute culminated in a suit in forcible entry and detention, wherein a judgment was rendered against Doctor Reils in the county court and an

appeal was perfected, the doctor removing from the hospital May 1, 1937. Doctor Reils testified that he first learned during the summer of 1935 that the hospital organization was a charitable one. November 27, 1936, he sent a postal money order for $5 as a donation to the corporation, which was rejected.

Stock in the corporation was issued in 5-dollar shares; each donor to the corporation in the amount of $5 would be entitled to one share of stock, and each share would entitle the owner thereof to one vote at stockholders' meetings. The stock was nonassessable and nontaxable, and no holder thereof was to receive any benefit from the corporation by reason of his ownership of such stock. The purpose of issuing the stock was to enable the corporation to perpetuate itself and designate who should have the right to vote and take part in the government and control of the corporation. It is apparent that the endowment fund and the property of the corporation, in the event it should be subsequently operated by some other charitable institution, could not be profitably divided among the stockholders, as claimed by plaintiff Reils.

About December 15, 1936, Doctor Reils procured 10 shares of stock in the corporation from one of his patients, crediting the patient with the amount of $50 on his account. He thereby became a minority stockholder. He carried on a publicity campaign in a newspaper and by handbills, setting forth that the hospital was organized for charitable purposes and admonishing that the trustees should comply with the purposes of the corporation and fulfil their obligations to the public accordingly. The hospital is now leased to a trained nurse for the same consideration for which Doctor Reils rented it. He at this time operates what is known as the Cottage Hospital.

Doctor Reils is the only person appearing for the plaintiffs, and, even though the corporation is named as a plaintiff, it is apparent that it is not, in reality, a party plaintiff. The conduct of Reils as a minority stockholder is obvious. Without doubt, the hospital should be run,

if possible, as contemplated by its articles of incorporation, and the trustees have shown an earnest endeavor to so operate it. It is not conceivable that, on a 10,000-dollar endowment fund and with an income of less than $1,000 a year, the hospital could be operated as contemplated in the articles of incorporation. Even the donor of most of the funds used in building the hospital and creating its endowment fund was told of this difficulty and disclosed his desire to have the hospital kept open. The record is void that any person, eligible to be treated in the hospital free of charge, has ever requested such treatment.

There is no occasion to discuss the 10,000-dollar loan complained of by Doctor Reils in this proceeding, for the reason that the money evidencing such loan had been turned back to the corporation, and by its trustees invested in government securities, prior to the time that the plaintiffs' action was tried, and Doctor Reils' complaint relating to such transaction is a nullity. He is not in a position to complain of the prior acts and management of this corporation.

As held in *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024: "Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation." In *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337, the court stated (p. 550): "The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of, cannot complain or bring a suit to have them declared illegal."

In *Home Fire Ins. Co. v. Barber, supra,* it is further said: "The right of the stockholder to sue exists because of special injury to him for which otherwise he is without redress. If his interest is trifling and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation. *McHenry v. New York, P. & O. R. Co.*, 22 Fed. 130; *Albers v. Merchants Exchange of St. Louis*, 45 Mo. App. 206."

It will be recalled that Doctor Reils, apparently for the purpose of bringing this action, obtained his stock December 15, 1936, seven years after he had had the use of the hospital under the arrangement, as above stated, and at the time of the difficulty with the trustees.

The cases which hold that a subsequent stockholder may sue for mismanagement are reflected by the case most commonly cited, *Ramsey v. Gould,* 57 Barb. (N. Y.) 398, discussed in the *Barber* case (p. 659) : "Plaintiff, believing that there had been mismanagement, bought shares for the purpose of proceeding against the directors and officers and 'bringing them to justice.' The court permitted the suit upon the ground that plaintiff's motives were immaterial. But it assumed, without discussion, that he had an interest to vindicate, and had suffered some wrong, which is the real question on which such cases depend. Moreover, it is by no means clear that the motives behind a stockholder's suit are immaterial. Where stock is acquired for the purpose of bringing suit, it has been held that the complainant is a mere interloper, entitled to no consideration. (Citing *Hawes v. Oakland,* 104 U. S. 450, and other cases.) And stockholders' suits not brought in good faith in the interests of the corporation have been dismissed on that ground." Citing *Beshoar v. Chappell,* 6 Col. App. 323, 40 Pac. 244.

A principle of law applicable to the instant case follows: "While equity will compel the trustees to exercise their discretion, and will decide, as a question of fact, whether the trustees have reasonably and fairly exercised their discretion, where such discretion is being fairly and honestly exercised the court will not control or interfere with it, nor substitute its own discretion for that of the trustees." 14 C. J. S. 508, sec. 49.

Courts of equity have general supervision and administration of charitable trusts and exercise extensive supervisory jurisdiction over such trusts to protect them and enforce their execution. In the instant case, the trustees have exercised a reasonable and fair discretion in the

management of the trust, considering all of the circumstances and conditions surrounding it.

The judgment of the district court is

AFFIRMED.

IN RE GUARDIANSHIP OF LEO M. WARNER.
ROBERT RICHARDSON ET AL., APPELLEES, V. LEO M. WARNER, APPELLANT.
288 N. W. 39

FILED OCTOBER 27, 1939. No. 30538.

1. **Jury.** A jury trial cannot be demanded, as a constitutional right, in proceedings for the appointment or removal of guardians, in the absence of a statute providing therefor.
2. ———. In proceedings not within the application of the constitutional provisions, the fact that an appeal is allowed does not entitle parties to demand a jury trial.
3. ———. The interposition of a jury in trials of appeals from the probate courts to the district courts is mandatory only when the inherent nature of the issues to be determined, in the light of constitutional and code provisions or the express terms of statutes which may be involved, so require.
4. ———. The interposition of a jury in trials of appeals from the county courts of this state to the district courts thereof, where there is involved only the appointment or refusal to appoint guardians for alleged incompetent wards, is a matter of discretion and not a matter of right.
5. **Trial.** In suits not triable by jury as of right, a verdict of a jury is advisory only.
6. **Jury.** In the instant case, the issues involved not being triable to a jury as a matter of right, the verdict returned therein in the district court is not to be deemed conclusive, but as advisory only, and the ultimate responsibility for the determination of the facts involved rests with the trial judge and not with the trial jury.
7. **Appeal.** In this proceeding, in this court, reversible error cannot be predicated on the admission of incompetent or immaterial evidence, or upon instructions given or refused by the trial court. The trial court is presumed to have disregarded evidence improperly received, and instructions given are not reviewed in the appellate court.

8. **Judgment:** COLLATERAL ATTACK. "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. * * * When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack." Van Fleet, Collateral Attack on Judicial Proceedings, 5.
9. **Insane Persons.** "In a proceeding for the appointment of a guardian for alleged incompetency because incapable of caring for his property, where the person is a party to the proceeding and has not been adjudged insane, his admissions, declarations, and showing of facts inconsistent with mental soundness are admissible as substantive evidence on the issue of sanity." (And this same rule was applied to the decision of the issue of competency.) *Keiser v. Keiser*, 113 Neb. 645, 204 N. W. 394.
10. **Judgment:** COLLATERAL ATTACK. "'The sufficiency of the petition,' in a court of record, 'is not a test of jurisdiction, as the court may commit an error in holding it sufficient; but this, if the court had jurisdiction, will not render the judgment subject to collateral attack.' *Taylor v. Coots*, 32 Neb. 30." *Brandeen v. Lau*, 113 Neb. 34, 201 N. W. 665.
11. ———: JURISDICTION. "The omission of an allegation of a jurisdictional fact, in a judgment of a court of record, is cured by proof of the existence of such fact, and where, in such court, a judgment is rendered, and is silent with respect to a jurisdictional fact, it will be presumed that the court acted within its jurisdiction. Woerner's American Law of Administration (3d ed.) secs. 143-145." *Brandeen v. Lau, supra.*
12. **Courts:** JURISDICTION. "Jurisdiction of the subject-matter, in a court of record, is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it. Woerner's American Law of Administration (3d ed.) sec. 144." *Brandeen v. Lau, supra.*
13. ———: ———. "In a court of record, it is not essential that every jurisdictional fact appear upon the face of the record, and if a petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts appear upon the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act." *Brandeen v. Lau, supra.*
14. **Insane Persons.** The rules as to collateral attack are applicable with full force to proceedings *in rem* and *quasi in rem*, such as adjudications of insanity and determinations of mental incompetency.

15. **Evidence** in the record examined, and *held* sufficient to sustain the judgment and findings of the district court.

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

Kirkpatrick & Dougherty, for appellant.

W. W. Norton and *O. S. Gilmore, contra.*

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

EBERLY, J.

Robert Richardson and Hazel Richardson filed in the county court of Polk county a petition, alleging that "Leo M. Warner, an inhabitant of and residing in Polk county in the state of Nebraska, is mentally incompetent to have the charge and management of his property;" that said incompetent person is possessed of personal property situated in Polk county of the value of about $4,500 and is also the owner of an interest in real estate situated within the state of Nebraska of the value of about $300; that said incompetent person has minor children dependent upon him for support, and it is necessary for the welfare of said incompetent person and his dependent children that a guardian be appointed for the purpose of taking charge of the property, etc. The petition also sets forth that petitioners are relatives of said incompetent person, being a nephew and a niece of him, and prays for the appointment of E. C. Nordlund as such guardian. Notice of hearing on this petition was served on Leo M. Warner, Eva B. Warner, Floyd M. Warner, Dean M. Warner and Herbert K. Richardson. A demurrer was thereupon filed to said petition by Leo M. Warner, challenging the capacity of the plaintiffs to sue, the jurisdiction of the county court to hear the proceeding, and the sufficiency of the petition to state a cause of action. Thereupon Leo M. Warner filed an answer which carried forward the challenge to the capacity of plaintiffs to sue and to the jurisdiction of the county court, and denied generally the allegations of the petition. On August 16, 1937, being the date to which the hearing on said matter

was continued by consent and agreement of parties, the county court overruled the demurrer of Leo M. Warner, also adjudged that "due and legal service has been had on all parties herein as provided by law, and that the facts set out and alleged in the petition filed herein are true and that said Leo M. Warner is mentally incompetent to have the charge and management of his property," etc. Further, the county court appointed E. C. Nordlund as guardian of said Leo M. Warner. In connection with this judgment there appears a stipulation that service of process was lawfully obtained as provided by law upon Leo M. Warner, the alleged incompetent, herein, and the next of kin of said Leo M. Warner. E. C. Nordlund thereupon qualified as such guardian and gave his official bond which was duly approved on August 26, 1937.

Leo M. Warner appealed from the judgment so entered, and on October 6, 1937, petitioners Robert Richardson and Hazel Richardson filed in this cause in the district court for Polk county, Nebraska, their petition on appeal which contained the essential averments originally set forth in the petition filed by them in the county court of Polk county, Nebraska. To this petition on appeal, Leo M. Warner answered by a general denial. The issues thus made up were submitted by the district court to a jury, which, after hearing the evidence, returned as their findings and verdict "That Leo M. Warner is now incompetent to have charge and management of his property." Thereupon Leo M. Warner filed his motion for a new trial which was by the district court overruled, and thereupon a judgment was entered for petitioners as prayed. This judgment recites, in part, viz.:

"Now, on this 14th day of July, 1938, this matter came on for hearing upon said motion for new trial and for a consideration of the advisory verdict of the jury and after due consideration, the court finds that said motion for new trial should be overruled, and an order and decree entered herein in accordance with the advisory verdict returned by the jury in said matter; further, the court finds that the

allegations set forth in the petition herein are true, and finds generally for the petitioners; further the court finds from the evidence submitted that the said Leo M. Warner is now incompetent to have charge and management of his property, and that the appeal herein should not be sustained, and guardianship affirmed, and the case remanded to the county court for further proceedings.

"It is therefore, ordered, adjudged and decreed by the court, that the motion for new trial filed herein by Leo M. Warner, be, and the same is hereby overruled; that Leo M. Warner is now incompetent to have the care and management of his property and estate; that he should have a guardian to manage and handle his property and estate, and that the appeal in said guardianship matter to this court be not sustained, and that the guardianship findings and decree of the county court should be sustained and the same is hereby affirmed and sustained and said case is hereby remanded to the county court for further proceedings."

From this judgment, Leo M. Warner appeals.

Preliminary to a consideration of the merits of this appeal is the necessity of determining the effect of the submission of the issues to a jury in the district court, and the nature of the verdict returned therein, whether conclusive or advisory only.

"A trial by jury cannot be had in a probate court unless expressly authorized by statute, since such courts, having always proceeded without the intervention of a jury, are not within the application of the constitutional provisions relating to jury trials." 35 C. J. 151.

Section 16, art. V of the Constitution of Nebraska, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of * * * appointment of guardians, and settlement of their accounts," etc. This confers on county courts exclusive original jurisdiction over the subject of the appointment and removal of guardians. *Stewart v. Herten,* 125 Neb. 210, 249 N. W. 552.

Also, section 6, art. I of our Constitution, provides: "The right of trial by jury shall remain inviolate," etc. We are

committed to the view that this provision does not create or extend, but merely operates to preserve, the right of jury trial as it existed prior to the adoption of our Constitution of 1875. In other words, it may not be curtailed. *Sharmer v. McIntosh,* 43 Neb. 509, 61 N. W. 727; *Kuhl v. Pierce County,* 44 Neb. 584, 62 N. W. 1066; *Omaha Fire Ins. Co. v. Thompson,* 50 Neb. 580, 70 N. W. 30.

"A jury trial cannot be demanded as a constitutional right in proceedings for the appointment or removal of guardians," in the absence of a statute providing therefor. 35 C. J. 181. See, also, 16 R. C. L. 204, sec. 23.

The general rule seems to be that there is no right to a jury trial in proceedings to determine the question of a person's sanity, except where, as in some jurisdictions, the right is conferred by statute. Indeed, "It is well understood that at common law there was no right of trial by jury in sanity inquisitions." *Sharum v. Meriwether,* 156 Ark. 331, 334, 246 S. W. 501. See, also, *Ex parte Tomlinson,* 1 V. & B. 57; *Crocker v. State,* 60 Wis. 553, 19 N. W. 435; *State v. Linderholm,* 84 Kan. 603, 114 Pac. 857; *In re Brown,* 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868; *Ex parte Scudamore,* 55 Fla. 211, 46 So. 279; *Hagany v. Cohnen,* 29 Ohio St. 82; *State v. Judge Eighth Judicial District,* 48 La. Ann. 503, 19 So. 475; *In re Bresee,* 82 Ia. 573, 48 N. W. 991; *Black Hawk County v. Springer,* 58 Ia. 417, 10 N. W. 791; *Gaston v. Babcock,* 6 Wis. 502.

"In proceedings not within the application of the constitutional provisions the fact that an appeal is allowed does not entitle the parties to demand a jury, unless the statute so provides." 35 C. J. 195.

The method and effect of appeals in probate proceedings in this state are governed by sections 30-1601, 30-1606, 30-1607, Comp. St. 1929. These are applicable to appeals in actions involving the appointment of guardians. *In re Guardianship of Strelow,* 116 Neb. 873, 219 N. W. 387.

Section 30-1606 provides, in substance, that upon compliance by the appellant with the requirements thereof, the district court "shall be possessed of the action, and shall

proceed to hear, try, and determine the same, in like manner as upon appeals brought upon the judgment of the same court in civil actions." This was enacted in 1881. Our present Code of Civil Procedure, enacted in 1867, expressly abolishes all forms of actions and suits heretofore existing, and provides: "And in their place there shall be hereafter but one form of action, which shall be called a 'civil action.' " Comp. St. 1929, sec. 20-101.

As to the trial of issues arising in the "civil action" thus defined, the controlling terms of our Code are, viz.:

"Issues of law must be tried by the court, unless referred as provided in section three hundred and eight (20-1139) of this Code. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided." Comp. St. 1929, sec. 20-1104.

"All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code." Comp. St. 1929, sec. 20-1105.

In view of the many questions which are within the civil jurisdiction of county courts (see *Gainsforth v. Peterson*, 114 Neb. 442, 207 N. W. 935) the statutory language of section 30-1606, Comp. St. 1929, quoted above, does not necessarily imply that the trial of an appeal from the probate court will of necessity involve a jury trial. Remembering the fact that our Civil Code is, at least in a degree, applicable to all our courts, it is obvious that the interposition of a jury is mandatory only when the inherent nature of the issues to be determined, in the light of constitutional and code provisions quoted, or the express terms of statutes which may be involved, so require. This as a principle of procedure has by implication at least been approved by this court in its application of the provisions of section 30-1606, Comp. St. 1929.

Thus, in *Sheedy v. Sheedy*, 36 Neb. 373, 54 N. W. 560, where the matter involved was the payment of an allow-

ance out of an estate to the widow, it was held error to refuse a jury trial on appeal.

And in the case of *In re Estate of Maag,* 119 Neb. 237, 228 N. W. 537, it was determined: "An appeal from the refusal of the county court to make an allowance out of the estate of a deceased husband for the support of his widow is a law action and is triable to a jury unless a jury be waived."

But, in the case of *In re Estate of Scott,* 76 Neb. 28, 106 N. W. 1003, we announced the rule, viz.: "Upon appeal to the district court from an order appointing an administrator, the issue presented by the appeal is one for the court, and should not be submitted to a jury."

Again, in the case of *In re Estate of Wilson,* 83 Neb. 252, 119 N. W. 522, there was presented the question of proper compensation for an administrator, and the court, while not unanimous on other questions involved, without dissent announced the principle that "in the district court the claim should have been tried without the assistance of a jury."

In the instant case, it is manifest that the controlling issue involved is not within the protection of section 6 of our Bill of Rights. Further, it is not an issue arising in an action for the recovery of money or of specific real or personal property, and neither in the court of original jurisdiction nor in the appellate court is there any statute which specifically directs a jury trial. The issues become triable by a jury only in the exercise of the discretionary power of the district court to "order any issue or issues to be tried by a jury." Comp. St. 1929, sec. 20-1105. This, indeed, constitutes our Civil Code authorization of the submission of issues to a jury in suits in equity, and, likewise, in the proceeding now being reviewed; in both it being a matter of discretion and not a matter of right.

"In suits not triable by jury as of right, a verdict of a jury is advisory only." 25 Standard Ency. of Procedure, 1053. In other words, "In suits in which a trial by jury is not expressly provided by statute, the verdict of a jury is advisory only (*Peterson v. Estate of Bauer,* 76 Neb. 652,

661, 107 N. W. 993, 111 N. W. 361) and the court is under no legal obligation to abide by it (*Bank of Stockham v. Alter*, 61 Neb. 359, 85 N. W. 300; *Foxworthy v. Colby*, 64 Neb. 216, 89 N. W. 800). The chancellor in reaching a final conclusion may modify the verdict, reject it *in toto*, or render a decree contrary thereto. The verdict of a jury is not the sole basis of a decree, but the decree must be made as the result of the chancellor's judgment upon the evidence, aided merely by the jury." 14 Standard Ency. of Procedure, 536.

The conclusion supported by the record in the instant case is that, the issues involved not being triable to a jury as a matter of right, the verdict returned therein is not to be deemed conclusive, but treated as advisory only, and the ultimate responsibility for the determination of the facts involved rests with the trial judge and not with the trial jury.

Therefore, in this proceeding, as in appeals in jury trials in equity cases, "Error cannot be predicated upon instructions given or refused by the court. In determining the correctness of the findings in a suit, the appellate court does not review the instructions, but considers the evidence introduced on trial in order to decide the cause on its merits." 14 Standard Ency. of Procedure, 536.

For, it is also a well-established rule of procedure in this state that "Reversible error cannot be predicated on the admission of incompetent or immaterial evidence in equity cases. The trial court is presumed to have disregarded any such evidence." *Lancaster County v. Graham*, 120 Neb. 785, 235 N. W. 338.

In this class of cases, notwithstanding the interposition of a jury in an advisory capacity, the issues involved are ultimately determined by the court, and the final judgment entered herein is within the protection of the rule that, in a case tried to the court, the presumption obtains on appeal that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was

admitted. *Miller v. Banner County*, 127 Neb. 690, 256 N. W. 639; *American Surety Co. v. First Trust Co.*, 124 Neb. 874, 248 N. W. 697; *McCarter v. Cover*, 122 Neb. 691, 241 N. W. 525; *Hartford v. Pinnie*, 128 Neb. 771, 260 N. W. 371.

The result of the application of the rules of procedure above discussed to the record in the instant case is to reduce the controlling questions for our consideration to two, viz.: (1) The sufficiency of the petition to state a cause of action; and (2) the sufficiency of the evidence to sustain the judgment entered.

As to the sufficiency of the petition, the substance of this pleading is set forth in the first paragraph of this opinion. Even if all reference to the minor dependent children contained therein be deemed surplusage and be excluded from consideration, ample allegations remain which set forth all the required statutory elements essential to the sustaining of the proceeding. In it are set out allegations that "Leo M. Warner, an inhabitant of and residing in Polk county in the state of Nebraska, is mentally incompetent to have the charge and management of his property," and that he is the owner and possessed of certain real and personal property of an alleged value situated within the jurisdiction of the court. It is clear that the pleading attacked states a cause of action, and the technical objections thereto are not well taken. Comp. St. 1929, secs. 38-201, 38-202.

In consideration of the question of the sufficiency of the evidence to support the judgment entered by the district court, the first matter requiring attention is the record of proceedings had in the county court of Polk county, Nebraska, entitled, "In the Matter of Guardianship of Leo M. Warner, an incompetent person," which were instituted by the filing of a petition by Leo M. Warner on March 29, 1929. It was offered in evidence by the petitioners in the district court, and admitted in evidence over the defendant's objection that "the county court of Polk county, Nebraska, did not have jurisdiction * * * of said subject-matter, or of the person of the defendant, and that the same * * * are

incompetent, irrelevant and immaterial." This is, in effect, a collateral attack on the judgment offered.

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. * * * When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack." Van Fleet, Collateral Attack on Judicial Proceedings, 5.

In the present case Leo M. Warner is not charged with insanity, but alleged to be incompetent. In support of this issue the general rule appears to be: "The acts and conduct of a party from his boyhood up are admissible to illustrate his condition of mind at the time of the trial; and so, of course, his sayings, and manner of talk and conversation, as furnishing the best evidence of his mental condition." Woerner, American Law of Guardianship, 411.

We are committed to the rule that, "In a proceeding for the appointment of a guardian for alleged incompetency because incapable of caring for his property, where the person is a party to the proceeding and has not been adjudged insane, his admissions, declarations, and showing of facts inconsistent with mental soundness are admissible as substantive evidence on the issue of sanity." (And this same rule was applied to the decision of the issue of competency.) *Keiser v. Keiser,* 113 Neb. 645, 204 N. W. 394.

The record objected to is a proceeding resulting in an appointment of a guardian for Leo M. Warner as an incompetent. It was commenced by a petition filed by him in the county court of Polk county, Nebraska, on March 29, 1929, as hereinbefore stated. This pleading is both subscribed and sworn to by him, in which it is alleged that the petitioner "is incompetent to handle his business affairs; that he is possessed of personal estate situate in the state of Nebraska of the estimated value of $400 and of real estate of the estimated value of $3,000 net; that it is necessary that a guardian should be appointed for the purpose of taking care of his interest in said estate." A guardian is

therein nominated, whose appointment is prayed for. This record further discloses that upon the filing of this petition, by order of the county court then made and entered, the cause was set down to be heard on April 15, 1929, and it was further ordered "that notice of said hearing be personally served on the said Leo M. Warner fourteen days prior to the said day of hearing." A proper notice of the pendency of said petition thereupon issued out of said court and was personally served on Leo M. Warner by the sheriff of Polk county on March 29, 1929. On April 15, 1929, pursuant to the notice served, a public hearing was had, as by law provided, in the county court of Polk county, the petition sustained, and the prayer thereof granted; and Frank W. Warner was adjudged "a suitable person to have the care and custody of the person and management of the estate of said Inc. (Incompetent), and it further appearing that a guardian should be appointed," the said Frank W. Warner was thereupon appointed, and he took oath, gave bond, and entered upon his duties as such. Said Frank W. Warner continued to serve in that capacity until the personal estate coming into his possession had been lawfully paid out and applied and thus wholly exhausted. Thereupon he filed a final report, together with his resignation. The final account was duly approved by the county court, and the resignation accepted, and Frank W. Warner was discharged as guardian. The irregularities in this record, on which the quoted objections are based, are, viz.: The omission of the word "mentally" (incompetent) in the complaint; the fact that the petition was signed and verified by an incompetent and not by his "relatives or friends," as required by section 38-201, Comp. St. 1929; and the fact that the petition does not disclose that he was a resident and inhabitant of Polk county and owned property situated therein.

The evidence in the instant case discloses that he was then a *bona fide* resident and inhabitant of Polk county, Nebraska, and the owner of personal property situated therein.

Webster's New International Dictionary (2d ed.) defines "incompetent" as, viz.: "One who is incompetent, as one incapable of managing his affairs because mentally deficient or undeveloped; as, children and idiots are incompetents in the eyes of the law; one incapable of doing what is properly required; as, these men are *incompetents.*"

The defendant relies on *Brandeen v. Beale,* 110 Neb. 686, 194 N. W. 787, to sustain his contentions. Unexplained this case might be deemed to furnish some support for his argument. But when the controversy came before this court a second time, our opinion was reported under the title of *Brandeen v. Lau,* 113 Neb. 34, 201 N. W. 665. We not only determined that it was wholly unnecessary to amend the petition before the court in *Brandeen v. Beale,* 110 Neb. 686, 194 N. W. 787, but that the original petition was ample to vest the county court with jurisdiction. The following excerpts disclose the gist of our second opinion of that case, viz.:

" 'The sufficiency of the petition,' in a court of record, 'is not a test of jurisdiction, as the court may commit an error in holding it sufficient; but this, if the court had jurisdiction, will not render the judgment subject to collateral attack.' *Taylor v. Coots,* 32 Neb. 30.

"The omission of an allegation of a jurisdictional fact, in a judgment of a court of record, is cured by proof of the existence of such fact, and where, in such court, a judgment is rendered, and is silent with respect to a jurisdictional fact, it will be presumed that the court acted within its jurisdiction. Woerner's American Law of Administration (3d ed.) secs. 143-145.

"Jurisdiction of the subject-matter, in a court of record, is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it. Woerner's American Law of Administration (3d ed.) sec. 144.

"In a court of record, it is not essential that every jurisdictional fact appear upon the face of the record, and if a petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts

appear upon the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act."

These doctrines were, in effect, upheld and the third decision (a Commissioner's opinion) of *Brandeen v. Beale*, No. 25436 (not officially reported), was made in harmony therewith, as also was the final determination of the matters in dispute in that case made by this court in *Brandeen v. Beale*, 117 Neb. 291, 220 N. W. 298.

Indeed, this result is quite in harmony with the doctrine announced by this court in the early case of *Seward v. Didier*, 16 Neb. 58, 20 N. W. 12, wherein it was determined, viz.: "Where a petition for the appointment of a guardian for a child six or seven years of age was signed in the name of the child, and a guardian was appointed and gave bond, etc., *held*, sufficient to give the court jurisdiction."

"The rules as to collateral attack are applicable with full force to proceedings in rem and quasi in rem, such as adjudications of insanity. * * *" 15 Standard Ency. of Procedure, 400. See, also, *Wirsig v. Scott*, 79 Neb. 322, 112 N. W. 655.

It follows that the county court of Polk county had jurisdiction both of the subject-matter and of the person of the defendant Warner in the proceeding begun March 29, 1929, and upon collateral attack, its judgment and proceedings therein were entitled to full faith and credit, and were properly admitted in evidence by the trial court. *Herter v. Herter*, 97 Neb. 260, 149 N. W. 795; *Holliday v. Shepherd*, 269 Ill. 429, 109 N. E. 976; *Spiers v. Hendershott*, 142 Ia. 446, 120 N. W. 1058; *Chase v. Spencer*, 150 Mich. 99, 113 N. W. 578; *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412.

Indeed, this judgment of the county court of Polk county having been entered granting Leo M. Warner the relief expressly designated in his petition, it is not subject to attack by him or in his behalf. 4 C. J. S. 404, sec. 213; *Schoren v. Schoren*, 110 Or. 272, 222 Pac. 1096; *Weander v. Johnson*, 42 Neb. 117, 60 N. W. 353; *Miller v. McGannon*, 79 Neb. 609, 113 N. W. 170.

In determining the sufficiency of the evidence to support the findings and judgment of the district court, appealed from, there are certain facts as to which no serious conflict is to be found in the proof. The defendant was 43 years of age. He had inherited approximately $5,000 in cash, of which he was about to come into possession. He is, and was, without doubt a moron, and his present degree of intelligence and mental competency has existed and remained unchanged for more than twenty years past. The question in fact is not whether the defendant is of impaired mentality, but the degree of mental impairment was for determination by the trial court. On this subject two expert "medical" witnesses testified in behalf of the defendant, and without substantial disagreement classify his degree of mental competency as the intelligence of a child between ten and twelve years of age. The evidence as to the determinative tests is that Warner was unable to perform those of a twelve-year-old child, but was able to successfully carry out the test for the next grade thereunder. These experts, on the basis of their test and observation, testify to the opinion that the defendant is not mentally incompetent to have the charge and management of his property. "It is obvious, however, that the opinions of even medical experts, though worthy of the most careful consideration, and respectful attention, and to be weighed with other testimony in reaching a conclusion, cannot and ought not solely to control the court or jury in the opinion they are to pronounce on the facts before them." Woerner, American Law of Guardianship, 410.

In addition, as lay witnesses, we have relatives and close acquaintances of the defendant, who, in testifying, detail facts and circumstances relating to the conduct and life of defendant, on the basis of which they testify to opinions that the defendant is mentally competent to have charge and management of his property.

Opposed to this proof, we have the evidence of members of his father's family, and others, who, likewise from the basis of observation, which the situation in which they

lived and contact with the defendant accorded them, testify to the opinion that the defendant is mentally incompetent to have charge and management of his property. The facts testified to by certain of these witnesses tend to support the conclusion that the defendant was never competent to, and did not, transact the important business transactions arising during his life; that so long as his father lived he transacted most of the defendant's important transactions for him; that finally, in the year 1929, defendant's mother, and his brothers and sisters, requested Dr. Frank W. Warner, a brother of the defendant, to handle the business and property of Leo M. Warner, the defendant. Circumstances appearing in the record indicate that Dr. Warner complied with these requests, and undertook the duties contemplated thereby. The record shows that it was at this time that the petition for the appointment of Dr. Frank W. Warner as his guardian was filed by the defendant, the signed consent of Dr. Warner to such appointment being indorsed thereon. It is further disclosed by the record that Dr. Warner duly qualified and continued to serve as such guardian until all moneys and personal property then belonging to the ward and coming into his possession as guardian had been disposed of as provided by law and the orders of said court, whereupon his resignation as such guardian was presented to and accepted by the county court, and he was thereupon on June 29, 1936, discharged as such. However, it appears that this order of the county court of Polk county neither expressly nor by implication in any manner changed or modified its determination as to the mental incompetency of defendant as necessarily made and determined in its order of April 15, 1929.

However, the conclusiveness of this evidence need not be determined. So considered, it is clear that the presiding judge in the district court accepted the testimony given in behalf of the plaintiffs and rejected the testimony offered in behalf of the defendant. The trial judge heard the testimony of Leo M. Warner and of the witnesses testifying in his behalf, and also the witnesses testifying for the peti-

tioners. The demeanor of defendant's witnesses was necessarily observed by him, as well as those who testified adversely to the defendant. He accepted as true and correct the testimony of plaintiffs' witnesses and similarly rejected the testimony in behalf of the defendant. The trial judge's opportunity for thus ascertaining the truth was greater than that afforded the members of this tribunal.

In consideration of the entire record, we are impressed with the view that this case was correctly determined. The judgment of the district court is, therefore, in all things,

AFFIRMED.

SIMMONS, C. J., dissenting.

This is an appeal from a decree of the district court holding that Leo M. Warner is incompetent to have the care and management of his property, and affirming and sustaining the findings of the county court to the same effect.

The petitioners, applying for the guardianship, are Robert and Hazel Richardson. Hereafter reference will be made to the petitioners as the plaintiffs, and to the alleged incompetent as the defendant.

The defendant is a man 43 years of age. The plaintiffs are his nephew and niece. The mother of the plaintiffs (sister of the defendant) is dead. As nearly as can be determined from the record, the plaintiff Robert Richardson is a resident either of York or of Polk county. The plaintiff Hazel Richardson is a resident of Holt county, and their father is a resident of either Holt or Boyd county, Nebraska.

The defendant was married in 1923. There are three children. In 1929 the wife sued the defendant for divorce. The decree in full is not in evidence, but it appears that she secured the divorce, and custody of the children was placed in the hands of third parties, at the expense of the defendant.

At the time the divorce proceeding was pending, the defendant, upon the advice of his brother and attorney, filed a personal application in the county court, alleging that he was incompetent, and asking to have a guardian appointed

for him. As a result of that application, and apparently without notice to any one except the brother, Dr. Frank Warner was appointed his guardian. Further reference to that proceeding will be made hereafter.

It is in evidence, and not denied, that the purpose of that guardianship was to protect the defendant's property from claims of the wife. The guardianship proceedings, which were admitted in evidence over the objection of the defendant, clearly sustain the contention of the defendant in that regard. They show that immediately following his appointment the guardian reported that he had in his possession certain personal property consisting of farm machinery, horses, feed, and household goods valued at $527; that between the time of the guardian's appointment and March 7, 1930, the guardian received a total of $798.54 cash. Of this, $197 was from money turned over to the guardian by the defendant, reference to which will be made hereafter. The balance came from the sale of the property, machinery, and oats belonging to the defendant. There was paid out during the first year of the guardianship a total of $629. Of that amount, $590 was paid either to the clerk of the district court, or to others, as alimony and child support. The guardian shows a receipt of $3 on May 31, 1930, and no further receipts. The last payment was made on March 23, 1931, and thereafter no further action was had, no money received, or paid out, until June 23, 1936, when the guardian reported a balance of $45.47 which he had had on hand, and which was paid out in court, attorney, and guardian fees and expenses.

The defendant testified in this action that his wife was extravagant (and in that his testimony is supported by other witnesses) and that his wife was unfaithful to him. He denied the paternity of the three children.

The defendant inherited real and personal property from the estate of his parents. In the probate proceedings of his mother's estate, there was over $800 payable to him, which was paid into court by the administrators of that estate, and held by the court. A partition action was brought by a

sister, and his one-eighth interest in the real estate which he had inherited was sold. Over $4,000 is held by the clerk of the district court as defendant's share of the proceeds of the partition sale.

It appears that, shortly after the divorce action, custody of two children passed as a matter of fact to the father of the plaintiffs. The third child appears to be with an aunt, apparently on the mother's side.

In April, 1937, the father of the plaintiffs herein filed an action against the defendant in the district court for Polk county, asking for the recovery of a substantial sum for the care of the two children. Thereafter a conference was held in Holt county between the two plaintiffs and their father, and it was determined that a petition should be filed asking that the defendant be placed under guardianship. At that time, the defendant had a brother and a sister living in Polk county, and a brother and a sister living nearby in York county. They were not consulted, and were not present at the family meeting when the plaintiffs determined to file the petition in this action. The brothers and sisters did not ask that it be filed. The plaintiff Hazel Richardson did not testify. Neither did the father. Plaintiff Robert Richardson testified that his reasons for filing the petition were that he knew the defendant had money coming to him, that he wanted to see the children cared for, and that he believed the defendant to be incompetent. He was asked twice who prepared the petition in this case for him, and he answered, "An attorney." He did not name the attorney until his attorney instructed him to do so. On cross-examination, he admitted that his father's claim against the defendant, then pending in court, "might have had something to do with" his filing of the petition. However, he denied that his father, or any one else, asked him to file the petition, although he did talk with his father about it. Plaintiff further admitted that his action in this matter was "partly" guided and controlled by the hope that his father would prevail in that litigation. One of plaintiff's attorneys was the county judge before whom the first guardianship

proceedings were had. Plaintiff's attorneys represented the father in his case against the defendant, and they now represent the plaintiffs in this action, who, the petition alleges, are the relatives and "friends" of the defendant.

As to the children, plaintiff Robert Richardson testified that two of them had been living with his father for seven years; that the defendant had never come to see them, written them, sent them gifts or cared about them; that his father was not physically able to continue to care for them and intended to return them to their father (*the alleged incompetent.*)

Robert Richardson also testified that in 1935 he bought a stock tank from the defendant and paid him $4 for it; that it was in good condition; that the value of *a new tank* at that time was $12.50, and that the defendant fixed the price on the tank. That is one of the acts of alleged incompetency of the defendant.

The other act of alleged incompetency, testified to by the plaintiff, was that at one time the defendant, who was then living with his sister, drove her car to the near-by town of Shelby, left it there on the street with the ignition locked, did not advise his sister where the car was, and did not return home until several days later. The sister, testifying for the defendant, explained that she was concerned only as to where the defendant and the car were.

Upon those two acts, plus his observations and associations with the defendant, the plaintiff was permitted to testify that the defendant is incompetent.

A brother of the defendant testified, for the plaintiffs, that, while living, the father took care of all defendant's business, then the mother did so, then a brother, Glen, now deceased, and, finally, Dr. Warner helped the defendant with his business; and that he wanted the boys to have some of the money. The witness himself never had anything to do with defendant's business and never was with him when he transacted it, but observed his actions. He testified that the defendant worked for him on a number of occasions, but was not good help because he would "quit for no good

reason that I know." He admitted that the defendant understood the value of a dollar and knows what is going on. He testified that he did not think the defendant knew the value of an automobile; that the defendant had traded cars and horses upon occasions; that he (the witness) did not know anything about these trades as to prices, values, and exchange conditions. When asked if he knew what his brother was going to do with his money if he got it, he replied that, in the summer of 1937, two men came to his place seeking the defendant, and that "they were out to sell a trailer house." There is nothing further in the record to show that the men ever attempted to sell the defendant a trailer, or that he ever bought one. On those facts, plus his general observations of the defendant, Ray Warner testified that he thought the defendant was incompetent.

It appears from the defendant's witnesses that at one time the defendant did quit working for his brother Ray. Two of the witnesses testified that the reason was that the brother Ray did not pay the defendant for the work which he had been doing.

Plaintiffs also called as a witness the brother, Dr. Frank Warner (a dentist), who testified by deposition. He also testified that the father, while living, transacted most of the defendant's business, and that from 1929 to 1936 he (the witness) handled the business and the property of the defendant at the request of his mother, brothers, and sisters; and, during that time, he sold the defendant's farm machinery and household property. Based upon the business which he transacted for him and observations of him, it was the opinion of Dr. Warner that his brother was incompetent to control and manage his property and that he was easily influenced. However, he admitted that he had not been associated with his brother enough to know if he had squandered his money, and that he did not know of any one who had ever influenced him to do anything that was not right. In his testimony, Dr. Warner did not refer to the first guardianship proceedings wherein he was appointed guardian. However, his testimony covered the

period of his guardianship, and during the period of time Dr. Warner was acting as guardian, from April, 1931, to June, 1936, he transacted no business whatever for the defendant. He did not testify as to any business which he had transacted. His sworn statement before the county judge recites that in that statement he had accounted for all of the estate of defendant that had come into his "possession," or to his "knowledge."

The present county judge was permitted to testify that he had known the defendant since 1927; that he had casually met him in and about the bank, courthouse, and on the street, observed him, and had an opinion as to his competency, and that he entered an order in the county court in August, 1937, placing a guardian over the property and person of the defendant. He recited no facts whatever upon which either his opinion or the order is based.

Plaintiffs offered the testimony of an attorney, who was counsel for the defendant in his divorce action. He also represented Mrs. Dickson in the partition suit. He saw the defendant and was present many times in conferences regarding the estate. In May, 1936, they had a series of conferences, one of which occurred on the street in Osceola. The sister was in a car; the witness standing beside the car talking to her. The defendant was sitting down, leaning over with an elbow on the curb and his limbs out in the street. He talked with them about the partition suit and his share in the property. Upon the basis of that testimony, plaintiffs contend in their brief "that on one occasion he (the defendant) was seen lying in the gutters of the streets in Osceola." The attorney was asked the foundation question, but not permitted to testify as to his opinion of the competency of the defendant. On cross-examination, he testified that he recommended to the defendant's two sisters (who testified for the defendant) that they have a guardian appointed for the defendant. One of the sisters testified that they refused to bring the guardianship proceeding against the defendant.

Defendant was called as a witness for the plaintiffs and

was cross-examined. He testified as to his age, the school which he had attended, the names of his teachers. He attended school for 14 years, and left school when he was in the seventh grade at the age of 19 to help his father on the farm. He left home at the age of 23. He had asked in 1936 about the money which he had coming from his mother's estate, and had not asked about it since, although he clearly knew that he had it coming; that he had a one-eighth share in the real estate; that he had earned $75 in 1937; that he read books, daily newspapers (naming two of them), novels, and magazines. He told when he was married, of his married life, that he treated the family all right, provided for them, and claims that no one had assisted him in business matters; that he bought a car in 1930, paid for part of it in day labor, financed the balance of it, and that Dr. Warner had paid that balance. (This testimony about the payment for the car out of defendant's money is established by Dr. Warner's report in the guardianship proceedings.) He frankly admitted that while he was farming for himself he was not able to secure the same farm for the second year. When asked what he intended to do with his money if he received it, he replied that he intended to pay his bills and put the rest of it in government bonds. When asked what interest government bonds paid, he said he did not know exactly. While on the stand subject to this examination, he was asked to figure 4½ per cent. interest on $4,000 for a year. He was unable to reach the correct answer.

Plaintiffs offered no expert witnesses. Defendant called as a witness Dr. A. E. Bennett, of Omaha, a specialist in mental and nervous diseases. He had examined the defendant, who told him that it was his desire to remove guardianship proceedings pending against him, and that his relatives wanted to get his money. At this examination he was accompanied by his sister. He told of his disagreement with his wife, and said that he had accepted the guardianship on the advice of a brother and an attorney for the reasons herebefore set out; that for a year and a half he

turned his wages over to his attorney, and that after that he had managed his own affairs; that his brother resigned as guardian in 1936; that in 1937, when he was to get this other money, the relatives were trying to prevent it.

Dr. Bennett testified that his statement with reference to why the guardianship proceedings were brought was a normal reaction; that the defendant had a poor grasp of general information; that he did not have the grasp of the "higher intellectual group;" that he had no delusions, no defective memory, no disturbances in mental retention; that he was poor in calculation and simple arithmetic; that his mental age was between 10 and 12; and that in his opinion, based upon the examination which he made and the information furnished by the defendant, the defendant was competent to have charge of and manage his property, and use ordinary intelligence and discretion with reference thereto; that he had a "moderate degree of intelligence retardation, which is well within the normal averages for a great many individuals who are self-supporting and able to adjust themselves at the level that he is called upon to adjust himself to;" that he was a "high-grade moron;" that he was more susceptible to influence than those of a higher mental rating, but that there were plenty of such individuals of his mental capacity who handle their own affairs, and while he might at times require some guidance in the management of his property "most of us do;" and that it was nothing unusual for people in that class to handle larger sums of money than $5,000, and that brilliant men often dissipate property more easily than the less brilliant.

Defendant also offered the testimony of Dr. J. S. Bell, of York, a general practitioner and surgeon. He testified that he had examined the defendant; that the defendant's mental capacity is a little below the medium grade of intelligence, but more than a ten to twelve-year-old child; that he was able to handle his own affairs with ordinary discretion; that he would not be generally guided by persons of stronger minds, nor more likely to be influenced "than any of the rest of us."

Seven of the defendant's neighbors also testified for him. They had known him for an average of 20 years or more. They were not interested in the outcome of the litigation. Some of them had worked with him. He had worked for some of them. All testified that he was a good worker; that he knew about his wages and had no extravagant habits. Several testified that, with the defendant, they had attended horse sales and sales of other types of property, and that the defendant's judgment was good; that he was as capable as the majority of people; that they knew of no reasons or facts upon which a charge that he was incompetent could be based. Testifying also for the defendant were his nephew and brother-in-law. They were with him on some of his car and horse trades; and, in their opinion, he received good value in these trades; and was fully competent.

His sister, with whom he is now living, testified for him that he had traded cows for her; had purchased property for her at sales; that he handled property in a very satisfactory way, and that he was as competent as any one of them to handle the property he would receive from the estate.

His other sister, Mrs. Dickson, also testified. Corroborating the other witnesses, she testified that in her opinion he was perfectly competent to manage and control his property. She was the plaintiff in the partition suit that was started in February, 1935. On cross-examination, it was pointed out that, in that petition which she signed, her brother was designated as an incompetent. She testified that that was done by the attorney, who told her that it was necessary to so designate him because of the guardianship proceedings and its effect upon the title of the property; that the guardian originally was appointed for him because of the divorce action, and that as long as it was pending it was necessary that he so be designated. She was also one of the administrators of her mother's estate. She testified she paid the money into court because the attorney and the county judge advised her that should be done. That also was not denied. She testified that she was appearing for her brother because she wanted him to get "a fair deal."

Called in rebuttal, the witness, Ray Warner, was asked further about the horse trades and testified that upon one occasion the brother had gotten a horse in a trade that was a "kicker."

It will thus be seen from an examination of this testimony that the factual basis of defendant's alleged incompetency is distinctly meager. With the exception of those incidents, the only supporting evidence upon which a finding of incompetency is based is the testimony of the plaintiffs' witnesses based upon general observations of the defendant, and the allegedly void guardianship proceedings.

There is no evidence in this record that the defendant was ever extravagant, wasteful, or careless with his money. There is no evidence that he was ever overreached or improperly influenced or deceived or imposed upon, unless it should be when he accepted the advice of his brother and attorney and personally asked that a guardian be appointed for himself.

The plaintiffs argue in their brief in this court that he has done little, if anything, in the last several years; that in 1937 he earned but $75. It may be pointed out that as a result of the guardianship proceeding in 1929, and the sale of his farm equipment, he was left without money or property to enable him to operate a farm. Subsequent to that time, it appears that he has, through labor for neighbors and relatives, earned his own way and cared for himself.

The extent to which his doctor brother thought defendant was incompetent to handle his business affairs is demonstrated by the guardianship proceeding. The guardian brother in that report shows that during the period from April 13, 1929, to September 20, 1929, the defendant paid to the guardian a total of $197, an average of almost $40 a month. Evidently the guardian allowed the alleged incompetent to collect his own wages. During the period from April 15, 1929, to April 9, 1930, a total of $23.40 was paid out of those funds for clothing for the defendant. Subsequent to that time, although the defendant continued to

work, accumulate property, make automobile and horse trades, etc., the guardian did not exert any control over his wages or over his property. After April 9, 1930, the guardian reports the receipt of but $3, and after April 23, 1931, the guardian neither received nor paid out anything until he made his final report in June, 1936. The partition suit, involving the brothers and sisters, was started in 1935. At that time, the first guardianship in Polk county had not been closed and the guardianship was in force. The mother's estate was then being probated, out of which a substantial amount of money became due the defendant. In the face of those facts, the defendant's brother, Dr. Frank Warner, made his final report, petitioned for his discharge as guardian, and did not ask that any one else be appointed guardian in his stead, and no one else was appointed in his stead.

It was not until after plaintiffs' father attempted to secure a judgment against the defendant that the plaintiffs, without consultation with the brothers and sisters of the defendant, initiated this guardianship proceeding. It is obvious that the conclusion of the defendant that some of his relatives wanted to get his money was a rational conclusion.

All persons are presumed to be sane and competent. An individual is entitled to the control of his own property unless good cause is shown for denying that control to him. *Keiser v. Keiser,* 113 Neb. 645, 204 N. W. 394. The burden of proof was upon the plaintiffs to establish that the defendant was "mentally incompetent to have the charge and management of his property." Comp. St. 1929, sec. 38-201. Woerner, American Law of Guardianship, 408, sec. 124. *In re Phillips,* 158 Mich. 155, 122 N. W. 554.

The Nebraska statute and the Michigan statute are in almost identical language. This court has often cited and followed the Michigan court in interpreting our guardianship act. *Mental* incompetency must be established. "The statute does not say merely 'incompetent,' but 'mentally incompetent.' It does not refer to persons who are sane, but

not, perhaps, as wise or intelligent as some other persons. It applies to those whose mind is so affected as to have lost control of itself to such a degree as to deprive the person afflicted of sane and normal action." *In re Guardianship of Storick,* 64 Mich. 685, 31 N. W. 582. Here it is noted that the plaintiffs' witnesses were not limited by their questions to the mental incompetency or incompetency of the defendant, but were asked merely as to their opinion of defendant's competency.

The power, vested in the courts, to place a guardian over a person or his property should not be exercised except in cases that clearly require that action. 32 C. J. 632; *In re Guardianship of Wilson,* 23 Ohio App. 390, 155 N. E. 654; *McCammon v. Cunningham,* 108 Ind. 545, 9 N. E. 455; *In re Bryden's Estate,* 211 Pa. St. 633, 61 Atl. 250.

It was early held in Michigan: "The fact that a man is unable to provide a comfortable and suitable maintenance for his family, even when coupled with the fact that he makes foolish bargains and squanders all he earns, is not made by either statute a reason why he should have a guardian appointed over him. If it were, a goodly number of people would be under guardianship. * * * The power of appointment of a guardian by the probate court is derived from the statute, and, in order to obtain jurisdiction in such cases, the statute must be strictly pursued." *Partello v. Holton,* 79 Mich. 372, 44 N. W. 619. See *North v. Joslin,* 59 Mich. 624, 26 N. W. 810; *In re Guardianship of Bassett,* 68 Mich. 348, 36 N. W. 97; *In re Guardianship of Storick,* 64 Mich. 685, 31 N. W. 582.

"An improvident business transaction may be competent evidence in support of an application for guardianship; most of the acts of a respondent in such a case are competent as going to show the mental condition. *But such an improvident act becomes cogent proof of mental incompetency only as it is reinforced and explained by other facts and circumstances.*" (Italics mine.) *In re Chappell's Estate,* 189 Mich. 526, 155 N. W. 569.

In *Keiser v. Keiser, supra,* this court said:

"*It is not sufficient that incompetency alone is established,* for it may well be, even where incompetency exists, that the situation and surroundings of the incompetent are such that no necessity exists for the appointment of a guardian, and that no good purpose would be served thereby. * * * But the present proceeding is under a statute, one of whose purposes is, indeed its chief purpose is, to prevent the necessity of such actions; and, while each individual is entitled to control his own property, the legislative intent was to prevent its dissipation in litigation over contracts secured by improper persons through improper means and *to save to the owners of such property* that which age and disease have made them unable and incapable to save for and to themselves. (Italics mine.) * * *

"Mental incompetency or incapacity is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life."

The real cause for the bringing of this proceeding is the desire of plaintiffs to aid their father in the collection of an alleged claim against the defendant. Guardianship proceedings are not intended to be a substitute for attachment or proceedings in aid of execution. Courts have repeatedly condemned the bringing of proceedings of this character by expectant heirs, for the purpose of conserving an estate for their inheritance. This proceeding presents a situation far more subject to condemnation. The plaintiffs herein are dominated by the selfish interest of aiding their father in the collection of a claim, rather than the unselfish interest of friends having the welfare of the defendant uppermost in their minds. Nowhere in this record is there any evidence indicating that these plaintiffs have ever been concerned about the defendant or his welfare.

It may here be pointed out that section 38-201, Comp. St. 1929, authorizes the "relatives or friends" of the alleged "mentally incompetent" person to apply for the appointment of a guardian. The brothers and sisters of the

defendant, living in the jurisdiction of the county court of Polk county, did not apply for this guardianship. While the plaintiffs are legal "relatives," their friendship for the defendant may well be questioned on this record. That the statute contemplates that this action shall be brought by persons friendly to the alleged incompetent is not open to serious question.

"The court will guard with peculiar care the alleged lunatic from interference springing from a hostile motive, and will weigh with more precision the evidence, if the person by whom it is tendered appears to be actuated by a sinister intent." Woerner, American Law of Guardianship, 408, sec. 124.

"Each case involving the guardianship of an (alleged) incompetent person must, of necessity, stand or fall upon the circumstances and evidence shown and the conditions surrounding the transaction." *In re Guardianship of Blochowitz,* 135 Neb. 163, 280 N. W. 438.

After a careful reading of this entire record in the light of the circumstances and conditions therein disclosed, I am convinced that the appointment of a guardian for the person and property of the defendant is not justified and is not authorized by the statute under which this proceeding was had.

In my opinion the judgment of the district court should be reversed and the case dismissed.

MICHAEL J. CORKLE, APPELLEE, V. CHARLES FENTON: LILLIAN GALLEHER, APPELLANT.

288 N. W. 55

FILED OCTOBER 27, 1939. No. 30645.

1. **Negligence.** If the facts proved establish the more reasonable probability of actionable negligence, the case cannot be withdrawn from the jury.
2. ———. While the question of ordinary negligence is one of fact, yet if, on an examination of the entire evidence, only one inference can be drawn, then it is one of law for the court.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed and dismissed.*

Chambers, Holland & Locke and *Hamer, Worlock, Randall & Tye,* for appellant.

Fred S. Martin, O. A. Drake and *McGan & Burbridge, contra.*

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

PAINE, J.

Plaintiff brings action against two defendants for injuries he received in an automobile accident. The jury return a verdict of $3,000 against each of the defendants. Charles Fenton, defendant, does not appeal. Lillian Galleher, the other defendant, appeals the judgment against her to this court for a reversal.

There is very little dispute between the parties as to the facts in issue, and they may be briefly stated as follows: The plaintiff, Michael J. Corkle, is 43 years of age, and was employed by the Starr Live Stock Commission Company, and lived in Omaha. He was driving west to Farnam, Nebraska, and had stopped in Grand Island for dinner. At a little after 1 o'clock on July 30, 1937, he was driving west in his 1936 Plymouth coupé on the Lincoln Highway, being No. 30, about two miles west of Wood River, Nebraska, where the highway runs nearly straight, parallel with the Union Pacific track. He felt that his car was weaving a little, and looked both ways and, seeing no car very close, he stepped out on the pavement and found that a rear tire was about half down. He got back in the car and drove entirely off the pavement, leaving about a foot and a half to two feet between the edge of the pavement and his nearest wheel. He jacked up the car with his bumper jack, got out his spare tire, and proceeded to change it.

There were cars passing frequently while he was engaged in this work. All of a sudden he heard a crash and a scream, and he saw a car and a truck coming towards him from the

east, both of them hugging right up to the black line in the center of the pavement. When he first saw them they were about 300 feet away. They then bumped together again, and the truck swerved to the north and headed directly for his car, so he jumped and ran towards the front of his car, but was struck by the truck and injured.

The evidence of the two defendants may be briefly stated as follows: Charles Fenton, a farmer, resides in Kearney, and owned a 1937 Dodge truck, in which he was returning from Missouri to Kearney. As he was driving west he noticed the plaintiff working beside his car, and in his opinion the left hind wheel was on the paving. There were no cars approaching from the west right at that spot, and he looked in his rear-view mirror and saw nothing just behind him, and started to pull over to the south after he had honked. The plaintiff stood up and looked at him, and then started to run around the front of his parked car, and at the same instant he heard something go "bing" against the side of his truck. A Chevrolet coupé was right against his front wheel and bumper, and he could not manipulate it. He was trying to keep his car from running against the car parked along the parkway, and just as he passed the parked car the Chevrolet coupé went off towards the ditch, and the truck struck the fender of the parked car slightly, just enough to knock it off the jack. In putting the brakes on hard, the engine stalled, and he was about twice the length of his truck past the parked car, and in the north lane of travel he at once started the engine and drove his truck out on the north shoulder of the road.

The third car involved in this accident was the Chevrolet coupé owned and driven by Miss Lillian Galleher, a teacher in the city schools of Scottsbluff, Nebraska, and riding with her as a guest was Miss Tassie Becker, who had ridden with her from David City. They had stopped at Grand Island for lunch, and had been following the Dodge truck for some distance, between a quarter and half a mile, which reduced their speed to 25 or 30 miles an hour. Miss Galleher looked down the road, saw it was clear, honked her horn,

and started around the truck. While in the south lane of the highway, the truck suddenly turned and bumped into her, causing her to lose control of her car, which started down the bank on the south side and turned over. Miss Galleher was stunned and unable to talk at first. A large number of cars stopped until there was quite a crowd, and a wrecker came from Wood River and took them there. She testified that just after the accident Mr. Fenton said to her: "I just had to do it, lady, or I would have killed that man sure."

The plaintiff made the following charges of negligence in his petition against Miss Lillian Galleher: That she was reckless, careless, and negligent in driving at an excessive rate of speed, to wit, 60 miles an hour, and in failing to warn the plaintiff of her approach; in striking the truck of the defendant Fenton, and knocking the same into and upon the plaintiff, injuring him severely; and, lastly, that Miss Galleher could have seen, or should have seen, the plaintiff in ample time to avoid striking the Dodge truck and knocking said truck into and upon the plaintiff.

Miss Galleher denied these allegations of negligence on her part, and says that she was driving her Chevrolet coupé in a careful and prudent manner.

Miss Galleher testifies that she was going about 40 or 45 miles an hour until she came to the truck. The evidence is that the speed of the truck was not over 25 or 30 miles an hour, and she followed it for a ways, "I looked up the road to see that the road was clear and honked my horn and started around the truck."

While she was in the act of passing the truck, it suddenly turned and swerved to the left across the center line of the pavement and struck her automobile, causing the same to be knocked into the ditch along the south side of the highway.

The plaintiff charges that this court has held: "When separate, independent acts of negligence combine to produce a single injury, each defendant involved therein is responsible for the entire result, even though the negligent

act of any one of the defendants alone might not have caused the injury." *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695.

In *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19, it is held: "If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured."

In the case of *Mason v. Reynolds,* 135 Neb. 773, 284 N. W. 257, several of the Nebraska cases are reviewed, and there is a citation from 1 Cooley, Torts (3d ed.) 247, which says: "The weight of authority will, we think, support the more general proposition that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action."

There is no dispute as to this principle of law governing injury caused by the combined negligence of two or more persons, as shown by these citations. However, to apply this principle to the facts in the case at bar, there must first be a preponderance of the evidence showing that each of the parties was guilty of some act of negligence as charged in the plaintiff's petition. The evidence does not support the complaint of driving at an excessive speed, as charged against Miss Galleher.

It is next alleged that she was negligent in striking the truck of the defendant Charles Fenton and knocking it into and upon the plaintiff, by which he was injured, but the evidence in the case at bar is to the effect that Miss Galleher was at all times on the south side of the middle line of the highway, and that the collision between her car and the truck occurred when the driver of the truck, suddenly and without any warning to her, came over several feet past the south line and collided with her car.

It was also charged by the plaintiff that Miss Galleher was guilty of negligence in failing to have seen the plaintiff beside the road in ample time to avoid striking the Dodge

truck and knocking it into the plaintiff. It was the testimony of Miss Galleher and Miss Becker that neither one of them saw the plaintiff's car parked to the north of the highway, or saw the plaintiff himself repairing his tire. If plaintiff had stopped his car on the pavement, and was working on the pavement as he repaired his car, there might be some merit to this charge, but the evidence appears to be that neither the plaintiff, while working on his car, nor his car projected upon the highway, and that the truck, if it had proceeded on its own side of the highway, could have passed the plaintiff with ample space without having gone over the center line of the highway.

At the close of the plaintiff's evidence counsel for Miss Galleher moved the court to direct a verdict in her favor, for the reason that the evidence was insufficient to sustain the plaintiff's cause of action against her, and for the reason that the evidence was insufficient to show that Lillian Galleher was guilty of negligence of any kind, or to show that any negligence on her part was the proximate cause of the accident.

"It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." *Steenbock v. Omaha Country Club,* 110 Neb. 794, 195 N. W. 117.

"Issues of negligence are questions for the jury only when the evidence is sufficient to sustain a finding of negligence." *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160.

"It is erroneous to submit a case to a jury and permit a jury to speculate with the rights of a litigant, when no question for the jury is involved." *Smith v. Epstein Realty Co.,* 133 Neb. 842, 277 N. W. 427.

If the facts proved establish the more reasonable probability of actionable negligence, the case cannot be withdrawn from the jury.

It is true that the question of ordinary negligence is one

of fact, but where the disputed evidence is such that only one inference can be drawn, then it is one of law for the court. *Nolan v. Young Men's Christian Ass'n*, 123 Neb. 549, 243 N. W. 639; *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13, 93 N. W. 526; *De Griselles v. Gans*, 116 Neb. 835, 219 N. W. 235; *Long v. Omaha & C. B. Street R. Co.*, 108 Neb. 342, 187 N. W. 930; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976.

In our opinion, the motion of Lillian Galleher for a directed verdict should have been sustained. It is therefore ordered that the judgment of the district court as to said defendant Lillian Galleher be reversed and the action dismissed.

REVERSED AND DISMISSED.

JOHNSEN, J., not participating.

IN RE ESTATE OF EDWARD P. MEYERS. DOUGLAS COUNTY, APPELLANT, V. ESTATE OF EDWARD P. MEYERS ET AL., APPELLEES.

288 N. W. 35

FILED OCTOBER 27, 1939. No. 30688.

1. **Domicile.** "One's residence is where he has his established home, and to which, when absent, he intends to return. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home." *State v. School District*, 55 Neb. 317, 75 N. W. 855.
2. ———. Where the evidence shows that a person has voted for 50 years or more in a certain county and, when absent from such county, either returned in person to vote or voted an absentee ballot, such fact, when taken in connection with all other facts in the case, is convincing and persuasive in determining a person's domicile.
3. ———. Where a person is under the care of physicians and, on account of illness, is unable to stand the rigorous winters of his residence, and, in order to benefit his health, he is required to move to a new place where he may receive the benefit of care by his physicians, such move is merely temporary, even though the actual time spent in the new residence may be long.

4. ———. Where a person, in order to educate his minor child in a private school, moves from one residence to another, the mere fact that he moved to the latter place for such purpose does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.
5. ———. Evidence examined and *held* sufficient to sustain the finding and judgment of the trial court that the deceased's residence during his lifetime was in Arthur county.

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

James T. English and *Oscar T. Doerr,* for appellant.

Votava, McGroarty & Sklenicka and *Marshall B. Reynolds, contra.*

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

MESSMORE, J.

Edward P. Meyers died August 25, 1938, in the city of Omaha, Douglas county, Nebraska. September 8, 1938, Margaret G. Meyers, his widow, filed a petition in the county court of Arthur county, praying for the probate of her husband's estate and that letters testamentary issue to her as executrix under the will; alleging also that the deceased left personal property in the state of Nebraska in an amount exceeding $100,000. September 29, 1938, Douglas county filed objections to the jurisdiction of the county court of Arthur county to probate the estate, alleging that the deceased was not a resident of that county at the time of his death, but was a resident of Douglas county. Arthur county was permitted to intervene, and, by petition, alleged that the deceased was a resident of Arthur county at the time of his death, and that the county court of Arthur county had exclusive and original jurisdiction of the probate of the estate, praying the objections of Douglas county be overruled. The county court overruled the objections of Douglas county, thus finding that the deceased was a resident of Arthur county, Nebraska, and that said court had jurisdiction to probate the estate. From this order

Douglas county appealed to the district court for Arthur county, which found that at the time of his death the deceased was a resident of Arthur county, affirmed all orders of the county court of Arthur county, and certified the judgment of the district court to the county court of Arthur county for further proceedings. The present appeal is from the order of the district court for Arthur county.

The only issue raised by the appeal is: Do the facts prove residence of the decedent in Arthur county or in Douglas county? Douglas county relies on the facts as shown by stipulation, concisely stated as follows:

Edward P. Meyers leased an apartment, No. 107 St. Regis, located at 621 South Thirty-seventh street in the city of Omaha, and lived at the apartment for a period of time during each year for at least eight successive years. His name was listed in the telephone directory in Omaha, and his name, together with that of his wife, Margaret G. Meyers, was listed in the Omaha city directory during that period of time. He maintained a bank account in the United States National Bank of Omaha, had a safe deposit box in and transacted his banking business with the bank during this period of time. Margaret G. Meyers owned the furnishings for seven rooms in their apartment at the St. Regis, upon which she paid taxes to Douglas county.

The record discloses that more than 50 years ago Edward P. Meyers, then 21 years of age, located in Arthur county on a homestead consisting of a section of land, upon which he had a home and necessary appurtenances. During his lifetime he attained considerable success as a cattle man, and through marked attention to his business became wealthy. He lived continuously and apparently without interruption in Arthur county for many years, but during the later years of his life, more especially during the period of his second marriage some 20 years ago, he occasionally took trips in foreign countries, in Florida, or other places. In 1919 he rented an apartment at the Blackstone Hotel in Omaha and spent some time in Omaha each year. About eight or nine years prior to his death he moved to the St.

Regis apartment which he leased from year to year. The younger daughter attended a private school in Omaha, Duchesne Convent, and was so attending at the time of her father's demise. During the school year Meyers spent most of his time in Omaha, except occasionally, in the spring and fall, he would go to Arthur county to attend to his business, especially during the shipping season, and, together with his family, he spent the summers at his ranch home.

The evidence reflects that the decedent voted continuously in the elections held in Arthur county over a period of 50 years or more, and, in fact, voted there in the election of 1938, about three weeks before his death, and on one occasion, when absent from Arthur county, voted on an absentee ballot, accompanied by an affidavit as provided for by law. He repeatedly declared Arthur county to be his home to his wife, family and friends during the whole period of time that he lived in Omaha. In his later years he suffered from chronic ailments, of the kidneys and a weakened heart. The record is not in dispute that it was necessary for him to obtain constant medical treatment, that he was under the care of Omaha physicians, and that he could not stand the rigorous winters in Arthur county. He did his banking business in Omaha. There were no banks in Arthur county. He filed personal tax returns and paid his personal taxes in Arthur county. Without question he was assessed for taxes in Arthur county from the organization of the county as such until at least the year 1938, as shown by the county assessor. A certified public accountant, employed by Meyers in 1919 to assist in looking after his business interests, prepared the personal tax schedules for him for a period of many years and included therein all of the taxable personal property that the decedent owned. The Arthur county home was always open during the life of Mr. Meyers, but was not equipped for the winter months. His wife testified that her husband spent practically 50 per cent. of his time in Arthur county and 50 per cent. in Douglas county, in addition to the time in the early spring and late fall which he spent in Arthur county until the late years of his life. He

owned no property of any kind in Omaha and paid no taxes in Douglas county.

"The term 'domicile' is difficult of accurate definition, and it has been stated that the concept cannot be successfully defined so as to embrace all its phases. Its meaning, in each instance, depends upon the connection in which it is used." 17 Am. Jur. 588, sec. 2.

As stated in *Thorndike v. City of Boston,* 42 Mass. 242: "No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case."

"It is universally held that in order to acquire a domicile by choice these essentials must concur: (1) Residence (bodily presence) in the new locality, and (2) an intention there to remain. In other words, there must be a concurrence of the fact and the intent, the factum and animus. Act and intent must, therefore, concur, and the absence of either of these thwarts the change. In addition there must be an intention to abandon the old domicile. As some writers express it, there must be an animus non revertendi and an animus manendi. The purpose to remain in or at the domicile of choice must be for an indefinite period of time." 17 Am. Jur. 599, sec. 16. See *Berry v. Wilcox,* 44 Neb. 82, 62 N. W. 249; *Wood v. Roeder,* 45 Neb. 311, 63 N. W. 853; *State v. School District,* 55 Neb. 317, 75 N. W. 855; *Shaw v. Alexander,* 94 Neb. 774, 144 N. W. 907; *Mudge v. Mudge,* 111 Neb. 403, 196 N. W. 706; *Denny v. Sumner County,* 134 Tenn. 468, 184 S. W. 14. In the last named case are cited *Hayes v. Hayes,* 74 Ill. 312; *Jopp v. Wood,* 34 L. J. Ch. n. s. 212; *Moorhouse v. Lord,* 10 H. L. Cas. *272. See, also, Jacobs, Law of Domicile, sec. 72; Wharton, Conflict of Laws, sec. 21; *Reed's Will,* 48 Or. 500, 87 Pac. 763.

We recognize that the intent of a person is not readily susceptible of analysis, and, therefore, in keeping with the great weight of authority, conclude that all of the surrounding circumstances and the conduct of the person must be taken into consideration to determine his domicile. It is

obvious from the record in the instant case that Mr. Meyers was not physically well. He was advised that he could not stand the severe winters in Arthur county and he was under the supervision and care of physicians in Omaha. The record is void that the same care and attention could have been given him in Arthur county. It is likewise clear that, when his younger daughter arrived at the age where it was necessary to educate her, the previous traveling and placing her in schools in different localities would result unfavorably to her from an educational standpoint. Therefore, living in Omaha, the metropolitan city of the state, not a great distance from his business activities, would be logical. In so doing, he did not burden the city of Omaha with educating his daughter, but placed her in a private school at his own expense. He returned to Arthur county in the late spring and fall to attend to his cattle business,—the business in which he had made a success in the county in which he had lived all his life. In the summer months and during school vacations the family returned to Arthur county to the ranch home and there lived until opening of the next school year. There is nothing in the record to show that after the completion of his daughter's education, or in the event that he recovered his health, he would have made Omaha his permanent residence. He transacted banking business in Omaha, but there were no banking facilities in Arthur county, and, by necessity, his financial contacts, in a business of the magnitude which he managed, must be such that he could obtain ready financial assistance when the occasion demanded. This is not unusual. Apparently, he lived quietly in his St. Regis apartment for the purposes as before stated. We believe that his every act discloses his intention not to create a domicile in Omaha.

Mr. Meyers voted in Arthur county, from the time he located there, in every election except when he was traveling in foreign countries, and, when absent, he voted an absentee ballot, supported by an affidavit, as provided by law, that he was a citizen and resident of Arthur county. He voted in person in Arthur county shortly before his death,

at the 1938 primary election.

In support of the theory that in Nebraska voting is conclusive as to the question of domicile, appellee cites *Mallard v. First Nat. Bank,* 40 Neb. 784, 59 N. W. 511. We are inclined to the belief that the statement in reference to voting being conclusive in establishing domicile, as made in the cited case, is *dictum.* The rule applicable in the instant case is reflected by the following:

"Of all the formal acts to be scrutinized in ascertaining a person's domicile, undoubtedly the act of registering and voting is the most important, and while not necessarily conclusive, it is usually most convincing and persuasive." *Matter of Curtiss,* 140 Misc. 185, 250 N. Y. Supp. 146. See annotation, 107 A. L. R. 453.

In the case of *Cooper's Adm'r v. Commonwealth,* 121 Va. 338, 93 S. E. 680, it was said (p. 349): "In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the voter. Its unlawful exercise subjects him to prosecution both for illegal voting and for perjury if he swears falsely, and such act is a distinct, unequivocal and public assertion by the voter of his legal domicile."

The court in *Sanderson v. Ralston,* 20 La. Ann. 312, upon rehearing, reexamined all the evidence and determined that the voting might be viewed in connection with certain antecedent facts as corroborative evidence to show that a person never intended to abandon his domicile in the state, although it asserted that the voting would not be conclusive by itself. See annotation, 107 A. L. R. 454.

In view of the foregoing authorities, we conclude that the fact that Mr. Meyers continuously voted in Arthur county is a strong factor in assisting to determine the status of his domicile.

It is disclosed that the change of residence to Omaha was for the purpose of benefiting the health of Mr. Meyers, and, in addition thereto, of educating his younger daughter. In

17 Am. Jur. 608, sec. 30, it is said: "A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long."

In *Reed's Will, supra,* the supreme court of Oregon said: "It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile. Every person *sui juris* and capable of controlling his personal movements may change his domicile at pleasure, but a change of domicile involves intention as the dominant factor. * * * A change of domicile, therefore, involves a question of fact and intent. The fact is easily proved because it is shown by the mere transfer of the bodily presence from the old to the new place of abode, but the intent with which the change is made is to be determined from the character of the residence, its object and purpose, in connection with the other evidence in the case. Residence in a particular place is a fact obvious to the senses and cannot be easily mistaken, but its value in fixing domicile is unimportant unless accompanied with an intent of remaining permanently or definitely, or, as it is sometimes said, with no present intent of removing therefrom. Residence alone, however long continued, will not effect a change of domicile. On this point the authorities speak with practically one voice. * * * To lose a domicile when once acquired, there must be an intention to do so. A mere change of the place of abode, however long continued, is not sufficient, unless the proper animus or intention is present." It was said that the intention must concur with fact and must clearly appear.

To us it is apparent that Mr. Meyers' residence in Omaha was temporary and for the purposes as above set out, and, from all of the facts and circumstances from which we can discern his intention, he did not intend by such residence to create a domicile in Omaha, or to abandon his domicile as originally created in Arthur county. See *State v. School District, supra*; *Denny v. Sumner County, supra.*

Generally, oral or written declarations of a deceased person as to his domicile do not bear much weight in a consideration of the question. However, when all of the facts and circumstances of a given case are considered, occasions arise where declarations, both oral and written, as to an intention on the part of the person, become important and receive considerable weight from the courts; based, of course, upon the individual under consideration, his conduct, his business, the period of his living in one locality, and all other facts that may be deduced from any circumstance.

In the case of *Reed's Will, supra,* we find the following (p. 516): "And Mr. Jacobs, in speaking of the weight to be given to the oral declarations of a party, says: 'The time, occasion and manner of making them, their reasonableness and consistency with themselves and with the other proved facts in the case, the presence or absence of the suspicion of sinister purpose in making them, the character and temper of the person, as well as (if they are oral) the length of time which has elapsed between the time of their alleged utterance and the time when they are testified to, etc., enter materially into the estimation of their value. If they are not inconsistent with the acts, and are faithfully reported, they often serve to turn the scale; but it is otherwise, if they are contradicted by the acts and general conduct of the person making them.' "

Nine years before his death, Mr. Meyers declared in his last will and testament that he was a resident of Arthur county, Nebraska. The making of a will naturally is a solemn occasion and especially so when a man is in poor physical condition and has reached old age. He contemplates the objects of his bounty with seriousness. Under the circumstances, the making of his will and the declarations, oral and written, as to his residence and domicile, made by him over a period of years are of such importance that such declarations and written instruments may be received, together with all the other evidence in the case, in assisting to determine the domicile of the decedent.

Having determined this case solely upon its merits, other alleged errors of the appellant need not be considered.

We conclude that the judgment and finding of the district court were right.

AFFIRMED.

LLOYD E. HAYNES V. STATE OF NEBRASKA.
288 N. W. 382

FILED NOVEMBER 10, 1939. No. 30588.

1. **Rape.** "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332, 35 N. W. 195.
2. **Criminal Law:** INSTRUCTIONS. In a prosecution for rape where no request for such an instruction is made, it is not error for the trial court to fail to instruct on the lesser included offenses.
3. ———: ———. In a prosecution for rape, it is not prejudicial error for the trial court to set out verbatim in his instructions the charging part of the information, where the court follows that instruction with an instruction in its own language as to the material elements of the offense.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed as modified.*

Beatty, Maupin, Murphy & Davis, for plaintiff in error.

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

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

SIMMONS, C. J.

The defendant, aged 31, was convicted of assault with intent to commit rape upon a female child 12 years of age. He was sentenced to the penitentiary for a period of 15 years. He brings proceedings in error here.

Defendant's first contention is that the evidence is insufficient to support the verdict of the jury. It will not be of advantage to the parties involved to set out a detailed abstract of the evidence. The crime is alleged to have been committed during the early morning of June 22, 1938, on a side road leading from one of the main traveled highways in Lincoln county, Nebraska. There is no dispute but that the defendant, the complaining witness, and her older sister were together for a period of time immediately preceding the commission of the alleged offense, and that he was alone with the complaining witness at the scene of and at the time of the alleged offense. The complaining witness testified in detail as to the assault. While the defendant denies the act, her testimony is fully corroborated as to material facts and circumstances. Her physical condition, as indicated by examinations of reputable physicians, also supports her testimony. The evidence is sufficient to support the verdict of the jury.

This court has held: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State,* 22 Neb. 332, 35 N. W. 195. See *Kotouc v. State,* 104 Neb. 580, 178 N. W. 174; *Robbins v. State,* 106 Neb. 423, 184 N. W. 53; *Mayo v. State,* 127 Neb. 227, 254 N. W. 887; *Beer v. State,* 129 Neb. 366, 261 N. W. 824.

The defendant next contends that the trial court failed to instruct the jury on the lesser offenses of assault and assault and battery. It is admitted that a request for such an instruction was not made. It was not error on the part of the trial court to fail to charge as to the lesser offenses in the absence of such a request. *McConnell v. State,* 77 Neb. 773, 110 N. W. 666; *Williams v. State,* 113 Neb. 606, 204 N. W. 64; *McIntyre v. State,* 116 Neb. 600, 218 N. W. 401; *Beer v. State, supra.*

The information in this case contained five counts. At the close of the state's case, upon motion of the defendant, the first, second, and third counts were dismissed, and the court ruled that counts 4 and 5 would be tried as one count. In its instructions, the court set out verbatim the charging parts of counts 4 and 5, and instructed the jury that the counts differed only in that one alleged the crime charged to have been committed by different means than the other, and that some of the allegations contained in each of the counts had become immaterial.

The court further in its own language set out the material elements of the crime of rape, which were charged in the two counts, and instructed the jury that, if they found from the evidence beyond a reasonable doubt that each and every one of said elements were true, they should find the defendant guilty of the crime of rape; that, if they did not so find, they would next consider the question of whether or not the defendant was guilty of the crime of assault with intent to commit rape. The court then set out in its own language the material elements of assault with intent to commit rape, and instructed the jury that, if they were satisfied beyond a reasonable doubt that all the elements of the crime of assault with intent to commit rape were true, they would find the defendant guilty of that latter crime. If they were not satisfied beyond a reasonable doubt of the truth of any of said elements, then they would find the defendant not guilty.

The defendant contends that the action of the trial court in setting out both counts verbatim was prejudicial. This court has held:

"It is the better practice in a criminal case for the trial court to charge the jury, in concise and informal language, as to the material facts which must be proved beyond a reasonable doubt to authorize a conviction, rather than to copy the information or indictment into its instructions." *Kirchman v. State,* 122 Neb. 624, 241 N. W. 100.

However, the language of the information set out involved no technical or ambiguous language. We cannot see

that it was prejudicial to the defendant to have the language of the count set out, particularly in view of the fact that the court, subsequent thereto, in its own language, complied with the better practice rule established in the case of *Kirchman v. State, supra.* See *Dixon v. State,* 46 Neb. 298, 64 N. W. 961; *Cooper v. State,* 123 Neb. 605, 243 N. W. 837.

The defendant further contends that the sentence imposed in this case is excessive. After a consideration of the circumstances, as shown by the record, we conclude that there is merit in this contention. By authority of section 29-2308, Comp. St. 1929, the sentence is reduced from 15 to 7 years.

The judgment is

AFFIRMED AS MODIFIED.

CLAUDE O. DRAKE, APPELLEE, V. S. D. RALSTON, APPELLANT.
288 N. W. 377

FILED NOVEMBER 10, 1939. No. 30597.

Evidence in the record examined, and *held* sufficient to sustain the judgment entered.

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

Halligan, McIntosh & Halligan, for appellant.

Cook & Cook and *Hoagland, Carr & Hoagland, contra.*

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

EBERLY, J.

This is an action prosecuted by S. D. Ralston to vacate a default decree entered in this cause (the injunction case) on January 17, 1936, in favor of Claude O. Drake and against S. D. Ralston, wherein the district court found "that said Claude O. Drake is the owner of a 2/11ths interest in the northwest quarter of section 29, in township

12, range 23, and the southwest quarter of section 29, township 12, range 23, Dawson county, Nebraska" (excepting a ten-acre tract thereof specifically described in such decree), and quieted his title thereto against the claims of S. D. Ralston therein evidenced by a judgment particularly described, and enjoined the enforcement thereof against the same.

The application to vacate the judgment herein is based on the fourth subdivision of section 20-2001, Comp. St. 1929, viz., "For fraud practiced by the successful party in obtaining the judgment." There was a trial to the court, and, at the completion of the hearing upon the evidence adduced, the court denied the petition and dismissed the action. The petitioner, S. D. Ralston, who will be hereinafter referred to as appellant, prosecutes this appeal.

The chronology of the events and transactions from which this litigation arises, in part includes the following, viz.:

December 21, 1910, Josephine Pollat, then the owner of the southwest quarter of section 29, township 12, range 23, in Dawson county, Nebraska, reserving to herself a life estate, conveyed the same by deed of general warranty, duly executed and delivered, to her children, who are named therein as grantees, each son and daughter to receive, under the terms of said deed, an undivided 1/11th interest in the lands just described. Included in this deed as grantees were Lewis Pollat and Anna Pollat (now Mrs. Anna S. Drake, wife of Claude O. Drake).

May 25, 1930, Josephine Pollat departed this life testate, then the owner in fee of the northwest quarter of section 29, township 12, range 23, in Dawson county, Nebraska, excepting ten acres in the northwest quarter of the northwest quarter of the northwest quarter. The last will and testament of Josephine Pollat was admitted to probate, and by its terms devised to Lewis Pollat, a son, and to Anna Pollat, a daughter, each an undivided 1/11th interest in the lands in this paragraph described.

May, 1930, the original note of $2,500 was made and delivered by Anna S. Drake and Lewis Pollat to the Stock-

mens State Bank in consideration of a loan of money then made.

March 28, 1932, Lewis Pollat and wife, Ruth, in alleged consideration of $1,000 paid by Claude O. Drake, executed and delivered their warranty deed conveying their 1/11th interest in all the lands hereinbefore described to Anna S. Drake, wife of Claude O. Drake.

December 7, 1932, Anna S. Drake, in consideration of the sum of $1,000 paid by Claude O. Drake, it is alleged, conveyed to him an undivided 2/11ths interest in all the lands heretofore described, as derived from Josephine Pollat.

February 15, 1933, suit was instituted against Lewis Pollat and Anna S. Pollat in the district court for Lincoln county, on a promissory note of $1,900, executed by them in renewal of the balance due on the original $2,500 note executed by them. Personal service of summons was had on all defendants.

December 18, 1934, judgment was entered on this $1,900 note, after trial on the merits, in favor of S. D. Ralston for the sum of $2,189.50 with interest from this date at 8 per cent. It will be noted that this judgment was affirmed in the supreme court. *Stockmens State Bank* (Ralston substituted) *v. Pollat*, January 24, 1936, 130 Neb. 244, 264 N. W. 875.

December 19, 1934, after issuance of execution and return of same *nulla bona* in Lincoln county, a duly certified transcript of this judgment was filed in Dawson county, execution issued thereon, and levied upon the 2/11ths interest in the real estate heretofore described as conveyed to Claude O. Drake by his wife, Anna S. Drake, as the property of the wife, and execution sale of said premises was advertised for February 15, 1935.

February 15, 1935, Claude O. Drake instituted an action for an injunction and to quiet title to the premises levied upon. A temporary injunction was allowed, and together with summons issued on the same day was on February 15, 1935, served upon S. D. Ralston, and upon Henry E.

Ash, sheriff of Dawson county. This summons was unindorsed and no pleadings were filed by Ralston or the said sheriff in this proceeding until the institution of the present application to set aside the judgment entered, and no appearance made whatever. This proceeding will be hereafter referred to as the "injunction case."

April 18, 1934, Claude O. Drake and Anna S. Drake *et al.*, plaintiffs, commenced an action for partition in the district court for Dawson county, the object and prayer of which was to secure a partition of all the lands formerly owned by Josephine Pollat, deceased, as hereinbefore described. Service of process on all parties in interest was had and issues joined. This case will hereinafter be referred to as the "partition proceeding."

December 6, 1934, judgment confirming shares and directing partition was entered, adjudging Claude O. Drake the owner of an undivided 2/11ths interest therein.

December 20, 1934, S. D. Ralston caused to be filed in the partition proceeding a petition in intervention, which was in form a creditors' bill; this in appropriate language alleged the rendition of petitioner's judgment against Anna S. Drake and Lewis Pollat, the issuance of execution thereon in the county of rendition and the officer's return thereto of *nulla bona*, the filing of a certified transcript thereof in Dawson county, the issuance of execution thereon and the levy of such execution on the undivided 2/11ths interest in the land hereinbefore described (being the same land conveyed by Anna S. Drake to her husband, Claude O. Drake); alleged that the conveyance last referred to was not *bona fide*, but made without valuable consideration, with fraudulent intent by the parties thereto of cheating, hindering, delaying and defrauding the petitioner, S. D. Ralston, in the collection of his said judgment. This petition in intervention contained an appropriate prayer for the application of said 2/11ths interest in the lands heretofore described to the satisfaction of S. D. Ralston's judgment, and costs accruing thereon. Process on this pleading was duly issued and served upon the parties in interest.

January 21, 1935, a demurrer was filed to this petition in intervention by Claude O. Drake and Anna S. Drake, which, upon hearing, was on February 7, 1935, overruled, and the order required demurrants to answer intervener's petition within 30 days from this date.

March 18, 1935, answers of plaintiffs Claude O. Drake and Anna S. Drake to the petition in intervention were filed, and issues joined. In these pleadings substantially the same facts were alleged as were set forth by these parties in the injunction case.

October 23, 1935, a sale of the premises by the referee was had and report thereof filed on October 24, 1935.

January 17, 1936, the report of sale was confirmed, deed ordered, and proceeds of sale distributed. This decree provides specially, viz.:

"It is further ordered and decreed that the share of the plaintiff, Claude O. Drake, in and to the proceeds of the sale of said land as shown in the judgment of partition entered in this cause, be and the same hereby is impounded with the clerk of this court until the further order of this court and until the determination of the claim of the intervener, S. D. Ralston, and the referee herein is hereby ordered and directed to pay said sum to the clerk of this court.

"The plaintiff, Claude O. Drake, excepts the impounding of the money with reference to his share in regard to the claim of the intervener, S. D. Ralston, in open court."

This decree, though made January 17, 1936, was filed and recorded January 21, 1936.

January 17, 1936, after the decree of confirmation had been announced from the bench and entered in the partition proceeding, attorney E. E. Carr, in the absence of S. D. Ralston and his counsel, called up and caused to be entered a default decree quieting title in the injunction case of Claude O. Drake v. S. D. Ralston.

February 16, 1936, the October, 1935, term of the district court for Dawson county adjourned *sine die.*

December 15, 1936, the amended answer of Claude O.

Drake and Anna S. Drake was filed in the partition proceeding, pleading the judgment entered in the injunction case by default on January 17, 1936, as *res adjudicata* and as in bar of S. D. Ralston's demands.

The actual contention of appellant in this case is, viz.: That prior to January 17, 1936, it had been agreed between R. H. Beatty, as attorney for S. D. Ralston, and E. E. Carr, as attorney for Claude O. Drake and Anna S. Drake, Lewis Pollat and Ruth Pollat, that partition proceedings should proceed, and that said property should be advertised and sold in said partition proceeding, and the rights of said intervener and Claude O. Drake, Anna S. Drake, Lewis Pollat and Ruth Pollat could be determined, and that a sale in said partition proceedings would be for the best interests of all parties concerned; that the rights of said parties in and to said real estate or the moneys to be derived from the said sale of said real estate would be tried upon the issues joined in the partition proceeding, and no further action would be taken in said injunction case; that this agreement was relied upon by appellant and no pleadings filed in, or attention paid to, the injunction case by him or his attorneys; that the defendants Claude O. Drake and Anna S. Drake, in violation of such agreement, secured the entry of a decree quieting their title to the 2/11ths interest in said land and now plead the same in bar to the claims of appellant, Ralston, in the partition proceeding.

Excepting the fact of pleading in bar, the foregoing is substantially denied by the Drakes.

In support of appellant's contention, attorney Beatty testified, in reply to an interrogatory by Victor Halligan, viz.:

"Q. And will you state what talk you had there with Mr. Carr at that time? A. Mr. Carr came into our office. You and I were sitting in the office, and Mr. Carr had just brought this injunction suit and prevented the sale on an execution that I had issued on the Lincoln county judgment. And I said to him, 'I see that you brought an

injunction suit to enjoin the holding of our sale in Dawson county,' and he said, 'Yes, I did,' and he said, 'I don't see any use in having two or three lawsuits pending over the same thing.' And I told him then, I said that that was your opinion, that you had also said there was no reason why the whole thing couldn't be determined in the partition suit, and that I saw no reason why the whole matter couldn't be determined in the partition suit, and he said that was his idea, too. Q. Now, after that talk you had there, did you take any steps in the injunction suit at all? A. No; I took no steps in the injunction suit."

He also testified, as to another conversation had by telephone between himself and attorneys Stewart and Carr, viz.:

"The Court: Just tell who you talked with. A. Yes, sir; that's what I'm doing. Mr. Stewart called me on the telephone, long-distance, and told me that Judge Nisley was in Lexington, and that they were having a session of court, and he said that he wanted to take a confirmation in the partition case of Drake against Morrow, I think is the name the case goes under, and wanted to know if I wanted to come down; and I told him I didn't want to come unless it was necessary; and he said they wanted to take a decree of confirmation, and I told him that that would be all right with me, to go ahead and take the decree of confirmation, provided that in the decree of confirmation it was provided that the 2/11ths interest, the money from the 2/11ths interest, should be impounded in the hands of the clerk of the district court until it was determined as to who had title to it in the partition suit; and Mr. Stewart said to me, 'Mr. Carr is right here. I'll let you talk to him.' And I then talked to Mr. Carr, and I told Carr that it would be perfectly agreeable with me to go ahead and take the decree of confirmation in the partition case provided the court entered an order that the money be impounded for the 2/11ths interest in the hands of the clerk of the district court, pending the rights between Ralston and his clients being determined in the partition

case. Mr. Carr said that was all right with him, that he didn't want it to appear on the face of the record, but as far as his clients were concerned that he was consenting to the order impounding the money, and that he had no objection to it being put in there if I would permit him to put an exception in the journal; and I told him that that would be perfectly agreeable with me, that he could put an exception in the journal; and he said all right, they would go ahead, then, and take the decree. Q. Now, that was virtually the content of the conversation, as you recall it? A. That is the substance of the conversation. * * * Q. After that, was there forwarded to you the journal entry for you to approve? A. There was; Mr. Stewart sent the journal entry to me for my approval, in accordance with our conversation."

In this connection, we note that defendants Drake presented a motion to strike all of this testimony because not reduced to writing, and "is in violation of standing orders of this court." This motion was overruled.

On the subject of the first conversation referred to above, attorney E. E. Carr testified as follows:

"Q. Well, I asked you if you had been in Halligan, Beatty & Halligan's office at a time about thirty days after the injunction suit was started? A. Well, I think that would be about—Oh! after the injunction suit was started? Q. After the injunction suit was started? A. No. I would say it was before that, Mr. Cook. Q. I will ask you whether or not at a time about thirty days after the 15th day of February, 1935, or at any other time, you were in the office of Halligan, Beatty & Halligan, at a time when Mr. Beatty and Mr. Halligan were present, and if at that time or at any time you stated, in reply to a question by Mr. Beatty as to the Ralston sale, that you had enjoined the sale, or in which Mr. Beatty stated to you that he had been informed that you had enjoined the sale, and if you then stated to Mr. Beatty that you didn't see any use in having two lawsuits involving the same matter, and that you thought the matter could all be deter-

mined in the partition case, and if Mr. Beatty said to you that that was Mr. Halligan's idea, and it was all right with him? A. No, sir. I did not. Q. Did any such conversation occur between you and Mr. Beatty and Mr. Halligan, or either of them, at any place, at any time? A. No, sir. I will say this: There was a conversation in Mr. Beatty's office, in their library, one time, relative to the hearing on the partition suit, about that matter coming up. The injunction suit was never mentioned in their presence, that I know of. I didn't even know they were attorneys for Ralston in the injunction suit."

With reference to the matters discussed immediately prior to the confirmation, the following testimony was given by attorney Carr:

"Q. Now, just state as well as you can the conversation you had with Mr. Stewart with reference to this partition case. A. Well, as I recall it, when I came here Mr. Stewart and Mr. Johnson called me out in the clerk's office and said, 'Now, we would like to have this sale confirmed.' * * * And Mr. Stewart said, 'You have got a good price there. Ten thousand dollars is all that land will bring, and the bidder is going to back out unless that sale is confirmed.' And I told him that we could not consent to any confirmation because there were other issues involved in that case, and if a confirmation came up without a determination of our interests it might jeopardize our rights to that money, and we wouldn't consent to it; and he said, 'Well, why can't we put that in court, tie it up in court?' And I recall definitely of telling Mr. Stewart that I was afraid of any order taking this property and converting it into personalty and tying it up in court under those conditions, and that I wasn't particularly objecting to the confirmation only as it affected the distribution of those proceeds, but that I thought we were entitled to that money. And they insisted on the confirmation coming up; and then he called up Mr. Beatty or Mr. Beatty called him. I don't know just how it was. I recall the conversation between Mr. Stewart and Mr. Beatty in which he asked Mr. Beatty

if he had any objection to the money being put up with the clerk of the district court. Q. I will ask you whether or not you talked to Mr. Beatty at all over the telephone that day? A. No; I did not."

It may be said that throughout the record there appears a definite and substantial contradiction in the testimony of attorney Carr and attorney Beatty on the subject of "trying out" the contest on the issues framed in the partition case and letting the injunction case "stand open." Attorney Beatty testified that his partner, Victor Halligan, was present and participated in the first conversation with attorney E. E. Carr held in their office, but Mr. Halligan, though present in court and participating in the trial as an attorney, failed to testify. Attorneys Stewart and Johnson were present when the telephonic conversation was had between attorney Beatty at North Platte and attorney Stewart at Lexington, relative to the confirmation of the partition sale. As part of this conversation attorney Beatty testified that he talked with attorney Carr with reference to the final determination of the disputed questions in the partition proceeding. Mr. Carr's statement is that at this time he had no conversation whatever over the telephone with attorney Beatty, and in this he is not contradicted by the other witnesses who were present at the time with him at Lexington.

The form of the issues here presented imposed on appellant the burden of establishing the allegations of his application to vacate the decree of January 17, 1936, by a preponderance of the evidence. The trial judge, who personally heard the proof adduced and observed the demeanor of the witnesses as they testified determined this issue adversely to appellant's contention. The question of fact which evidently was decisive in the district court was whether the oral agreement with reference to the trials of the injunction case and the partition proceeding had been actually made and entered into by these attorneys.

True, the powers possessed by attorneys by virtue of their office are limited. Our statute provides: "An attorney

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

The rule early announced in this state was: "Written agreements of attorneys, or those entered into by them in open court, in regard to the disposition of cases, will be enforced; but oral agreements, entered into out of court, will not be recognized or considered." *Rich v. State Nat. Bank,* 7 Neb. 201. See, also, *German-American Ins. Co. v. Buckstaff,* 38 Neb. 135, 56 N. W. 692; *Anderson v. Walsh,* 109 Neb. 759, 762, 192 N. W. 328.

In connection with the *Walsh* case cited above, it will be noted that in the instant case we are confronted with a motion to strike the oral evidence relating to the claimed agreement as incompetent. However, this may not be the decisive question in the instant case. As it comes to this court, the appellant carries the burden of proof. An attorney on each side constitute the sole witnesses, whose testimony must determine the existence of the disputed oral agreement. Neither witness is impeached. Under these circumstances, the fact becomes important that the trial judge, who personally heard the testimony adduced and observed the demeanor of the witnesses when testifying, accepted the testimony tendered by the appellee rather than the evidence produced by the appellant. Therefore, on trial *de novo,* this court, in view of the entire record, finds for the appellee and against the appellant.

The judgment of the district court is, therefore,

AFFIRMED.

CARTER, J., dissenting.

It is the contention of the appellant in this case that his attorney entered into an oral stipulation with the attorney for appellees to the effect that a partition suit then pending should proceed to trial and that the rights

of the parties to the moneys derived from the sale of the lands involved should be tried out in the partition proceeding instead of in an injunction suit that had been commenced by Claude O. Drake, one of the appellees. During the pendency of the partition action, without the knowledge or consent of appellant's attorney, appellee's attorney secured a default decree in the injunction suit in which title to appellee's claimed interest was quieted in him. This decree was then successfully pleaded as *res adjudicata* of the matters involved in the partition suit and deprived appellant of a trial of his claims on the merits.

That conversations were had between the attorneys for the respective parties relating to the disposition of the cases is amply borne out by the evidence. It is true that the evidence is in conflict as to whether the agreement was actually made by the two attorneys. It is evident, however, that both attorneys knew that the case was to be contested, and that neither party intended to default. Under such a state of facts the trial court should have vacated the default decree procured by appellee's attorney and permitted appellant to appear and defend.

This court has often said that attorneys are officers of the court, over whom the court may exercise a limited amount of supervision. Litigants generally place some confidence in these judicial assertions. One attorney ought not to be permitted to take a default decree favorable to his client, when he must have known from the circumstances surrounding the litigation of the intention of the other party to contest it, especially where it appears that the other attorney has been lulled into a feeling of security by reason of conversation had between them.

The purpose of courts is to arrive at justice between litigants who are unable to solve their own difficulties. To do so in an efficient way, rules must be adopted and followed. But a litigant, free from fault and without knowledge of the real facts, ought not to be deprived of his defense because officers of the court disagree as to the re-

sult of conversations had between them when both knew that each had interests which he desired to maintain. The enforcement of rules ought not to become such a fetish that the objectives of the law are lost and innocent litigants thereby compelled to risk their cases in a game of wits instead of in an impartial trial on the merits.

In my judgment, the trial court should have vacated the default judgment, and it was an abuse of discretion constituting reversible error on his part not to do so.

I am authorized to say that Simmons, C. J., and Johnsen, J., concur in this dissent.

HENRY HOMPES, APPELLEE, V. B. F. GOODRICH COMPANY ET AL., APPELLANTS.
288 N. W. 367

FILED NOVEMBER 10, 1939. No. 30533.

1. **Monopolies.** A combination or conspiracy between two or more persons against any person, firm or corporation to damage or destroy the business of such person, firm or corporation, which is carried into effect, is a violation of the Junkin Act (Comp. St. 1929, art. 8, ch. 59), and subjects such wrong-doers to an action for damages.
2. ———: PROOF. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions and circumstances, which vary according to the purposes to be accomplished. The evidence as a whole must show by a preponderance, however, the intent of the alleged wrong-doers to accomplish a result prohibited by the statute.
3. ———: ———. When the alleged overt acts are in themselves lawful, and the evidence does not tend to show an unlawful intent to conspire against and injure the business of another by stifling competition, the action must fail for want of proof.
4. ———. A person may do business with whomsoever he desires. He may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice.
5. ———. One engaged in business has the right to meet competitive prices of merchandise of similar class, character or quality, and when he does so for the sole purpose of meeting

competition, there is no violation of the Junkin Act.

6. ———. A volume bonus, which provides for a discount to a dealer in accordance with the amount of purchases he makes, is in itself entirely lawful unless an intent be shown to grant it as a means of injuring or destroying the business of another.
7. **Contracts.** A written contract, if couched in clear, unambiguous language, is not subject to construction. The intent of the parties to such a contract must be deduced from the language used.
8. **Monopolies.** Evidence examined and *held* insufficient to sustain a judgment for damages under the Junkin Act.

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

Flansburg & Flansburg and *F. C. Leslie,* for appellants.

Beghtol, Foe & Rankin, Walter E. Nolte and *Lawrence Vold, contra.*

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

CARTER, J.

This is an action brought by the plaintiff, Henry Hompes, against the B. F. Goodrich Company and others under the Junkin Act (Comp. St. 1929, secs. 59-801 to 59-822) for damages alleged to have resulted from a conspiracy of the defendants, in restraint of trade, to exclude the plaintiff from dealing in Goodrich products and to monopolize a part of the trade and commerce of the state. From a verdict and judgment for $25,000, the defendants appeal.

The record shows that since 1925, under the trade-name of Hompes Tire Company, plaintiff has been conducting a business in the city of Lincoln of warehousing and selling Goodrich automobile tires, tubes and accessories manufactured by the B. F. Goodrich Company; that, as a part of the business, plaintiff erected a building at a cost of $133,000 in which to carry on his business, expended large amounts for equipment, and set up an organization of salesmen and dealers for selling Goodrich products, which resulted in the establishment of a profitable business.

Plaintiff claims that, prior to 1933, the defendant B. F.

Goodrich Company entered into a conspiracy with other defendants to induce plaintiff to invest large sums of money in the establishment of his business, and then to compel him to give it up so that the benefits thereof would accrue to the B. F. Goodrich Company. The specific acts alleged to have been committed, and which plaintiff claims are sufficient to establish a conspiracy, may be summarized as follows: (1) That the Goodrich Company sold its tires to competitors and customers of plaintiff in Lincoln at a lower price than they were sold elsewhere. (2) That the Goodrich Company limited the price at which plaintiff could sell its products, but placed no limit on competitors. (3) That the Goodrich Company sent salesmen into Lincoln to destroy sales under negotiation by plaintiff. (4) That, in violation of their contract, they shipped products within plaintiff's territory without passing the same through plaintiff's warehouse, so as to deprive him of his commission thereon. (5) That defendants refused to complete sales of tires made by plaintiff in the city of Lincoln. (6) That defendant Goodrich Company organized the State Tire Company of Lincoln to compete with plaintiff in the sale of tires, which corporation was owned by the defendant conspirators. (7) That the Goodrich Company organized similar stores in Beatrice and Fairbury to aid in the accomplishment of their unlawful purpose. (8) That the Goodrich Company threatened to and did refuse to deal with plaintiff on and after February 10, 1936, for the purpose of carrying out the conspiracy of the defendants to drive the plaintiff out of business for their benefit.

The relationship between the Goodrich Company and plaintiff was, at all times herein mentioned, evidenced by certain written contracts and agreements which were renewed from year to year, until the cancelation of the 1936 contract took place. It is necessary that the nature of these contracts be investigated before a proper understanding of the evidence can be had.

Plaintiff had a five-year contract dated November 14, 1935, with the Goodrich Company in which he agreed to

purchase his requirements of Goodrich products. This agreement provided that plaintiff should pay regular dealer prices less a 2 *per centum* cash discount if paid before the tenth of the following month. The balance of the contract pertained to advertising, sales efforts, deliveries, adjustments and other matters incidental to the business. It was specifically provided that the matter of bonus credits for volume purchases was not a part of the contract, the contract stating that the bonus credit for volume was in the nature of a reward subject to cancelation or revision at any time. A rider accompanied the contract, however, in which the schedule of credits for volume was set forth. These riders were apparently sent out on November 1 of each year with instructions to attach to the dealer's contract.

Plaintiff and the Goodrich Company also entered into a "Dealer Warehouse Agreement" in 1930 and each succeeding year thereafter, the general provisions of which were substantially the same. The provisions with reference to the allowance of warehouse commissions are as follows: "For our faithful performance of the terms and provisions of this agreement, you agree to pay to us on all merchandise delivered under this agreement from your warehouse stock to your customers on the list which you furnish us, a commission amounting to five (5) per cent. of the actual invoice value of such merchandise, less all discounts shown on the invoices, including two (2) per cent. allowed for cash, said commission to be paid monthly in the form of a merchandise credit. No commission will be paid on merchandise drawn from your stock stored with us and delivered to ourselves or shipped by us to your other branches or to dealers not on your customers' list on file with us, except when such deliveries to customers not on your list are made by us at your request. No commission will be paid on any deliveries made from our stock to your customers or branches. In the event of goods being returned by your customers, the commission on the original sale will be deducted from the commission to be paid to us."

It will be noted that the "Dealer Warehouse Agreement" does not purport to give plaintiff a commission on all products sold within a designated territory. It in fact provides for a commission of 5 per cent. on all merchandise delivered from plaintiff's warehouse to Goodrich customers on a list to be provided by the company, said list being described in another section of the contract as one containing customers whose credit ratings met the requirements of the company. Commissions were to be paid on shipments to others only after approval by the branch office of the Goodrich Company. All commissions, however, are limited to deliveries made from the plaintiff's warehouse. It is the contention of plaintiff, however, that the construction placed upon the contract by the parties themselves requires a different conclusion. The provisions of the contract appear to be so definite and unambiguous that we doubt if they are subject to construction. *Farmers Ed. and Coop. Union v. Farmers Ed. and Coop. State Union,* 133 Neb. 397, 275 N. W. 464; *Crancer v. Reichenbach,* 130 Neb. 645, 266 N. W. 57; *James Poultry Co. v. City of Nebraska City,* 135 Neb. 787, 284 N. W. 273. But even if so, the evidence does not show that plaintiff was paid commissions on products which were not delivered from his warehouse. The evidence does show that on June 6, 1934, credit was allowed the plaintiff for commissions in the amount of $28.55 on products delivered from the Omaha branch. Officers of the company were unable to account for this credit, and assumed that it was due to mistake. In view of the fact that the officers of the company at all times refused to grant such credits to the plaintiff, and in view of the fact that their position was in accord with the terms of the contracts entered into each year, we hold that one credit of $28.55, among a huge number of business transactions, is insufficient to sustain a finding of liability based on mutual subsequent interpretation of the contract. The record further shows that one Lawrence Goodale, a salesman of the Fisk Tire Company who sells the products of that company to plaintiff, and who was for many years a busi-

ness associate of the plaintiff, testified that during a part of the times mentioned he was a representative of the Goodrich Tire Company, engaged in the selling of Goodrich products in the territory served by the Hompes Tire Company warehouse. The substance of his testimony was that Goodrich products were sold in the territory serviced by the Hompes Tire Company, which were not delivered from plaintiff's warehouse, and that Hompes was paid a warehouse commission on such sales. Other than the one credit hereinbefore noted, the books, credit slips and other records of the Goodrich Company and Hompes Tire Company do not in any way corroborate this statement. No foundation was laid for the admission of this evidence. In so far as the record shows, the witness merely expressed an opinion without a factual foundation sufficient to warrant its admission. The testimony of the officers of the Goodrich Company denies that commissions were paid to plaintiff on products not delivered from his warehouse. We must necessarily conclude that plaintiff failed to sustain the burden of proof on this point. The trial court submitted these claims for commissions to the jury as an element of damage. We think the trial court should have withdrawn these items from the consideration of the jury and that the failure to so do constitutes prejudicial error.

It is the contention of plaintiff that the Goodrich Company organized, owned and controlled the State Tire Company of Lincoln and the State Tire Company of Beatrice, which with W. G. Sabine, the Goodrich Company's branch manager at Omaha, conspired with the Goodrich Company to destroy the business of the plaintiff by diverting it to these company-controlled stores. Evidence was offered in an attempt to show that the company-controlled stores received Goodrich products at a lower price than plaintiff, thus enabling the company-controlled stores to undersell plaintiff.

It is established by the record that Goodrich products were sold to the company-controlled stores at the same price they were sold to plaintiff. Each was allowed the same

cash and factory shipment discounts. Plaintiff was allowed his 5 per cent. discount on products delivered from his warehouse. The contention that favoritism was shown arises from the allowance of a volume discount. In this respect, both the company-controlled stores and plaintiff had the same volume discount schedule. Plaintiff's volume discount was fixed by adding together the output of all of his outlets. In determining the volume discount of the company-controlled stores, the output of all of them was added together, which naturally resulted in their receiving the maximum volume discount. The plaintiff was unable to reach the maximum, and as a result obtained a lesser volume discount. The allowance of a volume discount is not of itself a violation of the Junkin Act. If the purpose of the discount was to make it possible to unlawfully undersell the plaintiff and assist in carrying out the unlawful conspiracy or combine, a liability would, however, be established. It is necessary that the evidence concerning the granting of more favorable discounts to the company-controlled stores be examined with a view of determining whether they were granted for a purpose prohibited by the Junkin Act. In so considering it, we are not unmindful of the rule announced in *Marsh-Burke Co. v. Yost*, 98 Neb. 523, 153 N. W. 573, wherein we said: "A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

The evidence shows that the volume discounts allowed the company-controlled stores were in accordance with a long-established business practice of the Goodrich Company, and they knowing full well that the added volume of

all the company-controlled stores would exceed the amount required for the maximum volume discount, it was customary to grant such discounts as payments on their accounts were made. The question immediately arises whether the discounts were in fact allowed to permit the company-controlled stores to undersell plaintiff and still make a profit. The evidence is clear that plaintiff and the company-controlled stores were furnished identical retail price lists, which all were obligated to follow. Evidence was produced which showed that the State Tire Company of Lincoln had sold Goodrich products at a price lower than the one prescribed. It was subsequently established that these sales were in accordance with the National Recovery Act code price which had abrogated the company retail price list. Evidence was also produced that plaintiff, during the same period, was selling at the identical price established as the code price. It is equally clear to us that the amount of discounts allowed the company-owned stores becomes unimportant if such stores were actually owned by the Goodrich Company. It has never been held in this state that it was unlawful to favor one's self. This is particularly true where the retail price has been maintained and no underselling indulged in by the subsidiary agency. Since retail prices were uniformly maintained by the company-controlled stores, it cannot be said that the allowance of a larger discount for a larger volume of sales is a violation of the provisions of the Junkin Act.

Complaint is made that the establishment of the company-controlled stores was in violation of plaintiff's contract with the Goodrich Company and also a violation of the provisions of the Junkin Act. The evidence shows that plaintiff did not have an exclusive contract to warehouse, or sell at wholesale or retail, the products of the Goodrich Company. The 1936 warehouse contract provided that either party could terminate the contract on five days' notice. The dealer's contract provided for a cancelation on five days' notice if plaintiff's account became delinquent. The evidence shows that plaintiff was requested to provide further

outlets for Goodrich products in Lincoln, and he refused. The evidence further shows that he acquiesced in the establishment of the State Tire Company in Lincoln, that he aided in locating it and celebrated its opening by giving a party at his home. The evidence also shows that he advertised jointly with the State Tire Company for a period of time. It is true that plaintiff says an oral agreement was entered into that the merchandise for the State Tire Company was to be delivered from his warehouse, but we are obliged to say, without discussing all the evidence on the subject, that plaintiff failed to sustain this contention by the burden of proof. In fact, the written contracts between plaintiff and the Goodrich Company, entered into subsequent to the opening of the State Tire Company store, negative this contention. It is not even contended that the State Tire Company was placed on the list of dealers to be serviced from plaintiff's warehouse. A consideration of the evidence, both written and oral, convinces us that the Goodrich Company not only could lawfully establish an additional retail store in Lincoln, but that the plaintiff acquiesced in its so doing. The evidence shows that volume discounts allowed were in accordance with uniform schedules provided to all dealers and were not directed specifically at the plaintiff. We conclude from the evidence that the defendants did not conspire to injure plaintiff in a program of underselling. It is true that the retail price established by the Goodrich Company was departed from due to the functioning of the National Recovery Act and the meeting of competitive prices in the Lincoln community, but this cannot be said to be unlawful. It is established by the evidence that, while a uniform retail price list was furnished all Goodrich dealers, special discounts were allowable to certain classes of consumers by all dealers. As an example, any dealer could allow an additional discount to a county or the state, or to a national account customer. Reduced prices were at all times permitted to meet competition in the open market. Such discounts being permitted to all Goodrich dealers uniformly to meet like prices of competi-

tors of similar products cannot be said to be in violation of the Junkin Act.

In the final analysis of the situation, it is not material what business methods and practices are employed by a company and its subsidiary branches as between themselves. The real question is, what the branch does to its competitors and the public, and the fixing of the company's responsibility for wrongs committed by a subsidiary or branch owned and controlled by it.

There is evidence in the record that plaintiff became dissatisfied with his contracts with the Goodrich Company, and negotiated with a major competitor of the Goodrich Company for more favorable ones. Upon their procurement he demanded like terms from the Goodrich Company, and stated that unless they were granted he desired to abrogate existing contracts with the Goodrich Company. Plaintiff refused to pay his account until his demands were met, and as a result his account became past due and his dealer's contract subject to cancelation on five days' notice. The Goodrich Company refused his demands, and, in accordance with plaintiff's expressed desire, served the required notice preliminary to the cancelation of the contracts. We fail to see where the cancelation of the contracts in accordance with their very terms can operate to create a liability against the defendants, either by contract or under the Junkin Act.

The contentions of the plaintiff that the Goodrich Company sent salesmen into Lincoln to destroy sales under negotiation by the plaintiff is not sustained by the evidence. Nor is there evidence to sustain a finding that the Goodrich Company wilfully refused to complete sales of tires made by the plaintiff in the city of Lincoln. It must be borne in mind that plaintiff did not have an exclusive contract to sell tires at retail or wholesale in the city of Lincoln. So long as the Goodrich Company, or its subsidiary, the State Tire Company, competed for business by the usual methods without any attempt to injure the plaintiff by stifling competition, it cannot be said that the Junkin Act

has been violated. An examination of the record does not disclose that the defendants pursued any different business policy with plaintiff than they did with any other dealer or warehouseman engaged in the tire business. While each of the acts of defendants were in themselves lawful, such lawful acts accompanied by an ulterior motive might be actionable. We must, therefore, look into the evidence bearing upon the question of intent.

Plaintiff contends that a statement contained in a letter from the defendant W. G. Sabine to F. C. Leslie, manager of the legal department of the Goodrich Company, shows the ulterior motives of the defendants. The statement is: "Nevertheless, Firestone, Goodyear and U. S., I am well satisfied, have no interest in the Hompes Tire Company account at this time, having accounts of much better volume in this market. Therefore, no major warehouse deal is open to him." The record shows that the tire companies referred to were three of the chief competitors of the Goodrich Company at the time. The Goodrich Company felt that it had not been getting its share of the tire business for some time. Naturally, the fact that none of three chief competitors were in a position to deal with the plaintiff and thereby gain an opportunity to secure the former dealers of Goodrich products as their own, was information of interest and value to the officers of the B. F. Goodrich Company. We fail to see how this statement could be construed as showing an intent to destroy or damage the business of the plaintiff.

Plaintiff also contends that on or about March 13, 1936, at the time the Goodrich Company was removing its products from the Hompes warehouse, a remark was made by Ed Lawrie, president of the State Tire Company, W. G. Sabine, or R. T. Eastman, representatives of the Goodrich Company, to the effect that Hompes would wish he had not acted as he had because when they got through he would have nothing left. The only person testifying to this statement is Alfred Goodwin, who was at the time employed by the State Tire Company of Lincoln. This statement appears

to us to be merely an expression of belief that Hompes had made a mistake in not remaining as a Goodrich dealer and warehouseman, and that he would go broke as a result of his action. We fail to find the expression of any ulterior motive in this statement that could be said to show an intent to destroy the business of the plaintiff within the purview of the Junkin Act.

Reliance is also placed upon a statement made to Dee Eiche by W. G. Sabine about the time of the establishment of the State Tire Company. Mr. Eiche said: "Well, he (Sabine) said they were going to go after the business and he said it might be a little tough for a while on the rest of the boys, but they were going to get their business in Lincoln, they hadn't been getting it to that time." This statement in no sense of the word indicates that anything other than fair competition was to be employed in its drive for business. The statement also had reference to all the competitors of the Goodrich Company, with no special reference to the plaintiff.

This fragmentary evidence of an intent to injure plaintiff, together with all the other evidence in the case, fails in our judgment to establish a violation of the Junkin Act. The alleged overt acts, together with the evidence of wrongful motives, fail to sustain a violation of the act as construed in *Marsh-Burke Co. v. Yost, supra,* and *State v. Interstate Power Co.,* 118 Neb. 756, 226 N. W. 427.

The law applicable may be stated as follows:

A combination or conspiracy between two or more persons against any person, firm or corporation to damage or destroy the business of such person, firm or corporation, which is carried into effect, is a violation of the Junkin Act (Comp. St. 1929, art. 8, ch. 59) and subjects such wrong-doers to an action for damages.

A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions and circumstances, which vary according to the purposes to be accomplished. The evidence as a whole must show by a pre-

ponderance, however, the intent of the alleged wrong-doers to accomplish a result prohibited by the statute.

When the alleged overt acts are in themselves lawful, and the evidence does not tend to show an unlawful intent to conspire against and injure the business of another by stifling competition, the action must fail for want of proof.

A person may do business with whomsoever he desires. He may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice.

One engaged in business has the right to meet competitive prices of merchandise of similar class, character or quality, and when he does so to meet competition, he does not violate the Junkin Act.

A volume bonus, which provides for a discount to a dealer in accordance with the amount of purchases he makes, is in itself entirely lawful unless an intent be shown to grant it as a means of injuring or destroying the business of another.

A written contract, if couched in clear, unambiguous language, is not subject to construction. The intent of the parties must be deduced from the language used in the contract.

We necessarily conclude, after a consideration of all the evidence and the application of controlling principles of law, that the evidence is insufficient to support a judgment.

In view of the conclusion reached, it will not be necessary for us to consider other alleged errors occurring during the trial. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

STATE, EX REL. PHILLIP FISCHER, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

288 N. W. 499

FILED NOVEMBER 10, 1939. No. 30582.

1. **Municipal Corporations**: OFFICERS: REMOVAL. Where the appointing power is given unconditional authority to remove a public officer or employee at any time in its discretion, it may do so without a hearing.
2. ———: ———: ———. Even where the power of removal is not expressly conferred, the general rule is that a grant of the power to appoint is construed to carry with it, by necessary implication, a grant also of the unconditional power to remove, if the term of office is not fixed by law and the right to remove is not in any other manner restricted.
3. ———. The purpose of the home rule charter provisions of our Constitution (art. XI, secs. 2-5) was to render cities as nearly independent as possible of state legislation.
4. ———. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means simply that, on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation.
5. ———. The legislature cannot, however, even by a general law, affect the powers of a city under its home rule charter over matters which are purely of local concern, or which only indirectly or remotely affect the people of the state outside the particular municipality.
6. ———. The right of a city to provide for a particular form of government in a home rule charter is in no way dependent upon whether the legislature by statutory enactment has authorized such a form, nor is it subject to the statutory conditions and limitations upon which the legislature may have authorized a city to adopt it.
7. ———. The city council of Lincoln, under the provisions of its home rule charter, had the right to discharge one of its firemen without a hearing before the council.

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

Frank A. Dutton, for appellant.

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

Heard before EBERLY, PAINE, CARTER and JOHNSEN, JJ., and KROGER, District Judge.

JOHNSEN, J.

This is a proceeding in mandamus, to compel the city council of Lincoln and the chief of its fire department to reinstate relator (who will be referred to herein as plaintiff) as a fireman, on the ground that he had been discharged without a hearing. The trial court sustained a general demurrer to the petition, and, on plaintiff's election not to plead further, it dismissed the action. Plaintiff has appealed.

Plaintiff had been summarily removed from his position by the fire chief, and the city council ratified the discharge by refusing to give him a hearing. His contention is that he could not legally be removed except on formal charges, notice, and a hearing before the council.

The question accordingly is whether such charges and a hearing were required under the provisions either of the city charter or of the statutes of the state.

Lincoln is a city of the first class, with more than 40,000 and less than 100,000 inhabitants, having a commission form of government, and operating under a home rule charter. Its charter provides: "The city council * * * shall elect * * * as many officers, assistants and employees as may, in its judgment, be essential and necessary to conduct the government of the city. * * * Any such officers or any assistant or any employee appointed by the city council may be removed by the city council at any time. The city council shall have power, in its discretion, to discharge any officer or employee appointed or elected by it or to discontinue any employment or abolish any office at any time."

The charter thus expressly grants to the city council the general power both to appoint and to remove all subordinate officers and employees, at any time, in its discretion.

"A grant of general power to remove an officer from office ordinarily carries with it the right to remove him

at any time without notice or hearing." 99 A. L. R. 391, annotation.

"If the power to remove is given, expressly or by necessary implication, by words or terms denoting that it may be exercised in discretion, such power, to the extent thus given, is, *ex hypothesi,* one which may be exercised whenever in the mind and judgment of the donee of the power the fact or thing exists upon which his discretion is rested." 2 McQuillin, Municipal Corporations (2d ed.) sec. 574.

Indeed, even where the power of removal is not expressly conferred, the general rule is that a grant of the power to appoint is construed to carry with it, by necessary implication, a grant also of the unconditional power to remove, if the term of office is not fixed by law and the right to remove is not in any other manner restricted. 2 McQuillin, *op. cit.,* sec. 582; 19 R. C. L. 931, sec. 232; *Id.* 935, sec. 235; 99 A. L. R. 336, annotation; *State v. Wunderlich,* 144 Minn. 368, 175 N. W. 677; *Lyon v. Civil Service Commission,* 203 Ia. 1203, 212 N. W. 579; *State v. Archibald,* 5 N. Dak. 359, 66 N. W. 234.

In *State v. Smith,* 35 Neb. 13, 52 N. W. 700, we specifically held: "Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary, and may be exercised without notice or hearing."

From these authorities it is clear that, in so far as the provisions of the charter are concerned, plaintiff has no ground for complaint because he was denied a hearing before the city council. The charter gives the council the power to discharge any appointee, at any time, without charges or a hearing, if it chooses to do so.

Plaintiff argues, however, that, apart from the charter, the ordinances of the city and the regulations of the fire department contemplate and entitle him to such a hearing. The petition sets out some ordinances which provide, in substance, that the chief may make such rules and regulations for the fire department as he deems advisable, with the consent of the council; that he shall keep a record of

all complaints against members and his judgment thereon; and that he may suspend from duty any member against whom a complaint has been made, until he has had an opportunity to examine the charges. Certain regulations of the fire department are also pleaded, which provide that preferred charges against a member must be made in writing and forwarded through the company officer to the chief; that officers shall report promptly to the chief, by well-sustained charges, any transgression of laws, ordinances, rules or orders; and that both company officers must sign any charges brought against a member.

These ordinances and regulations obviously are intended to provide a means of bringing grievances and complaints to the attention of the chief in an orderly and routine fashion; to require him to examine any charges made, for purposes of departmental discipline; and to enter a notation of his judgment or conclusion, presumably as a matter of service record exoneration or demerit. It may be supposed that, in getting at the facts of any situation, a fair-minded investigation will ordinarily include a discussion of the complaint with the person involved, even though there be no prescription for a formal hearing. But the legal concern in this case is not whether plaintiff was afforded such an opportunity for discussion with the chief; the controlling question is whether he could legally be discharged without a hearing before the city council. The ordinances and regulations cited involve, as we have indicated, only departmental routine and procedure. They do not, either expressly or by implication, make provision for a hearing before the city council, nor purport to impose any limitation upon the right of the council, under its plenary charter powers, to remove a fireman at any time and in any manner that it chooses to do so. Indeed (though the matter need not be determined here) there is substantial authority to the effect that a discretionary power of removal conferred by a charter cannot validly be limited by ordinance. 43 C. J. 652; 19 R. C. L. 931, sec. 232.

The city council, accordingly, had power, under the pro-

visions of the charter, to remove plaintiff without giving him a hearing. The remaining question is whether he was entitled to a hearing as a matter of statutory requirement.

Plaintiff relies upon the following provision of section 19-413, Comp. St. 1929: "Before any such officer or employee (appointed by the city council) can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer or employee to defend against such charges." In *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138, it was held that this provision was at that time applicable to the city of Lincoln. Lincoln was then operating, however, under such grants of power as had been made to it by statutes of the legislature, and not under a home rule charter.

The purpose of section 2, art. XI of the Constitution of Nebraska, providing that any city with more than 5,000 inhabitants "may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state," was to render such cities as nearly independent as possible of state legislation. *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N. W. 643. Liberal judicial construction has encouraged this salutary assumption by municipalities of the powers and responsibilities of local self-government. *Sandell v. City of Omaha,* 115 Neb. 861, 215 N. W. 135; *State v. City of Milwaukee,* 190 Wis. 633, 209 N. W. 860. Recurrently we discover that democracy is only the hearth-shadow of local self-government and try to preserve the crackle of its flame.

The extent of the powers which may be incorporated in a home rule charter was defined in *Consumers Coal Co. v. City of Lincoln, supra,* as follows: "We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are

also proper for state legislation, but upon which the state has not spoken, until it speaks."

The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state simply means, therefore, that on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation. This includes, as Judge Cardozo points out in his concurring opinion in *Adler v. Deegan,* 251 N. Y. 467, 490, 167 N. E. 705, 713, matters which, in a direct and substantial manner, are the subject of state concern, even though they may be also proper concerns of the municipality. In this latter field, however, until the superior authority of the state has been asserted by a general statutory enactment, the city may properly act under its charter. But in matters which are purely of local concern, or which only indirectly or remotely affect the people of the state outside the particular municipality, the provisions of a home rule charter will control over conflicting statutory enactments. *State v. City of Milwaukee, supra.* And the legislature cannot, even by a general law, affect the powers of a city under its home rule charter over matters which are essentially municipal affairs. *Pester v. City of Lincoln,* 127 Neb. 440, 255 N. W. 923; *City of Portland v. Welch,* 154 Or. 286, 59 Pac. (2d) 228, 106 A. L. R. 1188. The basic difference between a city operating under a home rule charter and one operating under statutory authorization is that the former's powers of local self-government are derived wholly from its charter, while the powers of the latter are dependent upon the extent of the grant which the legislature has made and the conditions and limitations which the statutes have imposed.

In contending that, in view of section 19-413, Comp. St. 1929, the city could not discharge plaintiff without giving him a hearing before the council, plaintiff has overlooked the fact that this statute was not operative against the city of Lincoln, after it adopted its home rule charter. The application of the statute is limited and it is not de-

signed to declare a general public policy. It is not a requirement imposed upon cities of the state generally, nor even upon all cities of a particular class, but is merely a condition or prescription made against such cities as desire to avail themselves of the optional right to adopt a commission form of government under the authority granted by the legislature in article 4, ch. 19, Comp. St. 1929. No such prescription has been attempted against cities operating under the statutes which authorize the general mayor and council system of government. If the city of Lincoln at the present time was operating its commission form of government under authority derived from the legislature, as it was at the time *State v. City of Lincoln, supra,* was decided, then, under the holding in that case, it would be subject to the prescription for a hearing which section 19-413, Comp. St. 1929, imposes. In adopting a home rule charter, however, the city had the right to make provision therein for any form of local government it desired, which was not in conflict with the letter and spirit of our Constitution. Its right to adopt a particular form of government was in no way dependent upon whether the legislature, by statutory enactment, had authorized such a form, nor was it subject to the statutory conditions and limitations upon which the legislature had authorized a city to adopt it. *People v. Perkins,* 56 Colo. 17, 137 Pac. 55; *In re Pfahler,* 150 Cal. 71, 88 Pac. 270. The requirement, in section 19-413, Comp. St. 1929, for a hearing before the council, therefore, had no application to the powers conferred by and exercised under the home rule charter.

Whether the legislature could, by general law and as a matter of public policy, require that no fireman in the state be discharged without a hearing before the city council is not now before us. No such statute is here involved. Nor do we have the right to pass upon the wisdom of the policy which the inhabitants of Lincoln have thus seen fit to adopt in their charter. All we can declare is that no question exists under present laws as to their power to do so. It may be added, for informational purposes, but without any

implication, that no pension rights are here involved, because the city of Lincoln is not required to provide a pension for its firemen. Comp. St. 1929, sec. 35-201.

For the reasons which have been set out, plaintiff cannot complain of the fact that the city council refused to grant him a hearing, nor can he claim that by virtue thereof his discharge was invalid. The trial court properly held that he was not entitled to a writ of mandamus to compel his reinstatement on that ground.

AFFIRMED.

HARRY H. ASHBROOK, APPELLANT, V. MARGUERITE BRINER ET AL., APPELLEES.

288 N. W. 374

FILED NOVEMBER 10, 1939. No. 30655.

1. **Mortgages.** A deed, absolute in form, given as security for the payment of money, passes the legal title to the grantee.
2. ———. Where such deed is accompanied by a defeasance in writing, the legal title does not pass to the grantee, and the transaction constitutes a mere mortgage.
3. ———. Where two instruments are executed at the same time, as part of the same transaction, and to accomplish a definite purpose, they will be construed together as one instrument in determining their effect and the intention of the parties.

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

Schnurr & Mumby and *F. J. Reed,* for appellant.

G. H. Seig, contra.

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

KROGER, District Judge.

This is an action to quiet title to 1,600 acres of land in Sioux county, Nebraska, and from an order dismissing plaintiff's action against two of the defendants, this appeal is prosecuted.

The record discloses the following facts: On March 20, 1925, Burwell R. Price was the owner of the real estate in question and on said date executed and delivered to his father, James W. Price, a warranty deed conveying said real estate to said James W. Price. On the same date, and as a part of the same transaction, a defeasance contract was executed and acknowledged by the same parties, wherein it was stated that the conveyance was as security for a loan of $7,000, which was to be due and payable in five years, with interest at 6 per cent., and that upon the payment of said loan said James W. Price was to reconvey said premises to Burwell R. Price, or to any other person whom he might, in writing, designate.

The loan of $7,000 had not been repaid when, on December 12, 1933, James W. Price died testate, a resident of Jefferson county, Iowa. Burwell R. Price, however, had retained possession of the real estate, had collected the income therefrom and paid the taxes thereon, and had paid the interest on the loan to the father up to the time of his death. James W. Price left surviving him his widow, Mary A. Price, and two sons, Burwell R. Price and B. Elroy Price. By the terms of his will certain real estate and all personal property, excepting some bank stock, were given to Mary A. Price as her absolute property, and the income of the bank stock and other real estate were given to her for life. The will further provided that upon the death of Mary A. Price all property, both real and personal, should be divided into two equal shares, one of which was to go to Burwell R. Price absolutely, and the other share to Burwell R. Price, as trustee for the benefit of B. Elroy Price and the children of B. Elroy Price. This trust was in the nature of a spendthrift trust and resulted from the fact that Ella G. Price, the wife of B. Elroy Price, had obtained a divorce and an alimony judgment, and the will provided that the trust should continue until the alimony judgment was released, or until the death of Ella G. Price, or until the death of B. Elroy Price, whichever should first occur. In the event of the release of the alimony judgment

or the death of Ella G. Price, then the trust was to terminate and the proceeds turned over to B. Elroy Price to be his absolute. In the event, however, that B. Elroy Price, should die before either of the other contingencies happened, then the proceeds of the trust fund were to be paid to the children of B. Elroy Price, who are Helen Mona Price and Dorothy A. Guinotte.

On January 8, 1934, an inventory of the assets of the estate of James W. Price was filed in the probate court of Jefferson county, Iowa, wherein the conveyance and contract between Burwell R. Price and James W. Price were listed as personal property.

On November 15, 1934, Burwell R. Price entered into a written contract for the sale of the land in controversy to Harry H. Ashbrook, plaintiff in this action, and on February 6, 1935, executed and delivered a warranty deed to said premises in favor of plaintiff.

On January 12, 1935, a petition was filed in the county court of Sioux county, Nebraska, by Mary A. Price and Burwell R. Price, as executors of the estate of James W. Price, praying that said will be admitted to probate as a foreign will, and thereafter said instrument was duly admitted to probate as a foreign will and probate proceedings were completed.

On January 2, 1936, plaintiff filed his original petition in this action, and on July 14, 1936, filed his amended petition on which the case was tried. Ella G. Price, former wife of B. Elroy Price, and his children, Helen Mona Price, Dorothy A. Guinotte, and Joseph Guinotte, husband of Dorothy A. Guinotte, were the only defendants to appear and contest plaintiff's action. All other defendants defaulted.

The trial court found that Ella G. Price had no interest in said real estate and title was quieted as against her and all other defendants, excepting Helen Mona Price and Dorothy A. Guinotte, and as against their contingent interest plaintiff's action was dismissed.

It is the theory of the plaintiff that the conveyance of

March 20, 1925, was a mortgage in fact, and that legal title to the premises did not pass to James W. Price by such conveyance, and that Burwell R. Price was still the owner of the legal title to said premises, which title was conveyed to the plaintiff by the deed executed and delivered February 6, 1935; that the interest of James W. Price in said premises was a chattel interest, or personal property, and that upon his death it became the absolute property of Mary A. Price, his widow.

It is the contention of the defendants that the conveyance of March 20, 1925, did pass the legal title to James W. Price, and that upon his death title passed to his devisees under the provisions of his will.

Defendants further contend that the only interest which Burwell R. Price had in the premises after the execution of the deed of March 20, 1925, was the right of redemption, and that he waived this right of redemption when he petitioned to have the will of James W. Price admitted to probate in Sioux county as a foreign will; and that in consequence of such waiver the defendants, Helen Mona Price and Dorothy A. Guinotte, have a contingent interest in said premises by reason of the trust created for the portion of the estate going to their father, B. Elroy Price.

This court is committed to the rule that, where a warranty deed is executed and delivered for the purpose of securing an indebtedness owing from the grantor to the grantee, the legal title passes to the grantee and the only interest retained by the grantor is the right of redemption. *Northwestern State Bank v. Hanks,* 122 Neb. 262, 240 N. W. 281.

Where, however, a deed, absolute in form, is given as security for the payment of money, and is accompanied by a defeasance in writing, it has been held to constitute a mere mortgage and the grantor retains all the rights of a mortgagor. *Connolly v. Giddings,* 24 Neb. 131, 37 N. W. 939.

Here we have two instruments executed as a part of the same transaction, to wit, a warranty deed and a contract

of defeasance, and it has been held that, where two instruments are made at the same time with reference to the same transaction and to effectuate the same purpose, they will be construed together to the same extent as though made in one instrument. *Standard Oil Co. v. O'Hare,* 126 Neb. 11, 252 N. W. 398.

It is a well-settled principle that a court of equity will consider the substance and not the form, and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained.

In this state the usual form of mortgage differs but slightly from the wording of the two instruments executed in this case, if the same are construed together and treated as one instrument; and so construing them, it is apparent that the parties intended the conveyance as a mortgage and not as a transfer of the legal title with the right of redemption.

Particularly is this true in view of the provisions of section 76-228, Comp. St. 1929, where we read as follows: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage, or conditional deed, be also recorded therewith and at the same time."

In the instant case there was such other instrument in writing which clearly shows that the conveyance was intended only as security in the nature of a mortgage, and James W. Price, when he recorded the deed, did not record the defeasance contract. If we were to hold that the deed conveyed the legal title, we would be, in effect, ignoring the above provision of the statute, which states that, under the circumstances existing in this case, "though it be an absolute conveyance in terms, shall be considered as a

mortgage;" and giving James W. Price an advantage from the recording thereof in violation of the statute just quoted.

In view of the conclusion arrived at, it is unnecessary to consider the defense that Burwell R. Price, by his act in having his father's will admitted to probate as a foreign will, waived his right of redemption. In passing, it may be said that the record does not indicate any intention to make such a waiver. A contract for the sale of the land in controversy was entered into some months before the petition to probate the will was filed, and less than a month after the filing of the petition a deed was executed and delivered to the plaintiff. Whether the filing of the petition for probate was due to the forgetfulness of the attorney for the estate, as he testified, or whether it was done with the thought that the title could be perfected in that manner, is immaterial, as, in any event, it does not show a clear intention to waive any interest which Burwell R. Price had in the premises.

We therefore hold that the deed and defeasance contract executed March 20, 1925, are to be construed together and, when so construed together, they constitute a mortgage given as security for the payment of a debt, and that the legal title did not pass to James W. Price; since the interest which James W. Price had was that of a mortgagee, it was a chattel interest and passed under his will as personal property and, as a consequence, Helen Mona Price and Dorothy A. Guinotte have no interest therein and the trial court erred in dismissing plaintiff's action as to them.

The judgment of the trial court is reversed and the cause remanded to enter decree in accordance with this opinion.

REVERSED.

THELMA HILL, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.

288 N. W. 508

FILED NOVEMBER 17, 1939. No. 30552.

1. **Appeal.** The rule heretofore adopted by this court, "that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts," is not applicable where there is a reasonable dispute as to the pertinent physical facts.
2. **Trial.** Where a litigant desires to offer all of a deposition in evidence, the proper procedure is to offer the deposition by question and answer, and thereby give the opposing party opportunity to object to the admission thereof, and also give opportunity to the trial court to rule thereon, subject to the statutory limitations applicable to depositions.

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

Thomas F. Hamer, George C. Holdrege and *William J. Schall,* for appellant.

Clare B. Davey and *Gray & Brumbaugh, contra.*

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

SIMMONS, C. J.

This case is an action for damages for personal injuries arising as a result of a collision between an automobile in which the plaintiff was riding and a passenger bus owned and operated by the defendant company. There was a verdict for the plaintiff in a substantial amount. The defendant appeals. The seriousness of the plaintiff's injuries is not questioned; neither is the amount of the verdict attacked as excessive.

Defendant in this appeal claims that the verdict is not supported by the evidence and is contrary to it; that the court erred in the refusal to admit certain testimony; and that the jury were erroneously instructed.

The accident occurred about 11 a. m., December 25, 1935,

near Keystone Junction, Iowa. At that time, the weather was very cold, and the wind was blowing from the northwest. It had been snowing. Whether the snow was falling or being picked up and carried by the wind is not certain.

At the point of the accident, the highway was paved, and ran due east and west through level country. The pavement was 18-feet wide. There was an expansion joint down the center line of the pavement, and on either side of that joint were two painted black lines about 12 inches apart. Snow was on the pavement in many places. The plaintiff was riding in a light coupé, either owned or controlled by her, driven by her brother-in-law. The defendant's bus was a standard passenger bus with a maximum width of eight feet, weighing 10 tons when loaded.

Plaintiff and her brother-in-law were driving west. Defendant's bus was traveling east, was behind schedule, and at the immediate time of the accident was traveling at a speed of 30 to 35 miles an hour.

A snowplow was proceeding west along the north side of the highway at a speed of 10 to 15 miles an hour. The snow was drifting across the highway at points, and when the plow came in contact with the snow, flurries were thrown into the air and were carried southeast by the wind.

The plaintiff's car had been following the snowplow for some distance. Shortly after the bus passed the snowplow, the collision occurred. The distance traveled by the bus after passing the snowplow and before the collision is in dispute.

The primary question of fact to be determined was the location of the car and the bus at the time of the collision with relation to the center line of the pavement. There is a dispute as to all facts bearing on that question. The plaintiff's car was pushed some 40 feet backward to the northeast, and came to rest headed northwest with its front wheels in the ditch, its rear wheels off the pavement on the shoulder. It was practically demolished. The pictures of the car, which are in evidence, were taken after the car

had been removed to a garage. The bus was damaged on the left bumper, light, and fender. If pictures were taken of the bus, they were not offered in evidence. The fender brace was bent so that the front wheels could not be turned to the left and were forced slightly to the right. This would account for the bus' angling to the right and coming to a rest off the pavement on that side.

The driver of plaintiff's car was killed almost instantly, and accordingly his testimony could not be had. Plaintiff's testimony is that they were some distance behind the snowplow on the right side of the center line of the pavement when the bus passed the snowplow, came out of the snow flurries, headed northeast with its front left wheel a foot or more across and north of the center line of the pavement, and ran into the plaintiff's car immediately thereafter, without fault on the part of the plaintiff or the driver of her car.

Defendant's testimony was that the bus was south of the center line of the pavement at all times, and that, just as it was passing the snowplow, the plaintiff's car came out from behind the snowplow, turned across the center line into the right lane of traffic in front of the bus, and that the collision occurred on the south half of the pavement. Several witnesses testified to certain marks on the pavement which support defendant's theory of the case. However, the existence of the marks, their point of beginning and what caused them is in dispute. Defendant's theory is that the marks were caused by the rim or tire of the left front wheel of plaintiff's car as it was hurled backward. An examination of the rim and tire was not made before the car was removed. There is a conflict as to the position of the tire and the rim on the car following the collision. There is no clear testimony as to the condition of the tire. There is testimony that the bus turned slightly to the right when it passed the snowplow. The bus was almost as wide as the half of the pavement. Any slight turn back to the left after passing could readily have put the bus across the center line in the position testified to by the plaintiff.

There is sufficient evidence in the record to sustain plaintiff's contention and the jury's finding that the accident occurred when the car in which she was riding was on the north half of the pavement. The case is controlled by the law of Iowa. The parties agree that the plaintiff should recover if the accident occurred as a result of the bus being north of the center line of the pavement.

To this situation we apply the well-recognized rule that, if there is testimony before a jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the verdict will not be disturbed.

Defendant urges the application of the following rule as controlling in this case:

"The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts of the case, or is in flat contradiction of recognized physical laws, and where the testimony presented, taken as a whole, is capable of no reasonable inference of such a state of facts as would allow the plaintiff to recover." *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, 178 N. W. 258.

However, that rule is not applicable where, as here, there is a reasonable dispute as to the pertinent physical facts. *Suhr v. Lindell*, 133 Neb. 856, 277 N. W. 381.

Defendant complains that the court erred in sustaining objections to the admission of the deposition of the plaintiff offered by the defendant. It is claimed that the deposition, taken some time before the trial, contains statements of the plaintiff contrary to those made at the trial. The plaintiff in her cross-examination was questioned as to certain of those statements. At the opening of its case in chief, the defendant offered "in evidence the deposition of Thelma Hill." After objection thereto and considerable argument, the court admitted in evidence certain questions and answers from the deposition which were read to the jury. The defendant then renewed "its offer of the deposition of the plaintiff, Thelma Hill, as a whole." The deposition was not received in evidence. In its motion for a new

trial, the defendant stated that "the court erred in refusing to receive the deposition of the plaintiff, Thelma Hill, in evidence." The defendant assigns as error in this court that the trial court "erred in refusing to admit the deposition of the plaintiff, Thelma Hill, in evidence." It will be noted that both the offer and the assignment of error go, not to the refusal to admit specific questions and answers, but to the deposition as a whole.

The proper procedure in cases of this kind is to offer the deposition by question and answer, and thereby give the opposing party opportunity to object to the admission thereof, and also give opportunity to the trial court to rule thereon, subject to the statutory limitations applicable to depositions. Any other rule would permit a litigant to abuse the power of compulsory testimony by deposition and might result in the admission of testimony that would be properly excluded were the witness present on the stand. The deposition was properly refused admission for another reason:

"An assignment of error that the district court erred in refusing to admit the evidence of a certain witness will be overruled, if the record shows that a portion of the evidence was, in fact, admitted." *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587, 81 N. W. 620.

Here certain questions and answers of the plaintiff contained in the deposition were admitted in evidence. The refusal of the trial court to admit the deposition in evidence "as a whole" was not error.

Instructions numbered 6, 7, and 7A given by the court are as follows:

(6) "The theory of the plaintiff's case is that she was riding in her car westerly following the snowplow, and she and her driver using ordinary and reasonable care, and driving on their own side of the highway, as they progressed westward, when the defendant's bus controlled by its driver, Finck, was so wrongfully controlled that it went in a northeasterly direction from its due and proper path on the highway because of the negligent control of the defend-

ant's servant, Finck, and collided with the plaintiff's car in which she was riding, and so, by reason of such negligent and wrongful control, brought about and proximately caused the collision in question and plaintiff's resulting injuries. If you find this theory of the plaintiff to be the true one and duly established by a preponderance of the evidence in plaintiff's favor, you will return your verdict for the plaintiff."

(7) "The theory of the defendant is that its bus was at all times under proper control and was being controlled without negligence in any degree, by its servant, Finck, and that it was on its right side of the highway, and progressing easterly, *and* that the collision between the plaintiff's car and the defendant's bus was brought about proximately by the plaintiff's car leaving its pathway at the north side of the roadway, and negligently being allowed to proceed westward on the roadway south of the center line of the road and in the path of the defendant's bus, while defendant's bus was proceeding eastward properly in its pathway on the south side of the roadway. If this theory of the defendant appears to be the true one in the case, then you will return your verdict generally for the defendant."

(7A) "If you find that the car in which the plaintiff was riding was on the south side of the traveled portion of the highway at the point of the accident, you are instructed that there is no evidence before you which, in any way, justifies or excuses the said car being on the south side of the traveled portion of said highway, and, then, in that event, the plaintiff was guilty of contributory negligence, and cannot recover as a matter of law, and you must return your verdict in favor of the defendant."

The defendant complains that there was prejudicial error in the giving of instruction numbered 7, in that it required that the jury find that defendant's "bus was at all times under proper control and was being controlled without negligence in any degree," and that the defendant was entitled to a verdict, even though it were negligent, if the collision occurred upon the south half of the highway, be-

cause the record does not show any legal excuse for the plaintiff's car being on the south side of the highway, if such were the fact.

An examination of these three instructions does not disclose prejudicial error. The court by instructions 6 and 7 set out the theories of the parties as to the evidence. Defendant suggests that the conjunctive "or" should have been used instead of the conjunctive "and" which we have italicized. Clearly, such a statement would not have expressed defendant's theory of the case as disclosed by its answer and its evidence. Instruction 7A is approved by the defendant. The three instructions, when read together, clearly limit the question of defendant's liability to the issue as to the location of the cars at the point of the collision. The other assignments have been considered and prejudicial error not found.

The judgment of the trial court is

AFFIRMED.

JOHNSEN, J., not participating.

CARTER, J., dissenting.

I am unable to agree with the majority opinion in this case. The sole question to be determined, in a final analysis of the case, is the location of the motor vehicles involved at the time of the accident.

The positive evidence of six witnesses who examined the pavement is that all marks from the bus and the automobile involved in the accident lead back to a point south of the center line of the highway, the side of the highway being traveled by defendant's bus. For instance, Dewey Waychoff, a farmer living near the scene of the accident, and called by the plaintiff as a witness, testified: "Q. These scratches that you observed, were they in the snow or what? A. They were in the pavement and snow. * * * Q. Did you notice just where the west end of this scratch began? A. Yes; I saw south of the black line they started. * * * Q. How far was the first scratch you noticed from the center lines? A. You mean how far south or over the black line? Q. Yes; if you know. A. Oh, I would say five

or six inches over." John R. Burrows, the county coroner, testified as follows: "Q. What examination did you make? * * * A. I examined the pavement. Q. What marks did you see there on the pavement, Mr. Burrows? * * * A. There were different marks on the highway, or scratches on the highway. Q. In which direction were they from the automobile? A. They were in a southwesterly direction from the automobile. Q. Did you notice where they led? A. Yes. Q. Where did they lead? A. To a portion of the pavement directly south of the black line painted on the pavement. * * * Q. How far (south) of the south black line were these marks that led over to the car? A. Approximately one foot." Kenneth Rhoades, state highway patrolman, testified: "The marks led from the north side of the pavement where the débris was off the shoulder, in a circle, a trifle of a circle, southwesterly direction over and just beyond the tar, the center tar stripe on the highway." Three employees of the defendant testified to the same facts as the foregoing witnesses. The only testimony produced to meet this evidence is that of two witnesses who stated that they observed no marks on the south half of the pavement. They did not testify that they looked for marks, nor to any other fact that would indicate that the evidence was other than the result of a failure to observe. This being true, the physical facts are not disputed and should control the result of the litigation. With the physical facts established, it is clear that plaintiff's driver turned across the center line to pass the snowplow into the path of the bus coming from the opposite direction.

The bus driver testified that he was driving on the right side of the highway, and as he was passing the snowplow, the car in which plaintiff was riding loomed up in the storm directly in his path. Harold J. Davis, a merchant of Tama, Iowa, and a passenger on the bus, testified that the bus was on the right side of the highway and that plaintiff's car darted over in front of it. Mrs. Emma Cox of Marshalltown, Iowa, also a passenger on the bus, testified that, before the bus had cleared the snowplow, "the car

tried to pass the snowplow, and it swerved around the snowplow, coming directly on the south side towards the car, or the bus." W. P. Cox of Huron, South Dakota, also a passenger on the bus, testified as follows: "Q. Now, as I understand you, you saw a black object about the time the bus and snowplow met? A. Yes, sir. Q. Where was it? A. Well, it appeared from behind the snowplow and swung out. Q. Had you seen it before the bus and snowplow met? A. No, sir; I had not. Q. Could you see as they met which way it was headed? A. It was headed across the road, towards the bus; yes, sir." The evidence of these disinterested witnesses is not only very convincing, but it is in line with the undisputed physical facts established in the record.

The only evidence in the record that supports the finding of the jury is that of plaintiff herself. She says that the bus was on the wrong side of the road when the accident occurred. Her testimony is impeached by at least three other witnesses. The record shows that Arthur L. Bye, court reporter of the Eighteenth judicial district of Iowa, took a statement from plaintiff the day following the accident, and testified that a part of it was as follows: "Q. Just prior to the collision, you were asleep, you say? A. I think I probably must have been. I don't remember anything, only I know it was snowing and blowing terribly, but I do remember seeing this snowplow ahead of us there, at that time or one other time, I don't remember now which it was. Q. But you do remember seeing it just ahead of you? A. No. Q. Prior to the collision? A. I don't remember seeing anything or anything about the collision." The coroner, Mr. Burrows, also testified that plaintiff told him that she was probably asleep. The highway patrolman Rhoades testified that the day after the accident he went to the hospital to interview plaintiff. His version is reported in the record as follows: "Q. Did you see Thelma Hill? A. I did. * * * Q. What was she doing? A. Smoking a cigarette, when I first went in. Q. Did you observe her as you talked to her, as to whether she seemed to be bright?

A. She talked bright, yes, sir, when I observed her." "Q. Did you ask her to tell you what she knew about the accident? A. Yes, sir; I did. Q. And what did she say to you in reply? A. She said that at the time of the accident she was either dozing or sleeping, and that she knew nothing about it."

I submit, therefore, that the undisputed physical facts require us to hold for the defendant. But, in addition thereto, we have the evidence of all the disinterested eyewitnesses who reconstruct the accident in conformity with the undisputed physical facts. And, in addition to all this, plaintiff's testimony as to how the accident occurred, upon which the verdict must rest if it is to be sustained, is impeached to such an extent that it is not worthy of belief. In my opinion, the evidence preponderates in favor of the defendant as a matter of law, and the judgment should be reversed.

CITY OF CURTIS, APPELLANT, V. MAYWOOD LIGHT COMPANY ET AL., APPELLEES.

288 N. W. 503

FILED NOVEMBER 17, 1939. No. 30630.

1. **Municipal Corporations.** Under the provisions of Initiated Law No. 324 (Comp. St. Supp. 1937, ch. 70, art. 6), as the business of maintaining and operating a municipal electric plant and selling current therefrom is wholly outside the truly governmental powers and functions of such city, the place of furnishing or receiving the electric current would be in no manner controlled by the situs of the same with reference to the corporate boundaries of the cities involved in the transaction.
2. ———. Where a municipality is given power, under circumstances then existing, to furnish public utility service beyond its corporate limits, it has the right to provide service within the corporate boundaries of another municipal corporation.
3. ———. Contract here in suit adjudged not *ultra vires*, but, under the terms of the statutes controlling, clearly within the powers of the city of Curtis to lawfully make.

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

Wells, Martin, Lane & Offutt, for appellant.

Butler, James & McCarl, Fred J. Schroeder, Harold Johnson and *Robert H. Downing, contra.*

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

EBERLY, J.

This is a suit in equity prosecuted by the city of Curtis, Nebraska, the principal relief sought being to secure the rescission and annulment of a contract of purchase and sale, in writing, bearing date of March 23, 1936, executed by plaintiff herein, and the Maywood Light Company by Harry Hall, sole owner thereof, and also Harry Hall and Hazel Hall, his wife. Pursuant to this contract of purchase, there had been sold, transferred and conveyed to the city of Curtis "a certain franchise, which is more specifically described in Ordinance No. 51 of the village of Maywood, Nebraska (the same being a 25-year franchise from and after the 20th day of June, 1930, and obligating the grantee to furnish electric current at the rates and for the purposes therein set forth to the village of Maywood and to its inhabitants); all of the electric distribution system now in operation in the village of Maywood, Nebraska, including all poles, lights, wires, transformers, meters, and all equipment belonging to said electric distribution system and two substations, being on each end of the transmission line between Maywood, Nebraska, and Curtis, Nebraska, and all transmission lines between Maywood and Curtis, Nebraska, and all right of way upon which said transmission line is located; the easement upon lot four of block eleven, in the village of Maywood, Nebraska; all right under a certain contract for joint use of specified poles, to which contract Harry Hall and the Maywood Carrico Telephone Company of Maywood, Nebraska, are parties." In consideration of which the city of Curtis had accepted and received said property, including the proper assignment of said franchise, executed and delivered

as the purchase price therefor its revenue warrants in the sum of $35,000, payable solely from the revenue and earnings of its electric light and power plant, and thereupon entered into possession of the property purchased, which it operates in connection with and by electric current generated in its own electric light and power plant at Curtis, Nebraska, which was owned and operated by it at the time of making the contract. It had also engaged in supplying electric current for the purpose of power, heat and light to its patrons situated in the village of Maywood from the 23d day of March, 1936, which it continued without interruption after the commencement of this action. So far as the record before us is concerned, the transaction was accepted and approved by the village of Maywood, though that village is not a party to this proceeding.

The relief sought was based on a claim that the contract of sale entered into was *ultra vires* and void, and plaintiff asked for the annulment and rescission thereof, and of the unpaid portion of the warrants outstanding, and for other relief incident thereto necessary to restore the original *status quo* formerly existing as to all parties who had become interested in the transaction. Without detailing the course of litigation, it may be said that, after all parties to the proceeding had filed their respective pleadings, all the defendants filed a motion for judgment on the pleadings, which was sustained by the trial court and the action dismissed, that court's finding in support of its judgment being "that the contract of March 23, 1936 * * * was within the powers of the city of Curtis to make and enter into, and is authorized by the statutes of Nebraska, and that the warrants issued pursuant to said contract are not void as beyond the authority of the plaintiff city, but are authorized by the statutes of Nebraska and are valid." From the judgment and finding plaintiff prosecutes this appeal.

Appellant's contention is, viz.: "That the city of Curtis had no corporate power to acquire, own and operate the distribution system and electric plant which was located inside the corporate limits of the village of Maywood and

had no power to acquire, own and exercise the franchise granted by the village of Maywood for the construction and operation of the electric plant and distribution system within its borders."

All parties to this controversy agree that the proper disposition of the same is dependent upon a correct interpretation of art. 6, ch. 70, Comp. St. Supp. 1937. This is Initiated Law No. 324, which, in the proper manner, was duly submitted to and adopted by the electorate of this state. The title of this act, so far as here involved, includes, viz.: "An act relating to cities, villages, and public electric light and power districts engaged in the generation, transmission, distribution, purchase and/or sale of electrical energy for lighting, heating and power purposes; to provide for the extension, by any city, village, or public electric light and power district of its electric light and power plants, transmission lines and service outside of the boundaries of such municipality or district; to provide for interconnection of electric light and power plants, lines, systems and service by and between cities, villages and public electric light and power districts in this state; to authorize the pledging or hypothecating of the net earnings and profits of publicly-owned electric light and power plants, lines or systems, to pay for property necessary or useful in the operation of such plants, lines or systems; * * * and to make applicable to cities, villages and public electric light and power districts, the general provisions of law concerning private electric light and power companies as to eminent domain, right of way and physical construction and maintenance of electric light and power plants, lines and systems." Laws 1931, ch. 116.

The provisions of this enactment applicable to the situation and to the arguments and contentions of the several parties here, are the following, viz.:

"Section 1. Any city, village, or public electric light and power district within the state, which may own or operate, or hereafter acquire, or establish, any electric light and power plant, distribution system, and/or transmis-

sion lines may, at the time of, or at any time after such acquisition or establishment, extend the same beyond its boundaries, and for that purpose is hereby authorized and empowered to construct, purchase, lease, or otherwise acquire, and to maintain, improve, extend, and operate electric light and power plants, distribution systems and transmission lines, outside of the boundaries of such city, village, or public electric light and power district, for such distance and over such territory within this state as may be deemed expedient. In the exercise of the powers granted by this section any such city, village, or public electric light and power district may enter into contracts to furnish and sell electrical energy to any person, firm, association, corporation, municipality, or public electric light and power district. No such construction, purchase, lease, acquisition, improvement, or extension of any such additional plant, distribution system and/or transmission lines, however, shall be paid for except out of the net earnings and profits of one or more or all of the electric light and power plants, distribution systems and transmission lines, of such city, village, or public electric light and power district. The provisions of this act shall be deemed cumulative and the authority herein granted to cities, villages and public electric light and power districts, shall not be limited or made inoperative by any existing statute.

"Section 2. For the purpose of selling or purchasing electrical energy for lighting, heating or power purposes, any city, village, or public electric light and power district in this state is hereby authorized to enter into agreements to connect and interconnect its electric light and power plant, distribution system and/or transmission lines with the electric light and power plant, distribution system and/or transmission lines of any one or more other cities, villages, or public electric light and power districts in this state, upon such terms and conditions as may be agreed upon between the contracting cities, villages and public power districts."

The clear legislative intent evidenced by the foregoing

enactment is controlling. The economic views entertained by the membership of this court can in no manner and in no degree affect the solution of the question here presented. On the contrary, proper discharge of judicial duty must clearly recognize that "The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States,* 163 Fed. 30, 18 L. R. A. n. s. 1194. See *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U. S. 381, 59 S. Ct. 516.

The intention of the legislature is here to be obtained primarily from the language used in the enactment, which must be given effect according to its plain, obvious meaning. *Gibson v. Peterson,* 118 Neb. 218, 224 N. W. 272; *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138; *State v. Farmers Irrigation District,* 98 Neb. 239, 152 N. W. 372; *State v. Bratton,* 90 Neb. 382, 133 N. W. 429; *Goble v. Simeral,* 67 Neb. 276, 93 N. W. 235.

The exact words of the statute empower the city of Curtis to extend its electric light and power system "beyond its boundaries, and for that purpose (it) is hereby authorized and empowered to construct, purchase, lease, or otherwise acquire, and to maintain, improve, extend, and operate electric light and power plants, distribution systems and transmission lines, outside of the boundaries of such city, * * * for such distance and over such territory within this state as may be deemed expedient." But, not satisfied with an absolutely unconditional grant of power, which manifestly and necessarily includes the right to operate within the domain of other cities or villages, the legislature has added thereto the words, "The provisions of this act shall be deemed cumulative and the authority here-

in granted to cities, villages * * * shall not be limited or made inoperative by any existing statute." In this connection it may be said that, obviously, statutes are the sole source of municipal rights and powers. In addition, section 2, quoted above, necessarily contemplates that one city may carry on the business of selling electrical current within the corporate boundary of another "upon such terms and conditions as may be agreed upon between the contracting cities." Indeed, we have but to give force and effect to clear and unambiguous language of this statute to sustain the transaction here involved in all its details, as well as to affirm the findings of the trial court, wholly unmodified. Nor, in so doing, do we in any manner depart from the principles of municipal law established by our decisions. In a case involving the operation of water-works owned and operated by a municipality, Fawcett, J., in delivering the opinion of this court, in *Henry v. City of Lincoln,* 93 Neb. 331, 140 N. W. 664, employed the following language with reference to municipal corporations, viz.:

"It is entitled to these privileges and immunities (governmental in nature) because of the fact that the functions and duties above referred to are imposed upon it by law and it must discharge and perform them; but here the duties imposed upon it by law cease. It is no part of its duty, as a municipal corporation, to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part, and it thereby assumes a third relation, separate and distinct from the dual relations above considered. While occupying this third relation no governmental functions or corporate duties, as a municipality, devolve upon it. It is then engaged in an ordinary business enterprise, and is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation. It is subject to the same liabilities and entitled to the same defenses; no more and no less."

In the case of *Cook v. City of Beatrice*, 114 Neb. 305, 207 N. W. 518, the principles above quoted were reaffirmed, and, in addition, the principle was announced that, "in maintaining its electric plant and selling current therefrom, the city of Beatrice was acting outside its governmental functions and corporate duties." It was thereby engaging in an ordinary business enterprise in which it inherently possessed no greater or higher privileges or immunities than those possessed by any other private corporation.

These conclusions are sustained by the following authorities: *Crandall v. Town of Safford*, 47 Ariz. 402, 56 Pac. (2d) 660; *Keever v. City of Mankato*, 113 Minn. 55, 129 N. W. 158; *City of Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316; *Pikes Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Muir v. Murray City*, 55 Utah, 368, 186 Pac. 433; *City of Tucson v. Sims*, 39 Ariz. 168, 4 Pac. (2d) 673; *City of Henderson v. Young*, 119 Ky. 224, 83 S. W. 583; *Milligan v. City of Miles City*, 51 Mont. 374, 153 Pac. 276; *Larimer County v. City of Fort Collins*, 68 Colo. 364, 189 Pac. 929; *Incorporated Town of Sibley v. Ocheyedan Electric Co.*, 194 Ia. 950, 187 N. W. 560.

On principle, it would follow that, as the business of maintaining and operating a municipal electric plant and selling current therefrom is wholly outside the truly governmental powers and functions of such city, the place of furnishing or receiving the electric current would be in no manner controlled by the situs of the same with reference to the corporate boundaries of the cities involved in the transaction.

The following authorities support the contention that, where a municipality is given power under the circumstances then existing to furnish public utility service beyond its corporate limits, it has the right to provide service within the corporate boundaries of another municipal corporation. *Crandall v. Town of Safford, supra; Kansas Gas & Electric Co. v. City of McPherson*, 146 Kan. 614, 72 Pac. (2d) 985; *Muir v. Murray City, supra; City of Colorado*

Springs v. Colorado City, supra; City of Omaha v. Omaha Water Co., 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991.

The conclusion therefore follows that the contract sought to be rescinded as *ultra vires*, under the terms of the statutes controlling, was clearly within the powers of the city of Curtis to make.

The judgment of the trial court as to all parties to this proceeding is in all respects correct, and it is

AFFIRMED.

CARTER, J., dissenting.

The only question in this case is whether the city of Curtis had the power to acquire the franchise granted by the village of Maywood and to own and operate the electric plant and distribution system within the corporate limits of the village of Maywood and sell electric energy direct to its inhabitants. As a premise for the discussion to follow, it cannot be disputed that a municipal corporation is a creature of statute. Its powers are limited to those granted in express terms, those reasonably implied from, or incident to, powers expressly granted, and those essential to the declared objects and purposes of the municipality. Special grants of power are to be strictly construed, and all doubt will be resolved against the existence of a power, rather than in favor of it. The rule generally is that a power not granted is withheld.

The legislature has authorized villages to grant franchises to and make contracts with any person, company or association for the purpose of granting to such person, company or association the furnishing of electric energy. Comp. St. 1929, sec. 17-440. Authority to grant such a franchise to another municipality was not granted, and consequently the village of Maywood had no power to grant a franchise to the city of Curtis. Clearly, if the city of Curtis was not a proper party to obtain such a franchise directly from the village of Maywood, it cannot subvert the statute and obtain one by assignment.

Neither is the city of Curtis authorized by statute to take or own a franchise from another city or village. The initi-

ated act before us, chapter 116, Laws 1931, authorizes cities and villages to extend their electric light and power systems beyond their corporate boundaries, to enter into agreements to connect and interconnect its electric light and power system with those of other cities and villages, and to enter into contracts to furnish and sell electric energy to any person, firm, association, corporation, municipality or public electric light and power district. We necessarily arrive at the conclusion that the village of Maywood is without power to grant a franchise to the city of Curtis for the privilege of providing electrical energy, and the city of Curtis has no authority to take or own such a franchise.

To permit a city or village to invade the territorial limits of another municipality and assume governmental or proprietary powers therein creates a conflict of jurisdiction and authority disadvantageous to both. Questions as to tax exemptions, eminent domain, control of rates, the compelling of adequate service, and the right of condemnation by the invaded city or village, create a field of political confusion which ought not be permitted in the absence of a statute expressly authorizing it. I submit that the language used in the act conclusively establishes an intent to avoid such a situation by withholding any such grant of authority to the cities and villages of this state. The attempt of the city of Curtis to take, own and operate under the franchise granted to the Maywood Light Company is, in my judgment, wholly unlawful, and the judgment of the district court ought to be reversed.

SIMMONS, C. J., and JOHNSEN, J., concur in dissent.

PETER MAUL, APPELLANT, V. IOWA-NEBRASKA LIGHT & POWER COMPANY, APPELLEE.

288 N. W. 532

FILED NOVEMBER 17, 1939. No. 30751.

1. **Workmen's Compensation.** Evidence examined and *held* to establish that appellant suffered an injury resulting from an accident arising out of and in the course of his employment.

2. ———: COMPENSABLE INJURY. "Injury from strain or overexertion due to a physical condition predisposing the employee to injury is an injury within the terms of the Nebraska workmen's compensation act, even though had the person been sound in every particular the strain would not have been sufficient to occasion any serious physical injury." *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N. W. 860.
3. **Appeal.** Hearsay evidence tending to prove a material fact, if admitted without objection, may sustain a finding of the existence of that fact. The probative force of such evidence is for the trial tribunal vested with the function of ascertaining facts to determine.
4. **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.

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

Chambers, Holland & Locke, for appellant.

Lee & Sheldahl, contra.

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

EBERLY, J.

This proceeding is an appeal to this court by Peter Maul, appellant and plaintiff, to reverse a judgment entered in the district court for Lancaster county on December 3, 1938, in favor of the Iowa-Nebraska Light & Power Company, defendant and appellee herein, and against the appellant, denying his petition for workmen's compensation and dismissing his action.

The claims of Peter Maul, as set forth in the pleadings, are: That on November 27, 1937, as he was performing his work for the defendant company, he stumbled and fell, while carrying a bundle of pipe for the defendant company, and he thereby sustained an injury to the first and second lumbar vertebræ of his spine. It is also charged by plaintiff that this accident and the physical results occasioned

thereby accelerated and lit up a general arthritic condition of his spine, which had theretofore not been disabling, to such an extent that thereafter he became totally and permanently incapacitated to perform any work and labor, which prior to said accident he was capable of performing. The defendant light and power company in its pleadings, in effect, denies the happening of the claimed accident and all other claims made by plaintiff. The record discloses that the Nebraska compensation court found that these injuries in suit arose out of and in the course of plaintiff's employment, and awarded him compensation and medical benefits. Thereafter, on appeal, after trial *de novo,* the district court for Lancaster county reversed the award and denied the plaintiff recovery. Now, on this appeal, plaintiff contends that the findings of fact as made by the district court in this case are not conclusively supported by the evidence as disclosed by the record; that plaintiff is entitled to a trial *de novo* therein (Comp. St. Supp. 1937, sec. 48-174); and that the district court erred in its denial of his petition.

The evidence discloses, without contradiction, that on November 9, 1938, plaintiff Maul was 58 years of age; that immediately prior to November 27, 1937, he had been employed by the Iowa-Nebraska Light & Power Company as a laborer for 16 or 17 years; that this employment was "steady." Maul's testimony is that during the 16 years he laid off only three times, and then because he had "an awful cold;" that during the last year immediately preceding November 27, 1937, he had not laid off at all on account of ill health; that he was able to do his part of the work, and was "earning the same wage that other men were earning working right with him."

In the early afternoon of November 27, 1937, plaintiff, together with three other employees of the defendant company, under the immediate supervision of defendant's foreman, was engaged in carrying "inch and a quarter" pipe from a box car across a neighboring street and into defendant's "pipe house." These pipes, the record discloses, were tied in bundles of some five or six each, which weighed

approximately 125 pounds a bundle. Each bundle was being carried by two men, the ends of the bundle resting on the shoulders of the carriers. Extending into this pipe shop, at right angles to one of its inclosing walls, is an elevated portion of the floor. This elevation is quadrilateral in shape and kept in place by bordering planks set on edge and secured by stakes. Thus constructed, it forms an obstruction to the passer-by from four to six inches high. It is referred to in the record as a platform. On the afternoon in question, while engaged in carrying a bundle of pipes and passing in the vicinity of this elevation, plaintiff's right foot came in contact therewith causing him to stumble and fall to the ground. This contact, it appears, was near the corner of this platform as it extended into the shop. The jar suffered from the fall was of course increased by the weight then being carried by plaintiff. As to Maul's position at the time of this fall, with reference to the platform, the foreman testifies: "Out far enough so when he grabbed his side with his right hand and kind of brought his foot that way (indicating) he was past the platform like that (indicating);" he was away from the corner of the platform "in the neighborhood of two and two and a half" feet. Plaintiff testifies that he did not feel any pain before he stumbled, but immediately afterwards a pain "hit him" in the "right lower part of (his) stomach." He grabbed his lower right side with his hand and manifested great pain. He was unable to stand up when they attempted to raise him to his feet, saying, "That hurts too much." The foreman had the workmen bring over a small tool box to where Maul was lying, and when some coats had been thrown upon it, Maul was picked up and laid over on it on his stomach, and he rested in that position with his knees on the ground and his chest and stomach over the tool box. The boys called an ambulance right away, and when it arrived went to the hospital with Maul. He was taken to St. Elizabeth Hospital of Lincoln, where the company doctor or surgeon took him in immediate charge. We have in the record what is referred to as exhibit 13. It is the complete record of Peter Maul's

case, as far as the hospital is concerned. It comprises 31 pages. It includes the records of attending physicians, by nurses, and from the laboratories. The first entry bears date "11-27-37" and the last "12-31-37." The record further discloses the following at the trial on this case in the district court, viz.: "Mr. Sheldahl (attorney for the Iowa-Nebraska Light & Power Company): We offer exhibit 13 in evidence. Mr. Holland (attorney for Maul): No objection. Exhibit 13 received in evidence and the same is attached to this bill of exceptions on the following page and made a part hereof."

It is to be noted that statements contained in exhibit 13 do not come to us under sanction of the customary oath. Strictly speaking, the recitals and facts therein contained are hearsay.' A possible exception exists as to the written report and findings of Czar Johnson, M. D., bearing date of December 6, 1937, who, prior to the commencement of the trial in the district court, had departed this life. Other evidence in the record discloses that Dr. Czar Johnson was called in consultation by the attending physician, Dr. Blum, and that Dr. Czar Johnson participated in an examination of Peter Maul, and in his written report and findings we have the result of Dr. Johnson's professional examination. His conclusions and findings are that the disabilities and injuries, under which Maul was suffering at the date of the examination, were traumatic in their origin, and tend to sustain a recovery in Maul's behalf in the present action.

"Said a learned judge: 'What a man has actually done and committed to writing when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury.'" 1 Jones, Evidence, Civil Cases (4th ed.) sec. 319. See cases in note 14, page 594 of foregoing citation; also *Lassone v. Boston & Lowell R.*, 66 N. H. 345, 24 Atl. 902.

Without a determination of the matter above presented, we shall consider all statements of exhibit 13 as hearsay, presented to the court by the Iowa-Nebraska Light &

Power Company, and, without objection of the opposing attorney, admitted in evidence by the trial court. On this subject, we are committed to the rule, viz.: "Hearsay evidence tending to prove a material fact, if admitted without objections, may sustain a finding of the existence of that fact. The probative force of such evidence is for the jury and not for the court to determine." *Metz v. Chicago, B. & Q. R. Co.*, 88 Neb. 459, 129 N. W. 994. See, also, *Sheibley v. Nelson*, 84 Neb. 393, 121 N. W. 458. It follows that each statement contained in exhibit 13 is for the proper consideration of this court in this trial *de novo*, to be given such weight as its intrinsic nature, taken in consideration with the other evidence in the case and circumstances in connection therewith, may justify. But, the rule appears to be, "Hearsay testimony admitted without objection may sustain a finding based solely thereon. *Sheibley v. Nelson*, 84 Neb. 393." *Metz v. Chicago, B. & Q. R. Co.*, 88 Neb. 459, 129 N. W. 994.

That Maul actually suffered an injury on November 27, 1937, seems to be established by his physical condition, which appears somewhat baffling to the company doctor and the consultant which the company doctor called to his assistance. The following is included in the cross-examination of the company doctor on the subject of his professional treatment of the plaintiff, viz.:

"Q. In fact, if the thing had been done that you wanted to do at one time in this case, his stomach would have been opened and his abdomen cavity explored for what you might have been able to find? A. That is right. Q. You believe now your diagnosis on that was wrong? A. I do. * * * Q. And at that time you wrote down in your hospital notes you couldn't be sure of diagnosis on it? A. Well, I couldn't be sure. I am not familiar with what I reported. Q. That is true anyway? A. Yes. Q. On November 28th, the following day, you thought it might be his heart? A. That is right. Q. On November 30th you thought it might be pleurisy? A. That is right. Q. And on December 1st, you thought that the signs suggested an appendicitis and you

advised a laparotomy? A. That is right. Q. Also on that date, as I note from the hospital records, you said and wrote in there, 'I favor acute gall-bladder.' That is there, isn't that? A. That was the thing I thought he probably had. Q. In other words, there was no question in your mind as to whether or not Mr. Maul was a malingerer or faker at the time he was in the hospital? A. Oh, he was having pain. Q. His complaints were real then, weren't they? A. That was obvious. * * * Q. Doctor, a while ago you said that you believed this man had become a malingerer because of the fantastic diagnosis of his doctor,—you made that statement? A. Right. * * * Q. Now according to what you said, I take it you don't think there is anything wrong with Mr. Maul's back now? A. I don't think anything wrong except chronic arthritis. Q. He said he can't tie his shoes. Do you think he could? A. No, I don't. I don't think you can put a man in a brace for a year and expect him—a man who has arthritis, of his age, and his station of nutrition, as obese as he is—to reach over and tie his shoes. I don't doubt that statement. Q. Is that physical disability or mental? A. Well, it has become physical disability. * * * Q. Well, you say this man never mentioned his back to you? A. That is right. Q. Isn't it true, however, that the day you left this case Dr. Blum came in and started immediate treatment to his back? A. That is right."

In like manner, the eminent physician who was called in by the company doctor as a consultant, and who with the company doctor had entire charge of the case for the first four days, testified:

"Q. And in other words, you and Dr. Witham suggested that this man's stomach be cut open and his stomach be explored to find out what was wrong? A. That is right. Q. And Dr. Blum came along and said, 'No, gentlemen, this isn't the thing to do?' A. Several hours after, too. Q. Several hours after, but the same day? A. Yes, sir. Q. And this man followed Dr. Blum's advice? A. Yes, sir. Q. And he has never had any surgery since, has he? A. He had relief right away, didn't he? Q. What is that? A. He had

relief right promptly? Q. You are answering the questions. He has never had any surgery since? A. No, sir. Q. And you don't recommend any surgery today? A. Absolutely not."

Another medical expert called by the defendant was Dr. J. E. M. Thomsen, whose cross-examination is as follows:

"Q. Doctor, you told us a lot about the back this morning. I want to confine my questions to one subject and that is, the thing you say that troubles this man now. You now say he has an osteoarthritis in his back? A. Yes. * * * Q. And you believe, do you not, that he has a disability in his back at the present time? A. Yes, I think he has some disability in his back at the present time. Q. You think you know definitely what the disability is from? A. Yes, in the back. Q. In the back? All right, what is your opinion, the wearing of the brace so long a time? A. No, I think it is because he has this extreme osteoarthritis. Q. You have no history in this case of this man ever laying off a day in sixteen years from arthritis, have you? A. No, sir. Q. Yet, as I understand it, you now say that the disability now is because of the osteoarthritis? A. I believe he has a disability in his back due to osteoarthritis. Q. Doctor, do you mean that the disability from his osteoarthritis has become manifested since November 27, 1937? A. I don't know."

Dr. Rowe, another medical expert, testifying in behalf of the defendant company, testified, in part, as follows (after being shown exhibits 35 to 44, inclusive, being X-rays of Maul's spine): "Q. What do they show, just generally? A. My judgment is they show signs of arthritis, which is very common in men over 45 years of age; shows the exostosis or bony growth about the margin of the vertebræ, more particularly the lower dorsal and the lumbar area and chalky deposit in the ligaments in several places which may be seen between the portions of the vertebræ; also the signs of arthritis are present in the articular facets of the lateral portions of the vertebræ, and in addition there is definite signs of injury to the cartilage, which is caused by the arthritis. * * * Q. Well, now, does this man

have what you call an osteoarthritis? A. Yes. Q. Is that in itself always disabling? A. No, sir. Q. May it become disabling by a fall or twist of some kind? A. It may; yes."

The evidence conclusively establishes that Peter Maul for 16 or more years had put in his life at continuous hard labor. He had had an accident on November 27, 1937. At the time of the accident, and prior thereto, he had been afflicted with osteoarthritis, but it had not been disabling previously, but was latent in its characteristics. The real question is whether the accident was the exciting cause of the activation of the disease and hence his disability. There can be no question but that he was totally and permanently disabled at the time of the trial in the district court, and that his trouble was a back injury, though the medical evidence on this last point is in hopeless conflict.

In *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N. W. 860, it is stated: "The facts in the instant case invoke the application of the well-recognized principle, viz.: 'Injury from strain or overexertion due to a physical condition predisposing the employee to injury is an injury within the terms of the various workmen's compensation acts authorizing compensation for injuries, personal injuries, accidental injuries, or personal injuries by accident, even though had the person been sound in every particular the strain would not have been sufficient to cause his death or provoke any serious physical injury.' 71 C. J. 607. See, also, *Bunker v. Motor Wheel Corporation*, 231 Mich. 334, 204 N. W. 110; *Hackley-Phelps-Bonnell Co. v. Cooley*, 173 Wis. 128, 179 N. W. 590."

As already suggested, the expert medical evidence in this record is conflicting and irreconcilable. We are committed to the view that traumatic arthritis is compensable. *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925. Also, that injury from strain accelerating a pre-existing weakened or diseased condition of the employee's back is compensable. *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N. W. 860. As a résumé it may be stated that on and prior to November 27, 1937, Maul had been continu-

ally engaged in hard labor. He was afflicted with osteoarthritis of his spine, but it had never been disabling. On that day he stumbled and fell, and the effect of his fall was accentuated by the weight that then rested on his shoulder. Dr. Rowe tells us that a spine which is subject to osteoarthritis may become disabling by a fall or twist of some kind. From the time of this fall on November 27, 1937, Peter Maul's disability has been continuous, and is evidenced in a manner consistent with the theories of his medical witnesses. These facts, in the light of the entire record, afford cogent reasons that strengthen the opinions of the expert witnesses as to the scientific facts in issue in the instant case, and tend to weaken opposite expert opinions not so supported, and determine the issue. *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925.

It follows that we find the allegations of Peter Maul's petition to be established by a preponderance of the evidence in the record; that prior to the accident of November 27, 1937, he had been in good health, and the testimony supports the claim of latent osteoarthritis; and that the accident was the exciting cause of the activation of the disease which has resulted in total permanent disability, and entitled him to have and receive the award as originally made and entered in the workmen's compensation court.

Therefore, the judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of Maul as herein determined.

REVERSED.

The following opinion on motion for rehearing was filed January 19, 1940. *Former opinion and judgment modified.*

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

PER CURIAM.

This matter coming on to be heard upon defendant's motion for a rehearing addressed to the opinion hereto-

fore adopted in this case and reported *ante*, p. 128, 288 N. W. 532, we deem the opinion and judgment entered therein correct, except as to two items, as to which the opinion should be modified and judgment entered therein amended, viz.: (1) It appears that the average weekly wage of complainant Maul for six months immediately preceding the accident in suit was but $20, which would entitle him to an award of but $13.33 a week as compensation for the period as determined, and no more. (2) It also appears that the proof received in evidence on the trial in the district court as to bill for services rendered by Dr. Czar Johnson is insufficient to sustain the allowance thereof; that the same should be disallowed *in toto* and should not constitute a part of the award made.

Under the facts established by the record in this case, attorney fees on appeal for plaintiff's attorneys may not be allowed.

The opinion heretofore adopted and judgment entered therein will, therefore, be modified to conform to the determination here made, and, as thus modified, will be adhered to. The motion for a rehearing is denied.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, APPELLEE, V. A. B. HAUSER, APPELLANT.
288 N. W. 518

FILED NOVEMBER 17, 1939. No. 30461.

1. **Municipal Corporations.** A prosecution for the violation of a city ordinance, while in form a criminal prosecution, is in fact a civil proceeding to recover a penalty.
2. **Criminal Law.** If an act be an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state and the municipality, and both may punish it without infringing any constitutional right.
3. **Jury.** The purpose of constitutional provisions guaranteeing the right of trial by jury was to preserve the right as it existed at common law and under the statutes in force when the Constitution was adopted.

4. ———. The legislature may prescribe that petty offenses, not recognized as crimes by the statutory or common law existing at the time of the adoption of the Constitution, may be determined without the intervention of a jury without offending constitutional provisions on the subject.
5. ———. Where the offenses of drunkenness and driving a motor vehicle while intoxicated are created by ordinance, with a fine of $50 fixed as the maximum penalty for the violation of either, they will be classed as petty offenses which may be determined by a police magistrate without a jury, as provided by section 18-205, Comp. St. 1929.
6. ———. On an appeal to the district court from a judgment of the municipal court imposing a penalty for the violation of a city ordinance, the defendant is entitled to a jury trial under the express provisions of section 18-203, Comp. St. 1929.

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

Lloyd E. Chapman, for appellant.

Clarence G. Miles and *Frederick H. Wagener, contra.*

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

CARTER, J.

Defendant was charged with drunkenness and driving a motor vehicle while intoxicated, contrary to the ordinances of the city of Lincoln. After conviction in the municipal court, an appeal was taken to the district court. Defendant was again found guilty, and fines were imposed for both offenses. From this judgment and sentence defendant appeals.

The ordinance under which defendant was charged provides that (a) it shall be unlawful for any person to drive any motor vehicle on the streets of the city while under the influence of intoxicating liquor, and (b) if any person shall be found in a state of intoxication, or under the influence of alcoholic liquor, he shall be deemed guilty of a misdemeanor. Lincoln Municipal Code, sec. 19-212.

The statutes of this state in force at the time the offense was committed provide that it shall be unlawful for any

person to operate any motor vehicle while under the influence of intoxicating liquor. Comp. St. Supp. 1937, sec. 39-1106. And, also, if any person shall be found in a state of intoxication, or under the influence of alcoholic liquor, he shall be deemed guilty of a misdemeanor. Comp. St. Supp. 1935, sec. 53-374.

It is the contention of defendant that the subsequent acts of the legislature, making the offenses charged crimes under the laws of the state, amount to a legislative occupation of the field, and abrogate existing ordinances on the same subject and deprive municipalities of the power to legislate thereon in the future. While this is undoubtedly the law in many states, it has been well settled in this state that, if an act is an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state and the municipal government, and that both may punish it without infringing any constitutional right. *City of Brownville v. Cook,* 4 Neb. 101. The ordinance involved herein prescribes a maximum penalty of $50 for its violation. It must therefore be classed as a petty offense. The ordinance being one authorized by the legislature by virtue of section 15-208, Comp. St. 1929, we necessarily hold that under the circumstances here existing it constitutes a valid exercise of the police power of the city.

The record shows that the defendant demanded and was denied a jury trial in the district court. It is the contention of the defendant that this is in violation of sections 6 and 11, art. I of the Constitution, which provide that the right of trial by jury shall remain inviolate, and that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury. We have held that the purpose of these provisions was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. *Bell v. State,* 104 Neb. 203, 176 N. W. 544. "Minor offenses were, at the common law, and before the adoption of the state Constitutions, tried by magistrates and justices of

the peace without a jury. It is therefore a general rule that to these cases the constitutional provision does not apply." 16 R. C. L. 207, sec. 25. We have also held that a prosecution for the violation of a city ordinance, while in form a criminal prosecution, is in fact a civil proceeding to recover a penalty. *McLaughlin v. State,* 123 Neb. 861, 244 N. W. 799. At the time of the adoption of our Constitution, the offenses now under consideration were not recognized as crimes by the common law or any statute then in existence. It is clearly within the province of the legislature to authorize the addition of petty offenses to certain classes of subjects previously triable without a jury. *State v. Kacin,* 123 Neb. 64, 241 N. W. 785. The legislature, by section 18-205, Comp. St. 1929, has provided that cases in the police court for violation of a city ordinance shall be tried by the police magistrate without the intervention of a jury. This same provision has been adopted by the city of Lincoln by ordinance. Lincoln Municipal Code, sec. 24-104. It is clear, therefore, that defendant was properly tried in municipal court by the police magistrate without a jury. See *State v. Parks,* 199 Minn. 622, 273 N. W. 233. The only question remaining is whether defendant was entitled to jury trial in the district court after an appeal was taken from the judgment and sentence of the municipal court.

We have heretofore demonstrated that the accused could be deprived of a jury trial of the offenses charged without offending constitutional requirements. It will be noted, however, that the applicable statute, section 18-205, Comp. St. 1929, only provides for a trial without a jury in the municipal court. The statute providing for an appeal to the district court says in part: "And shall deliver such transcript with all files and the recognizance in the case to the clerk of the appellate court, who shall thereupon enter the cause upon the criminal appearance docket of the court, together with the date of filing of the transcript and recognizance, the date and amount of recognizance, the names of the sureties and the amount of costs taxed in the police court, whereupon the case shall be considered as of record

in such court and *shall be proceeded upon as provided by law in cases of appeals in criminal cases from the justice of the peace courts.*" Comp. St. 1929, sec. 18-203. (Italics ours.) It cannot be questioned that the general jurisdiction of a justice of the peace in criminal cases goes to those cases which require jury trials, not only in the justice court but in the district court on appeal as well. We are obliged to hold, therefore, that the legislature in saying that such case "shall be proceeded upon as provided by law in cases of appeals in criminal cases from the justice of the peace courts" thereby prescribed that the accused should have a jury trial of his cause in the district court. To hold otherwise would be to disregard the express direction of the legislature as to the manner that appeals from the municipal court are to be determined on appeal.

We necessarily conclude that the trial court erred in denying the defendant a jury trial in the district court. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ANSBACHER-SIEGLE CORPORATION, APPELLANT, V. MILLER CHEMICAL COMPANY, APPELLEE.
288 N. W. 538

FILED NOVEMBER 17, 1939. No. 30624.

1. **Principal and Agent.** Where a party contracts to make another his agent to sell his goods exclusively, in consideration of the purchase of a certain amount of such goods within a specified time, a breach of the contract by such party subjects him to liability for the damages caused thereby.
2. ———. Where the continuance of a sales contract is dependent upon payment for purchases of merchandise as they become due, the making of a renewal contract by the parties after payments for merchandise become delinquent amounts to a waiver of the breach.
3. **Contracts.** A contract in which a manufacturer gives another a sales agency in a specified territory, and in which the other agrees to purchase a definite amount of the manufacturer's

products each year and to press their sale to the exclusion of other competing lines, is not void for want of mutuality.

4. **Principal and Agent.** The measure of damages for the breach of such a contract is such an amount as would compensate the party injured for all damage or detriment proximately caused by the breach, including profits lost which can reasonably be proved during the life of the contract.
5. **Contracts.** When a contract has no fixed period of duration, the law ordinarily implies that it shall endure for a reasonable time. What constitutes a reasonable time must be determined from the general nature and circumstances of each case.
6. **Evidence** examined and *held* sufficient to sustain the verdict of the jury.

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

Paul I. Manhart, M. J. Buckley and *Levin, Rosmarin & Schwartz,* for appellant.

Herbert T. White, contra.

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

CARTER, J.

This action was brought by the plaintiff to recover $1,873.74 for goods sold and delivered to the defendant. The defendant counterclaimed for damages for breach of a contract making the defendant a sales and distributing agent of plaintiff's products in a specified territory. The verdict and judgment were for defendant in the sum of $1,139.60, and plaintiff appeals.

The undisputed evidence shows that goods belonging to plaintiff were placed with defendant with the understanding that they were to be paid for at jobbers' prices as they were sold. At the time of trial defendant had sold goods belonging to plaintiff for which the sum of $860.40 was owing to the plaintiff. Defendant had on hand goods of the value of $733.32 belonging to plaintiff. Defendant offered to confess judgment for $860.40, and tendered back the remaining goods in open court. The trial court instructed

the jury to find that plaintiff was entitled to a judgment for $860.40 on its petition. Under the state of the record the trial court properly instructed the jury in this respect, there being no controverted issue of fact for the jury to determine in connection therewith. The only issues to be determined on this appeal, therefore, are those raised by defendant's counterclaim.

The record discloses that plaintiff was engaged in the manufacture and sale of insecticides, fungicides and other chemical products. The defendant was a jobber of similar products in Omaha. In 1931 the defendant entered into an oral agreement with the plaintiff by which it was agreed that defendant would purchase at least one car-load of insecticides from the plaintiff each year and the plaintiff would, in addition thereto, store another car-load of insecticides in defendant's warehouse to be paid for by defendant when and if taken from the warehouse stock. Defendant further agreed to close out all competing lines of insecticides and sell only those of the plaintiff. This oral agreement was carried out and renewed from year to year until January 22, 1936, when a written agreement was entered into, making the defendant corporation a sales agency of plaintiff. A few days later the president of the defendant company returned the written contract to the western representative of the plaintiff company. It is the contention of defendant that the contract was returned at the request of plaintiff's representative upon the representation that it was not in accord with the regulations of the insecticide industry, that it was desirable to take up the written contract to avoid controversies with competitors, but that its terms would be carried out. Plaintiff contends that its representative informed defendant that unless he paid up the amount owing to plaintiff it would be impossible to continue defendant as a jobber and exclusive sales agency, that defendant refused to pay its account with plaintiff and informed plaintiff's representative that the contract would be returned. The telephone conversations, letters and circumstances surrounding the return of the written contract

were gone into in detail. The matter was clearly for the determination of the jury, and its finding thereon, favorable to defendant, will not be disturbed.

The record shows that defendant ordered a car-load of insecticides on February 3, 1936, as required by the contract. The order was never filled. Notice of the termination of the contract was not given. Agents and officers of the plaintiff corporation refused to answer defendant's letters or to answer the telephone calls of defendant's officers. Plaintiff placed its sales agency for defendant's territory with a Kansas City firm. It is for this alleged breach of contract that defendant claims damages.

The record shows that defendant was indebted to plaintiff and that the indebtedness was past due. Plaintiff contends that this was a violation of the contract which warranted its cancelation. The evidence shows that payments had been irregularly made by defendant on its running account with plaintiff over the whole four-year period of their business relationship. At the time the written contract was entered into on January 22, 1936, defendant's account was past due. No change had taken place up to the time plaintiff refused to fill defendant's order. The plaintiff, instead of acting upon the breach of contract, proceeded to enter into a new contract for the year 1936. This was a waiver of the breach. This court has said:

"Where the aggrieved party does not act upon the breach by the other of the terms of a contract, but does anything which draws on the other party to execute its agreement after default in respect to time, or which shows it is deemed a subsisting agreement after such default, it will amount to a waiver, as will also a failure to avail oneself of it at the first fit occasion and before or when the other begins, after default, to act again on the agreement." *Elson & Co. v. Beselin & Son,* 116 Neb. 729, 218 N. W. 753.

Plaintiff contends that there was no mutuality of contract and that the alleged contract was void and unenforceable for that reason. We think there was mutuality of contract. Defendant was to purchase outright one car-load

of insecticide each year, sell plaintiff's products exclusively and pay for all plaintiff's goods sold from defendant's warehouse. Plaintiff agreed to sell at jobbers' prices less specified discounts, and to give defendant a sales agency in a specified territory. Clearly, the contract was not void for want of mutuality. In *Peck-Williamson Heating & Ventilating Co. v. Miller & Harris,* 118 S. W. (Ky.) 376, the court aptly stated the rule in a similar case as follows: "It is first insisted by appellant that the writing set out above is not a contract, because of its lack of mutuality. With this contention we are unable to agree. By the terms of the contract the parties of the second part are given the exclusive sale of appellant's furnaces, furnace fittings, etc., in the city of Bowling Green and vicinity for the term of one year. The party of the first part further agrees to bill its goods to the parties of the second part at certain discounts from the price list in its catalogue. In consideration of the prices quoted and the exclusive agency, the parties of the second part agree to sell exclusively the goods manufactured by the party of the first part, and to push their sale during the term of the contract. Here we have obligations proceeding from each party to the contract, and which are capable and possible of performance. Under such circumstances there can be no doubt of the validity of the contract."

Plaintiff contends that, as the contract had no fixed period of duration, it could be revoked by the plaintiff at any time, with impunity. We cannot agree that this is the rule where an exclusive contract is accompanied by a sale of merchandise manufactured by the plaintiff which cannot be readily replaced on the open market. The plaintiff may not revoke indiscriminately, or in bad faith, or without the giving of a reasonable notice. The rule is well stated in *Elson & Co. v. Beselin & Son, supra,* as follows: "The contract of agency being indefinite as to the time it was to run, what was its duration? Where the continuation of a contract is without definite duration the law implies a reasonable time, and what is a reasonable time is to be determined from the general nature and circumstances of the case. When the

obligor has expended a substantial sum of money or value or has substantially rearranged his business, as in this case, preparatory to engaging upon the terms of agreement for the benefit of obligee, he ought, through fairness, to have a reasonable time and notice of the cancelation of the contract in order that he might have a reasonable opportunity to put his house in order. And the notice of termination should be such as to clearly convey the intention of the parties. 13 C. J. 604, sec. 630; 6 R. C. L. 896, sec. 283." The evidence in the case at bar shows that the oral agreements preceding the written contract of January 22, 1936, were from year to year. The written contract fixed no different term for the contract to run. Under this evidence we are of the opinion that it was intended that the contract should operate for at least a year. In the absence of an operative breach of its terms, we hold, under the evidence in the record, that plaintiff could not terminate the contract with impunity before the expiration of a year.

Plaintiff also alleges that the damages allowed were excessive. The record discloses that on January 22, 1936, the date the written contract was executed, defendant had many advance orders for plaintiff's products. The president of the defendant company testified that he had orders for 50,000 pounds of insecticides, while plaintiff's representative testified that on that date he was shown orders for 15,000 pounds only. The officers of the defendant company testified that they spent large sums for advertising, soliciting and attempting to substitute other insecticides for plaintiff's products. It was also shown that defendant profited from the sale of plaintiff's products in the amounts of $1,443.57 in 1932, $2,882.13 in 1933, $2,866.16 in 1934, and $3,499.48 in 1935. In addition thereto, defendant lost many valuable customers because of an unwillingness to take a substitute product. The defendant had closed out all competing lines as required by his contract. A sudden change to a competing line naturally resulted in a substantial loss of business. The foregoing evidence is competent for the jury to consider in arriving at such sum as will fairly and

adequately compensate the defendant for the loss and damage suffered by it. The measure of damages for a breach of a contract such as we have here would be such amount as would compensate the defendant for all damage or detriment proximately caused by the breach of contract, including all profits lost from the sale of the products of the plaintiff which can reasonably be proved during the life of the contract. The jury allowed defendant damages in the amount of $2,000. The evidence is sufficient to sustain the verdict and judgment and we will not, therefore, disturb it.

Plaintiff contends that defendant's cause of action cannot properly be pleaded as a counterclaim. We think the provisions of our statute, section 20-813, Comp. St. 1929, govern the situation and require us to say that defendant's counterclaim was properly maintainable as such.

We find no prejudicial error in the record. The judgment is

AFFIRMED.

EIFEL ANSTINE, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF BANKING AND RECEIVERSHIP DIVISION, APPELLEE.

288 N. W. 525

FILED NOVEMBER 17, 1939. No. 30684.

1. **States.** The department of banking is a governmental agency of the state, and a suit brought against such governmental agency is, in fact, a suit against the state.
2. ———. Section 48-174, Comp. St. Supp. 1937, entitled "Procedure," provides: "Upon the filing of such petition (in the compensation court) a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy of the petition." Section 20-503, Comp. St. 1929, contains the requisites for a summons in civil causes and provides that it shall be directed to the sheriff of the county "and command him to notify the defendant or defendants named therein that he or they have been sued." The two preceding sections of the statute constitute the authority for the proposed issuance and service of a summons in a compensation case, wherein the state

is a party defendant. *Held* to be improper service in that the legislature has failed to provide in what manner summons may be issued and served against the state, and, therefore, violative of section 22, art. V of the Constitution of Nebraska.

3. **Statutes.** In the matter of the issuance and service of summons on a state, in the absence of a statutory provision as to the manner of serving such summons, and where the language providing for service, wherein the state is a party defendant, provides for such service only in general terms, the rule is that the state is not bound by the general words of a statute which, if applied, would operate to encroach upon its sovereign rights and injuriously affect performance of its functions, unless the contrary is declared or necessarily implied.

4. **Attorney General.** Section 84-203, Comp. St. 1929, refers to the powers and duties of the attorney general: "The attorney general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interest(ed)." As prescribed by section 84-205, Comp. St. 1929, the specific duties of the attorney general to appear and defend actions and claims against the state are insufficient, in and of themselves, to permit the attorney general to enter a voluntary appearance in the compensation court and bind the state thereby.

5. ———. The attorney general is commonly required to prosecute and defend all actions in which the state is a party or interested, but he cannot waive the immunity of the state from suit or the issuance and service of summons, and enter a voluntary appearance to make the state a party defendant, unless the statute authorizes him to do so.

6. **Statutes:** CONSTRUCTION. "In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent." *Kearney County v. Hapeman*, 102 Neb. 550, 167 N. W. 792.

7. ———: ———. The workmen's compensation law was passed by the Nebraska legislature in 1913 (Laws 1913, ch. 198). The language contained in the following sections, respectively: Section 48-106, Comp. St. 1929: "The provisions of this act (compensation act) shall apply to the state of Nebraska and every governmental agency created by it;" section 48-114, Comp. St. 1929, "'Employer' Described:" "(1) The state and every governmental agency created by it;" section 48-115, Comp. St. 1929, as amended (Laws 1913, ch. 198), "'Employee,' 'Workman' De-

fined:" "(1) Every person in the service of the state or of any governmental agency created by it," with certain restrictions; section 48-109, Comp. St. 1929, "Elective Compensation, Schedule:" "If both employer and employee become subject to Part II of this article, both shall be bound by the schedule of compensation herein provided;" section 48-172, Comp. St. Supp. 1937: "All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment;" *held*, clear and unambiguous, and the legislative intent adequately expressed to declare that the state intended to waive its sovereignty and consent to be sued in actions arising under the workmen's compensation law.

8. **States.** "A statute giving a court jurisdiction to hear and determine actions against the state is sufficient authority for the bringing of an action without any special statute expressly giving the consent of the state to be sued." 59 C. J. 303.

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

Thomas J. Dredla and *T. R. P. Stocker*, for appellant.

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

Clifford L. Rein and *Charles F. Barth, amici curiæ.*

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

MESSMORE, J.

Eifel Anstine, on February 28, 1936, filed her petition against the state of Nebraska, department of banking, in the compensation court, to recover benefits under the workmen's compensation law, with præcipe attached, directed to the clerk of the compensation court to issue a summons for service upon the defendant as provided by law. Summons was issued and no return made thereon. The state of Nebraska, department of banking, by B. N. Saunders as superintendent, answered; the answer being signed by "F. C. Radke, C. G. Miles, Their Attorneys." An amended petition was filed by plaintiff, summons issued thereon and no return of summons made to the court. The answer to the

amended petition was signed: "State of Nebraska, Department of Banking, Receivership Division, Defendants, William H. Wright, Attorney General, Paul P. Chaney, Assistant Attorney General." Plaintiff's petition was dismissed May 24, 1937, by one of the judges of the Nebraska workmen's compensation court. A transcript was filed from the compensation court, containing a copy of the order of dismissal, stipulation and waiver of rehearing, and notice of appeal. The stipulation appears in the record in the workmen's compensation court, filed June 5, 1937, as follows: In accordance with section 48-174, Comp. St. Supp. 1937 (to which we refer), in the event of appeal of the case, it may be submitted to the district court for Lancaster county, to be heard and determined as a cause in equity and tried *de novo,* signed by F. C. Radke, Bert L. Overcash, assistant attorney general. A petition was filed by plaintiff in the district court for Lancaster county. The record does not disclose an issuance or return of summons, but a journal entry appears dated December 16, 1938, wherein the court found against the plaintiff and generally for the defendant. Motion for a new trial was filed and overruled, and notice of appeal given. The appellee filed a special appearance in this court, for the purpose of objecting only to the jurisdiction of the court over the person of this appellee, the state of Nebraska, department of banking.

It is conceded that the department of banking of the state of Nebraska is a governmental agency of the state, and that suit brought against such governmental agency is, in fact, a suit against the state, and it is also not questioned that the state cannot be sued in its own courts without its consent.

The voluntary appearance made by the attorneys representing the state of Nebraska and the department of banking is of prime importance. However, the appellee first raises a point in reference to the issuance and service of summons in the following language: That the compensation court had no jurisdiction for the reason that no service was ever had upon the state of Nebraska or the department

of banking. This proposition is of such general importance as to require discussion.

Subdivision 2, sec. 48-174, Comp. St. Supp. 1937, provides: "Upon the filing of such petition a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy of the petition." Section 20-503, Comp. St. 1929, contains the requisites for a summons as in civil cases, and provides that it "shall be directed to the sheriff of the county, and command him to notify the defendant or defendants named therein that he or they have been sued."

Section 22, art. V of the Constitution of Nebraska, reads: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."

A state may, of course, lay its sovereignty aside and consent to be sued on such terms and conditions as it may prescribe. The provision of the Constitution in relation to bringing of suits against the state (art. V, sec. 22) is not self-executing. Legislative action is necessary to make it available. See *State v. Mortensen*, 69 Neb. 376, 95 N. W. 831.

Appellee directs the court's attention to section 27-319, Comp. St. 1929, under the heading: "(b) Jurisdiction in Actions Against State," and more especially to section 27-321, Comp. St. 1929, which provides for the service of summons in suits against the state. Section 27-321, *supra*, designates how the summons will be served, as follows: When a petition is filed, summons shall issue and be served upon the state by the sheriff of the county where the petition is filed, "by serving the same upon the governor and attorney general; and in any action, the subject-matter of which, in whole or in part, relates to or grew out of the conduct of any special department or institution of the government, summons shall also be served by such sheriff upon the chief officer of such department or institution."

The compensation law contains no language designating upon what officers of the state service is to be had, in the

event the state is a party to the action. See section 48-174, Comp. St. Supp. 1937. Section 20-503, Comp. St. 1929, under "Commencement of Civil Actions," provides for the service of summons in ordinary civil cases. It will be noted that section 27-321, Comp. St. 1929, contains specific language as to how summons shall be served in actions against the state, such actions being provided for in section 27-319, Comp. St. 1929. The question presents itself as to the applicability of section 20-503, Comp. St. 1929, and section 48-174, Comp. St. Supp. 1937, to the facts as presented in this case.

"It is a general rule that the state is not bound by the general words of a statute, which, if applied, would operate to trench (encroach) on its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the contrary is expressly declared or necessarily implied." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 953, sec. 514.

It is obvious that section 27-321, Comp. St. 1929, does not apply, nor is said section made a part of the compensation act by express language or otherwise, but refers specifically to actions authorized by the state, as reflected by section 27-319, Comp. St. 1929, wherein the district court is made a forum for actions against the state. The use of the general language, "defendant or defendants," as appearing in section 48-174, Comp. St. Supp. 1937, and section 20-503, Comp. St. 1929, as constituting service against the state, would operate to encroach upon the state's sovereign rights, injuriously affect its capacity to perform its functions, and would establish a right of action against it in the manner which should not be permitted.

Referring again to the language contained in section 22, art. V of the Constitution, "in what manner," it is apparent that the legislature had not provided a proper manner of obtaining service upon the state in compensation cases. Section 48-174, Comp. St. Supp. 1937, uses this language, "or the voluntary appearance of a defendant is equivalent to service."

The question presented is: Can the attorney general, or his assistants, or attorney for the department of banking, or his assistants, bind the state by a voluntary appearance in a suit brought under the workmen's compensation act, wherein the state is a party defendant?

Section 84-205, Comp. St. 1929, defines the specific duties of the attorney general to appear and defend actions and claims against the state. Section 84-203, Comp. St. 1929, refers to the powers and duties of the attorney general as follows: "The attorney general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interest(ed)."

In *Custer County v. Chicago, B. & Q. R. Co.*, 62 Neb. 657, 87 N. W. 341, the county attorney entered a voluntary appearance on behalf of the county, and confessed judgment. His authority was a resolution of the county board, authorizing him to confess judgment against the county. The resolution did not authorize him to make a voluntary appearance. This court held that the judgment confessed, under such circumstances, was void. It was said (p. 661): "Where there has been no service of process to give the court jurisdiction to render judgment by confession, the law requires the personal appearance of the party or of his attorney, acting under a warrant of attorney. Code of Civil Procedure, secs. 433-437."

The duties of a county attorney are defined in section 26-901, Comp. St. 1929, and correspond to the duties of the attorney general, as heretofore stated. Section 26-901 provides in part: "It shall be the duty of the county attorney, * * * to appear in the several courts of their respective counties and prosecute and defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested."

The case of *Custer County v. Chicago, B. & Q. R. Co., supra,* clearly held that, in the absence of a resolution by

the governing authority (in that case the county board), authorizing the act, the county attorney could not enter a voluntary appearance and bind the county thereby. If statutory enactments, setting forth the duties of the county attorney, are insufficient to permit him to appear and enter a voluntary appearance which would bind the county, then it logically follows that the duties of the attorney general, as prescribed by statute (Comp. St. 1929, secs. 84-203, 84-205), are not sufficient to authorize the attorney general to enter a voluntary appearance and bind the state, unless the governing power (the state), by legislative enactment, authorizes the attorney general to so enter a voluntary appearance in such case made and provided. The following Nebraska case supports the above analysis:

In *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Neb. 722, 84 N. W. 97, the statute provided for service of process upon a municipal corporation under the provisions of section 57, ch. 14, art. 1, Comp. St. 1899. While required to be served upon the mayor, chairman of the board of trustees, or, in his absence, upon the clerk, etc., the chairman of the board of trustees and the city attorney entered a voluntary appearance. The court held: "A chairman of the board of trustees of a village defendant is not empowered to waive the issuance and service of summons, and to enter the voluntary appearance of the defendant in an action, without authority of the village board acting in its corporate capacity as a body politic." The court said in the opinion that the authority of the attorney and chairman of the board of trustees of a village to waive the issuance and service of summons in an action against the village, and thereby give the court jurisdiction to render a valid and binding judgment against the village, was the question to be determined. The court further said (p. 725): "There is certainly no direct authority for such action, nor does it appear to us to be based on any well recognized rule of construction to hold that such authority is lodged in a presiding officer of a municipal corporation (even though he be the officer upon whom service is required to be had) as

an implied power, under the different sections of the statute bearing on the subject. * * * The service contemplated in the foregoing section * * * is upon the corporation in its corporate capacity, and not upon an individual officer of the corporation. * * * The method by which jurisdiction over the village might be acquired was clearly pointed out in the statutes. * * * We think it a wholesome rule that, in obtaining judgments against a municipal corporation, the defendant shall be brought into court, either by a properly served process duly issued, or that in its corporate capacity it acts within the scope of the authority conferred upon it by statute, and in such manner as to show that the action taken is that of the corporation, rather than of an individual who may be a member of a body chosen to conduct the affairs of such corporation."

The following Oklahoma case presents the logical rule: In *Faught v. City of Sapulpa,* 145 Okla. 164, 292 Pac. 15, it was said (p. 183): "In the absence of a statute authorizing the officers of a political subdivision of the state to waive the issuance and service of summons for that political subdivision, this court must hold that a court does not obtain jurisdiction over a political subdivision of the state by the waiver of the issuance and service of a summons by its officers." We know of no statute that authorizes the officers of a state to waive service of summons for a political subdivision thereof.

In 24 Standard Ency. of Procedure, p. 73, it is said: "The attorney general is commonly required to prosecute and defend all actions in which the state is a party or is interested. But he cannot waive the immunity of the state from suit and enter an appearance to make it a party defendant, unless statute authorizes him to do so." Cases cited under note 15.

In opposition to the foregoing, 59 C. J. 327, is cited, wherein it is said: "Where proceedings are authorized against the state but there is no express provision as to the service of process, the state may properly be brought into court by service upon the governor and attorney general,

or apparently either of such officers." We have examined the cases cited under note 62: *Port Royal & A. Ry. Co. v. State of South Carolina,* 60 Fed. 552, in which the state instituted the action and a cross-bill was filed against it. The court held that it was proper to serve the state by making substituted service upon the attorney general, by whom the cross-bill was filed. The distinction is apparent. In *State of Texas v. Cook,* 57 Tex. 205, the legislature permitted a judge of the criminal district court to institute a suit to determine what amount of salary, if any, was due him as a judge. No mode of service was prescribed, and the court held that service on the governor or attorney general is sufficient. There is a distinct difference between an action against the state, affecting the salary of one individual, and a compensation law affecting all of the employees of the state, and the liability of the state to pay compensation for injuries received in the course of employment. The other case, cited under note 62 above, is of no assistance in determining the question.

In *California Securities Co. v. State,* 111 Cal. App. 258, 295 Pac. 583, cited, the attorney general was permitted to voluntarily appear for the state. This was an action brought to recover a corporation license tax, paid by the company under protest to the secretary of state, sued in his individual and in his official capacity. We believe that the nature of the liability created against the state by the compensation law and its effect present an entirely different situation.

Our attention is called to the case of *Keil v. Farmers Irrigation District,* 119 Neb. 503, 229 N. W. 898, wherein it was said (p. 508): "The reference to the Civil Code is manifest. So far as applicable to the transaction, and not inconsistent with the workmen's compensation act, by the language quoted the terms of this Civil Code must be considered as part of the statute." The inapplicability of the rule announced in the *Keil* case to the instant case is apparent, for the reasons hereinbefore given. The *Keil* case, in which the language was used, applied to correction of a mistake in the summons.

Section 20-853, Comp. St. 1929, is cited. Said section provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." The foregoing section of the statute is not applicable. Substantial rights of the state would be materially affected by the failure of the legislature to properly provide for the issuance and service of summons in compensation cases, wherein the state would be liable, or where no provision of the statute is made authorizing the attorney general, or any of his assistants, to voluntarily appear.

We conclude that the legislature has failed to provide, as required by section 22, art. V of the Constitution of Nebraska, the manner in which service of process may be had against the state, or a department of the state government, in a compensation case, or upon what officers of the state service is to be had. We further conclude that there is no statutory provision authorizing the attorney general, as the law officer of the state, to enter a voluntary appearance, binding the state, in compensation cases.

The great weight of authority is that statutes should receive a broad and liberal construction, but howsoever worthy the end to be accomplished, courts may not amend statutes under their power to liberally construe them. Such power to amend is possessed only by the legislature, and to that authority the salutary reasoning of the court and the like argument of counsel in this case might be properly addressed.

The appellee in its special appearance contends that the state of Nebraska has never waived its sovereignty and consented to be sued in actions arising under the workmen's compensation act.

The workmen's compensation law was passed by the Nebraska legislature in 1913. Laws 1913, ch. 198. The title to the act reads: "An act prescribing the liability of an employer to make compensation for injuries received by

an employee in the course of employment. Modifying common law and statutory remedies, in such cases. Establishing an elective schedule of compensation. Regulating procedure for the determination of liability and providing methods for payments of compensation thereunder." Section 6 of the act reads in part: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it." Comp. St. 1929, sec. 48-106. Section 14, ch. 198, Laws 1913, reads: "The following shall constitute employers subject to the provisions of this act:

"(1) The state and every governmental agency created by it." Comp. St. 1929, sec. 48-114.

Section 15, ch. 198, Laws 1913, reads in part:

"The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this act; * * * and shall be construed to mean:

"(1) Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written, but shall not include any official of the state, or of any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term." Comp. St. 1929, sec. 48-115.

Section 9, ch. 198, Laws 1913, provides in part: "If both employer and employee become subject to Part II of this article (Comp. St. 1929, secs. 48-109 to 48-115), both shall be bound by the schedule of compensation herein provided."

Section 48-172, Comp. St. Supp. 1937, reads: "All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment."

59 C. J. 303, is cited as follows: "It is usually said that statutes authorizing suit against the state are to be strictly construed, since they are in derogation of the state's sovereignty. Consequently, it is generally essential that the consent of the state to be sued be given expressly and by clear implication." See, also, *State v. Mortensen, supra.*

In the case of *O'Connor v. Slaker*, 22 Fed. (2d) 147, the court stated that Nebraska had, to some extent, waived its prerogative as to immunity from suit, discussing section 27-319, Comp. St. 1929, but that there was no statute in Nebraska expressly consenting, in its terms, that the state of Nebraska may be sued in the federal courts by a citizen of another state; that section 22, art. V of the Constitution, was not self-executing, and, to be effective, required action by the legislature. Therefore, if the state had not made the provision that citizens of another state might sue the state of Nebraska in federal courts, the state had not waived its immunity to suit.

"The legislative intent is the cardinal rule in the construction of statutes." *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.*, 114 Neb. 734, 209 N. W. 497; *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N. W. 576.

"In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent. * * * *People v. City of Chicago*, 152 Ill. 546." *Kearney County v. Hapeman*, 102 Neb. 550, 167 N. W. 792.

In 59 C. J. 303, it is further said: "But a statute giving a court jurisdiction to hear and determine actions against the state is sufficient authority for the bringing of an action without any special statute expressly giving the consent of the state to be sued."

Appellee contends further that even though liability is created on the part of the state (see *Eidenmiller v. State*, 120 Neb. 430, 233 N. W. 447) there must be in each case a special or general statute waiving the immunity of the state, in addition to a statute creating liability, if none existed at common law. On this proposition appellee did cite cases wherein the state in each instance, by statutory provision, waived its immunity and consented to be sued. However, an act creating a liability against the state in favor of em-

ployees of the state, for injuries arising out of and in the course of their employment, is on an entirely different basis than the circumstances as occasioned in the cases cited by appellee. The language recited in the act, incorporating the state and every governmental agency thereof within the provisions of the act, is clear and unambiguous, and the legislative intent is adequately expressed to warrant this court in declaring the state intended to waive its sovereignty and give its consent to be sued in actions arising under the compensation law.

Other matters are raised in the special appearance and in the argument of appellee, which, in view of the foregoing, are not necessary to discuss.

For the reasons given in this opinion, the special appearance is sustained.

SPECIAL APPEARANCE SUSTAINED.

LIVE STOCK NATIONAL BANK, APPELLEE: FRANK SARGENT, ASSIGNEE, APPELLEE, V. TRUMAN A. JACKSON, APPELLANT: INTER-STATE LIVE STOCK COMMISSION COMPANY, GARNISHEE, APPELLANT.

288 N. W. 515

FILED NOVEMBER 17, 1939. No. 30769.

1. **Exemptions.** "Exemption from execution or attachment of wages of a judgment debtor is controlled by section 20-1559, Comp. St. 1929." *Lyons v. Austin,* 126 Neb. 248, 252 N. W. 908.
2. **Statutes.** "If an act is complete and independent in itself, it may amend or modify the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments." *Scott v. Dohrse,* 130 Neb. 847, 266 N. W. 709.
3. ———. Section 20-1559, Comp. St. 1929, is a complete and independent act in itself.

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

Samuel L. Winters, for appellants.

Reed, Ramacciotti, Robinson & Hruska and *Henry R. Marshall, contra.*

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

MESSMORE, J.

This is an appeal from a judgment of the district court for Douglas county, rendered in a garnishment proceeding in aid of execution. The case was tried, submitted and decided by the district court on a stipulated statement of facts, in substance as follows:

The Live Stock National Bank recovered a money judgment against the defendant, Truman A. Jackson, which was assigned to Frank Sargent, one of the appellees. Execution was duly issued on the judgment and returned unsatisfied for want of property to levy upon belonging to the defendant Jackson. Subsequent to the return of the execution, garnishee process was issued to the Inter-State Live Stock Commission Company, a copartnership, as garnishee, to appear and answer as to any indebtedness it might owe the defendant Jackson. Said garnishee process was issued upon an application of the plaintiff as required by law. May 8, 1939, the garnishee, Inter-State Live Stock Commission Company, appeared in open court and admitted that it was the employer of the defendant and indebted to him in the sum of $250, for the period covered by the garnishee process, as wages earned by him. Defendant Jackson appeared in said proceedings, filed an affidavit, received in evidence, in which he stated that he was a married man, the head of a family, having a wife and daughter living with and dependent upon him for support; that the wages sought to be garnished in this proceeding were wages earned after the first day of April, 1939, and that he had no other source of income except said wages; that said wages are necessary for the support of himself and family and are exempt, as provided in section 20-1574, Comp. St. 1929.

The district court entered an order as of date June 19, 1939, finding that the defendant is indebted to the plaintiff on the judgment entered herein; that execution against the

defendant had been returned unsatisfied for want of sufficient property on which to levy; that the garnishee, Inter-State Live Stock Commission Company, at the time of its answer, was indebted to defendant Jackson in the sum of $250. The court found as a matter of law that 90 per cent. of said $250 is exempt to the defendant, but that 10 per cent. of said sum is not so exempt and is subject to attachment and garnishment by the plaintiff. From this order defendant Jackson and Inter-State Live Stock Commission Company, garnishee, appeal.

The sole question tried in the lower court was as to whether 90 per cent. of the wages of defendant Jackson was exempt to him under the provisions of section 20-1559, Comp. St. 1929, or whether the whole amount of the wages was exempt to him under the provisions of section 20-1574, Comp. St. 1929.

Appellants' contention is that the act of 1907 (Laws 1907, ch. 160), which is the same as section 20-1559, Comp. St. 1929, is unconstitutional and void for the reason that it is amendatory of section 20-1574, Comp. St. 1929, without so stating in the section and without repealing section 20-1574; hence, there was a violation of section 14, art. III of the Nebraska Constitution, which provides: "No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

Section 20-1574, Comp. St. 1929, is found under article 15, "Executions and Exemptions," "(c) Proceedings in Aid of Execution," and reads: "The judge may order any property of the judgment debtor, not exempt by law, in the hands of either himself or any other person or corporation, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; but the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot be so applied, where it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor." The foregoing sec-

tion of the statute has been in existence, without change, since 1858, and was a part of the Civil Code enacted in 1858. Complete Session Laws 1858, Part II, pp. 487, 520.

Section 20-1559, Comp. St. 1929, is found under the same chapter as said section 20-1574, with the exception that the former section is under "(b) Exemptions." Section 20-1559 was first enacted February 15, 1869 (Laws 1869, p. 170), and provided "That the wages of laborers, mechanics and clerks, in the hands of those by whom such laborers may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution or garnishee process; Provided, That not more than sixty days' wages shall be exempt." This act was amended February 25, 1873, to read as follows: "The wages of laborers, mechanics, and clerks *who are heads of families* in the hands of those by whom such laborers, mechanics, or clerks may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution, and garnishee process; Provided, That not more than sixty days' wages shall be exempt." Complete Session Laws 1873, p. 729. (Italics ours.)

The similarity between sections 20-1574 and 20-1559, Comp. St. 1929, is apparent, in that section 20-1574 contains the provision "but the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot be so applied," meaning to the indebtedness; while section 20-1559, before being amended, contained the provision: "Not more than sixty days' wages shall be exempt." In 1907 said section 20-1559 was amended (Laws 1907, ch. 160), and now provides as follows: "The wages of all persons who are heads of families, in the hands of those by whom such persons may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution and garnishee process to the extent of ninety per cent. of the amount of such wages."

Section 20-1574, Comp. St. 1929, was a part of the Code of Civil Procedure enacted in 1858. The title to the act

was: "An Act to establish a Code of Civil Procedure," and under "Proceedings in Aid of Execution" provided as set out in section 20-1574. The Code did not state in precise terms the subject of exemption of wages; nor did any other enactment of the Code so state until 1869, when section 20-1559 was originally enacted, the title to the act reading: "To Exempt Laborers, Mechanics and Clerks wages in the hands of Employers, from Execution, Attachment and Garnishee Process." We deem it unnecessary to further follow this legislative history. The distinction between section 20-1574 and section 20-1559, in the manner of operation, follows:

Under section 20-1574, Comp. St. 1929, the judgment creditor proceeds directly against the debtor, citing him into court under oath for an examination of his assets. See, also, section 20-1565 *et seq.* to and including section 20-1582, Comp. St. 1929, all relating to proceedings in aid of execution. Also, under the provisions of section 20-1574 the debtor's wages, earned during the previous 90 days, is protected from attachment or execution. Section 20-1559, Comp. St. 1929, provides for exemptions allowed of the wages of heads of families, as classified in the chapter under "(b) Exemptions." If the judgment creditor proceeds directly against the wages earned for any given period by the judgment debtor, an exemption of 90 per cent. obtains. In section 20-1574, *supra,* in the first instance the remedy is by inquiry to ascertain whether a judgment debtor has any assets beyond his exemptions. Under section 20-1559 the remedy is against the *res,* consisting of wages in the hands of a third party, the defendant's employer, who becomes the garnishee and defendant. Under section 20-1559 the judgment creditor proceeds directly against the garnishee, employer, and, in the event of unsatisfactory disclosure, may prosecute his claim to a judgment against him. Under section 20-1574, in aid of execution against the debtor, if property is found which may be applied on the judgment, then by section 20-1575 and other sections of the statute, under "(c) Proceedings in Aid of

Execution," the court may appoint a receiver of the property; forbid a transfer or disposition of the property of the judgment debtor, not exempt by law; by section 20-1577 the judge or referee, acting under the provisions of this chapter, has power to continue the proceedings; and by section 20-1579, disobedience of any order of the judge or referee by the party may be punished as for contempt. So, the distinction between the remedial process of the two statutes here under discussion is more evident when we note the supplemental procedure involved, as above related.

The legislature, from the inception of this legislation, had in mind two types of remedial process for enforcing the collection of judgments. The cases cited under the propositions of law, as contended for by appellants, are cases in which the act is challenged and clearly and uncontrovertably changed or supplemented through laws, without expressly referring to and repealing them. We believe that section 20-1559, Comp. St. 1929, is not only not purely amendatory of section 20-1574, Comp. St. 1929, but it is a complete and independent act on the subject of exemption of wages, and is, as we have pointed out, entirely capable of construction apart from section 20-1574, and that both acts may stand.

It is stated that the district court in the instant case followed the reasoning in *Lyons v. Austin,* 126 Neb. 248, 252 N. W. 908. In that case the garnishee answered that it had money in its possession,—wages,—owing defendant. Defendant filed an inventory of his personal property, showing that its value did not exceed $25, except for wages, and claimed the total amount of wages exempt from judgment or garnishment, citing section 20-1553, Comp. St. 1929, which in part reads: "All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." This section further states that this provision shall not in any manner apply to the exemption of wages. Section 20-1559, as hereinbefore

stated, applies to the exemption of wages. The district court in the *Lyons* case found that the debtor was the head of a family; that his wages, with the exception of 10 per cent. thereof, were not subject to garnishment, following section 20-1559, *supra*. Section 20-1553, *supra*, had been amended April 5, 1913, to make it inapplicable to the exemption of wages. Laws 1913, ch. 52. Section 20-1574, Comp. St. 1929, was not amended or repealed by the laws of 1913. It may be gathered from the above decision that the legislature was content, and disclosed its intention, to treat the subject of exemption of wages as separate and distinct from proceedings in aid of execution, and apparently recognized the difference in the subject-matter from that contained in sections 20-1553, 20-1559, and 20-1574, Comp. St. 1929, even though the latter section was not involved in *Lyons v. Austin, supra*. We believe that the two sections of the statute in question may be reasonably construed together.

The modern rule is: "Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof." 1 Lewis' Sutherland, Statutory Construction (2d ed.) 446, sec. 239. See *Hinman v. Temple*, 133 Neb. 268, 274 N. W. 605; *Scott v. Dohrse*, 130 Neb. 847, 266 N. W. 709; *State v. Price*, 127 Neb. 132, 254 N. W. 889; *State v. Lehmkuhl*, 127 Neb. 812, 257 N. W. 229.

An examination of the act in question (Comp. St. 1929, sec. 20-1559) discloses that it is a complete and independent act. Such being the case, section 14, art. III of the Constitution, does not require that the statute, with which it purports to conflict, should be set out as amended and accompanied by a repeal of such statute.

As stated in 59 C. J. 871: "If an act or statute is in itself complete and intelligible without reference to other legislation, it is not within the prohibition of the constitutional provisions by reason of the fact that it amends other stat-

utes by implication, and it is not necessary that such statutes should be reenacted and set out at length as modified."

For the reasons given in this opinion, the judgment and decree of the trial court should be affirmed.

AFFIRMED.

DORA TRAVINSKY, ADMINISTRATRIX, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY ET AL., APPELLEES.

288 N. W. 512

FILED NOVEMBER 17, 1939. No. 30667.

Negligence. When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

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

Anson H. Bigelow and *Phillip F. Abboud,* for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

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

ELLIS, District Judge.

This is an action for damages for alleged wrongful death.

Upon trial, at the close of plaintiff's evidence, the trial court sustained defendants' motion for a directed verdict and dismissed plaintiff's action. Motion for new trial was overruled and plaintiff brought this appeal.

The motion for directed verdict was predicated on the ground that plaintiff's evidence disclosed contributory negligence on the part of plaintiff's deceased more than slight, precluding plaintiff's recovery, and the disposition of the

case by the trial court was upon that ground. This ruling of the trial court is assigned as error, and while there are other assignments, only the one requires consideration.

The evidence, in so far as it is necessary to set it forth in this opinion, may be summarized as follows: The accident producing death occurred at the intersection of Fifteenth and Chicago streets, in the city of Omaha. Chicago street runs east and west and Fifteenth street runs north and south. There are double street car tracks on Fifteenth street. The accident occurred in October, 1936, around 6 o'clock p. m., it being sufficiently dark at the time so that the street light at the intersection was lighted and vehicles had their lights on. One of defendant tram company's cars was proceeding north on Fifteenth street on the northbound track which is the right-hand or east track of the two tracks on that street. In the opinion of a pedestrian, who observed the car as it passed the first alley south of Chicago street, the car was then traveling at a speed of 35 miles an hour. He did not observe the car from that point on until after he heard the impact. A taxicab driver, who followed the car for some distance and estimated that it was about 200 feet ahead of him when it entered the intersection in question, testified that the car was going faster than his car and fixed his car speed at from 30 to 32 miles an hour. There was evidence of the distance required in which to bring the car to a stop after the impact which, it may be conceded, has some tendency to corroborate these estimates of speed. The only eyewitness of this fatal accident and the movements of the deceased prior to the impact was the motorman of the car involved, the defendant Monaghan. He testified that he brought the car into the intersection at a speed of from 10 to 15 miles an hour and that at that time it was drifting, that is to say, there was no power on. As he reached a point approximately the center of the intersection he saw the deceased step off the curb at the northwest corner of the intersection. The evidence indicates that immediately prior to stepping into the street he was proceeding on the sidewalk. Other

evidence, including a plat of the intersection, indicates that the point where deceased stepped into the street was approximately 38 feet north and 30 feet west of the center of the intersection. The motorman further testified that immediately on stepping off the curb the deceased started to run and ran at an angle south and east from the point where he stepped into the street until he reached a point approximately in the center of the south-bound car track, and that at some point in this movement he raised his hand as though to signal the car to stop for him. Incidentally the regular stopping place for street cars at this intersection was on the southeast corner of the intersection. The distance between the rails of each set of tracks is 5 feet and the distance between the inside rails of the two sets of tracks is also 5 feet. When the deceased reached the point above indicated, he stopped and lowered his hand. The motorman testified that when the deceased stopped he was between 3 and 6 feet northwest from the front of the car, the measurement being a diagonal one and including, of course, the distance which he was west of the car as well as the distance he was north of the car. The motorman fixed the latter distance at a "couple of feet." Incidentally the evidence shows that the car projects about 1½ feet beyond the outside rail. When the deceased stopped and lowered his hand, the motorman put on some power and at that instant the deceased "made a sudden dash"—"darted across" in front of the car and was struck by it. The motorman did not see the actual impact of the car against the deceased, but felt it, and stated that it occurred "almost instantly" after the deceased started to move from the point where he had stopped and lowered his hand. The deceased was thrown to the northwest and he was found lying in the space between the two car tracks. No witness attempted to fix the exact point of impact, but blood marks on the pavement indicated that it was at least 10 feet, 10 inches, south of the south line of the sidewalk on the north side of Chicago street off of which the deceased stepped into the street.

As previously indicated, all of the foregoing evidence was presented by the plaintiff. The plaintiff is entitled to have this evidence considered in the light most favorable to her, and to the benefit of all favorable inferences arising from it.

The plaintiff contends that the deceased was a pedestrian crossing the street within the crosswalk space, therefore entitled to the right of way, and that the defendants were negligent in not according that right of way to him. In the most favorable light, the description of deceased's movement, as well as the evidence of physical facts, not only do not support this contention, but refute it, and the contention must be disposed of on that basis.

The evidence shows that deceased had availed himself of street car service on this street on previous occasions, and it is no more than a fair assumption to say that he knew the regular stop for taking on passengers was on the diagonally opposite corner of the intersection from that where he stepped into the street. If he intended to intercept the car, as would be indicated by his raised hand, he certainly should not have expected to do so at a point out in the intersection. His actual movement to the southeast indicates an intention to reach the regular stop, which intention was not realized, either because he had misjudged the distance of the car from him, the speed of its approach or some other reason. Be that as it may have been, the evidence discloses that he reached a point out in the intersection, stopped and lowered his hand. At this point he was safe from the car, and if he had remained stationary, the car would have passed him without injury. From the position of the motorman, the deceased's conduct and action clearly indicated he was conscious and aware of the movement of the car. When he stopped in such close proximity to the car, but nevertheless in a place of complete safety, there was nothing to indicate any danger in the car proceeding. The speed of the car up to that point was wholly immaterial, as the plaintiff was safe from it, and, regardless of its speed, it constituted no menace to him. The evi-

dence is that from this place of safety he suddenly moved into the path of the car and almost instantly was struck by it. There is nothing in the record to contradict this evidence.

We think that, as a matter of law, the last movement of the deceased constituted more than slight negligence contributing to cause the accident, and that the case is controlled by the decisions of this court in *Troup v. Porter*, 126 Neb. 93, 252 N. W. 611, and *McDonald v. Omaha & C. B. Street R. Co.*, 128 Neb. 17, 257 N. W. 489. In each of these cases the pedestrian suddenly stepped from a place of safety in close proximity to a moving vehicle directly into its path, and this court held that, as a matter of law, such act was negligence which was more than slight, justifying the trial courts in refusing to submit the cases to the jury. In passing, it is interesting to note that in the *Troup* case the only evidence of Judge Troup's movements came from the defendant driver of the car.

The plaintiff vigorously denies the application of the two cases cited, and contends that the case of *Doan v. Hoppe*, 133 Neb. 767, 277 N. W. 64, announces a rule for determining whether the question of contributory negligence is one of law for the court or one of fact for the jury, and that the rule therein announced required submission to the jury in the principal case. More than that, the plaintiff in effect argues that the rule in the *Doan* case has nullified and superseded the rule developed in the *Troup* and *McDonald* cases. We are unable to agree with either of these contentions. The plaintiff relies on this court's statement in the *Doan* case of the rule stated in *White v. Davis*, 103 Cal. App. 531, 284 Pac. 1086. Plaintiff contends that, under the rule of the California case, if the pedestrian looks, this one circumstance makes the question one for the jury. This would be a rule of thumb easy of application, but we are unable to agree that the problem is quite so simple or that the use of such a rule would be productive of desired ends. We must rather be reconciled to the probable impossibility of finding or making one rule which will be a safe guide in

all cases. It is no reproach of the California rule to say that it is not determinative in the principal case. It is noted that each division of that rule is wisely qualified by the statement that it is "usually" determinative.

The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision.

In the instant case we think the fact that plaintiff's deceased looked and saw the car and was conscious of its motion and proximity made his act of suddenly stepping into its path negligence of a higher degree than if he had done so without looking, as Judge Troup apparently did.

The same reasoning applies to plaintiff's contention that the rule of the *Troup* and *McDonald* cases should not be applied here because of evidence of the excessive speed of the car. Conceding excessive speed to have been proved, it would seem that since the deceased observed the approach of the car he must have had some relative impression of its speed and that the higher that impression the greater his negligence in suddenly moving from a place of safety into its path.

The action of the trial court was right and the judgment is

AFFIRMED.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, ET AL., RELATORS, V. ALBERT C. TILLEY, STATE ENGINEER, RESPONDENT.

288 N. W. 521

FILED NOVEMBER 18, 1939. No. 30800.

States. Where an appropriation bill carries an appropriation in the following language, "not more than the sum of $9,200, to be expended under the direction of the attorney general and subject to the approval of the state engineer, for salaries and office maintenance in the office of the attorney general," said language

vests in the attorney general and the state engineer a discretionary power in the expenditure of the fund. There must be an affirmative determination by both of said officials before an expenditure can be made from the fund. The exercise of that discretion and the approval of the expenditure by the state engineer is indicated when he requires legal advice and service from the attorney general and that service is rendered.

Original application for a writ of mandamus. *Writ allowed.*

Walter R. Johnson, Attorney General, Clarence S. Beck, Don Kelley and *Rush C. Clarke,* for relators.

John S. Logan and *Robert H. Downing,* for respondent.

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

SIMMONS, C. J.

This is an original action of mandamus, which calls for the construction of certain language used by the legislature in the bill making appropriations for the state government for the current biennium.

The petition alleges that the relators are the attorney general and two of his assistants, and that the respondent is the state engineer; that, in said appropriation bill, the legislature provided a highway cash fund for the department of roads and irrigation, and that "not more than the sum of $9,200, to be expended *under the direction of* the attorney general and *subject to the approval* of the state engineer, for salaries and office maintenance in the office of the attorney general." Laws 1939, ch. 133, sec. 42. The petition further alleges that legal services were furnished to the department of roads and irrigation by the entire staff of lawyers, clerks, and stenographers in the attorney general's office, and that they performed all services during the month of July, 1939, required by said department; that each person on the staff of the attorney general's office is paid a regular salary; that the attorney general had directed the payment of the salary of the relator Beck in the

sum of $325 monthly and part of the salary of the relator Don Kelley in the sum of $8.33 monthly out of the funds so appropriated in consideration of services rendered by the attorney general and his staff for said department; that the relators presented to the respondent vouchers (on forms furnished by the respondent to the relators) for the month of July, 1939, for said salaries, upon which a direction of the attorney general was indicated, requesting the approval of the respondent; that the respondent refused to approve the same, giving as his reason that the office of the attorney general did not need the money, and that he would use it to build roads; that, when advised that he could not so use the funds, he informed the relators that he would let the appropriation lapse; that the respondent without good cause has refused to approve the vouchers. The petition further alleges that the office of the attorney general is maintained, as required by law, for the purpose of providing legal services to the various administrative branches of the state government, including the department of roads and irrigation. The petition further alleges that there is sufficient money in said fund to pay said vouchers. Petitioners pray for a peremptory writ of mandamus to compel the respondent to approve said vouchers, directing the payment of said salaries from said appropriation.

This court issued an alternative writ. Respondent in his answer admits the status of the parties, the passage of the appropriation act, the receipt and demand for approval of the vouchers; that he did not approve the vouchers, and that the attorney general's office provided legal services during the month of July for the department of roads and irrigation; and alleges that there was not submitted with said vouchers supporting information as to the time devoted to said services by the attorney general's office; that the relator Beck did not devote his full time to the department during that month, and that all of the services rendered by the attorney general's office to the department of roads and irrigation did not require the equivalent of the services of one full-time assistant to the attorney general;

that he has not approved, nor been asked to approve, the arbitrary arrangement or apportionment of salaries made by the attorney general; and that he has demanded that, if any part of said fund is to be expended with his approval, such expenditure be limited to payment for services actually rendered to his department.

The respondent sets out the history of the appropriation bill, the amount of the appropriation made directly for the salaries and maintenance of the attorney general's office, the further fact that several appropriations carried for various departments of the state government were similarly limited to the approval of the head of the department, and that the legislature did not intend that the appropriation involved in this action would be used for the general purposes of salaries and maintenance of the attorney general's office.

The respondent further alleges that the appropriation act vests in the respondent, and not in the relator, the authority and the discretion to determine whether, when, and to what extent, the $9,200 appropriation shall be used for salaries and maintenance of the attorney general's office; that unless demands of the department of roads and irrigation are so great that they cannot be met from direct appropriation to the attorney general's office, these funds should not be used. The respondent prays for a declaratory judgment fixing the rights, status, and legal relations of the parties under the act, and avers that he will cheerfully abide the judgment of the court.

The relators moved for the issuance of a peremptory writ on the ground that the answer does not state facts sufficient to justify the refusal to approve the vouchers, and that the answer does not constitute a defense.

The parties to this litigation do not occupy the position of ordinary litigants. They appear here in their official capacities. In their official capacities they are servants of a common master, to wit, the state of Nebraska. Their rights, duties, and responsibilities are fixed by the state Constitution and the acts of the legislature. The parties here are re-

sponsible to the people of this state for the performance of those duties.

The solution of the issue here presented, then, rests upon an interpretation of the law of the state of Nebraska and the intention of the legislature with reference to the expenditure of this fund. One of three propositions must be true: *First,* the discretion and the exercise of judgment as to the expenditure of the fund rests with the relator, and after the relator has reached a decision as to its expenditure, approval by the respondent is a ministerial act; or *second,* the relator and the respondent have a discretionary power in the expenditure of the fund, and there must be an affirmative determination by both before there can be an expenditure; or, *third,* the discretion and judgment with reference to the expenditure of the fund rests solely with the respondent, and the acts of the relator with reference thereto are ministerial.

In determining which of the three propositions is controlling, we consider the duties of the two parties, which the legislature must have contemplated, and the language of the act. Generally speaking, the relator is the legal adviser of the officials of the state and represents the state in litigation. To perform that function properly, it is necessary that his office be maintained, and that the employees of the office of the relator receive their compensation as provided by law and without delay.

So far as the duties covered by this appropriation are concerned, the general duty of the respondent is to build and maintain the highways of the state and to look to and receive from the relator legal advice as to any problems connected therewith. The respondent is responsible for the work of his department, and the decision of the question as to whether or not legal service is needed rests with him. Questions of personnel, methods of doing the work, and the correctness of the service given to the respondent by the relator are matters that rest with the relator, not with the respondent.

It must also be recognized that the purpose of the state,

in creating the offices held by the relator and the respondent, was to have the work of the state efficiently, promptly, and properly executed, and that it is the desire of the state to have its employees compensated for work done.

What was the intention of the legislature in making the appropriation subject to the expressed limitation? It is necessary that we define the terms used in the language under consideration, and, in doing so, give to that language the usual meaning. Each expression is to be construed in the light of the other; the expressions are to be reconciled and a meaning given to each if possible.

The word "direction" is defined by Webster as "that which is imposed by directing; a guiding or authoritative instruction; * * * order; command."

The words "subject to" are defined as "dependent upon; * * * limited by; * * * under the control, power, or dominion of." 60 C. J. 673.

The word "approval" is defined by Webster as meaning "approbation, sanction." It is defined in the authorities as follows:

"The word 'approved' naturally imports the exercise of judgment and discretion; and the power to approve ordinarily implies a power to disapprove.

"To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. The word 'approve' does not, *ex vi termini,* necessarily import the exercise of discretion, but from the connection in which the term is used it often involves the idea of discretion and adjudication, and is seldom construed as requiring a mere ministerial act. 4 C. J. 1464." *Apfel v. Mellon,* 33 Fed. (2d) 805.

It is apparent that the second proposition stated above, to wit, the relator and the respondent have a discretionary power in the expenditure of the fund, and there must be an affirmative determination by both before there can be an expenditure, is controlling.

We cannot agree with the contention of the respondent

that this fund is not to be expended until all other funds appropriated to the attorney general's office have been exhausted, nor can we agree with his contention that the matter is left to the discretion of the respondent to determine when it is necessary that this fund be used to pay for legal services to the department of roads and irrigation. Examination of the appropriation bill reveals that in several instances the legislature provided for the payment of legal services out of appropriations for various agencies of the state. In this particular instance, the highway cash fund of the department of roads and irrigation is a fund not accumulated from the general revenues of the state. It is reasonable to hold that the legislature intended that the department of roads and irrigation should carry the cost of its legal services within the limits of the appropriation, and that the fund covered by this appropriation should be used for the payment of legal services rendered to said department whenever and to the extent required by that department. The attorney general's office is not an office run for profit. The amount of work involved in rendering the services and the proportionate charge that should be made therefor is a matter peculiarly within the knowledge and the discretion of the attorney general. In the absence of a showing that such charges are unreasonable or unconscionable, his decision as to the allocation of expenditures must be controlling.

We cannot agree with the contention of the respondent that this work should be figured on a piece-meal basis. The contrary legislative intent is clearly demonstrated by the provision that the appropriation shall be used for the payment of salaries and office maintenance. The payment of salaries means something in the nature of a regular pay for work performed rather than for the payment of services on a job basis. The adjustment of the cost of this service as fixed by the attorney general appears to be reasonable and a proper basis upon which to place the cost of that service.

Holding, as we do, that the respondent has a discretion

in the matter of approving the expenditure of this fund for legal services of his department, we come to the question as to how that approval may be indicated.

The respondent has no duty to perform in the matter except to determine the need for legal service and to request and receive the same. After the service is requested, the determination as to what shall be done, the research involved, and the mechanical work in rendering such service rests with the attorney general.

We conclude, therefore, that the approval of the respondent for the expenditure of funds from this appropriation is indicated when the services are requested and rendered. From the record here presented, it appears clear that services were rendered to the department of roads and irrigation by the relators during the month of July, 1939. The respondent has exercised the discretion which is vested in him by the act, and therefore has approved the expenditure in fact. There remains nothing for him to do but to perform the ministerial act of examining the voucher as to form and place his signature thereon. The peremptory writ is therefore granted.

WRIT ALLOWED.

JOHNSEN, J., dissenting.

I agree that the appropriation involved is available for payment of salaries and maintenance in the attorney general's office, to the extent of the time and cost to that office of any services rendered the department of roads and irrigation. The method of attempted withdrawal in this case, however, is to me improper. I am unable to accept the view that the appropriation is intended as a general fund that may be drawn upon whimsically, merely because some services have been rendered the department. It seems to me rather that the fund was intended to be used only in direct payment of time actually spent or cost actually incurred. Certainly it would be unnatural and misleading, for example, to allow the salaries of any of the members of the attorney general's staff to be paid out of the fund, whose time had not actually been spent upon the business of the

department. On the same principle, it appears to me equally improper to permit a salary withdrawal in this case in favor of an individual member of the staff in excess of the portion of his time actually spent for the department. Yet, notwithstanding that it is openly admitted that such is the situation here, and that the individual in whose favor a withdrawal is being made has not personally devoted time to the work of the department equivalent to the amount of the withdrawal, the majority opinion is indorsing this method of disbursing public funds. Such an indirect application might easily become a screen. It certainly is not sound business practice, and (unless it is a fallacy to assume that the state's affairs ought to be conducted on a business basis) there is no reason to approve it. If separate vouchers had been submitted for the portion of time spent by the several members of the attorney general's staff on matters in which the department of roads and irrigation had requested or required the services of the attorney general's office, and the state engineer had refused to approve them, I would agree that a writ of mandamus should issue.

MESSMORE, J., concurs in the dissent.

EDWARD J. THOMAS, APPELLANT, V. C. H. SHELDON COMPANY ET AL., APPELLEES.
288 N. W. 546

FILED NOVEMBER 24, 1939. No. 30686.

Record examined, and the judgment of the trial court is affirmed.

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

G. N. Anderson and *Dudley Thompson,* for appellant.

Charles H. Sheldon, contra.

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

SIMMONS, C. J.

This is an action for damages tried to the court, a jury being waived. Judgment was for the defendants. Plaintiff appeals.

The first pleading, shown by the transcript, is plaintiff's "Third Amended Petition," filed October 4, 1937. Plaintiff for his first cause of action alleges that on or about August 17, 1931, the plaintiff and the defendants entered into a written agreement whereby the plaintiff "was to furnish pasturage for 250 head of cattle for the defendants until the first day of December, 1931, for the sum of $400." A copy of the alleged agreement was attached to the petition. Plaintiff alleged that the defendants placed 480 head of cattle in the pasture, that "the value of the pasturage for said 230 cattle was the sum of $368 from August 17, 1931, to the first day of December, 1931, at which latter date the said cattle were taken out of the pasture by the defendants;" that no part thereof has been paid; and prayed judgment therefor.

For his second cause of action plaintiff alleged that on the land rented to the defendants, at the time of renting, there were 18½ stacks of hay, each stack containing 5 tons, valued at $3 a ton; that defendants' "cattle did eat up 8 stacks of the value of $120," and from the remaining 10½ stacks "did eat and destroy * * * hay to the value of $100, being all of the value of $220 * * * at the time the cattle were taken out of the pasture on December 1, 1931," and plaintiff prayed judgment for said sum.

The transcript does not show service of summons or other process upon the defendants.

The next instrument shown in the transcript is defendants' amended answer filed April 2, 1938. It consists of a general denial, an admission of the execution of a lease by the parties, and allegations as follows: That the lease attached to the petition is not the lease which the parties executed; that the hay alleged to have been destroyed was old, decayed, contained weeds, and had no salable value; that the cattle of defendants were taken out of the plaintiff's

land on or before November 10, 1931; that the lease entered into by the parties terminated November 1, 1931; that the petition of the plaintiff was filed herein on November 27, 1936, and that, if any cause of action arose as alleged by the plaintiff, it is barred by the statute of limitations; that the defendants had settled with the plaintiff for said claims by the payment of $30 on July 27, 1932; that another action was pending on the same causes in Nance county. By reply, plaintiff alleged that the payment of $30 was for another matter not involved in this action. There are also allegations as to the legal description of the land not now material here.

The sufficiency of the pleadings to raise the issues presented does not appear to have been questioned in the court below, and they are not questioned in this court.

Plaintiff testified that the defendants put 480 head of cattle in the pasture for two and one-half months; that the consideration recited in the lease had been paid; that nothing was paid for the extra cattle; that he received $30 for mowing and raking certain hay; and testified rather indefinitely as to the amount and value of the hay taken and destroyed.

The copy of the lease attached to the petition recites: "The fences are to be put in order by the party of the first part (plaintiff). The number of cattle to be put into the above pastures shall be 250 head. All hay destroyed must be payed at the price at the time the cattle is taken out." The lease offered in evidence shows in typewriting: "The fences are to be put in order by the party of the first part. The number of cattle to be put into the above pastures shall be" (then follows an obvious erasure, and then written in pen is the following:) "250 head. All hay destroyed must be payed at price at the time the cattle was tokened out of pasture." Plaintiff on cross-examination testified that he made the erasure and changes and put in the part in ink "after I counted the cattle" in the pasture; that the change was made after the lease was signed and without the consent of the defendants; that the words erased were some-

thing like "shall be determined by the party of the second part (defendants);" that there was nothing in the lease about 250 head of cattle before the lease was changed; that he added the provision about payment for hay destroyed after the lease was signed and without the consent of the defendants; that he discussed the question of extra cattle in the pasture and the stacked hay with his attorney before he accepted the $30 settlement, but contended that the payment had nothing to do with hay in the stack.

The defendants' evidence clearly establishes that more than 250 head of cattle were in the pasture and that the number to be placed in the pasture was to be determined by the defendants; that the cattle were removed from the pasture not later than November 10, 1931; that there was some damage to hay, but that the hay was no good except for bedding; that these matters were all settled in September, 1932, by the payment of the $30 by check indorsed "In full settlement Ed Thomas a/c."

The trial court found generally for the defendants "upon the issues joined" (without specific findings of fact) and dismissed both causes of action at plaintiff's costs.

Plaintiff assigns as error that the findings and judgment of the court are not sustained by the evidence; that the judgment is contrary to law; and that certain evidence was improperly admitted.

This court has held: "Upon appeal, the admission of incompetent evidence at the trial below is immaterial in a case tried to the district court without a jury, if the judgment is supported by sufficient competent evidence." *In re Estate of Black,* 125 Neb. 75, 249 N. W. 84.

Disregarding the evidence to which plaintiff objects, the finding of the trial court may be sustained. No other judgment would have been proper under the pleadings, the evidence of the plaintiff, and the undisputed evidence of the defendants.

We have carefully examined the record and find no prejudicial error therein. The judgment of the trial court is

AFFIRMED.

JOHN SEARCEY, APPELLANT, V. VIRGIL BADGETT: M. M. BRIDGMON, GARNISHEE, APPELLEE.

288 N. W. 537

FILED NOVEMBER 24, 1939. No. 30698.

Garnishment. " 'In a garnishment proceeding in aid of execution, the answer and evidence of garnishee only are admissible in response to the summons in garnishment.' *Early v. Belgrade-Hord Co.*, 133 Neb. 884, 277 N. W. 596." *Orchard & Wilhelm Co. v. North*, 135 Neb. 39, 280 N. W. 272.

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

Kenneth S. Wherry, for appellant.

Moore & Finn, contra.

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

EBERLY, J.

This is an appeal from an order of the district court dismissing and discharging the garnishee. The garnishee, by written answer, denied he was indebted to the judgment debtor in any amount. The judgment was regularly obtained in the justice court of Pawnee county, a transcript thereof filed in the office of the clerk of the district court for Pawnee county, and likewise in the district court for Johnson county. An execution was issued in Johnson county and returned unsatisfied for want of sufficient property whereon to levy and collect the same. Proceedings were then had on affidavit in garnishment, requiring the garnishee (appellee) to answer. He answered in writing, denying that he was indebted to the judgment debtor in any amount. By agreement, the matter was continued and set for hearing. Evidence was adduced in favor of the judgment creditor, seeking to trace property of the judgment debtor into the hands of the garnishee. The contention of the appellant is that the answer of the garnishee constituted a disclosure, and the garnishee proceeded to trial without objection. At the conclusion of the testimony in be-

half of the judgment creditor, the garnishee moved that he be discharged for the reason that the judgment creditor failed to interrogate him as provided in the summons issued in said cause, and the motion was sustained.

Appellant cites and relies upon the case of *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 18 Neb. 303, 25 N. W. 94, wherein this court held: "When a garnishee, prior to the time when it is required to answer as to its indebtedness, files an answer as in an ordinary action, and issue being joined thereon a trial is had and other witnesses are examined, without objection to the course pursued, such garnishee will not be permitted to question the regularity of the proceedings in the appellate court."

The above case is cited as being directly in point, and in that case there were filed an answer and a reply to the answer, and the case did proceed upon the theory of trial. In the instant case there is nothing in the record to show that the garnishee proceeded upon the theory of trial.

Section 20-1056, Comp. St. 1929, contains the procedure to be followed by a judgment creditor, in pursuing collection on the original judgment, wherein, after return of execution, an affidavit shall be filed by the judgment creditor in the office of the clerk of the court in which said execution was issued, stating that he has good reason to and does believe that any person, etc., has property of and is indebted to the judgment debtor; the clerk of the court shall issue a summons, as in other cases, requiring such person to appear in court and answer such interrogatories as shall be propounded to him, touching the goods, chattels, rights and credits of the judgment debtor in his possession. This would indicate clearly that, if interrogatories were not propounded and the garnishee previously, by written answer, denied indebtedness, he should be discharged.

Section 20-1030, Comp. St. 1929, in substance, provides that, if a garnishee appear and answer, and his disclosure is not satisfactory to the plaintiff (in this instance the judgment creditor), "plaintiff may proceed against him in an action by filing a petition in his own name, as in other

cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff for the amount of the property and credits of every kind of the defendant in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee." This provision of the statute is one of the remedies available to the appellant.

This court, in *Orchard & Wilhelm Co. v. North,* 125 Neb. 723, 251 N. W. 895, held: "Where discovery of property of a judgment debtor is sought through evidence from others than a garnishee, the remedy is provided in sections 20-1565 to 20-1582, Comp. St. 1929;" and specifically held: "In garnishment proceedings in aid of execution (Comp. St. 1929, secs. 20-1056 to 20-1061) the answer or evidence of the garnishee only may be taken by the court." In the body of the opinion, in speaking of procedure as found in sections 20-1056 to 20-1061, Comp. St. 1929, the same being the subdivision of the chapter of the Code relating to garnishment in aid of execution, it was said: "Nowhere in that procedure is any power granted the court to require answers from, or to take testimony of, any one other than the garnishee. Our legislature has never seen fit to provide, in respect of garnishments, that other evidence may be taken than that of the garnishee. * * * If the judgment creditor desires to get the facts in part from other witnesses he must proceed in other ways in aid of his execution." See, also, *Early v. Belgrade-Hord Co.,* 133 Neb. 884, 277 N. W. 596; *Orchard & Wilhelm Co. v. North,* 135 Neb. 39, 280 N. W. 272.

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

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. ERNEST G. PRICE ET AL.: ELLA G. WOOD, APPELLANT.
288 N. W. 548

FILED NOVEMBER 24, 1939. No. 30705.

Mortgages. Cause being submitted on the transcript, no error being found, the ruling of the trial court, in refusing to set aside order of confirmation, is affirmed.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

D. R. Mounts and *C. Norman Gonderinger,* for appellant.

Franklin L. Pierce, Philip M. Wellman and *W. J. Hammond, contra.*

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

PAINE, J.

This is an appeal in a mortgage foreclosure from an order denying a motion to set aside the confirmation of a sheriff's sale and to be given leave to present a second time objections to the sheriff's sale.

The Federal Land Bank of Omaha was granted a decree of foreclosure on April 25, 1936. On March 15, 1937, the sheriff of Holt county held a sale of said land and sold the same to the plaintiff for $3,063.90. The total costs amounted to $118.04, leaving $2,945.86 to be applied upon the note and mortgage, which left a deficiency of $140.50.

On March 3, 1938, the cause came on upon motion to confirm the sheriff's sale. The court, having examined all of the proceedings, confirmed the sale, subject to the following conditions: (a) That defendants shall have until February 1, 1939, to redeem from the decree; (b) that if redemption is not made before said date, sheriff's deed shall issue; (c) that the defendant Ella G. Wood shall be continued in the possession and occupancy of the real estate until March 1, 1939, and shall pay as rental $350 to the clerk of the court, which cash rental shall be applied as provided therein. It was further ordered that the defendant

should not plant any crop which shall mature after March 1, 1939, and shall protect all buildings and improvements, and shall not cut any of the trees or timber growing on said premises, or permit any waste upon said premises. It is further ordered that a writ of assistance shall issue after March 1, 1939, to place the purchaser in possession of the premises in case redemption is not made as provided.

On January 31, 1939, nearly eleven months after confirmation, the said defendant Ella G. Wood filed objections to the confirmation on the ground that the sale was not held as provided by law; that the bid was wholly insufficient, and that a subsequent sale will bring a substantially greater amount; that the fair and reasonable value is greatly in excess of the amount bid at the sale.

On February 4, 1939, said matter came on for hearing upon motion and objections to confirmation of the defendant Ella G. Wood. Said defendant requested leave to introduce evidence in support of her objections to the confirmation of sale, and the court denied such request.

The court finds that no redemption has been made as provided by the order of March 3, 1938, and that said sheriff's sale should be finally confirmed and the sheriff ordered to execute and deliver to the purchaser a deed to the premises, to which the defendant Ella G. Wood excepts.

All objections and motions of defendant being overruled, the sheriff's sale was approved and confirmed, and the sheriff was directed to execute deed to purchaser, to which order defendant Ella G. Wood excepts. Thereupon, the supersedeas bond was fixed in the sum of $500, to be conditioned that Ella G. Wood, defendant, prosecute her appeal without delay, and will not during the pendency of the appeal commit any waste upon said real estate, will pay all costs and all rents and damages which may accrue during the pendency of said appeal, and if said Ella G. Wood, defendant, shall execute a bond, then no writ of assistance shall issue. On February 16, 1939, Ella G. Wood and the Massachusetts Bonding and Insurance Company, as surety, furnished a bond in the sum of $500.

The defendant Ella G. Wood sets out as errors for a reversal hereof: (1) The court erred in entering an interlocutory order of confirmation on the 3d day of March, 1938; (2) the court erred in denying defendant's motion which was filed January 31, 1939, to set aside the order of March 3, 1938; (3) the court erred in refusing to fix a date for hearing on objections to the confirmation of the sale; (4) the court erred in refusing the defendant's request to be permitted to introduce evidence in support of the objections to the confirmation of sale.

The above and foregoing is a synopsis of the transcript as filed by the defendant in this court on April 22, 1939. Thereafter the Federal Land Bank of Omaha, plaintiff, moved the court to file an additional transcript for the reason that certain pleadings were not included in the transcript as filed by the defendant.

On June 13, 1939, a stipulation was signed by counsel for all parties that an additional transcript may be filed by the plaintiff in this court, which was duly done. This additional transcript is composed of objections to the confirmation of the sale, filed September 2, 1937, by Ella G. Wood, defendant, in which she objected to the confirmation of the sale for the following reasons: First, that said sale was not held and had in the manner and form provided by law; second, that the amount bid at said sale is wholly insufficient, and far below the present value of said real estate; and, third, that a subsequent sale will bring a substantially greater amount, and that the fair and reasonable value of said real estate is greatly in excess of the amount bid at said sale.

Said supplemental transcript also shows that on July 30, 1938, Ella G. Wood, defendant, filed a motion reciting that it was provided in the order of confirmation entered March 3, 1938, that she should pay $300 cash rent on or before August 1, 1938, and that she has been unable to pay the same, and that said premises consist mostly of grazing land, and that she has thereon cattle for pasture, but that the owners thereof will not pay her until the end of the

pasture season, to wit, October 1, 1938, and moves the court that the time of the cash payment of $300, now due according to the confirmation entered March 3, 1938, be extended, and that she have until October 1, 1938, to pay said sum of money, and thereafter, said motion coming on to be heard for an extension of time of payment, the district judge entered an order extending such time of payment until October 1, 1938, and required that she file assignment of such pasture rent for the season of 1938 with the clerk of the district court on or before August 20, 1938.

It thus appears that objections, as herein set out, were duly filed September 2, 1937, to the confirmation of said sale; that on March 3, 1938, the order of confirmation shows that, as the moratorium law has been set aside and held unconstitutional by the court, the order of a continuance thereunder, which was then in force, should be set aside, and the matter being submitted to the court on the objections to confirmation of said sale, and the court having examined all of the proceedings therein, and finding that the sale was held in conformity with law, and the land was sold for its fair value, the sheriff's sale was duly confirmed.

It clearly appears that, after the objections to the confirmation were examined and overruled, and confirmation entered, Ella G. Wood, defendant, took no steps to appeal therefrom, but some months later did file a request and motion for extension of time for the payment of the $300 rent, and an order of the court was made extending said time; that long thereafter Ella G. Wood, on January 31, 1939, filed practically the same objections to confirmation, and asked to have the confirmation set aside because she had had no hearing upon objections to the sale.

In *McKee v. Goodrich,* 84 Neb. 479, 121 N. W. 577, it is held that a plaintiff cannot accept and enforce so much of a judgment as is favorable to him, and recognize the judgment in so far as it is of benefit, and then appeal from the portion of the judgment that is against him.

In *Harte v. Castetter,* 38 Neb. 571, 57 N. W. 381, it is

provided that, if a party accepts the benefit of a decree in his favor, he waives the right to prosecute an appeal, for a party, by voluntarily accepting under a portion of the amount found due him, thereby fully and completely recognizing the validity of the decree, for if he had desired to prosecute his appeal he should not have accepted any portion of the decree.

Under the facts in this case, it appears to the court that the order of confirmation was entered leaving the defendant in possession of the premises for a certain length of time under certain conditions therein set out; that in entering such decree the court had simply overruled the objections to the confirmation, and it does not appear that the defendant had had evidence taken thereon, or had asked leave of court to introduce evidence upon the objections which had been filed on September 2, 1937, and then not only received the benefit of the order of confirmation, and the conditions therein set out, but upon motion secured extension of time for the payment of the rents to remain in possession of the land.

The court having found that the sale was held in conformity with law, the real estate sold for its fair value, and that all of the proceedings were regular and legal, and the defendant having taken no steps to appeal therefrom, it is now too late to ask leave to introduce evidence in support of objections filed long ago, or of the same objections refiled at a later date, and the action of the trial court is affirmed.

AFFIRMED.

JENNIE CALLEN, ADMINISTRATRIX, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.

288 N. W. 547

FILED NOVEMBER 24, 1939. No. 30704.

States. Special appearance of the state of Nebraska sustained in accordance with holding in *Anstine v. State, ante*, p. 148, 288 N. W. 525.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed.*

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

Paul W. White and *Palmer McGrew, contra.*

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

CARTER, J.

This is a suit under the workmen's compensation law against the state of Nebraska and the department of public works to recover compensation for dependency resulting from the death of Walter Callen. The death of Walter Callen is alleged to have been caused by an accident arising out of and in the course of his employment as an operator of a road maintainer for the department of roads and irrigation of the state. The district court entered an award and the state appeals.

The attorney general complains of the overruling of the special appearance filed by him in the district court on behalf of the state. It appears from the record that service on the state was attempted by serving a summons on the governor, the head of the department of roads and irrigation and the attorney general, under the provisions of section 27-321, Comp. St. 1929. In a recent case we held that this section was not applicable and that the legislature had failed to provide the manner in which service of process may be had against the state, or a department of the state government, in a compensation case, as required by section 22, art. V of the Constitution. *Anstine v. State, ante,* p. 148, 288 N. W. 525.

It is also contended by appellee that the voluntary appearance filed by the attorney general and the subsequent general appearance that he made in the case are the equivalent of proper service. This was also decided contrary to the contentions of appellee in the *Anstine* case. There being no provision of statute for process against the state in a

compensation case, and the attorney general being without power to make an appearance binding upon the state, the trial court erred in not sustaining the special appearance filed by the attorney general on the state's behalf.

For the reasons stated, the special appearance is sustained and the judgment of the district court reversed.

REVERSED.

JUNE WREDE, APPELLANT, V. CITY OF DAVID CITY ET AL., APPELLEES.

288 N. W. 542

FILED NOVEMBER 24, 1939. No. 30753.

1. **Contracts.** An express contract requires a meeting of minds of the contracting parties upon the terms and conditions of the contract and an intention to contract with reference thereto.
2. **Work and Labor.** An implied contract results where one performs a useful service for another, with his knowledge, and with the expectation of being paid therefor, and the other party by his conduct indicates that he knew, or according to the ordinary course of dealing and the common understanding of men should have known, that the services were to be paid for.
3. **Workmen's Compensation.** Evidence examined and *held* to sustain the judgment of the district court that the findings of fact on rehearing before the compensation court are not supported by the record.
4. ———. Under the provisions of section 48-174, Comp. St. Supp. 1937, amendment of 1935 (Laws 1935, ch. 57, sec. 13), it is not required that appellant from award of the Nebraska workmen's compensation court sitting *en banc* serve transcribed copy of testimony taken on opposing party or her counsel before filing same in district court.

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

Frank A. Dutton, for appellant.

William H. Carns, M. A. Shaw and *Hall, Cline & Williams, contra.*

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

KROGER, District Judge.

This is an action by June Wrede, hereafter referred to as plaintiff, against the city of David City, Nebraska, a municipal corporation, hereafter referred to as defendant, and the Employers' Liability Assurance Corporation, Limited, a corporation, to recover compensation for the death of her husband.

A hearing was had before a judge of the Nebraska workmen's compensation court and an award made. Plaintiff requested a rehearing before the full compensation court, and from an award on rehearing, defendants appealed to the district court for Butler county. From a judgment of the district court setting aside the award of the compensation court and dismissing plaintiff's petition, this appeal is prosecuted.

The record discloses that in November, 1937, the city of David City, in cooperation with the Works Progress Administration of the federal government, hereafter referred to as the W. P. A., was carrying on a project in said city consisting of spreading gravel on the streets of said city. The arrangement required the defendant to furnish the gravel and the trucks for transporting the same, the W. P. A. to furnish all labor for hauling and spreading the gravel on the streets. In addition, the W. P. A. furnished gas and oil for the trucks so employed. The defendant hired two trucks, one owned by Leo Brochtrup and the other by Dale Wrede, for an agreed compensation of two and one-quarter cents per ton mile. Neither truck was operated by the owner, but drivers were furnished by the W. P. A. from their list of certified workers, and Dean Wrede, a certified W. P. A. worker, and a brother of Dale Wrede, was assigned to drive the Wrede truck.

On the evening of November 18, 1937, Dean Wrede informed his brother Dale that it would be impossible for him to operate the truck the following day because of other

work he intended doing, and Dale thereupon informed him that "somebody had to drive it, he'd take it and drive it himself, it had to work—he wanted to be able to make some money, so he took it and went to work."

On the morning of November 19, 1937, Dale Wrede commenced hauling gravel with his truck and was observed so driving by the street commissioner of defendant city. He was also observed so driving by the foreman and timekeeper on the project, who was employed by the W. P. A. He continued driving until shortly after 2 p. m. of said day, at which time his truck collided with the other truck engaged on said project and Dale Wrede was instantly killed. He left surviving him his widow, June Wrede, the plaintiff herein, and three minor dependent children.

While a number of questions are discussed in the briefs and were argued orally, the disposition of this case depends entirely upon whether the record made on rehearing before the compensation court supported the finding of that court that the plaintiff's deceased husband was an employee of the defendant, city of David City, under an "expressed and implied contract of hire."

In support of her contention that there was an express contract of hire, the plaintiff relies upon a conversation she had over the telephone with the mayor of the defendant city on the evening of November 11, 1937. Her testimony as to that conversation is as follows: "He told me that they had changed pits; they were to haul gravel from a different pit. This pit was over by Bellwood, and that that also would be a higher rate, and for Dale to come to work, I should tell him, which I did. I told him I would tell him, and I told him that evening." The record further discloses that Dale Wrede did not go to work the next morning, which would be November 12, 1937, but that his brother Dean took the truck and hauled gravel with the same until the evening of November 18.

That the alleged conversation of the plaintiff with the mayor of the defendant city on the evening of November 11, 1937, was insufficient to constitute a contract of hire

can hardly be questioned. This is forcibly demonstrated by the conduct of the parties themselves. Dale Wrede did not so construe it. He did not take his truck and haul gravel with it the next morning, but on the contrary his truck was operated by a certified W. P. A. worker. The fact that this worker happened to be his brother did not alter the circumstances. Dale Wrede did not furnish the driver for the truck and the defendant city was not required, under the arrangement with the W. P. A., to furnish drivers for the truck. Dale Wrede's decision to drive the truck on November 19 was as a result of a conversation with his brother, not with an officer of the defendant city. The defendant knew nothing of the arrangement.

To support a claim that there was an express contract of hire, the evidence must show that there was an intention to contract and that there was a meeting of the minds between the parties as to the terms and conditions under which the employment was to be performed. *Vandenburg v. Center Township,* 124 Neb. 790, 248 N. W. 310. All of these elements are entirely lacking in the instant case, and the record is bare of any other evidence supporting the claim that there was an express contract of hire.

This leaves but one other alternative and that is that there was an implied contract of hire. The only evidence bearing on the question of an implied contract was contained in the testimony of Peter Buntgem and Walter Curtis. Peter Buntgem testified that he was the street commissioner of the defendant city, saw the deceased on the morning of November 19, 1937, operating his truck on the project, and that he did not object to Dale's driving the truck. His testimony was: "Q. And you, as street commissioner, permitted him to do that, did you? A. Well, I didn't have anything to say about it. Q. No one told you not to allow him to haul this gravel? A. I didn't have anything to do with that. That was up to the W. P. A. boss. Q. You didn't stop Dale Wrede from hauling gravel to the streets of David City? A. I didn't say anything to him—had no right to." Walter Curtis testified that he was fore-

man and timekeeper for the W. P. A. on the project in question on November 19, 1937, and he saw Dale Wrede driving his truck on said day after he had brought in the first load of gravel; that Dale Wrede was not a certified W. P. A. worker on this project. And he was asked this question: "Did you, as foreman of this Works Progress Administration project, permit Mr. Wrede to drive his truck in hauling this gravel on that day?" And his answer was: "I didn't have no authority to tell him to, or not to. It was his truck, and I figured—which he knew—he was not getting anything for it from W. P. A. or the city, so far as I knew."

This is the only evidence in the record bearing on the question of an implied contract of hire and, like the evidence of an express contract, it falls far short of establishing a situation where a contract of employment would be implied.

An implied contract may be said to result "where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the latter expresses no dissent or avails himself of the services, a promise to pay the reasonable value of the service is implied. * * * The service or other benefit must, however, not have been given as a gratuity, and the person benefited must have done something from which his promise to pay may be fairly inferred." 6 R. C. L. 587, sec. 6.

In this case the defendant city did nothing from which its promise to pay could be inferred. While the street commissioner did not object to Dale Wrede's driving his truck, it must be borne in mind that the city had not selected the drivers of the gravel trucks during any portion of the work; neither had it paid the wages of such drivers; neither did the city have anything to do with certifying W. P. A. workers. For all the city knew, Dale Wrede could have been a certified W. P. A. worker on November 19, 1937. Under those circumstances, it cannot be said that the city, failing to protest, accepted the services of Dale Wrede under circumstances which would imply a promise to pay for the same. The entire record discloses that Dale Wrede did

not operate his truck on November 19, 1937, with the expectation of being paid by the defendant city for his services, but that he operated the same so that he might be in position to receive the contract price for the use of the truck alone.

Plaintiff's last assignment of error has to do with procedure on appeal from the Nebraska workmen's compensation court sitting *en banc*. A motion was filed to dismiss the appeal for the reason that defendants and appellants had not filed a proper or sufficient transcribed copy of the testimony and evidence taken before the Nebraska workmen's compensation court because the purported transcribed copy had not been served upon the plaintiff and appellee or her attorney within the time provided by law. This motion was properly overruled for the reason that the transcribed copy of the testimony and evidence taken in the compensation court was certified by the stenographer who made the record and settled by the compensation court as provided by section 48-174, Comp. St. Supp. 1937, amendment of 1935 (Laws 1935, ch. 57, sec. 13), and said statute does not require service of such bill of exceptions upon the opposing party or her counsel before filing same in district court.

Finding no error in the record, the judgment appealed from is

AFFIRMED.

RALPH LONG, APPELLEE, V. E. MERLE GUILLIATT ET AL., APPELLANTS.

288 N. W. 689

FILED NOVEMBER 28, 1939. No. 30689.

1. **Automobiles.** In an action under the last clear chance doctrine to recover damages for personal injuries alleged to have been negligently caused by defendants in a collision of motor vehicles on a public highway, plaintiff is not entitled to recover, if the jury may properly find from the evidence that he had the last

clear chance to avoid injury and negligently failed to do so, or if both drivers were contemporaneously and actively at fault.

2. **Appeal.** On appeal, an immaterial or harmless error in the proceedings below is not a ground for reversal.

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

L. R. Doyle and *Jessen & Dierks,* for appellants.

Lloyd E. Peterson, McKenzie & Dugan and *Virgil L. Brown, contra.*

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

ROSE, J.

This is an action against defendants to recover from them $10,232 for alleged negligence resulting in personal injuries to plaintiff. About noon December 14, 1937, a motor truck owned by E. Merle Guilliatt and driven by Walter Hoffman, defendants, collided with the automobile of plaintiff about a mile south of Nebraska City on paved highway 75 which runs north and south. Plaintiff had been traveling north. The truck was going south at the time of the impact. Plaintiff was injured. In his petition he alleged negligence of defendants as the proximate cause of his injuries, invoking the last clear chance doctrine.

Defendants in their answer denied the negligence attributed to them by plaintiff, and pleaded in detail that his injuries, if any, were caused by his own negligence and contributory negligence. The reply to the answer was a general denial. Plaintiff by formal preliminary motion in writing moved the court to strike from the answer the defenses of negligence and contributory negligence as inapplicable to the doctrine of the last clear chance upon which he relied for the recovery of damages. The motion was sustained after the evidence on both sides had been adduced.

The trial resulted in a verdict in favor of plaintiff for $1,950. From judgment thereon defendants appealed.

The principal assignment of error challenged as erroneous and prejudicial an instruction permitting the jury to return a verdict in favor of plaintiff for damages under the doctrine of the last clear chance, without regard to the rule that he was not entitled to such relief, if, in his peril, he had the time and the opportunity to avoid personal injury and neglected to do so.

Plaintiff testified to the following facts, in substance: He was an employee of the Otoe Food Products Company and, a few minutes before noon, December 14, 1937, started in his own Chevrolet car to the home of a fellow employee who resided about a mile south and half a mile east of Nebraska City; drove south a mile on highway 75; turned east from the highway and went a fourth of a mile; found the roads so slick that he turned around and started back to town; turned north at the highway; drove close to the east side of the pavement; front wheels went over the curb on the east side; got car back into the highway, where it slid to the west side; stopped with front wheels on the shoulder along the west curb and the rear wheels about two feet from the center line of the highway on the west side.

According to additional testimony of plaintiff, while trying to get his car off the west or wrong side of the highway, with the rear wheels spinning on the ice without any forward movement, he looked to the north and saw the truck coming over the hill. The evidence of an engineer is that the top of the hill was 650 feet from the place of the collision near a spillway; that the hill was 13½ feet higher than the spillway; that the pavement was nearly level immediately north of the spillway.

Hoffman, driver of the truck, testified that, going south, he first took notice of plaintiff's car when about 225 feet away; that plaintiff was following another car at the distance of about 45 feet; that the truck was within 40 feet of plaintiff's car when it commenced to skid; that it skidded in front of the truck; that Hoffman, on his own side of the highway, applied his brakes and skidded into plaintiff's car.

The evidence is in harmony on the icy and slippery condition of the pavement but is conflicting in most material respects.

Neither driver was in a good position to estimate the speed of the other's car. Plaintiff said he had been driving at a speed between 20 and 25 miles an hour and when he last started to skid he was going at the rate of 18 or 20 miles an hour. He estimated the speed of the truck at a rate between 40 and 45 miles an hour. The driver of the truck testified he came down the highway before applying his brakes at approximately 25 miles an hour and that plaintiff was traveling probably 30 or 35 miles an hour.

Plaintiff knew the condition of the pavement. He had passed the spillway going south a few minutes before the accident. He did not use chains on the wheels of his car. As the truck approached when he was in peril, he did not blow a horn or give any other signal. He said on the witness-stand that the truck was 400 feet away when the wheels of his car began to spin; that he discovered right after he stopped he could not get his car off the highway.

The petition and evidence show that plaintiff's car went out of control and stopped across the highway in defendant's line of travel; that plaintiff was sitting in his car at the time of the impact, and it is alleged he was unable to extricate himself. He testified: "I made an attempt to grab the door-handle to get out and the crash came." Whether he had the time, opportunity and means to avoid the peril in which he had negligently placed himself without any fault of defendants was a question for the jury in view of all the evidence and the physical facts disclosed by the entire record.

It would be exacting too much of the law to permit plaintiff to recover, if, in a perilous situation negligently created by himself, he had the last clear chance to escape and neglected to do so up to the very instant of the accident. The automobile does not do away with human desire to preserve life and to avoid bodily injury, nor eliminate legs of the driver in a stalled car on the wrong side of a slippery

highway as a means of locomotion. With the record as briefly outlined on the doctrine of the last clear chance invoked by plaintiff, the trial court gave an instruction containing the following direction to the jury:

"If you find and believe from the evidence that the said defendant Hoffman, servant of the said defendant Guilliatt, in charge of the said defendant Guilliatt's automobile, saw plaintiff was in a position of peril in time to avoid injuring him by the exercise of ordinary care by means reasonably within the control of the said Hoffman, and that said Hoffman failed to do so, then you are instructed that plaintiff would be entitled to recover and your verdict should be for the plaintiff and against said defendants."

This permitted the jury to return a verdict in favor of plaintiff though, if properly instructed, they might have found from the evidence that plaintiff himself had the last clear chance to avoid injury and negligently failed to do so, or that the drivers were contemporaneously and actively at fault. The instruction quoted was clearly erroneous and prejudicial to defendants. 11 C. J. 282; Annotations in 92 A. L. R. 47 *et seq.*, and 119 A. L. R. 1053 *et seq.*

Plaintiff by merely invoking the last clear chance doctrine as his sole cause of action did not thus necessarily eliminate the defenses of negligence and contributory negligence pleaded by defendants, if proved, but in the present instance the order striking those pleas from the answer do not appear to be prejudicially erroneous, since plaintiff pleaded and proved his own negligence and contributory negligence and defendants adduced their own evidence of the negligent acts of plaintiff to defeat a recovery on his only ground for relief.

For the giving of the erroneous instruction, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

O. J. HADLEY, APPELLEE, V. LIBBIE S. COREY ET AL., APPELLANTS.

288 N. W. 826

FILED NOVEMBER 28, 1939. No. 30620.

1. **Mortgages:** LIMITATION OF ACTIONS. The owner of the equity of redemption, who executed the real estate mortgage thereon, and who thereafter continued to retain the title thereto, had authority to bind the mortgaged property by her unrecorded extension agreement in writing extending the maturity date of the indebtedness secured thereby. As to such mortgagor, a cause of action did not accrue thereon, nor the statute of limitations commence to run, until after the termination of the stipulated extension period.
2. **Pleading.** "A demurrer to the petition is not, by the provisions of our code of practice, a proper part of the answer filed in a case, and should be disregarded." *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319, 94 N. W. 120.
3. ———. "The sufficiency of a petition cannot be raised by incorporating a demurrer in the answer." *Peterson v. Wahlquist*, 125 Neb. 247, 249 N. W. 678.
4. **Limitation of Actions.** The defense of the statute of limitations, if not raised either by demurrer or answer, is waived.
5. **Lis Pendens.** "From the time of filing such notice (*lis pendens*) the pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken in said action after the filing of such notice to the same extent as if he were made a party to the action." Comp. St. 1929, sec. 20-531.
6. ———. "The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in land which would preclude the court from granting the relief sought." *Merrill v. Wright*, 65 Neb. 794, 91 N. W. 697.
7. ———. If a purchaser or encumbrancer, subject to *lis pendens*, becomes a party to the action, he may be entitled to question the plaintiff's right to recover in the same manner as the original defendant, but is entitled to no greater rights of defense than possessed by the person to whose interests he succeeded.

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

Hoagland, Carr & Hoagland, for appellants.

J. C. Hollman, contra.

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

EBERLY, J.

This is a suit in equity prosecuted in the district court for McPherson county by plaintiff, O. J. Hadley, against defendants Libbie S. Corey, unmarried, "John Doe and Mary Doe, real true names unknown," to secure the foreclosure of a certain real estate mortgage upon certain real estate situated in that county, which, at the time this mortgage was executed, was owned by Libbie S. Corey, named in this proceeding as mortgagor and defendant. It is pleaded in the petition that this mortgage bears date of May 1, 1922, and was given to secure the payment of a certain "real estate first mortgage coupon bond" of $1,200 bearing even date therewith, due and payable, with interest, five years after date; that the real estate mortgage was duly recorded on June 8, 1922, in book 5, at page 516 of the real estate mortgages of McPherson county; that on March 1, 1927, Libbie S. Corey, mortgagor, entered into an extension agreement in writing with the then owner of the above described note and mortgage, by the terms of which Libbie S. Corey covenanted (in part) that, "In consideration of the extension of the time for the payment thereof (the $1,200 coupon bond secured by the real estate mortgage aforesaid), the undersigned hereby * * * agrees with Clarence F. Kenyon, the present owner of the said note or bond and mortgage deed, or his heirs, administrators, executors, successors or assigns, to pay the principal sum due on said note or bond on the first day of May, 1932, and also the interest thereon at the rate of five per cent. per annum, payable semiannually, during the said term of extension, according to the tenor and effect of the ten extension coupons hereto attached; * * * And all conditions, covenants and agreements contained in said note or bond or mortgage

deed securing the same are hereby continued in force and ratified, except as to the time of payment, and except that the place of payment and rate of interest shall be as stated herein, and this agreement shall bear the same relation to the original note and mortgage and be construed therewith as though its terms had been originally a part thereof."

It also appears that this extension agreement, together with ten extension coupons attached, had been accepted and received by Clarence F. Kenyon, and that all such extension coupons had been duly paid excepting the tenth; that the default alleged consisted of the failure to pay the tenth coupon note in the sum of $30, and the sum of $1,200 due upon the principal note thus extended, together with interest on each instrument from May 1, 1932, as therein provided, together with the defaults by defendants in payment of taxes assessed on the mortgaged premises, which it was charged constituted a breach of the conditions of said mortgage extended, and entitled the plaintiff to a decree of foreclosure and sale as prayed. The petition also alleges that this extension agreement was filed for record in the office of the county recorder of McPherson county, Nebraska, on August 25, 1937, at 9 o'clock a. m., in book 7, at page 465 of the real estate mortgage records of said county, and that on the same day the original mortgage was rerecorded in book 7, at page 463 of the real estate mortgage records of said county. Mesne assignments in writing are properly pleaded, by the terms of which the plaintiff herein became vested with all the rights and interest originally granted by the terms of the original mortgage and all the rights created by the extension in writing hereinbefore referred to. True copies of the original mortgage and coupon bond secured by the same, the written extension thereof, and the several mesne assignments thereof, are all attached to and constitute a part of the petition filed in this case. In addition, it is alleged in this petition that the defendant Libbie S. Corey, by the terms of said real estate mortgage, as party of the first part, covenanted and agreed with the mortgagee, as party of the second part, to

pay all taxes assessed upon the mortgaged premises, including assessment for water rights, "and all taxes or assessments of any nature whatever levied upon this mortgage, or the debt secured by this mortgage, or against said party of the second part, or the owner of said bond, on account of this indebtedness, before the same becomes delinquent." By the terms of said mortgage it was further agreed by said Libbie S. Corey that the mortgagee therein named, as party of the second part, its successors or assigns, "may pay said taxes and assessments for water rights, redeem said premises from tax sale * * * on failure of the party of the first part to do so, and all moneys so advanced, with interest at the rate of ten per cent. per annum thereon, shall be repaid by said party of the first part and be secured by this indenture."

The petition also alleged "that said defendants have also failed and neglected to pay the taxes regularly and lawfully assessed against said mortgaged premises for the years 1931, 1932, 1933, 1934, 1935 and 1936, and have suffered the same to become delinquent and the county treasurer of said McPherson county, Nebraska, regularly and lawfully advertised said premises for sale for said taxes and sold the same according to law, and on the 4th day of November, 1937, plaintiff herein was forced to redeem said mortgaged premises from said tax sale for the above mentioned taxes and in order to do so was required to pay to said county treasurer of McPherson county, Nebraska, the sum of $183.15;" and in effect that there is due plaintiff upon the taxes thus paid, satisfied and discharged the sum of $183.15 with interest at 10 per cent. per annum from November 4, 1937, which is a lien on the mortgaged premises to be satisfied by the foreclosure and sale thereof.

It also appears that on December 18, 1937, at 4 o'clock p. m., there was filed in the office of the county clerk of McPherson county a *lis pendens* in due form, giving notice of the pendency of the above entitled action. It also is disclosed that an alias summons for John B. Newburn was issued by the clerk of the district court for McPherson

county to the sheriff of Logan county, Nebraska, in the present action on January 12, 1938, and by that officer served on such Newburn on January 15, 1938. So far as disclosed by the transcript, no amendment to plaintiff's petition was made in reference thereto.

To this petition the defendant Libbie S. Corey, on February 5, 1938, filed a general demurrer, as to which no ruling appears to have been made by the district court.

On July 14, 1938, the record discloses that, by stipulation of the parties, "the motion of the defendant Libbie S. Corey and the demurrer of the defendant John B. Newburn" were heard by the court and judgment entered finding the motion of Libbie S. Corey had been "satisfied," and the demurrer of John B. Newburn was "overruled," and defendants granted 30 days in which to answer. But neither the "motion" of defendant Corey nor the "demurrer" of John B. Newburn appear in the transcript. Thereafter on September 12, 1938, defendants Newburn and Corey filed their separate answers. To these answers separate replies were filed by the plaintiff.

On the issues thus joined, a trial of the merits of this cause was had in the district court for McPherson county. On the 13th day of October, 1938, the district court found and adjudged that, upon consideration of the pleadings and process, "due and legal service has been had upon all of the defendants and that all of said defendants have appeared and answered;" and "finds generally in favor of the plaintiff and against each and all of the defendants;" and thereupon entered a decree of foreclosure and sale as prayed for by plaintiff. Defendants Libbie S. Corey and John B. Newburn appeal.

The evidence in the record fully sustains the allegations of the petition, and clearly establishes that defendant Libbie S. Corey was the owner in fee simple of the mortgaged premises on the date this action was instituted and the *lis pendens* filed. Waiving consideration of all questions of pleading involved, the essentials of defendant Corey's defense are that plaintiff's action is barred by section 20-202,

Comp. St. 1929. The applicable provision of that statute is, viz.:

"At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be presumed to have been paid, and the mortgage and the record thereof shall cease to be notice of the mortgage as unpaid and the lien thereof shall then cease absolutely as to subsequent purchasers and encumbrancers for value; said period of ten years shall not be extended by nonresidence, legal disability, partial payment, or acknowledgment of debt."

This statutory provision is remedial in character.

In *Steeves v. Nispel,* 132 Neb. 597, 606-609, 273 N. W. 50, it is stated:

" 'In construing a remedial statute three things must be considered, viz.: The old law, the mischief, and the remedy.' *Clother v. Maher,* 15 Neb. 1, 16 N. W. 902. See, also, *Harmon v. City of Omaha,* 17 Neb. 548, 23 N. W. 503.

"But, 'In order to ascertain the proper meaning of a statute, later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.' *Campbell v. Youngson,* 80 Neb. 322, 114 N. W. 415.

"So too, all statutes *in pari materia* must be taken together and construed as if they were one law, and, if possible, effect be given to every provision. *Hendrix v. Rieman,* 6 Neb. 516; *State v. Babcock,* 21 Neb. 599, 33 N. W. 247; *Dawson County v. Clark,* 58 Neb. 756, 79 N. W. 822; *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Neb. 689, 82 N. W. 26; *Logan County v. Carnahan,* 66 Neb. 685, 95 N. W. 812; *State v. Royse,* 71 Neb. 1, 98 N. W. 459; *State v. Omaha Elevator Co.,* 75 Neb. 637, 106 N. W. 979.

"Previous to April 1, 1925, the limitation prescribed for civil actions of this nature was: 'An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereof, can only be brought within ten years after the cause of action

shall have accrued.' Comp. St. 1922, sec. 8507. In this connection, section 20-216, Comp. St. 1929, which has been retained unchanged since 1866, provides: 'In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise.' These two sections were before this court in *Teegarden v. Burton*, 62 Neb. 639, 87 N. W. 337, and the following principles were there announced:

" 'In determining the period of limitation in an action to foreclose a real estate mortgage given for the security of a promissory note, section 6 of the Code of Civil Procedure (now section 20-202, Comp. St. 1929) should be construed in connection with section 22 of such Code (now section 20-216, Comp. St. 1929).'

"And, 'Where, after the maturity of a note secured by a real estate mortgage, interest payments are made annually on such note, a right of action accrues on the mortgage at any time within ten years after the date of the last payment on said note.'

"See, also, *Gillilan v. Fletcher*, 80 Neb. 237, 114 N. W. 161; *McLaughlin v. Senne*, 78 Neb. 631, 111 N. W. 377.

"In *McLaughlin v. Senne, supra*, the additional principle was also approved, viz.: 'Ordinarily the owner of the equity of redemption has authority to bind the property by such payment, and a payment by him on the mortgage debt before the statute has run is binding on the property, and tolls the statute as against a subsequent mortgagee with notice of the prior mortgage.' * * *

"But we are here concerned with a written extension agreement (made by the defendant), the terms of which constitute a promise to pay the indebtedness secured and evidenced by the note and mortgage in suit. The language of the 1925 amendment obviously does not include it, nor are the terms employed by this legislation repugnant to

that portion of section 20-216, Comp. St. 1929, which, in effect, provides: 'In any cause founded on contract, when * * * (as to) an existing liability, debt, or claim, * * * any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such * * * promise.' "

But the language of section 20-202, Comp. St. 1929, hereinbefore quoted, construed as authorities heretofore cited require, is necessarily limited in its application to "subsequent purchasers and encumbrancers for value." The defendant Corey, during the entire period covered by the transaction down to the time of the commencement of the suit, has been continuously the owner in fee of the mortgaged premises, or, as sometimes stated, the owner of the equity of redemption. As such, she is not a "subsequent purchaser or encumbrancer for value." Therefore, not being within the protection of this statute, the district court properly denied her any relief based thereon. *Steeves v. Nispel,* 132 Neb. 597, 273 N. W. 50; *Bliss v. Redding,* 121 Neb. 69, 236 N. W. 181; *Tynon v. Bliss,* 121 Neb. 80, 236 N. W. 184; *Hatch v. Ely,* 131 Neb. 882, 270 N. W. 480; *Wasson v. Beekman,* 188 Ark. 895, 68 S. W. (2d) 93; *T. A. Hill State Bank of Weimar v. Schindler,* 33 S. W. (2d) (Tex. Civ. App.) 833; *Head v. Oldham Bank & Trust Co.,* 249 Ky. 292, 60 S. W. (2d) 621; *Hastings v. Wise,* 91 Mont. 430, 8 Pac. (2d) 636.

The substantial contentions made by defendant Newburn, as presented by the briefs in his behalf, are based upon section 20-202, Comp. St. 1929. He asserts that thereunder the mortgage and note secured by the same, set forth in the petition, "was outlawed May 1, 1932;" that, therefore, a five-year lease of the mortgaged premises executed by defendant Libbie S. Corey on July 14, 1937, to defendant Newburn, and the quitclaim deed conveying the mortgaged lands to Newburn, signed and acknowledged by Libbie S. Corey on January 14, 1938, were each senior and superior to any rights created by the alleged "outlawed note and mortgage" set forth in plaintiff's petition.

We do not overlook the contention that there is no evidence of valid mesne assignments from Clarence F. Kenyon to the plaintiff. The record wholly fails to sustain this contention. In addition, the original mortgage, notes, extension agreement, and assignments were produced by the plaintiff and received in evidence, all of which fully sustain his claim of ownership. Prior authorization of this sale and transfer by the executors or administrators by a court of competent jurisdiction is not essential to the validity thereof, upon collateral attack. *Edney v. Baum,* 70 Neb. 159, 97 N. W. 252; *Battey v. Battey,* 94 Neb. 729, 144 N. W. 786.

The defendant, relying on the statute of limitations (Comp. St. 1929, sec. 20-202) as the foundation or basis of his defense, was charged with the duty of properly pleading the same.

"The defense of the statute of limitations, if not raised either by demurrer or answer, is waived, and when sought to be raised by answer, in order to preserve the defense, the answer must be good against demurrer." *Scroggin v. National Lumber Co.,* 41 Neb. 195, 59 N. W. 548. See, also, *Taylor v. Courtnay,* 15 Neb. 190, 16 N. W. 842; *Atchison & N. R. Co. v. Miller,* 16 Neb. 661, 21 N. W. 451; *Barnes v. McMurtry,* 29 Neb. 178, 45 N. W. 285; *Alexander v. Meyers,* 33 Neb. 773, 51 N. W. 140; *Dufrene v. Anderson,* 67 Neb. 136, 93 N. W. 139; *Pinkham v. Pinkham,* 61 Neb. 336, 85 N. W. 285; *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.,* 128 Neb. 779, 260 N. W. 172.

The answer of defendant Newburn contains no general denial of the allegations of plaintiff's petition, but is made up of four independent paragraphs. The first two paragraphs are each, in effect, a general demurrer to the petition as an entirety. Without consideration of their sufficiency as general demurrers, it may be said that they set forth no ultimate facts, but challenge the sufficiency of the facts alleged in the petition as an entirety to justify the granting of relief to plaintiff.

Section 20-811, Comp. St. 1929, sets forth the require-

ments of answers under the Civil Code of Nebraska. In the construction of this section we are committed to the rule, viz.:

"A demurrer to the petition is not, by the provisions of our code of practice, a proper part of the answer filed in a case, and should be disregarded." *Fidelity & Deposit Co. v. Parkinson,* 68 Neb. 319, 94 N. W. 120. See, also, *Damicus v. Kelly,* 120 Neb. 588, 234 N. W. 416; *City of Schuyler v. Verba,* 120 Neb. 729, 235 N. W. 341.

"The sufficiency of a petition cannot be raised by incorporating a demurrer in the answer." *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678.

The third paragraph of this answer includes an attack on the validity of the mesne assignments by which the plaintiff became vested with the ownership of the instruments in suit. This matter we have already considered and determined adversely to the appellants.

In the fourth paragraph of this answer there is set forth that, after said note and mortgage were outlawed "and while this said defendant was in possession of said section 34 with a lease therefor, this said defendant entered into a five-year farm lease dated the 14th day of July, 1937, extending said lease from the 1st day of May, 1937, to the 1st day of May, 1942," duly executed and acknowledged by defendant Corey; that defendant also purchased said land from defendant Corey who conveyed the same to him by quitclaim deed dated the 14th day of January, 1938, which conveyed "all of said land and the title thereto to the said defendant John B. Newburn," and further alleges, in effect, that the rights and title created and vested in said Newburn "is superior to any claim or lien of the said plaintiff in this foreclosure suit." It is obvious, therefore, from a careful reading of the fourth paragraph of defendant's answer that the defense of the statute of limitations is not in any manner raised therein. Where an answer seeks to avoid the operation of the statute of limitations, it must set forth by distinct averments the facts relied upon. In the instant case, there was no compliance with this Code

requirement, neither does the bill of exceptions disclose any objection to the introduction of evidence on that ground or that the facts alleged were insufficient to constitute a cause of action. In the review of a case, the statute of limitations will not be regarded as a defense unless pleaded or otherwise relied on in the trial court.

It will be remembered that this suit was instituted and commenced on December 18, 1937, and on the same day a proper notice of *lis pendens* was duly filed, indexed, and recorded in the office of the county clerk of McPherson county wherein the premises in suit are situated. An alias summons, bearing date of January 12, 1938, was personally served on defendant Newburn in Logan county on January 15, 1938. Defendant Newburn is claiming title to the premises in suit by virtue of a quitclaim deed (exhibit N), signed and acknowledged by Libbie S. Corey before a notary public in Los Angeles county, California, on January 14, 1938. Thereafter this deed was transmitted to defendant Newburn at Stapleton, Logan county, Nebraska, by air mail, and recorded in McPherson county on February 5, 1938. Newburn does not testify as to when the deed was actually received by him. As to the consideration paid therefor, he testifies, viz.: "Q. What consideration did you pay for the land involved in the quitclaim deed, in 'exhibit N' from Libbie S. Corey? A. I paid $5 at the time I received the deed, and I was to pay $50 a year as long as the lease I had on the land ran, which I believe was three years more, if I remember right, and after that I was to pay her $50 a year as long as she lived. That wasn't in the lease, that was in letters I had in the correspondence which we had with them."

It may be said that the issuance and service of the alias summons in the instant case upon defendant Newburn was wholly unnecessary. Section 20-531, Comp. St. 1929 provides in part, viz.:

"From the time of filing such notice (*lis pendens*) the pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby, and

every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken in said action after the filing of such notice to the same extent as if he were made a party to the action." See *Johnson v. Olson,* 132 Neb. 778, 273 N. W. 201.

We are committed to the doctrine, viz.: "The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in land which would preclude the court from granting the relief sought." *Merrill v. Wright,* 65 Neb. 794, 91 N. W. 697. See, also, *First Nat. Bank v. Young,* 124 Neb. 598, 247 N. W. 586; *Lincoln Rapid Transit Co. v. Rundle,* 34 Neb. 559, 52 N. W. 563; *Gwynne v. Goldware,* 102 Neb. 260, 166 N. W. 625.

"The alienee of the property in litigation cannot establish himself by means of the statute of limitations." 17 R. C. L. 1032, sec. 29.

"In a legal sense the term (*lis pendens*) is equivalent to the maxim that pending the suit nothing should be changed (pendente lite nihil innovetur); and the doctrine of *lis pendens* is that one who acquires any interest in property during the pendency of litigation respecting such property from a party to the litigation takes subject to the decree of judgment in such litigation and is bound by it." 18 Standard Ency. of Procedure, 1087. See, also, 38 C. J. 49.

If an alienee, subject to *lis pendens,* becomes a party to the action, he may be entitled to question plaintiff's right to recover in the same manner as the original defendant. Such party, however, occupies the same position as the original defendant and is entitled to no greater rights of defense. 38 C. J. 64.

It follows that as to all claims of the defendant Newburn based upon or arising out of the quitclaim deed which was obtained, executed and delivered after the commencement of the suit against the defendant Corey and the filing of notice of *lis pendens* therein, the same are subordinated to

the proceeding and determined by the judgment entered herein against said defendant Corey.

For the reasons hereinbefore set forth, the judgment entered by the district court is correct, and it is

AFFIRMED.

AMANDA OLSON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

289 N. W. 356

FILED NOVEMBER 28, 1939. No. 30682.

1. **Appeal.** An instruction to the jury, closing with these words: "The burden then shifts to the defendant street railway company either to deny the unusual motion or jerk or to otherwise explain or excuse it," is prejudicially erroneous.
2. **Negligence.** The burden of proving defendant's negligence rests upon the plaintiff, and never shifts to the defendant at any stage of the case.

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

Kennedy, Holland, De Lacy & Svoboda, for appellant.

Reed, Ramacciotti, Robinson & Hruska and *E. L. Marks, contra.*

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

PAINE, J.

This is an action for personal injuries sustained by the plaintiff in a fall in a street car, upon which she was a passenger. The jury returned a verdict of $4,000, upon which a judgment was entered. Motion for new trial being overruled, the defendant appealed, and asked for reversal upon the ground set out in twelve assignments of error.

The accident occurred at Fortieth and Cuming streets in the city of Omaha on January 6, 1938, about 6 o'clock in the evening. The street car was standing on Fortieth street, headed north, but about to turn west on Cuming street,

when plaintiff got on the car, and handed the motorman, who also acted as conductor, her transfer.

The plaintiff, who was 61 years of age, took hold of an iron stanchion, and started to go back in the car, the floor of which was about eight inches higher than the floor in the vestibule. Plaintiff anticipated the usual movement of the car in starting up to go around a sharp curve, but after it had gone a few feet there was a sudden and violent stop, which threw her backward, so that her head was down underneath the driver's seat. She broke both bones in her right arm and shattered the elbow joint. After being in a hospital a couple of weeks, she was subjected to an operation to remove pieces of broken bones. After this, she was kept in casts for six or seven weeks, and many adhesions formed around the joint, and there is no revolving motion in the forearm, and a 50 per cent. limitation in flexion and extension. The condition is permanent. She suffered a great amount of pain. She cannot do many things she could do before with this right arm. The hospital and medical bills amounted to $400. No very serious attack is made on the amount of the verdict.

To reverse this case, the defendant insists that prejudicial error occurred in the court giving instruction No. 3, requested by the plaintiff, and reading as follows: "You are instructed that where a street car passenger shows that he or she was injured by reason of a sudden and unusual movement, jerking, or lurch of the car, an inference of negligence arises against the street railway company. You are further instructed that it is not necessary for the plaintiff under these circumstances to show what caused the unusual motion or jerk; it is sufficient for the plaintiff to show that there was such an unusual movement, jerk, or lurch in the operation of the street car, and that this movement was the cause of the injuries complained of. *The burden then shifts to the defendant* street railway company either to deny the unusual motion or jerk or to otherwise explain or excuse it." Defendant insists that the vital defect is that it tells the jury in the last sentence that the burden

shifts to the defendant to deny the unusual motion or jerk, or to otherwise explain it or excuse it.

In the case of *Mercer v. Omaha & C. B. Street R. Co.*, 108 Neb. 532, 188 N. W. 296, paragraphs 5 and 6 of the syllabus read as follows:

"5. The burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging such negligence; and a proper application of the doctrine *res ipsa loquitur* does not change said rule.

"6. 'The giving of an instruction which places the burden of proof to establish some of the facts put in issue by pleadings on the wrong party is reversible error.' *Omaha Street R. Co. v. Boesen,* 68 Neb. 437."

In *Lincoln Traction Co. v. Webb,* 73 Neb. 136, 102 N. W. 258, it states in the fourth paragraph of the syllabus: "But where negligence is proved * * * the carrier is then required to show that it was in no wise at fault, or that the plaintiff was guilty of some negligent act which contributed to the injury complained of." But, as a part of this opinion, the fourth paragraph of the syllabus in *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672, 74 N. W. 1074, is disapproved, which paragraph reads: "In an action for damages for an injury received while being transported by a common carrier, the injury being shown, the burden of proof is upon the carrier to show that it was in no wise at fault."

The plaintiff offered the objectionable instruction No. 3 on her own motion, and the court gave it in the exact form in which it was offered. To avoid a reversal because of the error in this instruction, the plaintiff calls our attention to the fact that the court in two other instructions referred to the matter of the burden of proof. We find that in instruction No. 2 the court did say this: "And if it is charged by reason of negligent operation of a car containing passengers that one of them has been injured, then the burden is upon the ones so charging to prove such fact of negligent operation that proximately resulted in such injuries, before

the jury can conclude that there was a negligent operation."

And again, in instruction No. 4, the court stated generally that, before the plaintiff would be entitled to recover a verdict, she must establish by a preponderance of the evidence certain definite acts of negligence, and concluded: "But should the plaintiff not so establish as she is herein required to do as a condition precedent to being entitled to recover, then you will find generally for the defendant." But nowhere do we find the usual instruction placing the burden of proof generally upon the plaintiff.

Taking all of the instructions as a whole, it does not appear to the court that the objectionable statement in instruction No. 3 is modified or corrected in any other instruction.

The rules of law which the court should give to the jury in its instructions in reference to negligence are simple, and should state to the jury that the burden of proving defendant's negligence rests upon the plaintiff, and that this burden of proof never shifts to the defendant, but rests at every stage of the case upon the plaintiff; and it is well to add this fact, that negligence is never presumed, but must be proved.

For the prejudicial error in instruction No. 3, the judgment is reversed and cause remanded for a new trial.

REVERSED.

SIMMONS, C. J., dissenting.

I agree with the finding of fact set out in the opinion of the majority, in that the evidence established, and the jury found, that plaintiff was a passenger of the defendant; that the street car had started in its normal course; that there was a sudden and violent stop that caused the plaintiff to fall, and that injury to the plaintiff resulted.

I do not agree with the conclusions of law set out in the majority opinion. The case is reversed because of the giving of instruction No. 3 requested by the plaintiff. An analysis of that instruction shows that the court told the jury that, where a street car passenger is injured as a result of a sudden movement or lurch of the car, an *inference*

of negligence arises against the street car company; that it is not necessary for the plaintiff to show *what caused the unusual jerk*; that it was sufficient for the plaintiff to show that there was an unusual movement or lurch of the car, and that such movement caused the injury complained of. *The majority opinion does not object to that part of the instruction.* My examination of the holdings of this court, to which reference will be made herein, indicates that it is a proper statement of the law. The objection is made to that part of the instruction which states that, after plaintiff has made the showing set out in the first part of the instruction, "the *burden then shifts* to the defendant * * * either to deny the unusual motion or jerk or to otherwise explain or excuse it." The instruction does not say that the burden of proof shifts, nor that the defendant has a general burden. The burden is limited to either denying, explaining, or excusing the unusual motion or jerk. The defendant is not by the instruction or otherwise required to carry that burden by a preponderance of the evidence. As I see it, the error of the majority opinion is in the assumption that the use of the words "burden shifts" is equivalent to the statement that the "burden of proof shifts." The cases relied upon by the majority are cases dealing with the *burden of proof*. There is a difference between the burden of proof and the burden of the evidence. Briefly, the difference is that the burden of proof, correctly speaking, means the necessity of establishing certain facts. "Burden of evidence" means the necessity which rests upon a party, at any particular time during the trial, either to create a *prima facie* case in his own favor or to overthrow one which is created against him. 22 C. J. 68; 20 Am. Jur. 134, sec. 131.

The burden of evidence is on the party against whom the decision of the tribunal would be given if no further evidence were introduced. At the beginning of the trial, the burden of proof and the burden of evidence are on the same party; the burden of the evidence so continues until the party with the burden of proof establishes a *prima*

facie case, and then the burden of evidence shifts to the party who has not the affirmative of the issue, although the position of the *burden of the proof is in no wise affected.* 22 C. J. 76; 20 Am. Jur. 134, sec. 132.

While the existence of a presumption of law does not affect the burden of proof, yet an inference of fact which the law assumes to be correct establishes, in the absence of evidence to the contrary, a *prima facie* case, and then the *burden of the evidence* shifts to the party to overcome that inference. 22 C. J. 79, 20 Am. Jur. 136, sec. 133.

Here, at the beginning of the trial, the burden of proof and the burden of evidence were upon the plaintiff to prove her case. That case is established when she proved that she was defendant's passenger; that there was the sudden, unusual and violent jerking of the car which caused her to fall, with the resulting injury. The instruction so states. An inference of negligence then arose which shifted the *burden of the evidence* to the defendant to overcome that inference of negligence, and the instruction properly advised the jury that, after the plaintiff had established these facts, that burden then shifted to the defendant either to deny the jerking of the car or to explain or excuse it. The reason for that rule is clearly stated in the decisions of this court to which I refer herein. It is based partly upon the liability of the defendant as a common carrier and also upon the proposition that the cause of the jerking or stopping is a matter peculiarly within the knowledge of the defendant, and it has the burden of explaining it. See 22 C. J. 81; 20 Am. Jur. 134, sec. 132.

In this particular instance, in all probability, the only person who knew what caused the jerking of the car was the defendant's motorman, and the instruction put the *burden of the evidence* upon the defendant to explain or excuse the jerking and stopping of the car. It did not shift the burden of proof. It put no other burden upon the defendant.

The majority opinion cites the case of *Mercer v. Omaha & C. B. Street R. Co.*, 108 Neb. 532, 188 N. W. 296, and

quotes from the syllabus in that case. Examination of that case reveals that this court there recognized the exact distinction which I have pointed out herein, that where a *prima facie* case of negligence is established, the defendant must produce evidence to rebut the presumption, but that the burden of proof as such remained on the plaintiff.

The *Mercer* case cites and discusses with approval *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270. In that case, the court pointed out that the instruction there under consideration told the jury that the fact that the plaintiff was injured by the derailing of a car did not raise a presumption of negligence against the transit company, and that it put a burden upon the plaintiff to prove *the cause of* the derailment of the car which produced the injury. The instruction was held to be erroneous. There the third paragraph of the syllabus is as follows:

"Where a street railway car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the *burden is on it* to rebut that presumption."

On page 900 the opinion states: "Here the jury were told in effect that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by any one, nor is there a word of evidence, that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. *He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him.* This was enough. *The burden was then on the carrier to rebut this presumption of negligence* by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented."

That decision is clearly one sustaining the instruction given by the trial court. It has been repeatedly referred to with approval by this court down to and including the *Mercer* case, relied upon by the majority opinion.

Another case cited with approval in the *Mercer* case is that of *Lincoln Traction Co. v. Webb,* 73 Neb. 136, 102 N. W. 258, where the fourth paragraph of the syllabus is:

"But where negligence is proved, or where from the nature of the accident which was the proximate cause of the injury negligence is presumed, *the carrier is then required to show* that it was in no wise at fault, or that the plaintiff was guilty of some negligent act which contributed to the injury complained of."

This court there recognized the rule that the burden of proof never shifts. In that case, it was held that the plaintiff had to prove that her fall was the result of a sudden starting of the car when she was trying to alight. The court held that the basis of the presumption in actions against carriers for personal injuries was not the mere fact of the injury, but the act of the defendant which caused the injury, and when that act was shown, that the plaintiff had established a *prima facie* case. The court then referred to the *Spellman* case and said on page 140: "The *burden was then on the carrier to rebut this proof of negligence* by showing that it was produced by causes wholly beyond its control." Further, on page 141, quoting from *Omaha Street R. Co. v. Boesen,* 68 Neb. 437, 94 N. W. 619: "*It will then devolve upon the company* to show that the injury occurred without any negligence on its part, and that by the exercise of the highest degree of care it could not have prevented such injury." Again, on page 143, the "presumption arises from the inherent nature and character of the act."

The majority opinion cites the *Webb* case, apparently with approval, but says that a statement in the fourth paragraph of the syllabus in *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672, 74 N. W. 1074, was disapproved. The body of the opinion shows that the rule there criticized was *modified* so as to conform to the rule announced in the *Webb*

case. Instructions No. 2 and No. 3 given by the court and set out herein definitely meet the rule as so modified.

In the concurring opinion in the *Webb* case (73 Neb. 136, 145) Chief Justice Holcomb further developed this same principle, and stated that in the case at bar the injury was alleged to have been caused by the street car's starting while the passenger was alighting, and that by reason thereof she was thrown to the pavement and sustained the injuries; when that fact was established, then a presumption of negligence arose, and that it "*would devolve upon the carrier* to show that it exercised that degree of skill, diligence and foresight for the safety of its passengers which the law charges it with." Further, on page 147, he states: "When the physical act has been shown or is apparent, *and is not explained* by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact." Citing a Colorado case, *Denver & R. G. R. Co. v. Fotheringham,* 17 Colo. App. 410, 68 Pac. 978, he said: "When such proof is made, the burden is transferred to the carrier to show its own freedom from fault." He stated further: "The true rule seems to be that, where a passenger sustains an injury growing out of the acts of the carrier's servants or employees, or because of any defect in machinery, coaches or roadway, or any of the means, appliances or agencies connected with or employed in the transportation of the passenger, the presumption arises that the injury was caused by the negligence of the carrier, and it *then devolves upon it to explain* the act and relieve itself of the imputation of negligence thus cast upon it, the negligence complained of being the proximate cause of the injury inflicted."

In the case of *Lincoln Traction Co. v. Shepherd,* 74 Neb. 369, 374, 104 N. W. 882, 107 N. W. 764, on rehearing Judge Sedgwick states that, when a passenger is injured through some "defect in the appliances of the carrier, or some act that is done by its employees in the conduct of the business, a *presumption of negligence* on the part of the carrier arises, and this presumption is sufficient, in the absence of

any other evidence upon the subject, to supply the proof demanded of the plaintiff upon that point and establish *prima facie* the negligence of the carrier. *If unexplained by the carrier,* no further proof upon that point is necessary to establish his negligence. But if evidence appears in the plaintiff's own testimony, or is offered by the defendant, sufficient to rebut this presumption, then the negligence of the carrier is not established by the presumption." Further, on page 377: "The sudden starting of the car, in the manner and under the circumstances alleged, while the plaintiff was properly on the steps and in the act of stepping to the ground, being the act of the carrier, would, if the cause of the accident, furnish a *presumption of negligence* on the part of the carrier."

All these cases are cited with approval by this court in *Mercer v. Omaha & C. B. Street R. Co., supra,* upon which the majority relies as authority for reversing this case. All of them clearly establish that all that the plaintiff is required to do is to prove that she is a passenger; that she was injured by a sudden and unusual jerking of the defendant's car; that when those things are proved, a presumption of negligence arises which must be overcome by proof; that if the plaintiff's proof does not overcome that presumption, then *the burden of evidence* is upon the defendant to establish that fact. It is not a case of shifting the burden of proof. It is a shifting of the burden of the evidence to overcome a presumption.

The case of *City of McCook v. McAdams,* 76 Neb. 1, 7, 11, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596, presents a somewhat similar situation. In that case the city of McCook was sued for damages alleged to have been occasioned by the failure of the city to keep in repair an artificial drainage system constructed by it, whereby surface water was diverted during a rainstorm and cast upon the plaintiff's premises. The city pleaded a general denial, and that the storm was of such unprecedented character as to constitute an act of God. Three opinions were written on the matter. The defendant complained of an instruction on

the ground that it stated that on certain questions the burden of proof shifted to the defendant. The court points out on page 6 of the official report that the court first instructed the jury that the burden of proof was on the plaintiff to establish the material allegations of his petition. That was followed by the portion of the paragraph of which the complaint was made by the defendant, which was: "This burden, however, does not remain with the plaintiff upon a question of affirmative defense, and the point at which the *burden shifts* to the defendant will be later pointed out in these instructions." The court there in the opinion by Commissioner Albert stated: "It is clear that the court did not instruct, and the jury could not have understood, that the burden of proof as to any issue tendered by the petition shifted, but merely that the burden of proof rested upon the defendant to establish its affirmative defense."

The case is again reported in an opinion by Commissioner Albert on page 7, and in an opinion by Judge Letton on page 11. It was there held that an instruction was not erroneous which told the jury that, if they found that the defendant was guilty of negligence in failing to keep the drainage system in repair, the burden of proof was then upon the defendant to establish by a preponderance of the evidence that the storm was of sufficient violence to have caused the damage sustained by the plaintiff without the concurrence of such negligence.

While the burden there was put upon the defendant to establish its affirmative defense, statements of the court in the final determination of the case are illuminating upon the issue here presented. We quote from the opinion of the court:

"While the burden is on the plaintiff to show that his loss is the result of the defendant's negligence, when he has established the fact of negligence on the part of the defendant and that his loss occurred directly therefrom, he has met all of the conditions the law imposes upon him in order to recover, before any evidence is produced by the de-

fendant. * * * When the plaintiff has closed his case, the defendant may show that it was not guilty of the negligent act complained of by either direct or indirect proof which negatives the proof offered by the plaintiff as to the fact of its negligence or the plaintiff's damage. * * * While not confessing the cause of action, they seek to avoid its effect by proof of other and new matter which bars the plaintiff's right to recover, and they must be established by the defendant in order to overcome the evidence on the part of the plaintiff, which, *unexplained,* would establish the defendant's negligence. * * *

"In the former opinion a distinction is sought to be drawn between such defense if pleaded by a common carrier and if offered by another, but we see no reason for the distinction, provided that the person seeking to assert it stands in a similar relation to the person injured. A carrier has undertaken a special duty to carry safely. If he fails to do so *a presumption arises against him, which he must explain away.* In this case the city had constructed a drainage system which the jury found it had neglected to keep in repair, and that by its negligence the plaintiff apparently was injured. In the one case, the presumption took the place of evidence against the carrier; in the other, the jury found the facts against the city as to neglect to keep up the ditches. *The burden then rests alike on the carrier and the city to produce proof* to show that its negligence was not the proximate cause of the loss or injury, but that the loss was attributable to an independent cause without the concurrence of its negligence, or, in other words, that, even if it had not been negligent, the injury would have occurred. * * *

"This view does not conflict with the doctrines of the cases of *Omaha Street R. Co. v. Boesen,* 74 Neb. 764, or *Lincoln Traction Co. v. Shepherd,* 74 Neb. 369, 374, for the burden of proof as to the existence of negligence still rests upon the plaintiff throughout the trial; * * * The burden was placed upon the plaintiff by the instruction to prove the defendant's negligence of duty and his damage. After

he had made his case, in order to escape the logical result of this proof, the defendant was required to show that the loss was inevitable under the circumstances. We think this was proper. *After its negligence was established it had the laboring oar.* The burden did not rest upon it to disprove negligence, but upon the plaintiff to prove it, but, negligence being proved against it, it *did have the burden* of showing an independent cause for the injury, by reason of which it was released from liability."

In my opinion, the above authorities clearly establish that the jury were properly instructed as to the law of the case and as to the burden of the evidence which rested upon the two parties.

The majority opinion, after holding that the instruction is erroneous, states that the objectionable feature has not been corrected in any other instruction. The majority opinion quotes a part of instructions No. 2 and No. 4, which were given by the court on its own motion.

Instruction No. 2 in full is as follows:

"Street car companies by their servants are required to operate their cars for the benefit of their passengers with the highest degree of care and skill reasonably possible, and of which that operation is susceptible, and are liable for the slightest negligence that proximately brings about in such operation injuries to passengers. However, *they are not liable* for injuries to passengers for any such movements of their cars, which movements of such cars containing passengers are fairly and reasonably necessary in the operation of cars. Because passengers are injured by falling in cars, is not of itself proof of any negligence in the operation of the cars. And if it is charged by reason of negligent operation of a car containing passengers that one of them has been injured, then *the burden* is upon the ones so charging to prove such fact of negligent operation that proximately resulted in such injuries, before the jury can conclude that there was a negligent operation. It is the duty of those operating cars to start and stop the same without unnecessarily jerking or lurching the same, and should the

passengers while progressing towards a seat be caused to fall or become injured because of a sudden or violent jerking of the car, or violent lurching or violent stopping, which movements were so violent or unusual that it was unnecessary in the car's operation, and proximately resulted in a passenger's personal injury, who was taking due care of herself or himself at the time, then the ones so operating such car would be responsible for such injuries that such passenger might receive as the proximate result of such unusual violent and unnecessary movement of the car."

Instruction No. 3 given by the court on its own motion is:

"It is the *duty* of passengers on street cars on entering and progressing towards a seat to take reasonable care of themselves not to fall by reason of motions of the car that are necessarily made in the operation of the street cars. And should a passenger be injured, even by the motions of the car that are made reasonable and necessary in the operation of such cars on the streets, then there is no responsibility by the street car company in damages to the one injured, no matter how severe the injury may be, as a passenger *assumes* all the risks that are ordinary and usual in the way of jerking or lurching in the ordinary and necessary operation of the car. *The plaintiff must go further* and show that the jerking and lurching movement of the car of which she complains was of an unusual and forcible nature, and so forcible that a reasonable passenger knowing that he must take reasonable care of himself against ordinary movements of cars would not have reasonably anticipated."

Instruction No. 4 given by the court on its own motion is as follows:

"Before the plaintiff will be entitled to a verdict at your hands *she must establish by a preponderance of the evidence* that while she was progressing towards a seat as a passenger, and after the car had been started, that it was suddenly stopped with such unusual violence that she could not have reasonably anticipated, and that was unnecessary

in a reasonable and necessary operation of the car by the car operator. And should she so establish as herein required as a condition precedent to being entitled to a verdict at your hands, then you will return a verdict in some amount for the plaintiff, also including plaintiff's expense for doctors and hospital bills, and with reference thereto you will be guided by another instruction to which your attention will be later directed herein. But *should the plaintiff not so establish* as she is herein required to do as a condition precedent to being entitled to recover, then you will find generally for the defendant. You will not allow the question of sympathy for the plaintiff to have any relation to your conclusion."

Instruction No. 8 is as follows:

"By a preponderance of the evidence is meant not necessarily the greater number of witnesses, testifying on one side or the other, nor to any given fact or set of facts, but by this term is meant rather the weight of evidence, that which on the whole, when fully, fairly and impartially considered by the jury, produces the stronger impression upon the minds of the jury, and is more convincing as to its truth, when weighed against the evidence in opposition thereto."

It is true, as the majority opinion points out, that the court did not give the usual instruction on the burden of proof. It is also true that the defendant did not ask for such an instruction. It is likewise true that the defendant does not assign as an error the failure of the trial court to give such an instruction. It is also true that this court has held: "It is not necessary to use the words 'burden of proof' in instructing a jury. Other words may as well and aptly convey the idea." *Neeley v. Trautwein,* 79 Neb. 751, 113 N. W. 141.

This court in the above case clearly held that the instructions were sufficient if they told the jury where the *onus probandi* lay. I submit that in this case the instructions given by the court to the jury, while they did not use the words "burden of proof," did state to the jury (not once,

but several times) the facts which the plaintiff must prove by a preponderance of the evidence. They defined that "preponderance of the evidence," and also stated at what point in the trial of the case an inference of negligence arose, and when the burden shifted to the defendant to overcome that inference of negligence. I can find nothing in the instructions that would indicate that the jury could possibly have been misled by these instructions. This is particularly true when it is pointed out that the majority opinion does not question the first part of the instruction, nor does the defendant here claim that the first part of the instruction was erroneous. The fact that the court did not elsewhere use the term "burden of proof" is further evidence that the jury could not possibly have been misled by the use of the word "burden" in the instruction about which complaint is made.

I regret the length of this dissent, but it is made necessary by my conviction that the majority opinion is wrong in reversing this case for the reasons given, and, likewise, because of the effect of this decision upon litigation and the rights and liabilities of parties hereafter.

JOHNSEN, J., concurs in the dissent.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, APPELLANT, V. HOME SAVINGS & LOAN ASSOCIATION ET AL., APPELLEES.

288 N. W. 691

FILED NOVEMBER 28, 1939. No. 30542.

1. **States.** An act of the legislature which provided that certain land belonging to the state "is hereby dedicated to the use" of a particular church, "provided, however, that said church shall within one year from the passage of this act use and occupy such lot for church purposes; and provided, further, that if at any time such church shall abandon the use of said lot for the period of one year the title to said lot shall revert to this state," constituted, on acceptance thereof by use and occupancy of the lot for church purposes within a year, a grant of an

estate in fee simple defeasible, with a limitation upon its use.
2. Injunction. The state through its attorney general was entitled to enjoin any threatened diversion, on the part of either the original grantee or a third party, of the use for which such property was granted.

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

Walter R. Johnson, Attorney General, Rush C. Clarke and *John Adams, Jr.*, for appellant.

G. E. Hager, contra.

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

JOHNSEN, J.

The state on the relation of the attorney general brought injunction proceedings against Home Savings & Loan Association and Mount Zion Baptist Church (Colored), of Lincoln, to prevent diversion of the use of a certain lot in the city of Lincoln from that prescribed by chapter 92, Laws 1883. The trial court dismissed the petition, and plaintiff has appealed.

Chapter 92, Laws 1883, reads as follows:

"An Act to dedicate to the use of the Mount Zion Baptist Church (Colored) lot number 6 in block 179 in the city of Lincoln.

"Be it enacted by the legislature of the state of Nebraska:

"Section 1. That lot number six in block one hundred and seventy-nine in the city of Lincoln in this state is hereby dedicated to the use of the 'Mount Zion Baptist Church' (Colored), of the city of Lincoln: Provided, however, that said church shall within one year from the passage of this act use and occupy such lot for church purposes; and provided further, that if at any time such church shall abandon the use of said lot for the period of one year the title to said lot shall revert to this state and be disposed of in the manner provided by law for the sale and

disposition of other lots in the city of Lincoln, belonging to the state.

"Section 2. All acts and parts of acts in conflict with this act are hereby repealed.

"Approved February 24th, A. D., 1883."

Defendant Mount Zion Baptist Church (hereinafter referred to as the church) is a religious association organized in 1883. It has occupied and used lot 6, block 179, for church purposes, ever since the enactment of chapter 92, Laws 1883. It duly erected an edifice thereon, and in 1925 obtained a mortgage loan from defendant Home Savings & Loan Association (hereinafter referred to as the loan association) for $8,000, and executed a purported mortgage on the real estate. The mortgage later was foreclosed, and the loan association took sheriff's deed to the property and obtained an order directing that it forthwith be placed in possession.

When it sought to take possession and to oust the church from the property, the state brought this proceeding. The contention of the state is that the Act of 1883 merely gave the church the use of the property for church purposes, for the benefit of its adherents and the public, and thereby created a religious trust, and that the ousting of the church and the taking of possession by the loan association would be a violation of the dedication and a diversion of the use, which the state was entitled to enjoin.

The loan association's position is that the Act of 1883 was a grant of the fee title to the property, defeasible if the church abandoned the use thereof for a year; that the present suit was accordingly premature; and that the state was in any event estopped to maintain this proceeding.

We are not here concerned with the technical distinction at common law between a dedication and a grant. While the Act of 1883 uses the term dedicate in both its title and body, it must, by modern construction at least, be held to constitute a grant. The question then becomes whether it is a grant of the use or of the fee. It is entitled "An Act to dedicate to the use of the Mount Zion Baptist Church"

the property described. The body of the act provides that such property "is hereby dedicated to the use of the 'Mount Zion Baptist Church,'" if it be used and occupied for church purposes within one year. It will be noted that it is the property itself that is dedicated or granted to the church. True, the grant is made for a particular use or purpose, but there is a sound legal distinction between a grant of property, with a limitation upon its use, and a grant of the use only. If anything further were needed to convince that it was the fee, and not simply the use of the property, which the Act of 1883 intended to grant, it is contained in the proviso in the act that, if the church abandoned the use of the lot for a year, "the title to said lot shall revert to this state." What the church got under the legislative grant, therefore, conditioned, of course, on the use and occupancy of the property within a year for church purposes, was an estate in fee simple defeasible, with a limitation upon its use. 1 Restatement, Property, ch. 4. Whether it was a fee simple determinable or a fee simple subject to a condition subsequent is immaterial to the disposition of this case, and need not now be decided.

In holding that the Act of 1883 was a grant of the title, we have not overlooked the rule that public grants generally are construed liberally in favor of the state and against the grantee. 2 Lewis' Sutherland, Statutory Construction (2d ed.) 1020, sec. 548; 22 R. C. L. 273, sec. 35; *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66, 16 L. Ed. 500; *Langdon v. Mayor, etc., of City of New York*, 93 N. Y. 129. This rule, however, requires a common-sense and not a forced application. A natural and reasonable interpretation must be resorted to in determining the extent of a grant. 59 C. J. 1122. In this connection, it may be pointed out that the legislature has declared generally, without any exception in favor of the state, that "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1929, sec. 76-106. Whether this statute applies to grants by deed only, and not to grants by legis-

lative acts, we need not here consider. It is referred to simply to emphasize the point that, under any circumstances, the court must look at a public grant straight forwardly and give it a natural and common-sense construction. Even without regard to section 76-106, therefore, we are clearly of the view that what the Act of 1883 intended, and appropriately did, was to grant the church a fee simple defeasible title to the property.

The next question is whether the state in this situation can maintain an action to prevent a diversion of the use for which the property was granted. The grant to the church was, of course, for a public purpose and one of public benefit, since it was a grant for charitable purposes. *In re Estate of Douglass,* 94 Neb. 280, 143 N. W. 299. In fact, only on this theory would it be sustainable at all, since the legislature was prohibited from donating public lands to private corporations. Const. 1875, art. III, sec. 18. It constituted, however, a direct grant to the church, and not one in trust, but to a large extent it is subject to the same rules as a charitable trust.

In 2 Restatement, Trusts, Introductory Note, Charitable Corporations, p. 1093, it is said:

"Property may be devoted to charitable purposes not only by transferring it to trustees for such purposes, but also by transferring it to a charitable corporation for any of the purposes for which the corporation is organized or for a particular one of its purposes. Where property is given to a charitable corporation, a charitable trust is not created. * * *

"Although a gift to a charitable corporation for one or for any of its purposes does not create a charitable trust, the rules of law which are applicable are to a large extent those which are applicable to charitable trusts, since the ends to be served are the same. The differences are due to the fact that different juridical devices are employed."

As to charitable trusts, the attorney general has long been recognized as having the right, in the absence of some statutory limitation, to maintain an action for en-

forcement of the trust, or to prevent a misuse of the property. 10 Am. Jur. 668, sec. 115.5. In 2 Restatement, Trusts, sec. 391, the following statement is made: "Since the community is interested in the enforcement of charitable trusts, a suit to enforce a charitable trust can be maintained by the attorney general of the state in which the charitable trust is to be administered."

The right of the attorney general to maintain such an action is not limited to cases of charitable trusts, but it may be exercised also in cases of gifts to charitable corporations involving a general public interest. This is the view declared by the American Law Institute. "The attorney general can maintain a suit not only to enforce a charitable trust but also to compel a charitable corporation to apply property held by it to the charitable purposes for which it was given to the corporation." 2 Restatement, Trusts, Introductory Note, Charitable Corporations, p. 1094. The rule certainly is a salutary one as applied to a grant which the state itself has made to a charitable corporation for a particular use or purpose. The public interest and purpose necessary to support such a grant of public land in the first instance clearly must be held to be equally sufficient to entitle the state to prevent the property from being diverted to any other use.

The loan association argues that the rights of the state are limited by the provision for reverter, and that no action of any nature can be maintained by it until its reverter rights have accrued. Such a view would hardly further the public purpose for which the legislative grant was made, but would, on the contrary, tend to defeat it. Quite clearly, the interest of the public lies in continuing the use of the property for church purposes by the Mount Zion Baptist Church, and not in hastening a reverter. There could have been no justification for the grant otherwise. The reverter provision, therefore, was intended, in part at least, to encourage and insure the use of the property pursuant to the grant, and to effect a return of the property only when, by abandonment, its continued use for such purpose had been

made hopelessly impossible. It was not designed to restrict the right of the state to enforce the terms and purpose of the grant by preventing a diversion of its use.

The attorney general was accordingly entitled to prevent such a diversion on the part of either the original grantee or a third party, and injunction was the proper remedy therefor in this case. It is unimportant upon what technical ground the equitable jurisdiction is predicated,—whether (1) that a grant of public lands to a charitable corporation, though not technically a trust, savors sufficiently thereof, by reason of the public interest and purpose necessary to support the grant; or (2) that the loan association, under its sheriff's deed in this case, became the holder of the title subject to the limitations of the original grant, and so was constituted a trustee for the continued use of the property, for church purposes, by Mount Zion Baptist Church and its adherents; or (3) that the limitation in the Act of 1883, upon acceptance of the grant, constituted a restrictive agreement, on the part of the original grantee and any subsequent holder of the title, to use the property only on the terms and for the purposes for which it was granted, which was enforceable by an injunction, in the nature of specific performance (4 Pomeroy, Equity Jurisprudence (4th ed.) secs. 1341, 1342, 1343).

The contention of the loan association that the state is estopped to maintain this proceeding requires only a momentary consideration. It is argued that the state is not entitled to maintain this suit because it failed to take any steps to keep the loan association from making a mortgage loan on the church property, and because it has not offered to pay the amount of the loan association's indebtedness, which was used to pay for improvements on the property. It is further argued that the state waived any right it may have had to maintain this suit, when it refused to become a voluntary party to the mortgage foreclosure proceedings. These contentions are disposed of by the nature of the relief herein granted.

As has already been suggested, if the sheriff's deed oper-

ated to vest legal title in the loan association, such title was taken subject to the purpose and use fixed by the Act of 1883. Under the legislative grant, it was intended that the property should be used only for church purposes and by the Mount Zion Baptist Church. Its use for any other purpose or by any other party would constitute a diversion. In this situation, no one could acquire title to the property except as a trustee. If the loan association chose to take a mortgage on such a title, and, through foreclosure, to acquire a naked legal title to the property, as a trustee, it was, of course, at liberty to do so. As against the state, however, it could not divert the use of the property, or, in other words, prevent its use by Mount Zion Baptist Church for church purposes. Obviously, the grounds urged as an estoppel against the state would not under these circumstances prevent it from enjoining the diversion threatened in this case.

The judgment is reversed and the cause remanded, with directions to enter a decree in conformity herewith.

REVERSED.

MARY IRENE HAWLEY ET AL., APPELLEES, V. MERTIE M. ARNOLD, APPELLANT.

288 N. W. 823

FILED NOVEMBER 28, 1939. No. 30677.

1. **Homestead.** While a homestead cannot be claimed in two separate properties at the same time, a homestead claimant who is about to lose his homestead as result of foreclosure proceedings may abandon the same and establish a new homestead in other property.
2. ———. A building consisting of a single structure and under one roof, though divided into two parts by a solid wall, is a "dwelling-house" within the meaning of the homestead statute.
3. ———. Finding of trial court that there was no equity in property over and above encumbrances and homestead exemption *held* sustained by the record.
4. ———. "The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the

homestead claimant's interest therein." *Hoy v. Anderson*, 39 Neb. 386, 58 N. W. 125.

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

Hoagland, Carr & Hoagland, for appellant.

E. H. Evans and *Urban Simon, contra.*

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

KROGER, District Judge.

This is an action in equity brought by Mary Irene Hawley and William Hawley, wife and husband, to have a judgment in favor of Mertie M. Arnold declared not to be a lien upon certain premises claimed as a homestead. From a decree granting plaintiffs substantially the relief prayed for, this appeal is prosecuted by the defendant.

The record discloses that Mary Irene Hawley is the owner of lot 12 and the east one-half of lot 11, block 8, North Platte Town Lot Company's Addition to North Platte, Lincoln county, Nebraska, and since December 31, 1933, plaintiffs have occupied said premises as their homestead; that on the 15th day of January, 1934, Mary Irene Hawley, and her husband, mortgaged said premises to the Occidental Building & Loan Association to secure a loan of $5,000; on the 3d day of February, 1934, a deficiency judgment was entered against Mary Irene Hawley and William Hawley in favor of Mertie M. Arnold in the sum of $1,500; on February 16, 1938, this action was instituted against Mertie M. Arnold to have the title to said premises quieted in plaintiffs and the judgment of the defendant canceled, set aside and decreed not to operate as a lien or to cloud the title to plaintiffs' homestead property; issues were joined on this petition and decree entered, finding generally in favor of the plaintiffs and against the defendant, finding that the premises in question constituted the homestead of the plaintiffs, and that, at the time of the entry of the decree, there was no equity over and above the mortgage and homestead

exemption upon which the judgment lien could operate, and decreeing that the apparent lien of the judgment should be removed and adjudged not to operate as a lien on said premises, "without determining that such may not become a lien in the future, depending upon future events."

It is the contention of appellant that appellees had at one time claimed lots 1 and 2 in block 24 of North Platte Town Lot Company's Addition to North Platte as their homestead, and were claiming it as such when the decree of foreclosure was entered, out of which decree the deficiency judgment of $1,500 arose, and that they are now estopped from claiming a homestead in other property; that even if they are entitled to a homestead in the premises in controversy, all of the improvements cannot be claimed as exempt, for the reason that the improvements are a duplex, consisting of separate six-room houses, separated by a solid wall, and one of which units has never been occupied by the plaintiffs, but has been leased to tenants as revenue producing property; that the value of said premises is more than the encumbrances and the homestead exemption; and that the judgment lien attaches to any interest in the property above the homestead exemption, notwithstanding prior encumbrances on the property.

As to appellant's first contention, the record discloses that appellees did occupy and claim as their homestead lots 1 and 2 in block 24 of North Platte Town Lot Company's Addition to North Platte up until the time they vacated the same in December, 1933. It is equally clear from the record that, beginning with December 31, 1933, the appellees occupied and claimed as their homestead the premises involved in this action, and we know of no rule of law which would prevent the appellees from so claiming a homestead interest in the latter property and none has been called to our attention by appellant in her brief. Their former homestead was about to be taken from them by foreclosure proceedings, and they had a perfect right to select a new homestead, which was done in this case; the appellees having made their selection and occupied the premises as their

homestead before the deficiency judgment was entered, they were then entitled to their homestead exemption in the premises as against appellant's judgment.

With reference to appellant's next contention that all the improvements on the premises are not exempt, for the reason that the improvements consist of a duplex structure, consisting of two separate dwellings divided by a solid wall, the record discloses that the improvement is a single unit, all under one roof and a single structure, although there is a dividing wall through the building separating the same into two divisions with separate basements and separate heating plants. Under these circumstances, it cannot be said that the improvements are separate structures on the same premises, and we hold that the entire improvement constituted appellees' homestead.

In a similar situation, this court, in the case of *Corey v. Schuster,* 44 Neb. 269, 62 N. W. 470, speaking through Commissioner Ragan, used the following language: "The law does not contemplate by the word 'dwelling-house' any particular kind of house. It may be a 'brown stone front,' all of which is occupied for residence purposes, or it may be a building, part of which is used for banking or business purposes, or it may be a tent of cloth. All that the law requires on the subject is that the homestead claimant and his family should reside in this habitation or dwelling-house, whatever be its character, on the premises claimed as a homestead." And it was held that, where the first floor of a structure was used for mercantile purposes and the second floor for residential purposes, the entire building constituted the family homestead. See, also, the case of *Hess v. Eselin,* 110 Neb. 590, 194 N. W. 469, where it was held that an apartment house, in which mortgagor lived with his family, constituted a homestead; and the case of *Foltz v. Maxwell,* 100 Neb. 713, 161 N. W. 254, where a hotel was held to constitute a homestead, where a portion of the same was occupied by the homestead claimant.

Appellant's contention that the value of the property exceeds the homestead exemption and the encumbrances

thereon is not borne out by the record. While in her brief the appellant argues that the mortgage had been reduced to $3,425.49 as of September 12, 1938, there was no evidence introduced at the trial supporting that allegation. It is true that to the bill of exceptions there is attached an exhibit, designated as "Exhibit A," which is a copy of a petition in foreclosure filed by the Occidental Building & Loan Association against the Hawleys, and in which it is alleged that the amount due on said $5,000 mortgage as of September 12, 1938, is $3,425.49, but this exhibit was not introduced in evidence, and the record is bare of any testimony as to the amount of encumbrances against the property, except as of February 3, 1934, and the testimony is that on that date the encumbrance was $5,024.

There were three witnesses who testified as to the value of the premises at the time of the trial, two on behalf of plaintiffs and one produced by the defendant. One of plaintiffs' witnesses placed the value at $5,000. The other placed it at $6,500. Defendant's witness first placed the value at $7,500, but on cross-examination stated that, for the purpose of sale at that time, he would place the value at $6,750.

The trial court's finding that there was no equity in the property, over and above the encumbrances and the homestead exemption, is amply sustained by the record.

Appellant's final contention that a judgment lien attaches to any interest in the property above the homestead exemption, notwithstanding a prior encumbrance, has been disposed of adversely to her by this court in the cases of *Hoy v. Anderson,* 39 Neb. 386, 58 N. W. 125, and *Mundt v. Hagedorn,* 49 Neb. 409, 68 N. W. 610, where it was held that the extent of the homestead interest is not to be determined from the fee-simple value of the property, but from the value of the homestead claimant's interest therein.

The judgment of the trial court was right and is

AFFIRMED.

VERNER MARKEL, APPELLANT, V. RICHARD GLASSMEYER, APPELLEE.

288 N. W. 821

FILED DECEMBER 8, 1939. No. 30646.

1. **Appeal.** It is not error for the district court to permit an answer to be withdrawn and a general demurrer to be filed, if the petition fails to state a cause of action, even if the case has been theretofore under consideration in this court, if previously no objection has been made to the sufficiency of such petition.
2. **Pleading.** By pleading to the merits, the defect that the petition does not state a cause of action is not waived.
3. **Limitation of Actions.** An action by a husband (plaintiff) for damages resulting to him on account of, and occasioned by, an assault and battery committed upon plaintiff's wife by the defendant is barred unless brought within one year after the cause of action accrued.

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

Lloyd E. Peterson, for appellant.

Moran & James, Spencer & Neumeister and *W. A. Robertson, contra.*

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

EBERLY, J.

This action was commenced in the district court for Otoe county on August 10, 1935, by Verner Markel, as plaintiff, against Richard Glassmeyer, the defendant. To summarize, it may be said that the petition alleged that on February 5, 1934, the defendant unlawfully made an assault on the body of plaintiff's wife, Sena Markel, and did then and there beat, wound and ill-treat said Sena Markel, whereby said Sena Markel sustained (here follows a specific description of the injuries inflicted). And it was further alleged that, as a direct result of said unlawful assault and on account of the injuries sustained by plaintiff's wife, medical services were required to the extent of $36.50; to

the extent of $150 for employing household help; and $5,000 for deprivation of the wife's services, society, comfort, and association. To this petition defendant filed his answer, and to this answer plaintiff replied. A trial of the issues to a jury resulted in a verdict and judgment for the plaintiff. An appeal to this court resulted in a reversal of the judgment entered in the district court because of the erroneous admission of incompetent evidence at the trial, and the case was remanded generally "for further proceedings." *Markel v. Glassmeyer*, 132 Neb. 716, 273 N. W. 33.

The record before this court discloses no challenges made to the sufficiency of the petition during the first trial or on appeal. After the filing and entry of the mandate, the district court sustained the motion of the defendant for leave to withdraw his answer to plaintiff's petition, for the purpose of demurring to plaintiff's petition. Thereupon, a general demurrer was filed by defendant, which, in appropriate language, challenged the sufficiency of the petition to state a cause of action against defendant, for the reason that it accrued more than one year prior to the commencement of the suit. This demurrer was sustained by the trial court. Thereafter, plaintiff then declining to plead further, his petition was dismissed at his own cost. Plaintiff now appeals.

His first challenge is to the power of the district court to permit the withdrawal of the defendant's answer and the filing of his general demurrer. Under the circumstances set forth in this record, this was plainly a matter of judicial discretion exercised by the trial court.

In *Edney v. Baum*, 70 Neb. 159, 97 N. W. 252, this court held:

"It is not error for the district court to permit answers to be withdrawn and a general demurrer to be filed, if the petition fails to state a cause of action, even if the case has been four times under consideration in this court, if no objection has been made to its sufficiency.

"By pleading to the merits, without raising them, a party

waives all defects by way of misjoinder or defect of parties, but not the lack of jurisdiction in the court, nor that the petition does not state a cause of action."

Appellant further challenges the correctness of the dismissal of his action by the trial court. He insists that, his action being for the loss of a wife's services, for medical expenses, and for other expenses of a wrongful attack by another upon her, it is within the words of section 20-207, Comp. St. 1929, prescribing a four years' limitation to an action "for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated." The trial court, it is evident, applied the provisions of section 20-208, Comp. St. 1929, which, by its terms, is applicable to causes of action for assault and battery.

Our first statute of limitations applicable to the facts here in dispute was enacted by the territorial legislature of 1855. It provided: "First.—Actions of slander, libel, malicious prosecution, injuries to the person, or for a statute penalty, within two years; * * * Third.— * * * and all other actions not otherwise provided for in this respect (were required to be brought), within five years." Vol. 1, Complete Session Laws of Nebraska, 1855 to 1865, p. 25.

In 1858 the present Code of Civil Procedure was enacted. The limitations provided for by the act of 1855 were repealed, and in lieu thereof the following was adopted:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued." Comp. St. 1929, sec. 20-204 (Code, sec. 9).

"Within four years * * * an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated." Comp. St. 1929, sec. 20-207 (Code, sec. 12).

"Within one year an action for libel, slander, assault and battery, malicious prosecution, or false imprisonment," etc. Comp. St. 1929, sec. 20-208 (Code, sec. 13).

The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit

may be brought upon causes of action which it affects. Limitations are created by statute and derive their authority therefrom. They evidence a public policy formally declared by the legislative department of government; and as applied to each classification made by it are based upon the similarity of the intrinsic or inherent elements which the causes of action so classified comprise, considered with reference to the nature of proof required to establish the existence of the same. So considered, the adopted policy of this state has announced a limitation of "within one year" for "an action for assault and battery," irrespective of the plaintiff who may institute the same. There is nothing in the context of the present statute of limitations above quoted which indicates that the words "action for assault and battery" are used in a narrow sense, or that the actions referred to are only those brought by the person suffering the physical impact. Indeed, whether the action be instituted by the husband for injuries sustained by him occasioning damages to himself, or be brought by the wife, the causative factor or element still remains the "assault and battery," as to which the nature of the proof required would be identical. It is evident that they were so considered by the legislature in fixing this period of limitation so declared. If the language "action for assault and battery" be accorded the interpretation which we find adopted by the standard lexicographers, the word "for," as thus employed in the language under consideration, has the ordinary signification of "on account of," "because of," "by means of," or "growing out of." *Mulvey v. City of Boston,* 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349.

Thus, it appears that the language employed in our one-year statute of limitations applicable to assault and battery is fairly inclusive of the cause of action set forth in plaintiff's petition. In addition, it forms a part of section 20-208, Comp. St. 1929, thus being within the purview of the phrase "not hereinafter enumerated" as employed in section 20-207, Comp. St. 1929, which precedes it in the original enactment. Also, we are committed to the rule of

construction that, "Where different parts of the same statute are in irreconcilable conflict, the last words stand, and those in conflict therewith are disregarded." *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365. It therefore appears that the action of the trial court in the dismissal of plaintiff's action based on that fact is correct.

It may be said that this is a case of first impression in this jurisdiction, and that the authorities elsewhere are not in harmony.

The principle here approved is sustained by, or is consistent with, the doctrines announced in the following cases, viz.: *Basler v. Sacramento Electric, Gas & Ry. Co.,* 166 Cal. 33, 134 Pac. 993; *Cravens v. Louisville & N. R. Co.,* 188 Ky. 579, 222 S. W. 930; *United States Fidelity & Guaranty Co. v. Blue Diamond Coal Co.,* 161 Va. 373, 170 S. E. 728; *Mullen v. Town of Newcastle,* 180 Ind. 386, 103 N. E. 1; *Mulvey v. City of Boston,* 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349; *Maxson v. Delaware, L. & W. R. Co.,* 112 N. Y. 559, 20 N. E. 544; *Black v. Eastern Pennsylvania Rys. Co.,* 257 Pa. St. 273, 101 Atl. 644; *Blackwell v. Memphis Street R. Co.,* 124 Tenn. 516, 137 S. W. 486; *Johnston v. Southern R. Co.,* 155 Tenn. 639, 299 S. W. 785.

Deeming that reversible error was not committed by the district court in the instant case, its judgment is

AFFIRMED.

PHYLORY R. DOLEN, APPELLANT, V. BEATRICE RESTAURANT COMPANY, APPELLEE.

289 N. W. 336

FILED DECEMBER 8, 1939. No. 30653.

New Trial. When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

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

Bruce Fullerton and *Ladd J. Hubka,* for appellant.

Rexford C. Rankin and *H. F. Mattoon, contra.*

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

EBERLY, J.

This is an action for damages wherein the plaintiff, Phylory R. Dolen, sued the defendant, the Beatrice Restaurant Company, for bodily injuries sustained by her on February 1, 1938, in, accidentally and without negligence, falling down a dangerous stairway which plaintiff alleged the defendant negligently maintained in its place of business, and which, her petition sets forth, was dark and "hidden" and constituted "a trap." The nature of the injuries received by her, by reason of this accident, are specifically set forth, and she alleges that, as a result thereof, she has expended or become liable for doctor bills, nurse hire, and hospital bills; she has lost her entire earning power and will be unable to carry on her business in the future; she has been permanently injured; and has suffered and still suffers great and excruciating pain, all to her damage in the sum of $21,000, for which judgment was prayed.

The defendant in its answer admitted that the plaintiff on or about the 1st day of February, 1938, fell down a stairway in defendant's place of business, and denied each and every other allegation in plaintiff's petition contained. Also, contributory negligence of the plaintiff is pleaded. Plaintiff joined issues by her reply filed.

Trial was had, at the close of which the trial jury returned a verdict in which they "find for the plaintiff and against the defendant and assess the amount of her recovery at the sum of $700." Plaintiff thereupon filed her motion for a new trial, and from the order of the trial court overruling the same, she now appeals. The defendant filed no motion for a new trial and has not appealed.

An examination of the evidence preserved in the bill of exceptions discloses that while the case involved conflicting proof it contains ample evidence, if believed, to sustain

the finding for the plaintiff. The question as to whether the amount of damages allowed by the jury is clearly inadequate under the proof made is controlling.

A determination of the questions submitted by the trial court required either a verdict in favor of the defendant, or a verdict in favor of plaintiff for substantial damages.

On the subject of damages, the trial court instructed the jury, viz.:

"The jury are instructed that, if you find from a preponderance of the evidence that the plaintiff is entitled to recover in this action, she will be entitled to recover such an amount as will fairly and reasonably, but not excessively, compensate her for the physical injuries sustained by reason of the accident, which would also include fair and reasonable compensation for mental and physical pain and suffering which she may have sustained, for the diminution of plaintiff's capacity to carry on her occupation or business and fair and reasonable sums which she has paid or incurred for necessary medical, hospital and like expenses, as shown by the evidence."

There is evidence in the record which sustains every element of recovery referred to in the foregoing instruction, including value of personal earning power of which the accident deprived her. In addition, it is established by uncontradicted evidence that the doctor bills, the nurse hire, and the hospital expenses, including ambulance expenditures, all reasonably and necessarily incurred, amounted to the sum of $994. Therefore, the jury disregarded both the instruction of the court and evidence wholly undenied, as to necessary doctor bills, hospital fees, nurses, and ambulance hire; and also denied plaintiff substantial recovery for the injuries sustained by her, and for pain and suffering occasioned thereby, as clearly established by the proof. The instructions given did not permit the jury to award a recovery by plaintiff of a clearly inadequate sum. In the instant case the amount awarded the plaintiff for damages is established by clear, unequivocal testimony to be grossly inadequate.

The rule is, viz.: "When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict." *Preston v. Farmers Irrigation District,* 134 Neb. 503, 279 N. W. 298. See, also, *Meier v. Bridgeport Irrigation District,* 113 Neb. 344, 203 N. W. 543; *Mares v. Chaloupka,* 110 Neb. 199, 192 N. W. 397.

We think that the verdict returned is not only grossly inadequate, but that it must have been rendered under the influence of passion and prejudice. *Ellsworth v. City of Fairbury,* 41 Neb. 881, 60 N. W. 336.

It follows that the district court erred in its overruling of plaintiff's motion for a new trial. The judgment of the district court is, therefore, reversed and the cause remanded for further proceedings.

REVERSED.

NICK VALLAS V. STATE OF NEBRASKA.
288 N. W. 818

FILED DECEMBER 8, 1939. No. 30727.

1. **Homicide.** In a prosecution for shooting with intent to kill or wound, it is error to instruct the jury that the law warrants the presumption or inference that a person intends the results or consequences to follow an act that he intentionally commits which ordinarily do follow such act, where the witnesses to the shooting were present at the time of the shooting and testified fully thereto and to the attendant circumstances.
2. ———. In a prosecution for shooting with intent to kill or wound, intent is one of the essential elements of the offense charged, and a presumption of law does not take the place of evidence of witnesses who were present at the time and detailed the shooting and the attendant circumstances thereof.

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

William Morrow, for plaintiff in error.

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

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

MESSMORE, J.

Plaintiff in error (hereinafter referred to as defendant) was charged in an information with shooting with intent to wound, and on the second count with shooting with intent to kill. The jury returned a verdict of guilty of shooting with intent to kill. Motion for a new trial was overruled, and the defendant sentenced. He brings error to this court for review.

The record discloses the following pertinent facts, in substance: Defendant, on February 23, 1939, the date of the offense charged, loaned his automobile to Elsie Adams, as he had done on other occasions. She was to drive to the home of her brother, Edward Curtis, and he was to drive the car for her as directed by the defendant. Before she left, defendant removed a gun from a compartment in the car and placed the gun in his pocket. She met Tony Guzman about 10 o'clock in the morning and they agreed to meet at 6 o'clock in the evening at the Eagle Café in Scottsbluff. Elsie Adams, her brother, his wife, and Tony Guzman went to a show, leaving the theater shortly after 11 p. m. Guzman drove the car and delivered Curtis and his wife at their home, and she and Tony proceeded to his place of residence about three miles east of Scottsbluff. There is evidence that they took an indirect route.

The defendant went to the Curtis home, asked Edward where the car was, and was told that Elsie had just left with it. Curtis then went to Elsie's home in Gering, to watch over the children and to bring back the car. Elsie's husband, Noah Adams, then appeared at Elsie's home, accompanied by John Vohland, and there was some conversation among them about Elsie. Finally, it was decided that Noah Adams, Curtis and the defendant would go with Vohland in his car in search of Elsie. They located Elsie and Tony near his residence and sought to stop him. Guzman put the car in reverse, backed up quickly into a farm

driveway and turned around, proceeding at a high rate of speed to Scottsbluff, followed by Vohland and the others. Finally, Guzman was stopped on Broadway in the city.

Guzman stated that out on the highway, before arriving at Scottsbluff, defendant got out of the car, and he could see that defendant had a gun, and defendant "hollered for us to stop." Vohland stated he did not see defendant with a gun at that time. According to Guzman's testimony, when the car stopped in Scottsbluff defendant got out of the car and ran towards Guzman, appeared to be angry and called Guzman vile names, pointed the gun at him and fired. Guzman dodged and stated he could hear "the buzz of the bullet." The defendant was about 20 feet distant from Guzman at the time, and they were proceeding towards each other. Guzman said that defendant was going to hit him; "I grabbed his hand and pulled it up in the air and the next shot went up in the air." Guzman then pushed defendant, who fell down, and Guzman tried to obtain the gun. There was a scuffle, both trying to gain possession of the gun, the defendant calling for help. Vohland, so Guzman stated, struck him on the head, threatened him and called him a vile name. Guzman stated that defendant hit him on the head with his gun after he had fired the second shot. Curtis stated that he saw the defendant with a gun in his hand and saw him fire; that the gun was pointed at Guzman's head and that two shots were fired; he did not testify as to how the second shot was fired. The gun was .38-caliber, containing one load in the barrel and five in the magazine. One shell was found on the pavement by a police officer.

Vohland testified that at the time he got out of the car, and as he was going around it, he heard another shot; that Guzman was standing right in front of the door on the running-board of defendant's car, which he, Guzman, was driving; "he had clenched onto Nick (defendant) and they were scrapping standing up;" that Guzman jumped onto the defendant, "knocked him down and got on top of him and he was beating him, and the gun was on the cement and

they were scuffling around there trying to get the gun;" that the defendant was "yelling for help, * * * and as I got over there I shoved Tony Guzman right off of him—shoved him quite a ways onto the sidewalk;" he did not strike him but pushed him six or seven feet. Witness stated that defendant "staggered around there and he was getting up;" that Guzman "kind-a turned around and acted like he was going to come at me so I started after him again there and he started up the sidewalk and I followed him."

Defendant testified that when he got close to the car Guzman got off the running-board and jumped on him; that he did not pull a gun on or shoot at Guzman; that when he fell down the gun fell out of his pocket; that both he and Guzman tried to grab it; he, defendant, called for help. The evidence is not clear that two shots were fired, or the manner in which the second shot was fired, if at all. After the scuffling, Guzman proceeded towards the Eagle Café; the defendant got into his car and drove to Elsie Adams' home. Finding no one there, he then drove to Scottsbluff, where he had a business engagement, and was arrested en route. Elsie Adams did not testify at the trial, she being at her mother's home in Kansas at the time. There is evidence that the defendant took her to Kansas at her request.

The defendant complains of that part of instruction No. 6 reading: "The law warrants the presumption, or inference, that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarily do follow such acts." The defendant likewise contends that the court erred in giving instruction No. 10, as follows: "To constitute the offense charged in this case the intent alleged in the information is necessary to be shown, but direct and positive testimony is not necessary to prove the intent. It may be inferred from the facts and circumstances shown by the evidence." The following part of the instruction is criticized: "And if you believe from the evidence, beyond a reasonable doubt, that the shooting, as alleged in the information, was done wilfully and inten-

tionally and was likely to be attended with dangerous consequences, the intent to kill or wound requisite to make out this case as charged may be inferred therefrom."

The authorities are agreed on the general proposition that, in a prosecution for assault with intent to kill, the specific intent to take life is the gist of the offense. The intent must be proved as charged. The jury should be instructed that before they can return a verdict of guilty they must be convinced from the evidence that the accused entertained a design to kill. 13 R. C. L. 799, sec. 103, cases cited under note 7.

The cases of *Curry v. State,* 4 Neb. 545, *Krchnavy v. State,* 43 Neb. 337, 61 N. W. 628, *Botsch v. State,* 43 Neb. 501, 61 N. W. 730, and *Ward v. State,* 58 Neb. 719, 79 N. W. 725, are cited in support of defendant's contention that the foregoing instructions, or parts thereof, given by the court, constitute error. The state analyzes the cases on the presumption of intent, citing in addition *Bruno v. State,* 111 Neb. 715, 197 N. W. 612, and *Styskal v. State,* 116 Neb. 8, 215 N. W. 465.

In the latter case the defendant waited in ambush to shoot a man who was paying unwanted attention to his wife. He did shoot him and wounded him. He shot him intentionally and such fact was admitted. The question for the jury to determine was the malicious intent, and whether or not the theory of the defense, that the defendant shot in defense of his wife and home, was supported by the evidence. The following instruction was given relative to the presumption of intent: "Upon the question of intent, you are instructed that the law presumes a sane man to intend the reasonable, probable and natural consequences of any act by him intentionally and voluntarily done, and this presumption will always prevail, unless, from a consideration of all the evidence bearing upon this point, you entertain a reasonable doubt whether such intention did exist." The giving of this instruction, that the defendant is presumed to have intended the reasonable, probable and natural consequences of his voluntary act, was held to be error under

the circumstances of the case. The court stated in the body of the opinion: "The burden of proving a criminal intent beyond a reasonable doubt by competent evidence was on the state throughout the trial. Presumptions of law did not take the place of such evidence or lessen or shift the burden of proof." The court further stated: "When the circumstances of the tragedy were detailed by eyewitnesses, convictions have been reversed time and again," citing numerous cases.

Most of the cases cited deal with instructions on the presumption of malice in homicide cases, the court declaring that an instruction which presumes malice, where the witnesses to the transaction are eyewitnesses, is erroneous, where malice is one of the principal ingredients of the offense charged; and among the cases cited is *Styskal v. State, supra,* a prosecution for shooting with intent to kill. So, apparently, the same principle of law applies in a case involving shooting with intent to kill or wound, where the witnesses to the shooting and attendant circumstances are eyewitnesses.

In the instant case, the shooting was denied; in *Styskal v. State, supra,* the shooting was admitted. However, in the instant case, as in the *Styskal* case, the shooting and attendant circumstances thereof were detailed by eyewitnesses. The only other witnesses were police officers, testifying to collateral facts. This case is distinguished from those cited by counsel for both defendant and the state on the instructions given, and in the case at bar the instruction is erroneous in any event for the reasons stated in *Styskal v. State, supra.* The rule in such case is:

Where the defendant is charged with assault with intent to kill or wound, and the details of the shooting and the attendant circumstances in reference thereto are testified to by eyewitnesses, instructions with reference to the presumption of law on intent should not be given, and, if given, constitute prejudicial error. The presumption of law does not take the place of such evidence or lessen or shift the burden of proof. In cases of this kind, intent is one of the

principal elements of the offense charged, and instructions on the burden of proof in this respect are proper; likewise, instructions, informing the jury as to matters to be taken into consideration in determining the intent, as found in *Botsch v. State, supra,* would be proper, but instructions that overstate or overemphasize the intent, as heretofore explained, in view of the testimony of eyewitnesses to the shooting and to the attendant circumstances, are erroneous and prejudicial as a matter of law.

In addition, instruction No. 10, as given by the trial court and heretofore quoted, is erroneous in that it uses the language "was likely to be attended with dangerous consequences." In the light of the record in the instant case, it stands to reason that the shooting would not be "attended with dangerous consequences." No discharge of a bullet from defendant's gun struck Guzman. The court anticipated that which could not happen under the circumstances of the case, and such instruction is prejudicial to the substantial rights of the defendant.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

NATHAN RESNICK, APPELLEE, V. SARAH RESNICK, APPELLANT.

288 N. W. 816

FILED DECEMBER 8, 1939. No. 30618.

Divorce. "Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of equity may require." *Bigelow v. Bigelow,* 131 Neb. 201, 267 N. W. 409.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

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

Wayne E. Sawtell, contra.

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

CHAPPELL, District Judge.

This is a divorce case. Appellee, hereinafter called plaintiff, was granted a decree of divorce from appellant, hereinafter called defendant, on the ground of extreme cruelty. Defendant's cross-petition was dismissed. She was awarded the custody of Helen Resnick, their 11-year old daughter, together with child support and a money judgment in lieu of permanent alimony.

Defendant contends that the trial court erred in refusing to permit their 11-year old daughter to testify in her behalf, and made an unjust and unlawful division of the property.

At the conclusion of plaintiff's case, defendant asked the court for permission to call the daughter, who had been previously excluded from the courtroom during the trial, as a witness. Whereupon, the trial court said, in substance, that she did not need to be out of school; that it had been his rule for about 12 years to never permit a child to go on the stand in such cases; that children of that age ought not to be put on the stand as they did not play much of a part in a divorce case. Counsel for plaintiff and defendant then suggested that the court talk to her alone, to which the court replied: "Not right now. We will take care of the little girl. I would suggest that you do this; I am refusing to let Helen, 11 years of age, be placed on the stand and if I were you I would take exception to it." Defendant's counsel then excepted to the ruling of the court and made an offer of proof, which was refused, the court saying: "If any occasion should arise that I would want to talk to the little girl, I will have somebody from this department go out and then I will talk to her. That is, if I am not satisfied with the evidence when we get through."

The record shows that the little girl had just spent several

months, from February 1, 1938, until August 12, 1938, in the Hattie B. Monroe home for children in Omaha because of a nervous condition which had been brought about by the unhappy conditions in her own home. The court knew about this at the time, and its refusal to permit her to testify was undoubtedly prompted by a desire of the court to further shield and protect her. The trial court had known about the serious marital difficulties of the parties extending over a period of years. Twice previously, in 1931 and 1935, the defendant had filed suit for divorce from plaintiff in the same court. In each instance a reconciliation had been effected; the last, after a hearing and with the aid and assistance of the trial court, believing it to be for the best interests of this child and a minor son who is now 20 years of age. An examination of the offer of testimony shows that her evidence could only be cumulative in any event, and, if admitted, we fail to see how it could have changed the result upon any issue of the case.

The legislature and the courts of this state have established uniform juvenile procedure in divorce cases and recognized the inherent power of the court to shield and protect innocent children. Section 43-203, Comp. St. 1929, provides: "The juvenile court shall have jurisdiction to hear and determine all cases for divorce or alimony or involving the custody of children, and the court, or in vacation any judge thereof, may, through any probation officers of the county or otherwise inquire into the same." Section 42-307, Comp. St. 1929, referring to divorce cases, says in part: "Provided, that it shall be the duty of the court to make independent investigations of the merits of all * * * cases where minor children are involved through a probation officer or county superintendent of child welfare or other agency." Defendant was not prejudiced by the refusal, and, under the circumstances, the trial court had a right to exercise its discretion and refuse the offer.

The important question is whether there was a just and lawful division of their property. Defendant was awarded the custody of Helen Resnick, the minor daughter, and $30

a month for such child's support until further order of the court. In addition, she was awarded absolutely all the household goods and furnishings in their home in Omaha; was freed from all debts and obligations of every kind and nature, and they were all imposed upon the plaintiff. The court found that plaintiff and defendant were the owners of certain real and personal property, all of which was accumulated by the joint efforts of both the plaintiff and the defendant since their marriage, and that their joint estate had a net worth of approximately $8,500 which should be divided equally between them after deducting certain sums already received by defendant. After assigning the business and the real estate to plaintiff, the court awarded defendant, in lieu of permanent alimony, the sum of $4,065, payable $45 a month until fully paid, or, in the alternative, $30 a month if defendant lives in plaintiff's property, in which event credit is to be given the plaintiff of an additional $15 a month as rental therefor. The costs were all taxed to plaintiff and he was required to pay his own attorney fees and $50 to defendant's attorneys. *In toto,* defendant was awarded $75 a month from plaintiff.

While some of the real estate stood in defendant's name, it is undisputed that plaintiff and defendant accumulated all of their property and money during their marriage by the joint efforts of both of them in the same business venture. The court, therefore, had the equitable power to divide it between them in such manner as it deemed just and equitable. In *Bigelow v. Bigelow,* 131 Neb. 201, 267 N. W. 409, this court said: "Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of equity may require." Other authoritative Nebraska cases are cited therein.

The contention that defendant is put to hazard of loss by an alimony judgment for money payable by the month is answered by reference to section 42-319, Comp. St. 1929:

"All judgments and orders for payment of alimony * * * in actions of divorce * * * shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments." In addition, section 42-320, Comp. St. 1929, "The remedy given by the next preceding section shall be held to be cumulative and in no respect to take away or abridge any subsisting remedy or power of the court for the enforcement of such judgments and orders," preserves to defendant the remedy of civil contempt. See *Cain v. Miller,* 109 Neb. 441, 191 N. W. 704; *Maryott v. State,* 124 Neb. 274, 246 N. W. 343; *Thomas v. Thomas,* 132 Neb. 827, 273 N. W. 483.

A careful examination of the record discloses that the trial court correctly decided the issues herein and made a lawful, just, and equitable division of the property, and the judgment is

AFFIRMED.

UNION CENTRAL LIFE INSURANCE COMPANY, APPELLANT, V. NOEL COVER, APPELLEE.

289 N. W. 331

FILED DECEMBER 15, 1939. No. 30635.

1. **Specific Performance.** Plaintiff contracted to convey certain lands to the defendant, and the defendant agreed to purchase the same. Differences arose, and plaintiff brought this action to rescind the contract and for other relief. The trial court denied the rescission prayed for by plaintiff. Under the facts set out in the opinion, the judgment of the trial court in that regard is not disturbed.
2. **Vendor and Purchaser.** Defendant contracted to assume full responsibility for the maintenance of the buildings and improvements on the premises from the date fixed for full performance by the contract of purchase. Subsequent thereto and pending negotiations for settlement, defendant entered into possession of the premises and exercised rights of ownership thereto. *Held,* that defendant was not entitled to a reduction

in the purchase price for any waste or depreciation occurring to the buildings after the date fixed for performance of the contract and after he entered into possession of the premises.

3. **Waters.** Charges for irrigation water sold and delivered to land are not a lien upon the land unless made so either by statute or by contract. In order to create such a lien on land by contract, the language used must be definite and specific, and must by its terms be a direct declaration that such a lien is created.

4. **Decree.** The record is examined, the decree of the trial court modified, and the cause reversed and remanded, with instructions.

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

Hamer, Worlock, Randall & Tye, for appellant.

Hoagland, Carr & Hoagland, contra.

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

SIMMONS, C. J.

The appellant was the plaintiff and the appellee was the defendant in the court below. They will be referred to herein as plaintiff and defendant.

This is an equity action brought to rescind and cancel an agreement to purchase real estate, to foreclose any interest of the defendant therein, to quiet title in the plaintiff thereto, and for judgment for the use of the premises during the time that they have been occupied by the defendant. By his answer and cross-petition, defendant alleges a modification of the contract as to time of performance, a failure of the plaintiff to pay taxes and water-right assessments; damage to the buildings, orchard, and windbreak on the property subsequent to his contract to purchase; his inability to secure water because of plaintiff's failure to pay the water assessments, and loss of crops thereby; and prays for an accounting of the amount due and for specific performance of the contract as modified.

In June, 1934, the plaintiff was foreclosing a mortgage on a quarter-section of farm land in Dawson county. On

June 12, 1934, the defendant made a written proposal to purchase the property, which was accepted by the plaintiff on June 25, 1934. The agreed purchase price was $10,000, with $500 cash paid at that time, the remainder to be paid on or before March 1, 1935, by the payment of $1,500 in cash and the execution and delivery of notes and a mortgage for $8,000 payable in 10 years from January 1, 1935, with interest payable annually at 5 per cent., and 2 per cent. of the $8,000 payable annually after five years. The defendant accepted notice that foreclosure was in process and agreed that, if the plaintiff did not secure title, the contract was to be void and the $500 down-payment was to be returned with interest at 5 per cent. Defendant reserved the right to complete the contract "if possession and title can be given to me within a reasonable time after March 1, 1935."

Defendant agreed to "assume and pay the general taxes commencing with the year 1935, payable 1/1/36, and all other taxes and/or special assessments now levied or which hereinafter may be assessed or levied against said premises;" and further agreed "from March 1, 1935, * * * to assume full responsibility of the maintenance and upkeep of said premises, buildings and improvements and * * * keep said buildings insured." Final settlement was to be made, and a deed delivered "with warranty only as against your (plaintiff's) own acts * * * on or before March 1, 1935, or as soon as said title is shown to be merchantable."

The foreclosure was not complete, and plaintiff was not in a position to perform on March 1, 1935. Subsequent thereto, title vested in plaintiff by confirmation of foreclosure sale, and in October, 1935, plaintiff tendered to the defendant an executed deed together with note and mortgage for execution and asked for the payment of the $1,500. About that time, defendant had contacted plaintiff's agents and advised them that, inasmuch as he was not to receive possession so as to receive the beneficial use of the land for the year 1935, he did not feel that he should close the contract until March 1, 1936, and plaintiff agreed

to a modification of the contract to that extent. Plaintiff made another tender and demand for performance in February, 1937, and on November 29, 1937, following a final effort to secure settlement, plaintiff tendered the defendant a return of the $500 down-payment and notified defendant of the cancelation of the contract.

At the time of the tender in October, 1935, the 1935 taxes on the property in the sum of $427.26, and some prior taxes, had not been paid. Apparently, the 1935 taxes have not since been paid.

Defendant claimed that, subsequent to the date of the contract, the orchard and buildings had been damaged, and demanded a set-off of the damages against the purchase price, and refused to perform until said alleged damages were adjusted and allowed. In the spring of 1936, he fixed the amount of those damages at $2,600.

Following confirmation of the foreclosure sale, members of the family of the former owner remained in possession of the buildings until April, 1937.

In April, 1936, defendant (without complying with the contract and without notice to the plaintiff) entered into possession of the premises, farmed the same during the crop season of 1936, and since said time has remained in possession of the land. The defendant planted the land to alfalfa, claims to have secured a good stand, and that alfalfa was lost as a result of his failure to secure water. Defendant did not demand possession of the buildings from the plaintiff. Legal steps were not taken by either plaintiff or the defendant to secure possession of the buildings from the occupants. Defendant testified, however, that before March 1, 1936, the occupants asked him if they could stay in the buildings, and that "I told them I couldn't let them stay, I wanted them to get out of there."

At the time the buildings were vacated in April, 1937, they were in a poor state of repair. The barn was old in 1909 and not very well constructed. The house was old at that time. Repairs and additions were made to it in 1910 or 1911. The orchard and windbreaks were planted in

1909 and cared for up to, but not after, 1930. The defendant testified that the condition of the house was "good" on March 1, 1935, and "very good" on March 1, 1936, and that the barn "was in very good shape" on March 1, 1936. Within 30 or 40 days after the buildings were vacated in 1937, a large number of the windows in the house were out, plaster had fallen off, doors were off the hinges, a portion of the porch had sunk down and the barn collapsed in a heavy windstorm. The defendant contends that a large part of the supports on the inside of the barn were taken out during the period from March, 1936, to April, 1937, and that the barn collapsed as a result. That testimony is denied by parties in a position to know the facts. The defendant after March 1, 1936, made no effort to preserve the buildings or prevent waste being committed thereon. It appears reasonably clear that whatever depreciation, above ordinary wear and tear, suffered by the house occurred after it was vacated in April, 1937.

There was owing to the Cozad Ditch Company the sum of $210 for irrigation water maintenance charges for the years 1931 to 1935. Defendant contended that plaintiff should pay these charges with accrued interest. On May 7, 1937, defendant paid these charges, which, with interest, amounted to $295.26, and demanded credit therefor on the purchase price.

On September 30, 1938, the trial court entered its decree, finding that time for performance of the contract was extended to March 1, 1936; that the defendant was entitled to specific performance of his contract; that the plaintiff did not deliver possession of the buildings until 1937, and that, because of the damage thereto, the real estate had depreciated in value in the sum of $800; that he was entitled to receive the property with the 1935 general taxes paid; that defendant was entitled to credit for the maintenance taxes paid in the sum of $295.26 and for the $800 damages to the buildings; and that as of March 1, 1936, there was a balance due the plaintiff of $9,500. He deducted the maintenance and damages totaling $1,095.26 from the $9,500 and deter-

mined that the balance was $8,404.78 (should be $8,404.74), and upon that amount computed interest at 5 per cent. for 2 years and 7 months, which amounted to $1,085.70, making the total due the plaintiff, $9,490.48. The court further found that all over $8,000, to wit, $1,490.48, should be paid within 60 days from date, and that $8,000 should be evidenced by a note and mortgage payable March 1, 1946, with interest at 5 per cent. per annum, 2 per cent. of the $8,000 to be paid annually after March 1, 1941. The court further found that, upon the execution of the note and mortgage and the payment of $1,490.48, plaintiff should execute a good and sufficient warranty deed conveying clear title to said premises as of March 1, 1936, and furnish an abstract showing title to be in plaintiff as of March 1, 1936, with taxes for 1935 and prior years paid, and that upon failure of the plaintiff so to do, the decree quieted title in the defendant subject to the mortgage. The court further found that should the defendant not pay the $1,490.48 and execute said note and mortgage within 60 days, then the contract of purchase shall be null and void, title to the lands quieted in plaintiff, possession given and judgment for three years' rental at $800 per year less $500 was to be rendered to the plaintiff against the defendant accordingly. The court so decreed.

The trial court having denied the defendant recovery for damages to the orchard and loss of his alfalfa crop, and no cross-appeal being taken, those matters are referred to herein only in so far as they may explain the conduct of the defendant. The appeal presents the question: Is the plaintiff entitled to a rescission and cancelation of the contract, or is the defendant entitled to specific performance? If that question is resolved in favor of the defendant, then the next three questions presented are: (1) Is the defendant entitled to receive the premises with the 1935 general taxes paid? (2) Is the defendant entitled to credit for damages and depreciation to the buildings? (3) Is the defendant entitled to a credit for his payment of the water maintenance charges?

The record indicates a desire of the defendant at all times to complete the purchase of the property, and a willingness of the plaintiff to carry out the contract of sale, down to and including November 29, 1937. At that time, the plaintiff notified the defendant that it rescinded and canceled the contract because of the failure and refusal of the defendant to comply with the terms, conditions, and provisions of the contract. During the time that both parties were willing to perform the contract, the defendant was making claim for certain alleged unliquidated damages which he insisted should be adjusted and credited on the purchase price. He also demanded that the plaintiff pay the 1935 general taxes and water charges which had not been paid. There was an oral agreement that the time of settlement was extended to March 1, 1936. At the time of the tender made by the plaintiff in October, 1935, the 1934 taxes had not been paid. The demand of the plaintiff for the payment of the $1,500 plus the execution of notes and a mortgage for $8,000 before those taxes were paid was not justified. The plaintiff, while unwilling to grant the credits, did not until November 29, 1937, attempt to rescind and cancel the contract, and did not begin this action until February 8, 1938. While the demands of the defendant for credits were not justified, yet both parties considered the contract as in force and attempted to make settlement under it. Under the circumstances here existing, we will not disturb the decree of the trial court denying rescission to the plaintiff and decreeing specific performance of the contract.

It is axiomatic, however, that the contract to be performed must be the contract which the plaintiff and the defendant made. The contract calls for the defendant to assume and pay the 1935 general taxes. It was clearly within the contemplation of the parties that plaintiff might not be able to convey title and give possession on March 1, 1935. The defendant reserved the right to complete the contract if possession and title could be given within a reasonable time after March 1, 1935. Defendant, under the

contract, could elect to make settlement at a subsequent time, or he could elect to consider the contract null and void and secure a return of his "earnest money" with interest. However, the contract did not provide for the waiver of its terms with reference to the taxes if the contract was completed after March 1, 1935. The subsequent oral agreement to make settlement March 1, 1936, did not affect the defendant's contractual obligation to assume and pay the 1935 general taxes. The defendant, therefore, as a condition to specific performance, must comply with his contract to assume and pay the 1935 general taxes. It follows that the trial court erred in finding that the defendant was entitled to receive the property with the 1935 general taxes paid.

In the contract of purchase, the defendant assumed "full responsibility of the maintenance and upkeep of said premises, buildings and improvements" from March 1, 1935. Defendant by his answer alleges that the "contract and conditions thereof were deferred for one year and that the said plaintiff retained possession of said property until March 1, 1936, and assumed *the full responsibility* for the maintenance and upkeep of said premises, buildings and improvements during the year 1935 and until March 1, 1936."

From the testimony of the defendant himself, it is evident that the damages, if any, to the buildings occurred after March 1, 1936. The defendant also entered into possession of the premises as of that date, asserted rights of ownership, and has since maintained that possession and received the beneficial use of the premises. He asserted acts of ownership of the buildings by telling the occupants that he "wanted them to get out," and he made no effort to protect the buildings or prevent waste.

The defendant cannot accept the advantages of ownership without also accepting its responsibilities and liabilities, contractual and otherwise. The record discloses that before entering possession he had the abstract of title examined, and his acts thereafter indicate that he approved the title as to all matters except taxes.

Under the circumstances here existing, an equity court regards the defendant as the real owner subject to the claim of the plaintiff for the unpaid purchase price. The defendant as the owner of the premises must bear the loss, if any, that has occurred to the buildings. *McGinley v. Forrest,* 107 Neb. 309, 186 N. W. 74; 66 C. J. 1052; 14 Neb. Law Bulletin, 178. Independent of equitable rules, the defendant assumed that responsibility by his contract, and it attached as of a date, in any event, not later than March 1, 1936.

The trial court therefore erred in allowing the defendant a credit for damage to buildings.

We come next to the question of the deduction of the amount of the water charges. There is no reference in the contract to water charges or irrigation. The corporate capacity of the Cozad Ditch Company, to whom the payment was made, is not shown. So far as this record is concerned, it is a private corporation engaged in the business of selling water. There is in evidence a letter from the Cozad Ditch Company, indicating that it is the successor of the Cozad Irrigation Company, and that it "recognizes a water right on" the land involved in this controversy. The abstract, which is in evidence, shows a water-right deed executed by the Cozad Irrigation Company to one Robert Shields wherein the company sold Shields, his heirs and assigns the right to the use of water from the company's canal upon the land here in controversy; the grantee to pay an annual rental for the use of said water, payment to be a condition precedent to the delivery of water, and upon default in payment the company had the right to cease delivery until payments are made or declare the contract forfeited, and in the event the company declared a forfeiture, all "equitable and legal interests in the water rights" conveyed reinvested in the company.

Assignments of the rights conveyed were not to be binding on the company unless approved by them.

No evidence is cited showing either an assignment of this contract to the plaintiff or the approval of such an assign-

ment by the company. The water rights, obligations, and appropriations of the company are not shown.

Defendant in his answer alleges, and in his brief argues, that the contract for water was an appurtenance to the property which it was the duty of the plaintiff to convey to the defendant; that he had a right to the conveyance of that appurtenance free of the lien. The contract is silent, however, as to that matter. Elsewhere in his brief, defendant refers to these charges as an "equitable lien," and still later states that they "are a valid lien against this property." Certainly, these charges are not a valid lien unless made so either by statute or contract.

"In a number of the Western States it is provided by statute to the effect that the contract amount, or the amount that may be provided for in accordance with law, to be paid to water companies by the consumers furnished with water shall be a first lien upon the land for the irrigation of which the water is furnished and delivered. But whether this right is provided for by statute or not, we take it that a corporation has the power to make such a contract with its consumers, and that the lien so provided for may be enforced. * * * *But in order to create the lien on the land the language used in the contract must be definite and specific, and must be a direct declaration that such a lien is created by its terms.*" 3 Kinney, Irrigation and Water Rights (2d ed.) 2741, sec. 1522. See, also, 67 C. J. 1419.

The "water-right deed" does not purport to make the rental charges a lien upon the land. Collection is enforced by stopping delivery of water or a forfeiture of rights under the contract, and a loss of the consideration paid. The abstract does not carry the delinquent charges; apparently they do not appear upon any public record, and, obviously, they are paid direct to the company.

Defendant cites section 77-207, Comp. St. 1929, which is as follows: "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."

If these are such special assessments, then the defendant is obligated to pay them, for he agreed to pay "all other taxes (except general) and/or special assessments *now levied* or which hereinafter may be assessed or levied against said premises."

The burden of establishing a lien is upon the defendant. Under the facts as disclosed by this record, we are unable to determine that such a lien exists or that the plaintiff is liable to remove the same if it exists. The defendant has failed to sustain his burden of proof. The trial court erred therefore in allowing the defendant credit for the water charges paid.

The trial court erred in ordering the plaintiff to deliver a warranty deed. The deed should be in accord with the covenants of the contract. Likewise, the mortgage should conform to the contract. The defendant should also be required to insure the premises and otherwise perform the contract.

The decree of the district court is accordingly modified and remanded to the trial court with instructions to enter a decree conforming to this opinion, and in particular to provide that:

(1) The defendant shall pay the plaintiff the sum of $1,500 together with interest thereon from March 1, 1936, at 6 per cent. per annum.

(2) The defendant shall pay the plaintiff interest on the sum of $8,000 from March 1, 1936, at 5 per cent. per annum.

(3) All calculations of interest presently payable shall be made to the date of the payment thereof.

(4) The defendant shall pay all taxes accrued and owing for the year 1935 and years subsequent thereto.

(5) The defendant shall make, execute and deliver to the plaintiff notes for $8,000, due March 1, 1946, with interest payable annually at 5 per cent. per annum, and 2 per cent. of the principal sum of $8,000 payable annually beginning March 1, 1941, and shall make, execute, and deliver a mortgage to the plaintiff securing said indebted-

ness upon said premises, the terms of said notes and mortgage to be in conformity with the provisions of said contract.

(6) Denying to the defendant recovery of the sum of $800, or any other amount, for decrease in value of the premises resulting from loss of barn or damage to the house on said premises.

(7) Denying to the defendant recovery of the sum of $295.26, or any other sum, for water maintenance charges paid.

(8) The defendant shall insure the buildings and deliver said policies to the plaintiff as provided in the contract.

(9) All costs of this action are to be taxed to the defendant. Plaintiff's costs shall be paid by the defendant before the execution and delivery of the deed from the plaintiff to the defendant.

(10) The defendant shall fully comply with the provisions of said decree within 40 days from the issuance of the mandate herein.

(11) When the defendant shall have complied with the provisions of said decree and made said payments, then the plaintiff shall execute and deliver to the defendant a deed for said premises with covenants as provided in said contract.

(12) Should the defendant fail to comply with the provisions of said decree within the time set out herein, then and in that event, the contract of purchase shall be declared null and void, the title to said land quieted in the plaintiff, the plaintiff shall have and recover possession thereof, and at its request a writ of restitution shall issue, and the plaintiff be placed in possession, and the plaintiff shall have judgment against the defendant for the sum of $1,900 for the use and occupancy of said premises for the years 1936, 1937, and 1938, said sum being calculated at the rate of $800 per annum, and deducting therefrom the sum of $500 paid by the defendant to the plaintiff at the time said contract of purchase was executed.

AFFIRMED AS MODIFIED.

MARJORIE GLEASON, APPELLEE, V. HERBERT D. BAACK, APPELLANT.

289 N. W. 349

FILED DECEMBER 15, 1939. No. 30669.

1. **Automobiles.** Section 39-11,112, Comp. St. Supp. 1937, places a positive duty upon the driver of a motor truck or combination thereof, on bringing his vehicle to a stop upon or immediately adjacent to the traveled portion of a highway, at any time within a period of from one-half hour after sunset to one-half hour before sunrise, requiring the driver to immediately place flares, as provided in said section of the statute.
2. ———. The word "immediately," as used in section 39-11,112, Comp. St. Supp. 1937, means with reasonable and proper diligence, or promptly, and what would constitute immediately would depend upon all of the facts and circumstances proved. The term "immediately" should be reasonably construed in connection with the attendant circumstances.
3. ———. In applying the term "immediately," as contemplated by section 39-11,112, Comp. St. Supp. 1937, the evidence and the circumstances in the instant case require submission of the question to the jury.
4. ———. Section 39-1154, Comp. St. Supp. 1937, providing for the parking and leaving of vehicles, attended or unattended, upon improved main portions of the highway, under circumstances as set forth therein, places a positive duty upon the driver of such vehicle, and whether or not the vehicle could, or should, have been parked on the shoulder of the highway under the circumstances is a question for the jury.
5. ———. Section 39-1176, Comp. St. Supp. 1937, providing: "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that * * * (with certain exceptions) they will at all times mentioned * * * and under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but shall not project a glaring or dazzling light to persons in front of such head lamp," places a positive duty upon the driver of a motor vehicle.
6. ———. The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence *per se*, but evidence of negligence that may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
7. ———: DUTY OF GUESTS. The duty of a guest riding in an

automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. The evidence and circumstances of the instant case are not such that the guest was in a position to anticipate or perceive danger sufficient to require the guest to warn the driver.

8. **Witnesses.** In an action to recover damages for personal injuries suffered in an automobile collision, where plaintiff's witness was cross-examined as to whether he had made statements in writing as to details of accident, there was no error in permitting plaintiff's counsel, on redirect, to inquire to whom the statement was made; nor was the answer that such statement was made to a "lawyer for the insurance company" ground for declaring a mistrial, where no element of bad faith is involved.

9. ———. When a party offers a witness, the relation of that witness to the thing in issue and his interest in the result become material as affecting his credibility.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Prince & Prince and *Chambers, Holland & Locke,* for appellant.

Joseph M. Emmert and *Cleary, Suhr & Davis, contra.*

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

MESSMORE, J.

This is an action for personal injuries suffered by the plaintiff (appellee herein) in a collision upon the highway between the automobile in which she was riding and defendant's truck, which had temporarily stopped upon the highway. The cause was tried to a jury, and a verdict returned in favor of the plaintiff in the sum of $3,250. Motion for a new trial was overruled. Defendant appeals.

The record discloses the following facts: John Doherty,

the owner of a 1928 DeSoto coach automobile, was driving on the evening of November 28, 1937, from Greeley to Grand Island, Nebraska, accompanied by the plaintiff and four other companions. The party left Greeley at 7 o'clock. The plaintiff was returning to her duties at St. Francis Hospital in Grand Island. The radiator of the car leaked, and the driver had a can of water in the back of the car to replenish the radiator when needed. Between Greeley and St. Paul water was put into the radiator on two occasions. At St. Paul the party remained for an hour and a half to two hours at the Whale Café. After leaving St. Paul they delivered one member of the party at her home shortly before midnight, when plaintiff moved to the front seat of the car. The windshield was cleaned and water put in the radiator before the party entered highway No. 281. They proceeded south on the highway, an oil mat, 26 feet in width, with a white stripe down the center.

Floyd Hester, driving a G. M. C. truck, with an Omaha standard stock trailer attached, approached an intersection of highway No. 281 from the west. The width of the body of the trailer was 7 feet, 10 inches, and the height from the ground 11 feet. The trailer was loaded with 17 head of cattle, weighing 16,500 pounds, and the weight of the trailer was 13,800 pounds. The owner of the cattle, Henry Volke, was riding in the truck cab with the driver. Herbert D. Baack, the defendant, owner of the truck, and W. A. Munson were riding in an automobile following the truck. As the truck approached the intersection some of the cattle in the trailer were down, and the truck was stopped to rectify this condition. The truck was on an incline and was moved onto highway No. 281 about 100 feet south on said highway, where it was stopped temporarily on the west edge of the paving. There was a light at each corner of the truck, a cluster of three lights across the center, and a tail or stop light; in all, six lights, burning. When the truck stopped on the highway Munson remained in the car following the truck on the side road leading into the intersection. The highway at the point where the truck stopped was

level for a half-mile or more ahead, and for a quarter of a mile back, of the truck.

The DeSoto car proceeded south on highway No. 281 for a distance of about two miles, when the collision occurred, about 80 rods south of a filling station opposite St. Libory. The driver Doherty explains the accident, in substance, as follows: The DeSoto car was proceeding along the pavement on the right-hand side of the center thereof, going south, at a rate of speed of 30 miles an hour, and when within 10 or 15 feet of the truck, and just before the crash, the driver applied his four-wheel brakes, which were in good condition. A red light appeared all at once. There was no person signaling with a flashlight. The front part of the DeSoto car from the radiator back to the windshield went under the truck, took the top off the radiator and drove the hood of the engine back, breaking out the windshield and throwing the driver through the left front door. The driver stated that the night was very dark, bitter cold, and blustery, and the highway was dark. Other witnesses, including an expert, testified that the night was clear and stars were shining, and some of the witnesses for the plaintiff testified that there was frost in the air and it was foggy.

When the truck stopped on the highway the driver stepped out on the running board, looked back towards the north, and could see no cars. He went immediately to the back of the truck, found that some of the cattle were down and endeavored to get them up. When Volke, who had remained in the driver's seat, was getting out to go back to see what had happened, the crash occurred, he said, within two or three minutes altogether. Munson stated he saw the DeSoto car immediately at the time the truck stopped; he did not contemplate going onto the highway until the cattle were up; he blinked the lights on his car two or three times before the DeSoto car arrived at the point adjacent to the intersection. Defendant Baack stated that before the truck entered the highway he noticed that some cattle were down and concluded that there was no use try-

ing to get them up, because of the incline on the side road, so suggested to the driver to pull onto the highway, and as the driver got into the cab to comply defendant walked on the right-hand side of the truck, watching the driver maneuver to the place where he stopped the truck. After the truck stopped defendant walked to the rear end to examine the cattle, saw that two of them were down, and proceeded towards the front end of the cab to obtain flares.

With reference to the shoulder of the road, west of the edge of the oil mat, the road boss testified that the shoulder was between four and five feet in width, of clay soil, solid and rolled with a heavy roller. Volke testified that the shoulder did not appear to be solid. The defendant testified that he observed the shoulder of the road and considered that it was not packed well enough to carry the weight of the truck, and, further, that the truck was parked less than four inches from the west edge of the pavement; that is, the west edge of the truck wheels were four inches from the west edge of the pavement. Doherty stated that the truck was standing so that the inside edge of the box of the truck would be a distance of 12 inches, or thereabouts, from the white line. Leo Cordes, a witness for plaintiff, testified that he observed the truck on the right-hand side of the highway, facing south, and that all wheels were on the pavement. Sheriff Petersen testified that the shoulder of the road was a little sandy and did not look to be firmly packed.

There is evidence of a conversation between Doherty and defendant, wherein defendant said that he did not have the flares out; also that he went around the side of the truck next to the ditch, back of the DeSoto car, got the flares out and came back with them. The foregoing statement of the evidence brings us to a consideration of the following statutory provisions:

Section 39-11,112, Comp. St. Supp. 1937, provides in part: "The operator of a motor truck or combination thereof, * * * shall immediately upon bringing his vehicle to a stop upon or immediately adjacent to the traveled portion of

the highway at any time during the period of from one-half hour after sunset to one-half hour before sunrise, place one lighted flare at the side of such vehicle just inside the black line marking the center of paved highways and near the center of dirt or gravel highways, place one lighted flare approximately one hundred feet to the rear of such vehicle and place one lighted flare approximately one hundred feet to the front of such vehicle; and shall maintain such lighted flares in such position during the time said vehicle remains parked."

The court instructed "that the word 'immediately,' as used in the law requiring the flares to be placed, means with reasonable and proper diligence, or promptly, and what would constitute immediately would depend upon all of the facts and circumstances proved. The term 'immediately' should be reasonably construed in connection with the attendant circumstances."

Section 39-1154, Comp. St. Supp. 1937, provides in part: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon."

The foregoing provisions of the statute place positive duties upon the defendant and the driver of the truck. The trial court properly instructed the jury as to the duty required of the owner of the truck, or his driver, in placing flares and when they should be placed, and further instructed, as heretofore stated, as to the manner in which the term "immediately" should be construed. The evidence with reference to the shoulder of the highway west of the

line of the pavement, and as to whether or not the load in the truck could be supported by the shoulder, is in conflict. The facts thus being in controversy, the issues involved in this respect were questions for the jury's determination.

Section 39-1176, Comp. St. Supp. 1937, provides in part: "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that * * * (with certain exceptions) they will at all times mentioned * * * and under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but shall not project a glaring or dazzling light to persons in front of such head lamp."

The testimony with reference to the lights on the DeSoto car may be summarized in the following respects: The driver of the car could have avoided the accident if he had seen the truck within a radius of 50 to 75 feet of his lights. He could have avoided the accident had he seen the truck within a radius of 25 feet. He saw the truck when he was within 10 or 15 feet of it. The lights on the truck were burning, and the lights on the DeSoto car would penetrate so that a man could be seen within a radius of 30 feet in front of the lights. The last cited statutory provision and facts stated with reference thereto constitute the principal charge of negligence against the driver of the DeSoto car.

The cases of *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572, *Most v. Cedar County,* 126 Neb. 54, 252 N. W. 465, and *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902, are cited on the principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead. See, also, *Tomjack v. Chicago & N. W. R. Co.,* 116 Neb. 413, 217 N. W. 944.

In the instant case, the petition charged that the proximate cause of the collision was the carelessness and negligence of the defendant. The answer charged that the contributory negligence on the part of the plaintiff, combined with the negligence of the driver of the car in which she

was riding, was the proximate cause of the collision. And, in addition, the court instructed that, if the jury should find from the evidence that the defendant and the driver of the car in which plaintiff was riding as a guest were both negligent in a manner which contributed to plaintiff's injury and was the proximate cause of the injury, this fact would not defeat recovery. The foregoing cases would be pertinent to the issues in this case if the evidence did show that the negligence of the driver of the car in which plaintiff was riding was the proximate cause of her injury. The evidence does not disclose that this is the fact.

The law is well settled by the decisions of this court that a violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence *per se* but evidence of negligence that may be taken into consideration with all the other facts and circumstances, in determining whether or not negligence is established thereby.

It is the law of this state that in cases of this character negligence of the driver cannot be imputed to a guest in the automobile.

"A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances." 5 Am. Jur. 769, sec. 475.

In the case of *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340, we find this statement (p. 167): "The qualification is that the same degree of care is not required of the guest as of the driver. If the guest perceives danger, or if at certain times or places he should anticipate danger, such as at railway crossings, he should warn the driver, but ordinarily he need not watch the road or advise the driver in the management of the car."

The plaintiff had a right to assume that the driver was a reasonably safe and careful driver. When a situation

arises which is out of the ordinary, the guest is under the duty to warn the driver of dangers which would be apparent to the guest. The windshield on the DeSoto car was cleaned and the radiator replenished with water just prior to the time the car entered on the pavement, going south, which was two miles north of the scene of the accident. The pavement was level; the driver had a clear vision ahead; the plaintiff was seated at the right of the driver, not paying particular attention to the road, had slumped in her seat and was a little drowsy, shortly before the crash. There was nothing said by any person in the car just prior to the crash. Under the circumstances, there was no apparent reason for plaintiff to anticipate or perceive danger of such a nature as would place the duty upon her to warn the driver.

We believe that the evidence was inadequate to submit to the jury, in any event, the question of contributory negligence on the part of this plaintiff, and the instructions given by the court in reference to comparative negligence as between the alleged contributory negligence of the plaintiff and the negligence of the defendant, even if erroneous, are not applicable to the situation and, therefore, not prejudicial to the defendant.

The defendant, at the conclusion of the trial, asked leave to amend the answer to show that the plaintiff negligently acquiesced in the driving of the DeSoto car without lawful lights thereon. The evidence fully covers this situation, as do the instructions of the trial court. There was no prejudicial error in the refusal of the court to allow the amendment.

The claim made by the defendant in relation to frost forming on the windshield of the DeSoto car, and steam coming from the top of the radiator and freezing on the windshield, as a ground of negligence, is not supported by the record, and the claim made by the plaintiff that three men were working behind the truck, obscuring the lights burning on the truck, is likewise not sustained by the evidence. The driver of the truck, however, was caught be-

tween the truck and the DeSoto car at the time of the crash.

The defendant predicates error upon the failure of the court to direct a mistrial when, on redirect examination, one of the witnesses for the plaintiff testified in reference to insurance. We deem it advisable to set out this testimony somewhat in detail. The cross-examination conducted by Mr. Prince, representing the defendant, is in part: "Q. About the first of December, 1937, didn't you talk to a man by the name of Blocke and sign a written statement? A. I don't remember the man's name. Q. Do you remember of signing it? A. Yes. Q. That was a day or two after the accident, second or third day? A. Are you referring to the lawyer? Q. The man who came out and had you sign this statement? A. Yes. Q. Calling your attention to exhibit one, is that your signature at the bottom of that writing? A. Yes. Q. Did you read it over at that time? A. Yes. Q. In that statement didn't you tell him it was a clear night? A. No; I didn't. Q. But you signed the statement; read the statement and see if that is not in that, the very last words, the line immediately above your signature? A. It was foggy." From this point the testimony continued as to whether or not witness had made contradictory statements in the trial of the case when he was being examined as to weather conditions on the night in question. On redirect examination of the witness by Mr. Davis, we find the following: "Q. Who was it that got you to sign a statement? A. A lawyer for the insurance company. Q. What was his name? By Mr. Prince: The defendant now moves that a mistrial be declared in this case and asks leave to withdraw the jury. The Court: Q. For what? By Mr. Prince: A. Misconduct of counsel and the answer that has been given. Court: Overruled. By Mr. Davis: Q. Did you tell him at the time you signed the statement that it was clear that night? A. I don't believe I did, I think I told him it was foggy. Q. In whose handwriting is that statement that was presented to you? Is it in your handwriting? A. No." Recross-examination by Mr. Prince: "Q. But

you did sign it? A. Yes. Q. And read it over before you signed it? A. Yes."

The rule in Nebraska, stated in *Fielding v. Publix Cars, Inc.*, 130 Neb. 576, 265 N. W. 726, is: "In an action against a taxicab company for injuries to a passenger, it is reversible error for the trial court to permit plaintiff on his case in chief to show that defendant is indemnified from loss by an insurance company, where such proffered evidence is not relevant to any material issue in the case;" revoking the rule of practice promulgated in *Jessup v. Davis,* 115 Neb. 1, 211 N. W. 190.

The injection of insurance into the instant case rests primarily upon the following question and answer on redirect examination by plaintiff's counsel: "Q. Who was it that got you to sign a statement? A. A lawyer for the insurance company."

In the case of *Moy Quon v. Furuya Co.*, 81 Wash. 526, 143 Pac. 99, the claim agent called on the injured man in the hospital, and propounded to him carefully written questions, and subsequently the claim agent was called for the purpose of discrediting the injured person's testimony. On cross-examination, it developed that this witness was a claim agent from the casualty company which carried appellant's liability insurance. The court referred to the general rule and made this statement: "This rule, however, was never intended to override the equally positive and salutary principle that a party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. * * * When a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility. It is universally held that these things may be developed on cross-examination." They may be likewise developed on redirect examination when a statement is taken by a representative of the defendant and a witness interrogated in reference thereto by defendant's counsel.

In *Gianini v. Cerini,* 100 Wash. 687, 171 Pac. 1007, the

court said: "In the instant case, counsel for defendant having gone into the matter of the statement signed by plaintiff, it was entirely proper for the plaintiff to show on redirect all the circumstances under which the statement was made and to develop the entire conversation relating thereto. The evidence, therefore, was competent, and the mere fact that it may have been prejudicial did not render it inadmissible. If the effect was harmful, such was the defendants' misfortune, rather than the plaintiff's fault." See annotation, 56 A. L. R. 1439.

In *Treftz v. Kirby,* 146 Atl. 688 (7 N. J. Misc. 555) counsel, on redirect examination, inquired of a witness to whom his statement was made. The court held: "In action for automobile collision damages, where plaintiff's witness was cross-examined as to whether he had made statement in writing as to details of accident, there was no error in permitting plaintiff on redirect to inquire to whom statement was made, nor was the answer that such statement was made to insurance man any ground for declaring mistrial." See, also, *Webb v. Hoover-Guernsey Dairy Co.,* 138 Or. 24, 4 Pac. (2d) 631, wherein it was said: "When parties interested, either directly or indirectly, in the result of litigation, send their agents to interview witnesses and prepare statements for such witnesses to sign, the jury has not only the right to know who such agents are, but whom such agents represent, when a discrepancy arises between the testimony given by the witness on the stand and the statement prepared by such agent." This would be especially true when the statement is presented by counsel for defendant to a witness for the plaintiff and apparently for impeachment purposes. In the instant case the rule as announced in the preceding cases governs.

Reference is made to a scar received by the plaintiff while en route to trial in the instant case, assuming that she was endeavoring to recover for injuries sustained in another accident. This matter is fully explained in the evidence and is not prejudicial.

The injuries received by the plaintiff as the result of the

collision sustain the jury's verdict. Other assignments of error are without merit.

For the reasons given in this opinion, the verdict of the jury and the judgment of the trial court thereon are

AFFIRMED.

FRANK REITHMILLER ET AL., APPELLANTS, V. EDWARD CARR, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.

289 N. W. 338

FILED DECEMBER 15, 1939. No. 30612.

1. **Charities.** A testamentary gift of a residuary estate to a church, "for the purpose of building the church, at this time partially built," and with authority in the executor "to turn over and deliver to the officers of said church said residue of my estate, when said church is fully finished and completed and not before," is a present gift of such residue, with the right of possession and enjoyment conditionally postponed, and is not violative of the rule against perpetuities.
2. ———. The failure of the church to complete the building for a period of nine years after the testator's death, under the circumstances and conditions set out in the opinion, did not constitute a renunciation or defeasance of the gift.

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

Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellants.

Hoagland, Carr & Hoagland, contra.

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

JOHNSEN, J.

The heirs at law of Warren B. Ellis, deceased, seek by this action to have it declared that the twenty-fifth paragraph of his will is violative of the rule against perpetuities, and that they are accordingly entitled to the residuary estate which it creates. They claim further that, if the

rule against perpetuities is not violated, they are still entitled to the residuary estate as a matter of renunciation or defeasance, because the beneficiary has failed to comply with the condition of the will within a reasonable time.

The principal defendants—and the only ones material so far as this appeal is concerned—are the residuary beneficiary under the will, and the administrator *de bonis non* of the estate. The trial court held that there was no violation of the rule against perpetuities, and that no renunciation or defeasance had yet occurred. Plaintiffs have appealed.

The twenty-fifth paragraph of the will is as follows: "All of the rest and residue of my property of every kind and description and wherever situated, I hereby give, devise and bequeath to the Christian Church of North Platte, Nebraska, for the purpose of building the church, at this time partially built, and hereby authorize my executor, hereinafter named, to turn over and deliver to the officers of said church said residue of my estate, when said church is fully finished and completed and not before. It being my express wish and desire that no moneys be paid over to said church until the church building is completed as aforesaid."

The testator died in 1928. His will was made in 1926. In 1925 the First Christian Church, of North Platte, Nebraska, of which he was both a member and an elder, had built the basement structure for a new brick church, at a cost of $13,000, which was used as an auxiliary of the old church, which it adjoined. The joists were laid for the main floor auditorium, and a temporary roof was placed over the structure. Ellis advocated the immediate completion of the building and stated that he would make a donation of at least $20,000. Plans were drawn for the finished structure, which was to cost approximately $40,000, and other subscriptions were solicited. Ellis then decided that the condition of his estate made it inadvisable for him to make an immediate cash gift, and he thereupon told the church that he would make provision for it in his will.

This made the other pledges uncollectible and completion of the building had to be deferred.

By 1931 administration of the testator's estate had been completed, except as to the residuary estate. While the will empowered and directed the executor to convert any real estate into money or interest-bearing securities, disposition of the real estate was not deemed advisable under the economic conditions which had set in following the testator's death. The marketability of the real estate contained in the residuary estate had been so affected by the depression, both national and sectional, that to have sold it would have meant an unjustifiable sacrifice. This economic situation still obtained when this action was instituted in 1937. In addition, the record indicates that the original executor had been guilty of mismanagement or misappropriation, which made it necessary for the present administrator *de bonis non* to institute litigation on his bond, and this litigation was not completed until 1938, after the commencement of this suit. A claim against the trustee in bankruptcy of the trust company with which the executor had been connected and in whose affairs some of the assets of the residuary estate had seemingly become involved was shown to be still pending. At no time, therefore, since the testator's death had the assets of the residuary estate been available to aid in completing the church, as he had contemplated. The church was unable to raise sufficient outside funds for this purpose, and so the structure remained in the same condition as at the time of the testator's death.

It is plaintiffs' contention that the residuary clause was violative of the rule against perpetuities, because the completion of the church building was a condition precedent to the vesting of any rights on the part of the church in the property, and that, since such condition might not be performed within twenty-one years of lives in being, the gift was too remote.

If the completion of the church was a condition precedent to the gift—that is, if no rights in the residuary estate were vested in the beneficiary until the church was finished

—then plaintiffs' contention must be upheld. "If a gift is made to a charity on a contingent event and the happening of the event is a condition precedent to the gift, then, if the condition is too remote, * * * the gift to the charity is void." Gray, Rule Against Perpetuities (3d ed.) sec. 605. If, however, it was a present gift, and the rights in the residuary estate became vested immediately in the church, even though the time of its possession and enjoyment was postponed and made to depend upon a contingent and uncertain event, it would not violate the rule against perpetuities. 21 R. C. L. 310, sec. 38, and 315, sec. 45; 10 Am. Jur. 598, sec. 19.

In 2 Restatement, Trusts, sec. 401, comment k, it is said: "If property is given in trust for a charitable purpose * * * until the happening of an event which may not occur within the period of the rule against perpetuities, the intended charitable trust is valid if the happening of the event is not a condition precedent to the existence of the charitable trust, and if it does not appear that the settlor intended that no trust should arise unless the event should occur. In such a case the property is wholly devoted to charitable purposes from the outset. The court may permit the property to be held by the trustees to await the happening of the event."

Courts view with favor gifts for charitable purposes and will strain themselves to uphold such testamentary donations, if it can legitimately be done. *St. James Orphan Asylum v. Shelby,* 60 Neb. 796, 84 N. W. 273; *In re Estate of Secrest,* 109 Neb. 431, 191 N. W. 663. They will accordingly attempt to construe a gift in trust for charitable uses in such a way as to make it a vested interest, and not one subject to a condition precedent, where it is possible to do so. 48 C. J. 986.

The limitation in the residuary clause in this case is upon the turning over or delivery of the property, and not upon its vesting. It is a wholly reasonable construction, therefore, that the testator intended to make a present gift and to vest the church's rights as of the time of his death, even though the possession and enjoyment were condition-

ally and possibly indefinitely postponed. The residuary clause, accordingly, did not violate the rule against perpetuities.

It is plaintiffs' next contention that, if the gift did not violate the rule against perpetuities, there has since been a renunciation or defeasance of it by the failure of the church to complete the building within a reasonable time. Nine years had elapsed from the time of the testator's death to the institution of this suit. Six years had elapsed since the report of the executor showing that all expenses, claims and specific legacies had been paid. But, as has already been indicated, the residuary estate was at no time since the testator's death in such condition that it could have been used to help pay for the building, if the church had undertaken to complete it. A substantial portion of the assets had to be collected by the administrator *de bonis non* through litigation, which was not terminated until 1938. A claim in bankruptcy was still pending at the time of the trial in the district court. As to the real estate, no prudent business man would have sacrificed it on the existing market. In view of all these circumstances, it would be inequitable and, we believe, contrary to the testator's intention to hold that a renunciation or a defeasance had occurred because the building had not been completed at the time this suit was instituted. There is testimony to show that the church is now trying to work out arrangements to complete its building, but the significance and effect of this attempt are without importance here. We have no hesitancy, however, in holding that the situation which existed with respect to the residuary estate—not merely the litigation required for the recovery of part of the assets, but the impossibility of prudent sale and liquidation as to the real estate as well—and the general paralysis in developmental activity produced by economic conditions in the agricultural section of the country did not make the nine-year delay in completing the building an unreasonable one.

In *Allebach v. City of Friend,* 118 Neb. 781, 226 N. W. 440, where there was a testamentary gift for the erection

of a hospital, it was held that under the attendant circumstances in that case a four-year delay was not such an unreasonable length of time as to constitute a refusal to accept the gift. The court said: "This provision creates an estate upon a condition subsequent, and it is incumbent upon the donee to carry out the purposes of the bequest within a reasonable time. * * * What constitutes a reasonable time in giving effect to the express directions of the testator's will is determined from all the circumstances affecting and surrounding the gift."

It was defendants' contention that plaintiffs should have sought construction of the will in the first instance in the county court, and that the district court therefore was without jurisdiction, but this contention is sufficiently answered by *Merrill v. Pardun,* 125 Neb. 701, 251 N. W. 834, and the cases therein cited.

The decree of the trial court attempts to construe the status and relationship of the administrator *de bonis non* and the church with respect to the residuary property and its further administration, but since these questions are not necessary to a disposition of the issues raised between the plaintiffs and the defendants, we do not feel called upon —and we doubt if on this appeal we would have the right— to pass upon them. To dispose of the issues existing between plaintiffs and defendants, it is only necessary to determine the questions which we have discussed in this opinion, and to the extent of the trial court's determination of these matters, the decree is affirmed.

AFFIRMED.

KATHERINE M. VANDERLIPPE, EXECUTRIX, APPELLEE, V. MIDWEST STUDIOS, INC., ET AL., APPELLANTS.
289 N. W. 341

FILED DECEMBER 15, 1939. No. 30681.

1. **Automobiles.** A servant may on the same trip combine both his own and his master's business, and if one of the intended

results is to further the master's business, the master is liable.

2. **Master and Servant.** "In actions wherein it is sought to hold the master liable for the wrongful act of his servant, each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment, in the execution of his master's business, is ordinarily one of fact for the determination of the jury." *LaFleur v. Poesch*, 126 Neb. 263, 252 N. W. 902.
3. ———. Where there is conflicting evidence and different inferences may properly be drawn therefrom, the question of whether a servant is acting within the scope of his employment is properly submitted to the jury for determination.
4. ———. Under the facts set out in the opinion, *held*, that the questions of negligence and contributory negligence and whether the deceased was guilty of such contributory negligence as would bar a right to recovery under the comparative negligence statute were issues properly submitted to the jury for their determination.
5. **Automobiles.** It is not essential to establish the negligence of a motorist that eyewitnesses of the accident be produced. Circumstantial evidence may constitute adequate proof of negligence.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed on condition.*

James J. Fitzgerald and *Wear, Boland & Nye*, for appellants.

Earl Hasselbalch and *Tunison & Joyner, contra.*

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

ELLIS, District Judge.

In this case the appellee, who was plaintiff in the court below, as the personal representative of the deceased, Benjamin R. Vanderlippe, sued on two counts to recover damages for alleged wrongful death. The first count was for damages recoverable under the statute for the benefit of the widow and next of kin, and the second count was for

damages for pain and suffering sustained by the deceased from the time of the injury until his death and for medical and burial expenses.

Upon trial the jury found against both defendants and fixed the amount of plaintiff's recovery on her first cause of action at the sum of $5,000 and on her second cause of action at the sum of $3,500. The defendants filed separate motions for new trial. Upon consideration thereof the trial court entered a conditional order overruling the motions, the condition being that plaintiff file a remittitur for $1,000 from the verdict and judgment. The plaintiff complied with the conditions and motions for new trial were overruled. The remittitur has been treated by the parties as applying to the recovery on the second cause of action. In her remittitur the plaintiff expressly reserved her rights under section 20-1929, Comp. St. 1929.

Both defendants have appealed and have filed separate briefs herein. The defendant Midwest Studios, Incorporated, a corporation, will hereinafter be referred to as "Midwest" and the defendant Fred Brinch as "Brinch."

The action arises out of an automobile collision which occurred in Boone county, Nebraska, on July 6, 1937, as a result of which plaintiff's deceased sustained injuries from which it is admitted he died on July 8, 1937.

In her petition plaintiff alleged that defendant Brinch was an agent and employee of defendant Midwest; that Midwest was the owner of the car being driven by Brinch at the time of the accident, and that it was then being used in the course of his employment; that the proximate cause of the accident and resulting injuries was the negligence of Brinch in operating said car, and specified as negligence (1) unlawful and negligent speed; (2) omission to sound horn; (3) failure to keep proper lookout and to have car under proper control; and (4) speed greater than proper and reasonable under the conditions.

By separate answer Midwest admitted Brinch was its employee, but denied that he was acting within the scope of his employment, and alleged that he was on a mission of

his own. It further denied negligence on its part and alleged that the proximate cause of the accident, resulting injuries and death was the negligence of plaintiff's deceased. The answer of Brinch was in effect the same as that of Midwest.

At the close of all the evidence Midwest moved for a directed verdict on the grounds (1) that the evidence affirmatively established that Brinch was not at the time and place of the accident engaged in the service or furtherance of the business of Midwest, but was on a mission entirely his own; and (2) that deceased was guilty of more than slight negligence. At the same time Brinch also moved for a directed verdict on the second ground assigned in Midwest's motion and for the further reason that plaintiff had failed to establish any act of negligence on his part.

Midwest assigns three errors in this court—the overruling of its motion on the ground first stated above; the overruling of its motion on second ground as stated above; and the overruling of the motion for new trial.

Brinch likewise assigns three errors in this court—separately assigning the overruling of his motion on two grounds stated therein and the overruling of his motion for new trial.

It thus appears that the defendants rely on substantially the same errors, except the assignment by Midwest that Brinch was not at the time acting within the scope of his employment, and we will discuss that assignment first.

Midwest is a corporation engaged in the portrait business. The business was obtained through salespeople or canvassers who obtained orders for portraits and frames and sent them in to the company where the work was done. At the head of the sales organization in the field there were division managers. Next under the division managers and subject to their directions came district managers and Brinch was one of these. Each district manager had under him several crews. A crew consisted of a varying number of people and was in general charge of a crew foreman. The foreman and crew members made the actual solicita-

tions of customers, although Brinch spent part of his time in the direct solicitation of customers and taking of orders. His time appears to have been divided between direct solicitation of orders and the supervision and stimulation of production of business by crews under him. He received a commission on the orders which he obtained as a result of his own solicitation and an "overwrite" or commission on all orders obtained by the individual members of the crews under him. As indicated above, both defendants admit by way of answer that Brinch was an employee of Midwest.

On July 6, 1937, Brinch was staying at a hotel in Central City. In the morning of that day he left Central City to go to Madison and it was while on this journey that the accident occurred. He testified that he had a portfolio with some samples and business papers in it, but that he did not take it with him on that morning. There is no testimony however that he had any need for the portfolio or its contents when not actually soliciting orders himself and when engaged in the other part of his work consisting of supervision and stimulation of the work of his crews. Brinch gave as his reason for making the trip to Madison, "I was going to join Bob Burke." Burke was a crew foreman under Brinch. Brinch had no appointment with Burke and his going was just his own idea. Brinch stated that the word "join" had no particular meaning. Burke was going to send his wife home and wanted to talk to Brinch about it. Brinch was going to discuss that with Burke that day. Burke's crew consisted of Burke, his wife and one man and they had been working in Madison for a week or two. After testifying as above, Brinch later in his examination denied that Burke's wife was a member of his crew. Burke wanted to send his wife home and wanted to borrow the needed money from Brinch. Brinch later on personally made the loan and Burke repaid it to him. Brinch admitted that as district manager he was interested in seeing that Burke kept at work and that Burke's wife was not much assistance to him in his work. "Q. And you thought that Burke would do better work if he did not have his wife around,

did you? * * * A. Well, I imagine so. She did need a vacation; traveling on the road does get on a lady's nerves. Q. And you thought that the quality of Burke's work could be improved if his wife could be sent away for a while, did you? * * * A. It might help. * * * Q. Whenever you saw a crew foreman, such as Bob Burke, you, of course, discussed business with him, didn't you? * * * A. Yes—well, every time we got together we discussed something about business, certainly." On the morning in question the crew which was with Brinch in Central City all went out to work before he left, and while Brinch took no orders that morning, he said he would have if some one had come up and given him one.

Midwest had legal title to the car Brinch was driving, but had sold it to Brinch on a conditional sales contract, which was unrecorded, so that, in so far as public records were concerned, Midwest was the owner. Brinch had made payment direct to Midwest on the purchase contract. "Q. As I take it, the sole purpose of the company in buying this car was to furnish Fred Brinch with a car so that he could work? I don't want you to misinterpret that. Put it this way; the sole purpose was for there to be a car available that he could have or could buy? A. That is correct. He wasn't in a financial position to purchase it, and without a car he couldn't operate, and, of course, the more business the field got, naturally the more business we would have to take care of. Q. So that you people bought him a car in order that he could continue to work? A. Well, not that exactly. We bought him this car, which was a new car. If he had gone—if he had got one, I knew he would have got an old rattle-trap that would have a lot of expense attached to it. He could have worked just the same without this car. Q. But you did buy it for him for the purpose of his working? A. That is correct."

Brinch reported the accident to Midwest by letter dated July 6, 1937. In it he stated, as on the witness-stand, that he was going "to join Bob Burke," but did not further amplify the purpose of his trip. He made no suggestion

that the trip was solely for personal reasons and said nothing to indicate that it was not in the course of and in connection with his work. He reported the damage to his car, estimated costs of repair at $100, transmitted offers by car dealers to exchange cars, and asked for instructions. Midwest sent Brinch a check for $100 to pay for repairs to his car and charged it to Brinch's division manager's account.

On this record Midwest insists that the question of whether Brinch was acting within the scope of his employment was one for the court, and that the trial court erred in not determining the question and determining it in favor of Midwest. This contention seems to be based on the assertion that there is no conflict in the testimony. With the latter assertion we are unable to agree. There is the conflict arising from Brinch's own testimony as to whether Mrs. Burke was or was not a member of Burke's crew. The triers of fact could choose between his conflicting statements. If she was a member of the crew, then certainly it would be a proper inference that her going directly affected the business of the Midwest. If she was not a member of the crew, there were the alternative inferences, either that her going was a private matter not affecting Midwest's business or that if she was sent away it might enable Burke to do better work. While Brinch patently sought to establish that the trip was for purely personal reasons, he admitted that when he got with a crew foreman they discussed business.

In *Harrell v. People's City Mission Home,* 131 Neb. 138, 267 N. W. 344, the court said: "A servant may on the same trip combine both his own and his master's business," and cited *Lytle v. Union Gas & Electric Co.,* 24 Ohio App. 314, 157 N. E. 804, and *McCormack Bros. Motor Car Co. v. Holland,* 218 Ala. 200, 118 So. 387. In *Primos v. Gulfport Laundry & Cleaning Co.,* 157 Miss. 770, 128 So. 507, it was held that an employee was acting within the scope of his employment where he was using his employer's truck partly for his own pleasure to attend a dance with his wife

and partly for his employer's benefit by soliciting business while at the dance.

The instant case is not like those of *Harrell v. People's City Mission Home, supra,* the companion case of *Parker v. Harrell,* 131 Neb. 147, 267 N. W. 348, and *Wise v. Grainger Bros. Co.,* 124 Neb. 391, 246 N. W. 733 (all cited by Midwest), in all of which cases the evidence was undisputed and without conflict that the employee was engaged solely on his own business. There was no evidence from which any contrary inference could properly be drawn. In such cases it goes without saying that the trial court, not only is justified, but should say as a matter of law that the employer is not liable.

Midwest cites the following rule and comment from 1 Restatement, Agency, sec. 235: "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of *or incident to* a service on account of which he is employed." (Italics ours.) "Comment: a. The rule stated in this section applies, although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. *The act is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.* However, it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined. *If, therefore, the servant* does the very act directed, or *does the kind of act which he is authorized* to perform within working hours and at an authorized place, *there is an inference* that *he is acting within the scope of his employment.*" (Italics ours.)

We think the rule is sound and applicable, but that it does not support appellants' contention. We cannot say, as a matter of law, that Brinch's trip was not incident to the service on account of which he was employed. Neither can we say that he was not actuated at least to some extent

by an intent to serve his master. It certainly does no violence to logic to conclude from the record that, if Brinch had no other purpose in making the trip than personally to discuss with Burke the matter of his wife's trip, he was influenced to do this for the broad purpose and with the intention of promoting and furthering the interests of his employer. His own testimony directly supports such an inference. We are unable to say that different minds might not properly draw different conclusions from the evidence and we certainly cannot say that the jury's determination against Midwest was without foundation in the evidence.

In the case of *LeFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902, this court cited with approval as a general rule of law applicable in cases like this the rule stated in *Stone v. Hills,* 45 Conn. 44, 29 Am. Rep. 635, which is as follows: "For all acts done by a servant in obedience to the express orders or directions of the master, *or in the execution of the master's business,* within the scope of his employment, and for acts *in any sense warranted* by the express or *implied* authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." (Italics ours.) The rule applies in this case, and what this court said immediately following the citation of the rule is controlling in the instant case: "Whether the act was done in the execution of the master's business, within the scope of his employment, is a question of fact. The rule cannot aid in the determination of the fact. Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury."

We now turn to the contention of both defendants that the deceased was guilty of more than slight negligence as a matter of law and that the trial court erred in not sus-

taining defendants' motions for a directed verdict on that ground. In considering this assignment it is necessary to set forth the substance of the evidence bearing on the collision. The accident occurred in the approximate center of the intersection of highways Nos. 14 and 56. No. 14 runs north and south and No. 56 runs east and west. The deceased was proceeding west on No. 56 and at the point of collision the left wheels of his car were approximately on the center line of the roadway. Brinch was proceeding north on No. 14 and the left wheels of his car were approximately on the center line of the roadway. It thus appears that each driver was on his own side of the road. The roads as they approached the intersection were of normal width (approximately 22 feet), but all four corners of the intersection had been cut back or rounded off so that the area of the intersection was substantially greater than the square of the width of the highways. On the southeast corner of this intersection there was a bank higher than a car. This bank had the equal effect of obscuring the view of the deceased to the south and the view of Brinch to the east, as each driver approached the intersection. No. 56 as it approaches the intersection from the east is upgrade. It levels off in the intersection, then is downgrade to the west. No. 14 from the south is upgrade until a point about 75 to 100 feet south of the intersection is reached, when the traveler comes over a "kind of a crown of the hill." Another witness stated it was 325 to 350 feet from the crest of the hill to the center of the intersection. Still another witness placed the top of the hill as 250 feet south of the center of the intersection. On approach to the intersection on No. 14 from the south there are several highway signs, first, a "slow" sign, then a "state highway 200 ft." sign, then two signs with highway numbers and directional arrows on them, and then one indicating towns, directions and distances, the latter being nearest the intersection. The same number and kind of signs are located on No. 56 as it approaches the intersection from the east. Approaching the intersection from the east on No. 56 one

could not see the crest of the hill to the south on No. 14 until within 30 to 35 feet of the center of the intersection. From a point 25 feet south of the center of the intersection one could see east on No. 56 a quarter of a mile. From a point 50 feet south of the center of the intersection one could see east on No. 56 to the 200 foot highway sign. From a point 250 feet south of the center of the intersection one could see east on No. 56 60 to 70 feet from the center of the intersection. Cars coming from the north are not required to come into this intersection in order to proceed west, but about 150 feet north of this intersection a road branches off to the west and south and in a sweeping curve connects with No. 56 to the west of the intersection formed by the right angle crossing of Nos. 56 and 14. The curved road forms one leg of a Y to the north and west of the intersection. The space in between the right angle formed by the crossing of Nos. 56 and 14 and the curved road is referred to by the witnesses as an island.

The car that the deceased was driving was struck approximately in its center on the left side. The damage to Brinch's car was largely confined to its front end. After the collision the Vanderlippe car moved in a northwesterly direction about 60 feet and came to rest on its left side in the island above referred to and 10 to 12 feet off the gravel. The rear end of Brinch's car turned to the east and after being turned around one or more times came to rest headed south in the ditch on the west side of No. 14, 80 to 90 feet north of the intersection. There were no tire marks of the Vanderlippe car east from the point of impact. There were tire marks made by Brinch's car and they extended from about the center of the intersection south 12 to 14 feet to about the south edge of the intersection.

The accident occurred about 10:30 in the morning on a "nice, clear summer day." The witness McClung was riding with the deceased and had a case pending as a result of the same accident. He testified that as they approached the intersection the deceased slowed down and came practically

to a stop—down to 5 miles an hour; that you could not see to the south until you approximately reached the circle or widening of the intersection resulting from rounding the corners. McClung looked to the north and saw a car just starting to turn off to the southwest on the Y above referred to. He looked to the south, estimated that he could see about 250 feet to the top of the hill and saw no car. After slowing down, as above stated, deceased proceeded across, gaining a little speed ("probably to 10 miles an hour") in the few feet before the car was struck. When they reached a point a little past the center of the intersection, witness glanced to the south and saw a car right on them—maybe ten feet away. The crash followed immediately. He was rendered unconscious for a time by the force of the collision. He testified that the brakes on the Vanderlippe car were working all right. He thought that at 5 miles an hour the car could be stopped almost immediately—within a foot or two.

Brinch testified that, when he reached the sign showing towns, directions and distances, he stopped to ascertain the closest way to Madison and estimated this sign as 100 feet or so south of the intersection. He then put his car in low gear, shifted to second, then to high and started downhill. No car was coming from the west, but he could not see to the right or east. He took his foot off the accelerator and kept looking until he could see around the bank on his right. He was two to four feet from the edge of the intersection when he first could see to the east. At this point he saw a cloud of dust and a car 50 feet east of the east line of the intersection. He kept looking at the car and also put on his brakes as hard as he could. He had driven three to four hundred thousand miles and estimated the speed of the other car at 50 miles an hour, at least. This speed was not reduced up to the time of the collision. Just before the impact he saw the driver of the other car talking to the man beside him; that is, he saw him turn his head toward his companion. He estimated his speed, when he entered the intersection, at 15 miles an hour and at the

time of the impact at 5 to 7 miles an hour. His brakes were good. He thought that at 15 miles an hour he could stop within 12 to 15 feet. There was some conflict between statements in his letter reporting the accident to Midwest and his cross-examination on the stand as to whether the Vanderlippe car moved straight west up to the time of impact or swerved to the north just before the impact. His final position seems to have been that it turned to the north somewhat.

The witness Closson was coming south on No. 14 on his way to Cedar Rapids, which is west of the intersection in question. Instead of coming south to the intersection, he turned off to the west on the cut-off or Y above referred to. He estimated the cut-off started at a point 200 feet north of the intersection and that the curve was 100 yards, more or less, from where it turned from No. 14 to where it joined No. 56. Just before turning he was looking to the south and could see to the top of the hill south of the intersection. He saw no car coming from the south, but did see a car headed west on No. 56 not to exceed 50 feet east of the center of the intersection. He could not say whether it had "clearly stopped or was just moving * * * but it was not moving at a rapid rate." He moved around the curve at 15 to 20 miles an hour and after traversing the curve as he headed west he heard a crash and in his rear-view mirror saw a big cloud of dust. He drove on possibly 200 yards, turned around and came back to the intersection, where he saw the results of the collision. He did not see any other car in the vicinity of the intersection before the collision, and the evidence clearly indicates he could see all of No. 56 west of the intersection to the point where he entered it to the west of the intersection.

The actual conflict between the testimony of the witnesses McClung and Brinch is apparent. We think the innumerable conflicting inferences which different minds might properly draw from the testimony and the physical facts are likewise apparent. These conflicts could only be resolved by a determination of credibility and the corroborative influence

of all the facts and circumstances proved. The testimony of Closson certainly tends to corroborate the testimony of McClung. If Closson, who had a perfect view to the south on No. 14, did not see the Brinch car, it was not within the view of the deceased. Closson's testimony corroborates McClung's testimony as to the slowing down of the Vanderlippe car before entering the intersection and flatly contradicts Brinch's estimate that its speed was at least 50 miles an hour. If Brinch's car was not in sight when the Vanderlippe car reached the intersection, its driver had a right to proceed on through the intersection. There is no denial in the evidence that it had reached the center of the intersection at the time of the collision. That it was farther through the intersection than the Brinch car is clearly established by all the witnesses as well as the point of impact of the Brinch car against it.

There would be no point in further discussion of the conflicts in the testimony and conflicting inferences arising from it. Suffice it to say, we conclude that determination of responsibility for the accident was for the jury, and that the evidence did not justify the trial court in saying as a matter of law that the negligence, if any, of the deceased was more than slight.

The defendants rely on the decisions of this court in *Nelson v. Plautz,* 130 Neb. 641, 265 N. W. 885, *Ritter v. Hering,* 135 Neb. 1, 280 N. W. 231, and *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673. All these cases turned on the facts, and in each this court determined that the plaintiffs either did not look or that, notwithstanding claims of looking, the driver failed to see what was in plain sight. The essence of the rule developed by these cases was the failure to look (or to see what was in sight) where looking would have been effective.

The contention of the defendants necessarily involves the contention that the facts in the cases last above cited were similar to the facts in the case at bar. We think the evidence amply supports a finding in conflict with defendant's contention. In the cases cited the physical facts of

the grades of intersecting roadways compelled the conclusion that the drivers did not look or did not see where looking and seeing would have been effective. In the instant case the hill crest south of the intersection beyond which a car coming from the south could not be seen is a physical fact clearly distinguishing this case from those cited. The question of whether a driver looks, obviously, only becomes of controlling importance where looking would be effective. By this statement we do not wish to be understood as suggesting that there are ever any circumstances where a motorist is justified in not maintaining a constant lookout in all directions from which danger may come. We simply mean that if the Brinch car was not over the crest of the hill and in sight when the Vanderlippe car approached the east line of the intersection, as both McClung and Closson testified, then the absence of direct testimony that the deceased looked to the south is not controlling. Paragraph 3 of the syllabus in the *Bergendahl* case, *supra*, imposes the duty to see what is in plain sight *unless some reasonable excuse for not seeing is shown.* The hill crest in the instant case is within the exception. If no car was visible in the space south to the hill crest, when the Vanderlippe car approached the edge of the intersection, it had a right to proceed. Any other rule would render No. 56 from the east useless for travel. The Vanderlippe car had the right of way over traffic from the south and had the right to assume that motorists from that direction approaching an intersection, which was a blind one to them, would approach with their cars under such control that they could yield that right of way. We cannot escape the conclusion that the jury were justified in finding that Brinch did not heed the slow and intersection warning signs and his inability to see the intersection which the sign warned was within 200 feet and came over the crest of the hill at too great a speed. On the facts we conclude that the cases cited are not controlling and that the assignment last discussed is not well taken.

What precedes disposes of all assignments of error made

and discussed by Midwest and all assignments made by Brinch except the general one that the trial court erred in overruling his motion for a new trial. Under the rules of this court respecting assignments of error relied on, we are not required to consider the remaining contentions of error made by the appellant Brinch *only* by way of argument. See *Kuhlman v. Schacht,* 130 Neb. 511, 265 N. W. 549; *Currier v. Teske,* 98 Neb. 660, 154 N. W. 234. However, we will discuss them briefly. Appellant Brinch complains that the trial court erred in submitting to the jury the issue of excessive speed on his part. This contention is based on the fact that no witness other than Brinch himself testified directly as to the speed of his car. This position necessarily involves the contention that speed cannot be proved except by direct testimony. With this contention we cannot agree. "It is not essential to establish the negligence of a motorist, who has injured a traveler in the operation of his machine, that eyewitnesses of the accident be produced. Circumstantial evidence may constitute adequate proof of negligence." 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) 152, sec. 6555. No further citation of authority is required to support our conclusion that speed, like any other act of negligence, may be proved by circumstances, the conclusions to be drawn from the circumstances being for the jury. The appellant Brinch cites *Knoche v. Pease Grain & Seed Co.,* 134 Neb. 130, 277 N. W. 798. The reversible error in that case resulted from the admission of the opinion as to speed of a motor vehicle of a witness who did not see the vehicle before the collision and who had no reasonable time, means, distance or opportunity from which to formulate an opinion as to speed. In that case it was contended that what the witness saw after the collision was sufficient to provide the foundation for his opinion as to speed. This court said: "Testimony based on these facts would be a mere conclusion of fact and *an attempt to impinge upon the province of the jury.*" (Italics ours.) The opinion specifically holds "that this evidence was prejudicial to the rights of the defendant and constituted

reversible error." We do not find anything in the opinion holding that the issue of speed was improperly submitted in that case. Appellant Brinch cites paragraph 3 of the syllabus from this case, which is as follows: "'Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error.' *Roseland v. Chicago, M., St. P. & P. R. Co.*, 130 Neb. 637, 265 N. W. 882." This paragraph of the syllabus was not prompted by the discussion on the issue of speed but referred only to the issue of defective brakes, on which point there was no evidence. The case is not authority against proof of speed by circumstantial evidence. The trial court did not err in the instant case in submitting the issue of the speed of the Brinch car to the jury.

Brinch complains that the court's instructions gave undue emphasis by way of repetition to the issue of Brinch's speed, and that prejudicial confusion resulted from giving two instructions the same number, which instruction number was referred to in a preceding instruction. The transcript before us does not exactly reflect the situation as described by appellant. In any event, we have examined the instructions complained of and conclude that there was neither prejudicial repetition nor confusion.

Brinch further complains of inflammatory and prejudicial statements by counsel for plaintiff in their arguments to the jury. Without extending this opinion by setting forth the statements complained of, we have no hesitancy in saying that the statements complained of were improper and ought not to have been made. Generally, such conduct on the part of counsel has but one rational effect, and that is to impeach counsel's faith in his own client's cause. If courts would inexorably give that effect to it, the result might be to develop uniform strength sufficient to resist a temptation unworthy of the profession. In the instant case the court was called, the statements read to him, and counsel for defendants asked the court to instruct the jury to disergard them. There were three such interruptions, and on each

occasion counsel for defendants only asked that the jury be instructed to disregard the remarks and for admonition of opposing counsel. No request that the court declare a mistrial was made. In each instance the court properly instructed the jury. From consideration of the whole matter, as reflected by the record before us, we conclude that it does not justify reversal.

Both Brinch and appellee complain of the remittitur required by the trial court. Appellee contends that no remittitur should have been required. Brinch contends the verdict on the second cause of action was grossly excessive and the result of passion and prejudice. He further contends that the remainder is still grossly excessive. A verdict which is deemed to have been the result of passion or prejudice cannot be purged of the inherent and fatal quality by remittitur. See *Collins v. Hughes & Riddle,* 134 Neb. 380, 278 N. W. 888. The verdict on the first cause of action was not in any sense excessive and could not possibly be ascribed to passion or prejudice. On the record, the verdict on the second cause of action is obviously disproportionate to the verdict on the first. We conclude that the verdict in question was not so grossly excessive as to indicate passion or prejudice. We approve the trial court's action in requiring a remittitur, but question the amount of the remainder. There is no question but what deceased sustained multiple injuries and suffered intense pain. He lived approximately 42 hours after the accident. He was given some, although not complete, relief by the use of morphine. He was not mentally clear at least two-thirds of the time. Damages for pain and suffering are not allowable during the time that the injured person is unconscious. See *Fries v. Chicago, R. I. & P. R. Co.,* 159 Minn. 328, 198 N. W. 998; *Stone v. Sinclair Refining Co.,* 229 Mich. 103, 200 N. W. 948. Allowance can only be made for pain and suffering of which the injured person is conscious. The only evidence of specific damage under this cause of action was burial and medical expenses in the amount of $650. After the remittitur and deduction of expenses proved, the

allowance for pain and suffering is $1,850. Considering all the factors involved, we are of the opinion that this is still excessive and that justice will be subserved by requiring a further remittitur of $500. The gross judgment of $7,500 will be affirmed to the extent of $7,000 if a remittitur of $500 (in addition to that filed in the district court) is filed herein within 30 days from the releasing of this opinion. Otherwise the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

IN RE ESTATE OF PETER E. WANTZ.
GEORGE W. CHAPPELL ET AL., EXECUTORS, APPELLEES, V. LEROY E. WANTZ, APPELLANT.

289 N. W. 363

FILED DECEMBER 15, 1939. No. 30693.

1. Wills. The intention of the testator as ascertained from the will must be given effect, if not prohibited by law.
2. ———. When apparent from the terms of the will that proper debts of a beneficiary are to be deducted from his legacy, such intent governs.
3. ———. Proper parol evidence, including evidence of testator's conduct subsequent to execution of will, and entries properly identified in an account book and other memorandum showing amounts paid, are admissible in proof of ademption of a legacy.
4. ———. Where the evidence is such as to show an intention of the testator to adeem or satisfy a legacy by gift or other payment of money subsequent to the execution of the will, such intention is controlling, and the burden of disproving such intention is on the party denying it.

APPEAL from the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

G. A. Farman, Jr., and *J. J. Harrington*, for appellant.

William M. Ely, contra.

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

FALLOON, District Judge.

This is an appeal from the lower court involving the construction of the will of Peter E. Wantz, which will was admitted to probate in the county court of Brown county on May 24, 1938. It more particularly concerns payments made by the testator on certain obligations or debts of Leroy E. Wantz, a son and legatee of the deceased. The district court found $16,495.83 as the amount to be considered by the executors as having been so paid. Leroy E. Wantz has appealed.

The will was jointly executed by Peter E. Wantz and his wife, Adda Wantz, on November 25, 1931. The wife died first and it was admitted to probate first as her will and subsequently probated as the will of Peter E. Wantz. It provided for certain cash bequests to a half-sister of the wife and to the Congregational Church of Ainsworth, and the residue of the one who died first went to the survivor and then after the death of the survivor was bequeathed to certain children and grandchildren of the wife. As to those provisions of distribution there is no dispute except as it involves the share of the appellant.

The will also contained the following provisions:

"Whereas, Leroy E. Wantz, a son of said Peter E. Wantz, is indebted to said Peter E. Wantz for moneys advanced at various times for the payment of notes signed by said Peter E. Wantz jointly with and as surety for said Leroy E. Wantz, and said Peter E. Wantz is still liable on other notes executed by him jointly with and as surety for said Leroy E. Wantz, and it is the desire of these testators that all moneys, already paid, and which will hereafter be paid by said Peter E. Wantz before his death, or out of his estate after his death, on any notes signed by him jointly with and as surety for said Leroy E. Wantz, and which have not been repaid by said Leroy E. Wantz, shall be considered as advancements to said Leroy E. Wantz out of the estates of these testators and be deducted from the share he would otherwise receive;

"(All such notes so paid by said Peter E. Wantz in his

lifetime will be found in the possession of Wm. M. Ely, Attorney at Law, at Ainsworth, Nebraska, together with a true and correct account of the dates and amounts of the payments made thereon by said Peter E. Wantz, as well as a true and correct account of any payments that shall have been made by said Leroy E. Wantz to said Peter E. Wantz to apply thereon, and the production by said Wm. M. Ely of such notes and account into this court, supported by his sworn testimony that they are the notes and items given to him by said Peter E. Wantz as representing the indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz, shall be accepted as conclusive evidence of the truth of the items of such account and of the amount of indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz for money advanced prior to the latter's death)"

"V"

"Upon the death of the survivor of us, the entire estate of which such survivor shall die seized, real, personal and mixed, shall be converted into cash by our executor or executors as soon as conveniently may be, and, after the payment of all debts, legal charges and expenses of administration, shall be distributed and divided as follows, to wit:

"1. The First Ten Thousand Dollars ($10,000) shall go to William Soper, son of said Adda Wantz;

"2. The next Twenty Thousand Dollars ($20,000) shall go one-half to Verna McGachle, daughter of said Peter E. Wantz, and one-half to the heirs at law of Viva Arnold, a deceased daughter of said Adda Wantz, by right of representation;

"3. The residue shall be divided one-fourth to William Soper, one-fourth to Verna McGachle, one-fourth to Edna Soper, and one-fourth to the heirs at law of Viva Arnold, deceased, by right of representation, until the total amount received by each, including the advancement to Cecil Soper and the amounts mentioned in the two preceding subdivisions 1 and 2, equals the amount of Leroy E. Wantz's advancement, after which the remainder shall be divided one-fifth to William Soper, one-fifth to Verna McGachle,

one-fifth to Edna Soper, one-fifth to Leroy E. Wantz, and one-fifth to the heirs at law of Viva Arnold, deceased, by right of representation;

"And in the event that said Verna McGachle is not living at the time of the death of the survivor of us, then her bequest shall lapse and become a part of the residuary estate, but in the event that any of the other legatees are not living at the time of the death of the survivor of us, then the share of such deceased legatees shall go to his or her issue or next of kin, by right of representation.

"In making this distribution we are endeavoring to divide all of our property which remains after the death of both of us equally among our children, except that we desire William Soper to have the first Ten Thousand Dollars ($10,000) even though the others shall not receive that much, and it is our intention that the advancement previously made to Cecil Soper and Leroy E. Wantz shall be applied toward the satisfaction of their equal shares in our estates."

The appellee executors asked for construction of the will and the amounts considered advanced, to which the appellant joined, but pleaded the statute of limitations and asked that none of the items set forth in the petition be deducted from his share in the distribution.

How did the testator intend to distribute his estate? Courts if possible must arrive at his true intention. That has been pointed out so many times by this court that citations of authorities are unnecessary. The will provided specifically how the indebtedness of Leroy E. Wantz should be determined.

The testimony shows that, about the time of the execution of the will, an account book was given by the testator, Peter E. Wantz, to his attorney, William M. Ely, in which he was to enter certain items as reported to him by said testator from time to time in regard to certain debts paid for his son, Leroy. The will has directed the method and the evidence afforded by the account book and other memorandum was properly admitted to determine the intention

of the deceased. When such intention has been shown, the burden of disproving such is on the person denying the same.

It is true, as has been pointed out in the case of *Stanton v. Stanton,* 134 Neb. 660, 279 N. W. 336, that the doctrine of advancements in this state only applies to intestate estates. That case concerned testacy and this court rightfully refused to read into the will an effect that the testator never intended. Likewise, directions by the testator as to the deductions from certain legacies of proper debts will be enforced precisely as an estate will permit.

The terms used by the testator are immaterial except they point to his obvious intention. In this case the testator intended that the Leroy E. Wantz debts paid by him should be applied on or deducted from his otherwise equal share. Whether the language used was scholarly or not makes no difference, if the manifest meaning or intent can be ascertained. If there be no legal objection, "a man may do what he will, with his own."

"While the term 'advancements' is generally used in case of intestacy, it is also applicable to wills; and, when testator's intention is clear that sums advanced should be deducted from bequests made, his intention must control." *In re Bresler's Estate,* 119 N. W. 1104 (155 Mich. 567).

This intention to adeem a legacy may be shown by parol evidence, including that of the testator's conduct subsequent to the execution of the will, and entries made in an account book and other memorandum properly identified, showing the amount of such payments, are admissible as proof of such satisfaction or ademption. When the evidence shows such an intention on the part of the testator to adeem or satisfy a legacy subsequent to the execution of the will, such intention is controlling, and the burden of disproving such intention is on the party denying it.

"Where the circumstances are such that an intention of the testator to adeem a legacy is presumed, the presumption is one of fact and not of law, and so may be rebutted, but the burden of doing so is on those seeking to rebut it; and

the rebuttal evidence must be clear and satisfactory, particularly where the will contains language tending to confirm the presumption." 69 C. J. 1026.

The terms of the will are clear. The will says that the shares of Cecil Soper and Leroy E. Wantz should be charged certain amounts that they had received. The amount charged against Cecil Soper was definitely fixed at $10,000 and there is no controversy as to his share. The amount as to Leroy E. Wantz was to be determined as provided in the will on such notes paid by the testator in his lifetime to be found in possession of his lawyer, William M. Ely, and on "the production by said Wm. M. Ely of such notes and account into court, supported by his sworn testimony that they are the notes and items given to him by said Peter E. Wantz as representing the indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz, shall be accepted as conclusive evidence of the truth of the items of such account and of the amount of indebtedness owing by said Leroy E. Wantz to said Peter E. Wantz for money advanced prior to the latter's death."

When there is a direction in the will as to deduction for debts of a beneficiary from his legacy, it will be enforced even though barred by the statute of limitations. The testator has control over his property, and the courts, unless prohibited by law, must carry out his intention as expressed by his last will and testament. The language used clearly denotes the intention of the testator to treat the payments, which he had previously made, as well as those he should thereafter make, in payment of appellant's debts, as deductions from his otherwise equal share.

The case of *Stanton v. Stanton, supra,* has been cited by both appellant and appellees, and the clear reasoning therein expressed by this court points the way to the proper solution of this case.

The evidence in this case has been carefully read and the decree of the district court is the correct construction and findings of fact under the terms of the will and the evidence adduced, and it is hereby

AFFIRMED.

IN RE APPLICATION OF PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT.
HAROLD E. COATES, ADMINISTRATOR, ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
289 N. W. 383

FILED DECEMBER 20, 1939. No. 30661.

1. **Eminent Domain.** The damages that are recoverable in a condemnation action are those that arise as a consequence of the condemnation, and from no other cause.
2. ———. The evidence as to the value of the land taken and damaged by the condemnation proceeding must be based upon its value in the condition in which it was at the time of the condemnation.
3. ———. Liability to respond in damages arises from the nature of the acts, not from the identity of the parties.

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

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

J. T. Keeffe and *Harold E. Coates, contra.*

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

SIMMONS, C. J.

This is an action brought by the appellant for the purpose of acquiring a right of way across lands of the appellees for the construction, operation, and maintenance of drainage ditches. The appellees hereinafter will be called the plaintiffs and the appellant hereinafter will be called the defendant. The defendant appeals from an award in favor of the plaintiffs.

The following statement of facts is all that is necessary for the purpose of the question here presented and determined. The defendant is a corporation organized and existing under and by virtue of Senate File No. 310, Laws of Nebraska 1933, ch. 86; Comp. St. Supp. 1939, secs. 70-701 to 70-715. The defendant constructed and put in operation

a diversion canal and storage reservoir in Lincoln county, known as the Sutherland reservoir. Shortly thereafter, seepage water appeared on lands between the reservoir and the river, and a large part of the plaintiffs' lands became water-logged and seeped. "This seepage, or a portion thereof" came from impounded waters in the reservoir. The defendant, being "in part at least" liable for the seeped and water-logged condition of the land, proposed the construction of a drainage system, and for that purpose brought this action to condemn land, including parts of the water-logged and seeped lands of the plaintiffs. It is agreed by both parties that this is not an action for damages arising out of seepage of said lands.

During the examination of plaintiffs' first witness, the trial court, in ruling upon the introduction of testimony, stated:

"The court, in the trial of this case, rules that the measure of damage in this case will be such as to consider the land as if it were completely dry and had never been seeped in any manner, and as if though it never would be seeped, the measure of damages being the value of the land actually taken as if dry, and as if it never had been seeped and never would be seeped, plus consequential damages to the rest of the land by virtue of the construction of the ditch, such balance of the land also being treated as though it were dry and had never been seeped and never in fact would be seeped. This is upon the theory that another action for damages for the seepage may be recovered, but not in this case. Any other rule would prevent the plaintiff from recovering consequential damages to the balance of the land on account of the benefits of this ditch being sufficient to offset the consequential damages to the balance of the land. If the value were taken as of the date of the beginning of these proceedings, with the seepage upon it, the consequence would be that the land taken would be of little or no value. The attorneys therefore will try the case upon the theory that seepage is not there at all."

The trial court followed this theory in its instructions

to the jury and in the jury's verdict which the court approved.

Is it a correct statement of the law?

Section 7, Senate File No. 310, *supra,* provides in part as follows: "In addition to any other rights and powers hereinabove conferred upon any district organized under the provisions of this act, such district shall have and exercise the power of eminent domain for the purposes and after the manner provided for in sections 46-602, 46-603, 46-607, 46-608, 46-617, Compiled Statutes of Nebraska, 1929, or in any one or more of said sections." See Comp. St. Supp. 1939, sec. 70-707.

"In case of the refusal of the owner or claimant of any lands through which such ditch, canal or other works are proposed to be made or constructed, to allow the passage thereof, the person, desiring the right of way, may present to the judge of the county in which such lands are situated, a petition describing the lands to be crossed, the size of the ditch, canal or works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of five appraisers, disinterested freeholders of said county, to ascertain the compensation to be made to such owners or parties interested. Upon the filing of said petition, the same proceedings for condemnation of such right of way shall be had as is provided by law for the condemnation of rights of way for railroad corporations; and the same provisions of law providing for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to irrigation ditches, canals and other works provided for in this article." Comp. St. 1929, sec. 46-603.

This court has held:

"The damages to which a landowner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken at the time of the taking, without diminution on account of any benefit or other set-off whatsoever; (2) the depreciation in value of the re-

mainder of the farm, caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits." *Omaha S. R. Co. v. Todd,* 39 Neb. 818, 58 N. W. 289.

"The elements of damage for the construction of a railroad across a farm are the actual value of the portion taken and the depreciation in value of the remainder caused by the proper construction and operation of the railroad, excluding general benefits." *Chicago, R. I. & P. R. Co. v. Buel,* 56 Neb. 205, 76 N. W. 571.

"Where land is taken from the owner by the power of eminent domain, the owner is entitled to receive the full market value of such land as of the date it was appropriated." *Stewart v. City of Lincoln,* 108 Neb. 825, 189 N. W. 279.

"The compensation for land taken by right of eminent domain is measured by its market value at the time taken, and no evidence is admissible of its peculiar value for special reasons to its owner." *Wiles v. Department of Public Works,* 120 Neb. 689, 234 N. W. 918.

"The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593.

"Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry." 18 Am. Jur. 877, sec. 242.

"The just compensation, required by the clause in the Constitutions, to be made to the landowner, is to be measured by the loss occasioned to him by the appropriation." 2 Kinney, Irrigation & Water Rights (2d ed.) 1941, sec. 1081.

These general rules are not in dispute. The difficulty presented is caused by the trial court's requirement that the case be tried "upon the theory that seepage is not there at

all," rather than upon the fact that seepage was there. In this action, is the defendant required to pay for the land taken and the resulting damages to the remaining land, based upon its seeped condition, or should the values be based upon what its value and condition were before the seepage occurred? It is obvious that, under the "theory" of the trial court, the witnesses were required to base their opinion as to value upon a pretended and nonexistent situation. The record discloses that some of the witnesses found it impossible to disassociate the fact from the theory and were permitted to testify as to values based in part upon the fact of the seeped condition. When, as here, the jury were permitted to view the premises, they were permitted to see a condition of fact as to the condition of the land, not in accord with the "theory" upon which the court required the case to be tried, and not in accord with the requirement of the verdict which they rendered.

The damages that are recoverable in a condemnation action are those that arise as a consequence of the condemnation, and from no other cause. Compensation is to be recovered in this action for the depreciation in value caused by the taking of land and the construction and operation of the drainage ditch, and not for that caused by the seepage of water from the reservoir.

Here the issue is the damage caused by the condemnation. The damage caused by the seepage from the reservoir is not an issue.

It necessarily follows that the evidence as to the value of the land taken and damaged by the condemnation proceedings must be based upon its value in the condition in which it was at the time of the condemnation. The damage caused to this same land by seepage from defendant's reservoir gives rise to a cause of action for which damages may be presently recovered in a proper action. See *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N. W. 585. "Damages from seepage shall be recoverable when and if it accrues." Laws 1933, ch. 86, sec. 7; Comp. St. Supp. 1939, sec. 70-707.

The error of the trial court can be demonstrated by one illustration. Suppose "A" built the reservoir and caused the seepage damage. Suppose "B" proposed to drain the land and brought this action for condemnation. Then it is clear that "A" would be liable for damages for the seepage, and "B" would be liable for damages for the condemnation. It is also obvious that the damages which "B" would be required to pay would be based upon the value of the land already damaged by seepage. The fact that in the instant case "A" and "B" are one and the same does not alter the situation. Liability to respond in damages arises from the nature of the acts, not from the identity of the parties.

This error of the trial court permeates the evidence, the instructions, and the jury's verdict. It is a prejudicial error that requires a reversal of the case and makes a discussion of the other errors assigned unnecessary.

REVERSED.

DANIEL BOCIAN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

289 N. W. 372

FILED DECEMBER 20, 1939. No. 30700.

1. **Master and Servant.** The law that permits a conductor on a passenger car to make a reasonable assault upon a dangerous person, when necessary for the protection of passengers, does not apply to a wrongful assault by the foreman of a railroad section crew upon a member thereof.
2. ———. Under the federal employers' liability act, an interstate railroad carrier is not liable in damages for an assault by a section foreman upon a member of the section crew, unless the negligent or wrongful act was committed within the scope of the foreman's employment or directed or authorized by the carrier.
3. **Courts.** In the administration of the federal employers' liability act, pertinent opinions of the federal courts are binding on state courts.
4. **Master and Servant.** Under the federal employers' liability act, liability of an interstate carrier is not created by conduct of

the wrong-doer, if impelled by motives that are wholly personal to him or to gratify his own feelings of resentment.

5. ———. Under the federal employers' liability act, the burden of proving an actionable injury resulting in whole or in part from the negligence of any of the officers, agents or employees of an interstate carrier, while the wrong-doer was acting within the scope of his employment, is on a plaintiff who claims damages as the proximate cause of such negligence.

6. Trial. Correct instructions to the jury do not cure prejudicial error in other misleading and contradictory instructions on the same issue.

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

Thomas F. Hamer, George C. Holdrege, Walter B. Sadilek and *William J. Schall,* for appellant.

Wagner, Wagner & Albert, contra.

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

ROSE, J.

This action was brought under the federal employers' liability act, making an interstate railroad carrier liable to an employee for an injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," if the negligent act is committed within the scope of the wrong-doer's employment or directed or authorized by the carrier. 45 U. S. C. A. ch. 2, sec. 51.

Plaintiff, Daniel Bocian, was employee. Defendant, Union Pacific Railroad Company, was employer. Plaintiff was a member of a section crew engaged in repairing defendant's railroad track near Rogers in Colfax county. John Demos was defendant's section foreman. He assaulted plaintiff April 11, 1938, and shoved him off the shoulder of the railroad track at about 2:30 p. m. into a ditch, where he was allowed to remain without attention until evening. After the assault plaintiff had a hernia in the scar of a former appendectomy.

Plaintiff alleged in his petition that the assault was com-

mitted within the scope of the foreman's employment; that the foreman was a person of violent temper and vicious character and disposed to assault men under him in order to induce them to work faster, facts within the knowledge of defendant; that the assault was made for such purpose; that as a result of the assault plaintiff was totally disabled and suffered great physical pain and mental anguish; that the injuries were permanent. There was a prayer for judgment in the sum of $2,990.

In the answer to the petition it was admitted that defendant was an interstate carrier; that John Demos was foreman of the section crew April 11, 1938; denied that plaintiff's injuries were caused by any act of defendant, its agents, servants or employees; alleged injuries of plaintiff were caused by his own acts. The reply to the answer was a general denial.

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

On appeal the verdict is challenged as being without support in the evidence, and instructions by the trial court to the jury are criticized as erroneous and prejudicial to defendant.

There is testimony tending to prove the following facts: It was the duty of Demos, the foreman, to keep the tracks in his section in proper repair for railroad purposes. He had authority to direct all other members of the crew in the performance of their duties and to employ and discharge section hands.

While there is testimony to the effect that, in addition to the assault on plaintiff, the foreman previously threw a bucket at another employee, the evidence is wholly insufficient to sustain a finding that, within the knowledge of defendant, the foreman was at the time of the assault a person of violent temper and vicious character and disposed to assault men under him to induce them to work faster, as alleged in the petition.

The law that permits a conductor on a passenger car to

assault a dangerous person, when necessary for the protection of passengers, as pointed out in *Zaitz v. Drake-Williams-Mount Co.*, 107 Neb. 262, 185 N. W. 424, has no application to the present controversy.

The evidence proves that the foreman assaulted plaintiff and thereafter directed other members of the crew to pay no attention to him. Through inhuman cruelty, plaintiff was left for hours after the assault on damp ground in a ditch at the side of the railroad track. There is an entire absence of proof that Demos was authorized or directed by defendant to assault a member of the crew for any purpose.

The law is that an interstate carrier, under the federal employers' liability act, is not liable in damages for such an assault unless it was committed by the wrong-doer within the scope of his employment or directed or authorized by the employer. *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123; *Allertz v. Hankins*, 102 Neb. 202, 166 N. W. 608; *Zaitz v. Drake-Williams-Mount Co.*, 107 Neb. 262, 185 N. W. 424. In the administration of the federal employers' liability act, pertinent opinions of the federal courts are binding on state courts. *Sullivan v. Chicago & N. W. R. Co.*, 128 Neb. 92, 258 N. W. 38.

A vital issue in the case at bar was whether the foreman made the assault while acting within the scope of his employment. Plaintiff had been in the employ of defendant at different times for several years. On the afternoon of the assault the members of the crew were at work on defendant's railroad track at or near a private crossing not far from Rogers.

In testifying, plaintiff was hampered by failure to understand the English language and his handicap was not entirely overcome by the aid of an interpreter, but he testified in effect that, as directed by Demos, the foreman, he was at work alone with a shovel 200 feet from the other members of the crew; that Demos walked back and forth between him and the crew three times; said nothing first and second times; third time came up, grabbed plaintiff's shovel

and hit him on the right side and he fell on his knees. Demos said to him, "Come with me;" both went to the place where the others were at work; Demos, approaching the crew and rubbing the side of his face, said: "Dan (plaintiff) hit me;" plaintiff took a shovel, Demos grabbed it and threw it on the ground, saying, "Get away. I will kill you;" plaintiff sat on the gravel on the "hobo path" and Demos shouted, "The train is coming;" plaintiff got up, turned around, and Demos hit him on one side of his face and then on the other and pushed him into the ditch and something then bursted in his right side a little above the waist line; fell on the ground and called in vain for help. This is a mere summary from plaintiff's testimony. It appears from other evidence that plaintiff was taken from the ditch in the evening in a helpless if not unconscious condition. In spite of orders to pay no attention to him, his coat was thrown to him by a member of the crew.

Referring to the assault and the incidents connected therewith, Demos, the foreman, testified that he took plaintiff to his place to work; showed him how to do it and returned to the crew; went back to see if plaintiff had done as directed and found he had not; Demos stooped down and asked plaintiff for his shovel to give further instructions and was struck on his left cheek by plaintiff, who was told to go home; that he was fired; that plaintiff, as directed by Demos, followed the latter to the place where the other members of the crew were at work, was shoved into the ditch and was told to stay there; that he had been previously discharged. The foreman explained the cause of the assault as follows: "Because I was mad because he hit me in the face." There were, however, inferences from evidence that he gave plaintiff directions as foreman after he first claimed to have ordered the discharge and that the assault grew out of the failure of plaintiff to perform his duties as directed. Plaintiff testified he did not strike Demos. The evidence is also in conflict as to the discharge of plaintiff before he was assaulted. In a recent case to recover from an employer damages resulting from an employee's assault it was held:

"An act that is incidental to the duties authorized is within the scope of the employment." *Rich v. Dugan,* 135 Neb. 63, 280 N. W. 225.

In the same case, referring to conduct of an employee, the following rule was quoted:

"Such conduct, to come within the rule, must not be impelled by motives that are wholly personal, or to gratify his own feelings or resentment, but should be in promotion of the business of his employment."

This rule conforms to federal law. *Davis v. Green,* 260 U. S. 349, 43 S. Ct. 123.

The burden of proving an actionable injury "resulting in whole or in part from the negligence of any of the officers, agents or employees" of an interstate carrier, while the wrong-doer was acting within the scope of his employment, is on a plaintiff who claims damages as the proximate cause of such negligence. This is the rule of both federal and state courts.

In the case at bar, with evidence as already indicated, the trial court in explaining to the jury the answer to the petition, including affirmative pleas and claims of defendant, gave instruction Number 2, as follows:

"Defendant for its answer to the claims of plaintiff denies the statements and allegations of plaintiff's amended petition and affirmatively pleads and claims that plaintiff had already been discharged at the time the said John Demos assaulted him and that the assault in question was not in the course of the employment of the said John Demos but was a personal matter between him and plaintiff and was made after plaintiff had ceased to work for defendant and as a personal retaliation of the said John Demos on account of the plaintiff having struck the said John Demos and was not in any way connected with or in furtherance of the work of the said John Demos as section foreman. Defendant further claims that the plaintiff was not injured in the affray between himself and the said John Demos but that the rupture complained of was an old one of long standing, from which the plaintiff has been suffering long

prior to the said assault. Defendant further alleges that such assault was not unprovoked but resulted from the misconduct of the plaintiff."

With affirmative defenses and claims thus stated to be that plaintiff was not an employee of defendant at the time of the assault, because previously discharged, and that the wrongful act of the foreman was committed while acting beyond the scope of his employment, the trial court gave instruction Number 4, reading thus:

"The burden in this case is upon the plaintiff who in order to recover herein must prove the allegations of his petition by a preponderance of the evidence and if he does not do so or if the evidence is evenly balanced or if it preponderates in favor of the defendant then the plaintiff cannot recover. The burden is upon the defendant, however, to prove his affirmative allegations and claims."

As already explained, the burden was on plaintiff to prove that he was an employee of defendant at the time of the assault and also that the foreman was then acting within the scope of his employment. The last sentence in the fourth instruction put on defendant the burden of proving that plaintiff was not an employee when assaulted, because previously discharged, and that the wrongful act of the foreman was beyond the scope of his employment, thus misplacing the burden of proof on these issues and making the instructions conflicting—plain error well calculated to mislead the jury to the prejudice of defendant.

The eighth instruction relating to liability under the federal statute omits the essential element that negligence or assault, to be actionable, must be within the scope of the wrong-doer's employment, thus also conflicting with other instructions. Correct instructions to the jury do not cure prejudicial error in other misleading and contradictory instructions on the same issues. *Brooks v. Thayer County,* 126 Neb. 610, 254 N. W. 413; *Toliver v. Rostin,* 120 Neb. 363, 232 N. W. 616; *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19.

There are complaints of other rulings in the proceedings

below, but, if erroneous, they are not likely to be repeated in this case.

For errors in the instructions, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

FLOYD H. KINYOUN, APPELLEE, v. WILLIAM F. REINSH, APPELLANT.

289 N. W. 382

FILED DECEMBER 20, 1939. No. 30712.

Judgment. Objections to revivor of dormant judgment *held* properly overruled on evidence considered in opinion.

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

Lawrence Fredericksen, for appellant.

Fred N. Hellner and *G. H. Seig, contra.*

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

ROSE, J.

This proceeding was begun in the district court for Douglas county to revive a dormant judgment of the municipal court of Omaha, wherein it was found and adjudged that William F. Reinsh, defendant, owed Floyd H. Kinyoun, plaintiff, $165.75 for necessaries of life. The judgment was entered December 1, 1930, and a transcript thereof was filed in the office of the clerk of the district court for Douglas county October 18, 1938. A conditional order of revivor was made by the district court and served on defendant December 6, 1938. Defendant made a special appearance and objected to a revivor on the ground that the judgment was void because the municipal court was without jurisdiction to pronounce it for the reason there was no service of summons or of other process on him or appearance by him.

After evidence was adduced by plaintiff on his application for revivor and by defendant on his special appearance and objections, the district court found that the judgment was unpaid and that no sufficient cause was shown why it should not be revived. The special appearance and objections were overruled and the judgment revived January 27, 1939, which then with interest amounted to $260.48. Defendant appealed.

On appeal it is argued by defendant that the judgment of the municipal court is void and therefore not subject to revivor. Want of jurisdiction is urged as a fatal defect. The return of the constable to whom the summons was delivered for service recited:

"On Nov. 22, 1930, I received the writ, and on Nov. 28, 1930, served by leaving a certified copy of this writ and all endorsements hereon to the within named William F. Reinsh at his usual place of residence, 2116 Cass St., the defendant, in the city of Omaha, in Douglas county, Nebraska."

The sum of the defense to the application for revivor is that 2116 Cass street, Omaha, was not defendant's usual place of residence November 28, 1930, nor at any other time. At the hearing on the issue of residence, defendant contradicted the return and any other evidence tending to sustain it and presented affidavits and produced oral testimony of witnesses to prove he never resided at 2116 Cass street, the residence of his son. It is evident, nevertheless, that the constable left a certified copy of the summons for defendant at 2116 Cass street, which was the residence of his son. The copy necessarily disclosed the date to appear in court and the amount and nature of the claim—$150 with interest "for medical and surgical services performed."

Plaintiff testified that, two or three days after the copy of the summons had been left for defendant at 2116 Cass street, the latter came to the office of plaintiff with the summons in his hand and said "that was a pretty shabby way for one lodge member to treat another," and that he could not pay the bill. Plaintiff testified further that defendant

made no objections to the bill and never paid it. This testimony in connection with the return of the constable is sufficient to sustain the judgment of revivor. The possession of the copy of the summons left by the constable at the residence of the defendant's son, and the upbraiding of plaintiff for bringing the suit, show that defendant had all the notice that could have been imparted to him by a copy of the summons, and is evidence sufficient in a revivor action for the court to find, together with the officer's return, that 2116 Cass street had been in fact his usual place of residence. In this view of the evidence, there is no error in the revivor. Having reached this conclusion, appeals from subsequent judicial orders enforcing the revived judgment are wholly without merit.

AFFIRMED.

ANDREW C. NELSEN ET AL., PLAINTIFFS, V. A. C. TILLEY, DEFENDANT.
289 N. W. 388

FILED DECEMBER 20, 1939. No. 30716.

1. **Constitutional Law.** The right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, but such an occupation may be subjected to regulation in the public interest, even though such regulation involves in some degree a limitation on the exercise of the right regulated.
2. ———. Liberty, as used in the state and federal Constitutions, implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.
3. ———. Whether an occupation is charged with such a public interest as to warrant its regulation is a legislative question with which the courts ordinarily will not interfere.
4. **Automobiles.** The regulation of the sale of motor vehicles under the state's police power for the purpose of preventing fraud and promoting the general welfare of the public is a proper subject for legislative action.
5. **Monopolies.** The legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of

lawful competition, or the creation of trade restraints tending to establish a monopoly.

6. **Licenses.** The sale of new motor vehicles is a lawful business which any person has a right to pursue, subject only to reasonable regulation.
7. **Constitutional Law.** A provision in a regulatory statute limiting the issuance of a motor vehicle dealer's license for the sale of new cars to persons enfranchised by the manufacturers of new motor vehicles is an unlawful restriction upon the right of a person to adopt and follow a lawful industrial pursuit.
8. ———. A section of a regulatory statute which authorizes the administrator to deny an application or revoke a license upon proof of unfitness of the applicant or licensee is not unconstitutional as conferring arbitrary power, where it appears that an adequate appeal to the courts is provided.
9. **Monopolies.** Injuries sustained as a result of fair competition are not protected against by either the state or federal Constitutions.
10. **Constitutional Law.** Where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition or to create a monopoly or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed.
11. **Statutes.** A section of a regulatory statute providing that the administrator may deny an application or revoke a license for wilfully discriminating in favor of one purchaser of a motor vehicle against another such purchaser is void for indefiniteness, where the element of wrongful intent is not included, all such wilful discriminations not being of themselves unlawful.
12. **Constitutional Law.** The survey provisions of the act, Comp. St. Supp. 1937, sec. 60-913, construed to be advisory and of a regulatory nature not inimical to constitutional provisions.
13. **Statutes.** If a statute be subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, the courts are required to adopt the construction which would make the act valid.
14. **Licenses.** The power to regulate includes authority to license and to collect a reasonable license fee.
15. **Statutes.** Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.

Original action by Andrew C. Nelsen *et al.*, against A. C. Tilley, for a declaratory judgment. *Judgment in accordance with opinion.*

Kelso A. Morgan, Joseph B. Fradenburg and *Alfred A. Fiedler,* for plaintiffs.

Walter R. Johnson, Attorney General, and *Philip M. Klutznick,* for defendant.

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

CARTER, J.

This is an original action seeking a declaratory judgment interpreting a statute regulating and licensing the sale of motor vehicles, Comp. St. Supp. 1937, secs. 60-901 to 60-919, inclusive.

The evidence shows that the A. C. Nelsen Auto Sales, a corporation, has a motor vehicle dealer's license authorizing it to sell new Nash automobiles, and that it has no license to sell other makes of new cars. It is stipulated that A. C. Nelsen Auto Sales has purchased and sold new automobiles other than those manufactured by Nash, and unless it be violative of this act to do so, it intends to continue to buy and sell new automobiles of all makes, using a dealer's license for the sale of new Nash cars only. It is also stipulated that the Central Credit Corporation does not directly deal in automobiles, but that it does make loans secured by chattel mortgages on new and used cars, and that it is often necessary to repossess both new and used automobiles when defaults occur. The Central Credit Corporation also alleges that a part of its business is to purchase new cars at chattel mortgage, bankrupt and execution sales for the purposes of resale. It is stipulated that Central Credit Corporation has no dealer's license to sell new cars, and that it cannot obtain one under the statute in question. The plaintiff A. C. Nelsen is the owner of all the stock of the Central Credit Corporation and A. C. Nelsen Auto Sales, except qualifying shares, and has an automobile salesman's license issued under the questioned statute.

It is stipulated for the purposes of this suit that the A. C. Nelsen Auto Sales and the Central Credit Corporation sometimes wilfully discriminate, either directly or indirectly, in prices between different purchasers of automobiles of like grade and quality, where the effect thereof may be substantially to lessen competition, or tend to create a monopoly, or to injure or destroy the business of a competitor. It is also stipulated that the plaintiffs are wilfully discriminating in favor of one purchaser and against others by contracting to furnish or furnishing service or facilities, or allowing discounts or rebates upon terms not accorded to all purchasers. It is also stipulated that plaintiffs are wilfully and habitually making excessive trade-in allowances on used motor vehicles for the purpose of lessening competition or destroying a competitor's business. In addition to the request of the plaintiffs for an interpretation of the statute to determine its exact meaning, plaintiffs contend that certain parts of the act contravene the Fifth and Fourteenth Amendments to the Constitution of the United States, and sections 1, 16, 21 and 25, art. I, and section 1, art. II of the Constitution of Nebraska. The decision will be limited, therefore, to a consideration of the business practices indulged in by plaintiffs and the relation of such practices to the statute before us, including the claims of unconstitutionality.

The plaintiffs contend that the regulation of the motor vehicle industry serves no public purpose; that such regulation does not promote the health, safety, morals or general welfare of the public, and consequently is inimical to the due process clauses of the state and federal Constitutions. Plaintiffs also contend that it is an unlawful interference with their right to contract, and amounts to a discrimination in respect to ownership and enjoyment of property contrary to constitutional inhibitions.

Whether these questions are to be determined as being within the prohibitions of the state and federal Constitutions, or within the broad field of legislative action known as the police power, presents a question that has brought much confusion into the jurisprudence of this country.

Liberty of contract and the right to use one's property as one wills are fundamental constitutional guarantees, but the degree of such guarantees must be determined in the light of social and economic conditions existing at the time the guaranty is proposed to be exercised, rather than at the time the Constitution was approved, otherwise legislative power becomes static and helpless to regulate and adjust to new conditions constantly arising. *State v. City of St. Petersburg,* 133 Fla. 766, 183 So. 304; *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board,* 134 Fla. 1, 183 So. 759. The balance between due process and the police power is therefore more or less unstable, as it must necessarily keep pace with the economic and social orders. As the exercise of the police power increases to meet new conditions, the protection of the due process clauses must necessarily recede to a corresponding degree. A proper consideration of the act requires us, therefore, to construe it in the light of the later decisions, rather than the earlier ones which were controlled by circumstances and conditions playing no part in the case now before us.

It is clear that the state cannot prohibit the ordinary business of buying and selling new or used motor vehicles. It may, however, regulate a business to promote the health, safety, morals or general welfare of the public. It may also regulate a business, however honest in itself, if it may become a medium of fraud. The state may, to some extent, compel honesty by imposing a license fee, if widespread frauds upon and losses by its people are thereby prevented. The liberty guaranteed to us by the Constitution implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, B. & Q. R. Co. v. McGuire,* 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259.

It is the contention of plaintiffs that there is no basis that warrants the regulation of the sale of new and used motor vehicles in this state. It cannot be seriously disputed that the motor vehicle industry has grown to huge proportions in both the state and nation. Motor vehicles, once

luxuries, are now necessities. The handling of motor vehicles has become a complex business. The sale of new automobiles is closely tied in with the purchase, trade and sale of used cars. The possibilities of fraud upon the public have correspondingly increased. The elimination of harmful trade practices and dishonest dealings resulting in injury to the purchasing public may have been, and undoubtedly was, a factor in the passage of the act. Many courts have sustained similar legislative enactments. The "Blue Sky Laws" of Ohio and other states, which require dealers in corporate stocks and other securities to be licensed, have been held constitutional. *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480, 37 S. Ct. 217. Licenses may be required for the operators of employment agencies. *Brazee v. Michigan*, 241 U. S. 340, 60 L. Ed. 1034, 36 S. Ct. 561. The business of selling patent rights, being peculiarly one in which fraud may be practiced, may be regulated. *Allen v. Riley*, 203 U. S. 347, 51 L. Ed. 216, 27 S. Ct. 95. A commission merchant's business has been held subject to regulation. *State v. Mohler*, 98 Kan. 465, 158 Pac. 408. Creameries may be licensed to insure honest dealing in weighing and testing the produce purchased. *Cofman v. Custerhous*, 40 N. Dak. 390, 168 N. W. 826. Wholesale produce dealers have been held subject to regulation. *State v. Levitan*, 190 Wis. 646, 210 N. W. 111; *State v. Wagener*, 77 Minn. 483, 80 N. W. 633; *Payne v. State of Kansas*, 248 U. S. 112, 63 L. Ed. 153, 39 S. Ct. 32. Sellers of bread may be regulated to protect purchasers from imposition by the sale of short-weight loaves. *Petersen Baking Co. v. Bryan*, 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277; *Id.*, 124 Neb. 464, 247 N. W. 39. Whatever the personal views of this court may be as to the necessity of such legislation, the fact remains that the legislature of the state concluded that a reasonable basis existed for its enactment and, there being some foundation in fact to justify legislative action, this court is powerless to substitute its judgment for that of the legislature even if it cared to do so. *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N. W. 624. We conclude that the

legislature has the authority under the police power to regulate the purchase and sale of motor vehicles for the protection and general welfare of the public.

But the legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly. It is contended that subdivision (a) of section 60-906, Comp. St. Supp. 1937, tends toward the creation of a monopoly. It is as follows: "Motor Vehicle Dealer's License: This license shall permit the licensee to engage in the business of selling or exchanging new and used motor vehicles or both; Provided, such license as it pertains to the sale or exchange of new motor vehicles shall be limited to such new motor vehicles as the licensee discloses in his application he is enfranchised to sell. This form of license shall permit one person named thereon to act as a motor vehicle salesman."

Plaintiffs argue that the limitation of a license to sell or exchange new motor vehicles to those which the applicant is enfranchised to sell creates a monopoly in those persons enfranchised by the manufacturers to sell new automobiles. The sale of new motor vehicles is a lawful business which any person has the right to pursue, subject to reasonable legislative regulation. No person, who complies with such reasonable regulations as the legislature may prescribe, may be arbitrarily deprived of that right. We agree that the limitation contained in subdivision (a) creates a monopoly in the persons enfranchised by the manufacturers of motor vehicles and thereby contravenes the Fourteenth Amendment to the Constitution of the United States, and sections 1, 3, 16 and 25, art. I of the Constitution of Nebraska. We base our holding in part on the case of *Hall v. State,* 100 Neb. 84, 158 N. W. 362, wherein this court said that an attempt on the part of the legislature to limit the sale of anti-hog cholera serum to persons holding a United States government veterinary license is a restriction upon the right of a person to adopt and follow a lawful industrial pursuit, it appearing that such government licenses were

issued only to the manufacturers of the serum. Also, in *State v. Geest,* 118 Neb. 562, 225 N. W. 709, this court said in a case similar in principle: "A law which restricts to registered pharmacists the sale of such articles as salt, soda, soap, distilled water, corn starch, and other useful but harmless articles, does not tend to promote the public health or welfare, but tends to place in the hands of a limited class a monopoly of the sale of such articles. Such an act is beyond the scope of the police power and is invalid." In the instant case, the issuance of a license to sell new cars is limited to those enfranchised by the manufacturer of the new motor vehicles to be sold. The effect would be that the business of selling new cars would be monopolized by dealers enfranchised by the manufacturers. It constitutes an attempt to create a monopoly, a power that the legislature does not possess. The legislature cannot prohibit a citizen from engaging in the lawful business of selling and exchanging new motor vehicles by licensing the business and limiting the issuance of licenses to a favored few. We therefore hold that the limitation contained in subdivision (a) of section 60-906, Comp. St. Supp. 1937, is unconstitutional and wholly void.

In the light of the foregoing holding, any person desiring to engage in the purchase and sale of new automobiles is entitled to a license upon payment of the fee and a compliance with the valid requirements of the act. This removes from our consideration the rights of the plaintiffs to sell new cars under the act before us, as each would be entitled to obtain a license to sell new cars without a limitation as to make. The defendant contends that the act contains no restraints tending to create monopoly for the reason that a manufacturer engaged in private business may lawfully announce in advance the retail prices at which his goods may be resold and refuse to deal with persons who do not conform to such prices. We concede for the purposes of this suit that the foregoing is a correct statement of the law, but it has no application here. A person may do business with whomsoever he desires and he may likewise

refuse business relations with any person if he sees fit. *Hompes v. B. F. Goodrich Co., ante,* p. 84, 288 N. W. 367. But the fact that manufacturers may lawfully contract with such persons with whom they choose to deal can add nothing to the power of the legislature if its enactments clash with restraints imposed upon it by the Constitution.

Plaintiffs contend that subdivision (f) of section 60-912 of the act, providing that the administrator shall have power to deny an application or revoke a license upon proof of unfitness of the applicant or licensee, is unconstitutional for the reason that it confers arbitrary power upon the administrator. We think this point has been decided contrary to the contentions of plaintiffs by a former decision of this court. We have held that a statute providing that the secretary of state shall have the power to reject any application for a license to lend money after a hearing does not confer arbitrary power upon the secretary of state. *Althaus v. State,* 99 Neb. 465, 156 N. W. 1038. In the instant case, a simple method of appeal to the district court is provided in which the licensee, by giving a one hundred dollar bond, may supersede the order of the administrator denying his application or revoking his license. Comp. St. Supp. 1937, sec. 60-916. Adequate protection against the exercise of arbitrary power is thereby provided. The situation respecting the ascertainment of qualifications as to fitness and suitability by an administrative officer under legislative direction is aptly stated in *Kreutzer v. Westfahl,* 187 Wis. 463, 204 N. W. 595, as follows: "The statutory directions for ascertaining the qualifications and fitness of the applicants for permits are not so explicit, and the argument is made that there is no standard for their selection and that in this respect the statute attempted to confer arbitrary power on the commission. The applicant is required to furnish a written statement showing his previous business history and such other facts as may be required. The commission, if it is deemed advisable, may make a detailed examination of his business and conduct, and if satisfied as to his good business reputation and conduct it is

required to issue the permit. It cannot be doubted that the legislature has the power to determine the qualifications of persons engaging in a business which from its nature affords opportunities for defrauding the public. In this statute it has declared what these qualifications shall be. The legislature might have added language prescribing in great detail the qualifications of applicants for permits and the mode of ascertaining those qualifications, but it is a question whether such details would not have tended to confuse rather than enlighten."

To the same effect is *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549, in which the court said: "The statute is not invalid for failing to prescribe the standards to be applied by the commission in granting licenses or refusing them. The obvious purpose of the license is to provide the commission and the members of the local boards with a record of the distributors and producers subject to the act. Supervision and enforcement are thus likely to be easier. No inference is permissible that any one was intended to be excluded because of favor or caprice. * * * Indeed the statute makes provision * * * that an order refusing to issue a license, or suspending or revoking one, may be reviewed on appeal to the Supreme Court of Appeals. There is sedulous protection against oppression or abuse of power. One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. * * * He should apply and see what happens." We conclude therefore that subdivision (f) is not void for failure to provide more definite standards for determining qualifications as to fitness. The statute adequately protects against the exercise of arbitrary power by the administrator of the act. The subdivision in question, when considered with other parts of the statute, conforms with constitutional requirements.

Plaintiffs contend that three other subdivisions of section 60-912 of the act violate constitutional provisions; and because of their similarity in principle, they will be con-

sidered together in this opinion. The subdivisions in question provide that the administrator may deny or revoke a license on proof that the applicant or licensee is (i) wilfully discriminating, either directly or indirectly, in price between different purchasers of a commodity of like grade or quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly or to injure or destroy the business of a competitor, (j) wilfully discriminating in favor of one purchaser of a motor vehicle by furnishing or contracting to furnish services or facilities or allowing discounts or rebates in connection with the sale or offering for sale of such motor vehicles so purchased upon terms not accorded all purchasers on proportionately equal terms, and (k) wilfully and habitually making excessive trade-in allowances on used motor vehicles for the purpose of lessening competition or destroying a competitor's business.

This court is committed to the doctrine that constitutional guaranties "contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter." *State v. Ruback,* 135 Neb. 335, 281 N. W. 607. A person has the right to adopt and follow any lawful business pursuit, not injurious to the community, which he may see fit, without being subjected to arbitrary restraints. Incidental to this, he has the right to labor or employ labor, make contracts in respect thereto upon such terms as the parties may agree, and to purchase, sell, inherit, sell and convey property of all kinds. Under the guise of regulation, these rights may not be arbitrarily abridged. *State v. Sperry & Hutchinson Co.,* 94 Neb. 785, 144 N. W. 795; *Hall v. State,* 100 Neb. 84, 158 N. W. 362.

It will be noted therefore that in subdivisions (i) and (k) the prohibited acts are unlawful only where the effect of

such discrimination may be substantially to lessen competition or tend to create a monopoly or to injure or destroy the business of a competitor. The act itself is not prohibited; it is the act accompanied by an intent to accomplish a result made unlawful by the statute which the legislature attempted to correct. Injuries sustained as a result of fair competition are not protected against by either the state or federal Constitutions. It is only when the act is accompanied by a wrongful intent, established by sufficient and competent evidence, to lessen competition, to establish a monopoly, or to injure or destroy the business of another that the penalty provided by the statute can be imposed. Properly interpreted, the subdivisions in question provide for reasonable regulations, and do not constitute the exercise of arbitrary powers or an interference with the rights of property or personal liberty guaranteed to us by the state and federal Constitutions.

As to subdivision (j), the element of intent is lacking. The prohibition is against wilful discrimination in favor of one purchaser against another in the respects noted therein, without reference to the intent or motive of the person so doing. It is in effect a price fixing statute. It is violative of the holdings heretofore cited and of the constitutional prohibitions hereinbefore referred to. Certainly, a person may sell his property for any price he cares to sell it for, unless it be accompanied by an intent to accomplish a purpose that is unlawful. If the statute purports to prohibit every wilful discrimination in price, every agreement to furnish services, every allowance of a discount or rebate, and every sale of a motor vehicle at other than a fixed standard price, it conflicts with constitutional restraints imposed on the legislature with reference to the acquisition, ownership and enjoyment of property, and the guaranty that no person shall be deprived of life, liberty or property without due process of law. If any of such acts were not intended to be inhibited by the statute, the case then falls squarely within our holding in *State v. Ruback, supra,* wherein we said: "The test to determine whether a statute

defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. * * * It is obvious that the terms of the statute under consideration are indefinite and uncertain. The elements of the crime it attempts to define and punish are not so clearly expressed that the ordinary person is apprised in advance as to what course it is lawful for him to pursue, and the intent and purpose of the sovereign is not clearly declared." We are therefore obliged to hold that subdivision (j) of section 60-912 of the act is invalid and of no force and effect.

Plaintiffs contend that the survey provisions of the act, section 60-913, Comp. St. Supp. 1937, are unconstitutional and void because they result in price fixing by the exercise of arbitrary power on the part of the administrator of the act. The section under consideration provides: "For the purpose of determining whether or not an applicant for a license or a holder of a license has violated any of the provisions of this law with particular regard to price discrimination and excess allowances on used motor vehicles, the administrator may authorize or at the request of 40% of the licensed motor vehicle dealers in any county or section larger than a county of this state, shall authorize a survey to be made to determine a fair basis for allowances to be made for used cars in purchases thereof or exchanges for other new or used cars. Such survey, if made, shall be amended from time to time as market conditions change and copies of the survey and amendments thereto shall be made available to all licensed dealers and salesmen. Said survey shall serve as a guide and shall in no way be binding upon any licensed dealer or salesman except for the purposes stated hereinbefore in this Act."

We quite agree that, in construing an act of the legislature, all reasonable doubt must be resolved in favor of

constitutionality. Likewise, it has been held that, if a statute is subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, this court is required to adopt the former. *Hinman v. Temple,* 133 Neb. 268, 274 N. W. 605; *Abie State Bank v. Weaver,* 119 Neb. 153, 227 N. W. 922.

It will be noted that the survey provision provides that the administrator shall authorize a survey to be made to determine a fair basis for allowances to be made for used cars in purchases thereof or exchanges for other new or used cars. It is to be used by the administrator to determine whether price discriminations exist. The completed survey is advisory only to the administrator. No provision for its admission as evidence is made. It is not even made *prima facie* evidence of the market price of used automobiles. All the other elements of the offense must be established, including the fact that the discrimination was unlawful. It is true that copies of the survey are to be made available to all licensed dealers to be used as a guide in their business transactions. Dealers are not required by the act to comply with the prices fixed in the survey. This being true, it is not a price fixing statute, nor one authorizing the use of arbitrary power by the administrator of the act. It is merely a statutory means which the administrator shall use in judging whether there have been price discriminations, either lawful or unlawful. Construed as a guide in the determination of price discriminations in carrying on a business decreed by the legislature as subject to regulation, the survey provision must be said to be regulatory in character. *City of Newman v. Atlanta Laundries, Inc.,* 174 Ga. 99, 162 S. E. 497.

Plaintiffs contend that section 60-908 of the act, providing for the collection of license fees, is unconstitutional and void. We think the law is that power to regulate includes authority to license, and authority to license includes authority to collect a reasonable license fee. *Commonwealth v. Clay,* 224 Mass. 271, 112 N. E. 867; *Opinion of the Justices,* 250 Mass. 591, 148 N. E. 889; *Paramount Pictures Dis-*

tributing Co. v. Henneford, 184 Wash. 376, 51 Pac. (2d) 385.

The question arises whether the parts of the act found herein to be invalid are sufficient to vitiate the whole act. The act itself provides that, if any section, sentence, clause, phrase or requirement of this act is held unconstitutional, such decision shall not affect the validity of the remaining portions thereof. This evidences an intent on the part of the legislature to have the valid parts of the statute in force if some be declared unconstitutional. The applicable rule is: "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld." *State v. Stuht,* 52 Neb. 209, 71 N. W. 941. Also, *State v. Price,* 129 Neb. 433, 261 N. W. 894; *Laverty v. Cochran,* 132 Neb. 118, 271 N. W. 354; *State v. Howard,* 96 Neb. 278, 147 N. W. 689.

In our opinion, a workable plan remains after the invalid portions are stricken out. An invalid proviso relating to the licensing of the sale of new motor vehicles has been herein nullified. Also, one cause for the denial of an application for a license or the revocation of an existing license, as the case may be, has been invalidated. Can it be said that these two sections of the act were such an inducement to its passage that it would not have been enacted if they had not been included? We think not. See *Weller v. New York,* 268 U. S. 319, 69 L. Ed. 978, 45 S. Ct. 556; *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549. We think the saving clause contained in the act, together with the nature of the invalid parts that have been nullified and the relation they bore to the remaining portions of the act, are such as to permit the remaining valid parts of the statute to remain in full force and effect.

We conclude that plaintiffs' allegations of unconstitu-

tionality as shown in the pleadings are without merit, except as otherwise declared in this opinion.

JUDGMENT ACCORDINGLY.

MELVIN DOBESH, APPELLEE, V. ASSOCIATED ASPHALT CONTRACTORS, INC., ET AL.: VILLAGE OF ANSLEY ET AL., APPELLANTS.

289 N. W. 369

FILED DECEMBER 20, 1939. No. 30741.

Appeal. When it appears that an appeal was dismissed solely because the transcript did not show facts sufficient to give this court jurisdiction on appeal due to mistake in the preparation of such transcript, and it further appears that appellant was not apprised of such defects in the transcript until the judgment of the court was entered dismissing the appeal, this court will, if timely application be made accompanied by a showing of such mistake, vacate the order of dismissal and permit a correction of the record by the filing of a supplemental transcript.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Judgment of dismissal vacated, and leave to file supplemental transcript granted.*

Evans & Lee, Chambers, Holland & Locke and *T. J. Kiesselbach,* for appellants.

Allan F. Black and *Perry, Van Pelt & Marti, contra.*

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

CARTER, J.

This is a motion to vacate a judgment dismissing an appeal for want of jurisdiction in a compensation case, and for leave to file a supplemental and amended transcript showing that jurisdiction in fact existed.

When this case was previously before this court, it was discovered that the transcript showed that the judgment in the district court was entered on May 8, 1939. The

record before the court further showed that an authenticated transcript of the proceedings was filed in this court on June 12, 1939. The motion for a new trial was shown therein as having been filed on May 15, 1939. We held, correctly we think, that the motion for a new trial and the transcript of the proceedings were filed out of time and that this court did not have jurisdiction to hear the appeal. *Dobesh v. Associated Asphalt Contractors, ante,* p. 1, 288 N. W. 32.

The appellants now move the court for an order vacating the judgment of dismissal and for leave to file an amended and supplemental transcript for the reason that the records of the district court in fact show that the motion for a new trial was filed on May 15, 1939, and that the judgment was filed and spread on the journal of the court on May 15, 1939, which facts, if properly appearing in the transcript of the proceedings, would lodge jurisdiction in this court.

The record does not show that a motion to dismiss for want of jurisdiction was ever filed in this court by the appellee, or that appellants were apprised of the error of the clerk of the district court at any time prior to the dismissal of the appeal by this court. Obviously, an injustice would be done the appellants to thus finally dispose of their case if, as a matter of fact, a properly prepared transcript would have invoked the appellate jurisdiction of this court.

Appellee contends that the law applicable to such a state of facts casts upon the appellants the duty of procuring and filing a transcript of the proceedings in this court showing all facts necessary for the jurisdiction of this court to attach. While this is undoubtedly the rule in some jurisdictions, we do not think it is a salutary one. In our opinion, the correct rule to be applied to the facts in the case before us is: When it appears that an appeal was dismissed solely because the transcript did not show facts sufficient to give this court jurisdiction on appeal due to mistake in the preparation of such transcript, and it further appears that appellants were not apprised of such defects in the transcript until the judgment of the court was entered dismissing the appeal,

this court will, if timely application be made accompanied by a showing of such mistake, vacate the order of dismissal and permit a correction of the record by the filing of a supplemental transcript. While we do not feel obliged to follow the holdings of other jurisdictions on a matter of practice and procedure, the following cases do sustain the rule announced. *Allerding v. Cross*, 15 Wis. 587; *Dabney v. Stearns*, 73 Wash. 583, 132 Pac. 400; *Linahan v. Barley*, 124 Mo. 560, 28 S. W. 84; *Turner v. State*, 79 Tex. Cr. Rep. 390, 186 S. W. 322; *Sullivan v. Tremont & Gulf Ry. Co.*, 4 La. App. 358.

The judgment of dismissal heretofore entered will therefore be vacated and set aside, and leave granted the appellants to file a supplemental transcript within fifteen days.

JUDGMENT OF DISMISSAL VACATED, AND LEAVE TO FILE SUPPLEMENTAL TRANSCRIPT GRANTED.

JOHN THIES, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

289 N. W. 386

FILED DECEMBER 20, 1939. No. 30517.

1. **Waters.** The evidence set out in the opinion warranted the submission to the jury of whether defendant's diversion dam and reservoir in the North Platte river were the proximate cause of an ice jam and a resulting overflowing of plaintiff's leasehold estate.
2. **Eminent Domain.** Accretions are property within the meaning of section 21, article I of the Constitution, providing that the property of no person shall be taken or damaged for public use without just compensation therefor.
3. **Waters.** The measure of damages for the actionable flooding of a leasehold is its diminution in value for the remaining term.
4. **Dismissal and Nonsuit.** It was not an abuse of discretion to permit the voluntary dismissal of a landowner from an action to enjoin the maintenance of a diversion dam and for the recovery of damages from a flood, brought by him and his tenant, and to allow the tenant alone to file an amended petition at law for the damages to his leasehold claimed in the original petition.

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

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

Halligan, McIntosh & Halligan, contra.

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

JOHNSEN, J.

This is an action for damages to plaintiff's leasehold estate from a flood due to an ice jam, alleged to have been occasioned by defendant's diversion dam and reservoir in the North Platte river in Keith county. A jury returned a verdict in favor of plaintiff for $822.25, and, from the judgment entered thereon, defendant has appealed.

The case is a companion case to *Welsh v. Platte Valley Public Power and Irrigation District,* 135 Neb. 441, 282 N. W. 385, in that it arises out of the same flood. In the *Welsh case,* which was a suit in equity for an injunction and for damages, tried *de novo* in this court, we held that plaintiff had failed to establish by a preponderance of the evidence that the diversion dam and reservoir were the proximate cause of the flood. We accordingly reversed a judgment for plaintiff and dismissed the suit. In this case, which is an action at law for damages, where the weight of the evidence is a matter for the jury and not for us to determine, we are concerned simply with whether there is substantial evidence in support of plaintiff's claim. The question therefore is, not what result we might have reached if we were trying the case *de novo,* but whether there is sufficient evidence to warrant submission of the question of proximate cause to a jury.

From a careful reading of the record, we are obliged to hold that there is. There is evidence on behalf of plaintiff to show that defendant had closed the gates of the dam, for the first time since its construction, about a week before the flood, and that the reservoir thereby became filled with

shallow water, which froze and checked the flow of slush ice through the river, causing it to accumulate and push the water backward, until it ultimately reached and flooded plaintiff's leasehold. There is testimony by eyewitnesses from the neighborhood that they saw the slush ice start piling up and commence to freeze at the dead water line of the reservoir and watched it gradually work backward and push the water over the surrounding lands for a distance of approximately two and a half miles. A qualified engineer testified that, in his opinion, the freezing of the dead, shallow water which had been admitted into the reservoir and the obstruction created thereby to the normal channel flow were the proximate cause of the flood. The record contains further testimony indicating that such a slush ice jam in the fall of the year was unknown in the river prior to the construction and operation of the diversion dam and reservoir. There is other evidence, also, disputing defendant's contention that the diversion dam and reservoir were in no way a causal factor, but that the flood was due solely to towheads and other obstructions in the river and to general weather conditions. We shall not attempt to detail the evidence of defendant or to compare its weight with that produced by plaintiff, for, as has been sufficiently indicated, there was substantial and credible evidence to support plaintiff's contention, and in this situation, irrespective of our personal views, the question of its weight and of plaintiff's right to recover was wholly for the jury.

Defendant contends that plaintiff was in no event entitled to recover for the damages to that portion of his leasehold that consisted of accretion lands in the old river bed, for the reason that all property interests in such lands must be held to be subservient to the use of the bed of the river for public purposes. The state does not hold title to the river beds in Nebraska. *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744. Such river beds are as effectually the subject of private ownership as other property, except that, in the case of navigable streams, there is an easement for public navigation. "The interest of the public in the waters and

bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it has over the road. * * * When by reason of natural changes the stream abandons the bed over which, through the instrumentality of its waters, the public had the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road, and its right and privilege to pass over the old one revert to the abutting owners; and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed." *Kinkead v. Turgeon, supra.* The title of an abutting owner to the accretions to such land is similarly absolute. *Conkey v. Knudsen,* 135 Neb. 890, 284 N. W. 737. It follows that under section 21, article I of our Constitution, an interest in accretion lands, like other property, cannot be taken or damaged for public use without just compensation.

Defendant contends, as a further ground for reversal, that since plaintiff's petition was filed on December 20, 1935, he was entitled to recover such damages only as had accumulated to that date, but that the trial court allowed him to prove and recover damages to March 1, 1936, the date his leasehold expired. This argument overlooks the fact that the diminution in value of plaintiff's leasehold occurred immediately at the time of the flood, and hence the fact that the leasehold ran beyond the date of the institution of suit did not make it an attempt to recover damages which had not yet accrued. The principal elements of damage shown were the destruction of hay and other feed by the inundation, and a deprivation of the use of the land, with its trees and brush, for winter shelter and pasture. The destruction and deprivation were complete and unmitigable from the date of the flood, and hence plaintiff's

damages were definitely fixed as of that time. It was not necessary to wait until the expiration of the leasehold to determine the extent of its diminution in value. Defendant's contention is therefore without merit.

It is further contended that the trial court erred in allowing plaintiff to file an amended petition, over defendant's objection, because it set up an entirely new cause of action and was between different parties than the original petition. The record shows that plaintiff and the owner of the land originally joined in a suit to enjoin defendant from maintaining its diversion dam and to recover damages. Later the action was dismissed as to the owner of the land, and plaintiff filed an amended petition for damages only. The damages which he sought to recover were the same as those which he claimed in the original petition. The order of the trial court permitting the filing of the amended petition was within the authorization of section 20-809, Comp. St. 1929, and, even without the statute, it would not have constituted an abuse of discretion. Procedure must be made as simple a vehicle as possible for direct approach to and prompt and orderly dispatch through the courts.

We find no error in the proceedings of the trial court.

AFFIRMED.

C. B. SCOTT, SPECIAL ADMINISTRATOR, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

289 N. W. 367

FILED DECEMBER 20, 1939. No. 30656.

Workmen's Compensation. A proceeding under section 48-142, Comp. St. Supp. 1939, to modify a previous settlement agreement or an award of the compensation or district court, payable periodically for more than six months, on which the payments have been completed, and to recover additional compensation for an increase in disability, can only be brought within one year from the time the employee knows or is chargeable with knowledge that his condition has materially changed, and that there has been such a substantial increase in his disability as to entitle him to additional compensation.

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

Vasey & Mattoon, for appellant.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

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

JOHNSEN, J.

This is a proceeding to recover additional compensation under the workmen's compensation law, on the ground of increased disability. The workmen's compensation court held that, since the increase in disability was known to plaintiff more than a year before the filing of her petition, the claim was barred under section 48-138, Comp. St. 1929. On appeal to the district court, the proceeding was similarly dismissed. Plaintiff, who was 73 years old, had died in the meantime, and revivor was had in the name of the special administrator of her estate, who has appealed to this court.

Plaintiff, Louise Scott, fell on a slippery floor in April, 1926, while employed as an attendant at the Nebraska Institution for the Feeble Minded, at Beatrice. She sustained an impacted hip fracture, which resulted in some bone absorption, a somewhat rotated union, and a 1½ inch shortening of the left leg. A petition for compensation was filed before the compensation commissioner and on October 27, 1926, an award was entered, allowing her 161¼ weeks compensation, for 75 per cent. permanent partial loss of use of her left leg, from August 1, 1926. Payments on this award were completed in September, 1929. She had continued in her employment from July, 1926, following the injury, to December, 1935, when her advanced age and physical condition made it impossible for her longer to do the work.

The record shows that for some time prior to December, 1935, she was becoming increasingly disabled. The major portion of the increase was probably due to her age, but the disability in her leg appears also to have increased.

The evidence which she offered, however, clearly indicates that she knew there had been a material change in the condition of her leg prior to the time her employment was terminated in December, 1935. As early as 1929, after the payments on the original award were completed, she claimed to be entitled to further compensation, and her son, who is now the special administrator of her estate, had consulted an attorney for her, about reopening the award. No proceedings, however, were instituted at that time. It is not particularly important here whether the disability in her leg had so increased in 1929 that she would then have been entitled to additional compensation, for, in any event, the son admits that, for at least a year and a half to two years prior to 1935, it was quite obvious that his mother was "breaking," and that the disability to the leg had been materially increasing. The present proceedings were not instituted until November, 1937.

The compensation court and the district court, as has already been indicated, took the view that in this situation the proceeding was barred under section 48-138, Comp. St. 1929, which provides: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (48-139) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment." In the case of latent injuries, we have held, of course, that the proceeding may be commenced within the statutory time after the employee first has knowledge that the accident has caused a compensable disability. *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449, and subsequent cases.

It is plaintiff's contention that the limitation provision in section 48-138 has no application to this proceeding; that where a compensation award, payable periodically for more

than six months has once been entered in the compensation or the district court, even though the payments thereunder may have been completed, the court has the power, under section 48-142, Comp. St. Supp. 1935, at any time, without limitation, to modify the award and to make an additional allowance for an increase in disability; that section 48-142 is wholly independent of section 48-138 and that a proceeding thereunder is not controlled by the limitation prescribed in such section. Section 48-142 provides: "All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his dependents, by lump sum payments, shall be final, but the amount of any agreement or award payable periodically for more than six months may be modified as follows: (a) At any time by agreement of the parties with the approval of the Compensation Court. (b) If the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage, or by reason of the death of the dependent. In such case, the same procedure shall be followed as in section 48-139, Compiled Statutes of Nebraska, 1929, in case of disputed claim for compensation, except that after the district court has entered order, award or judgment in the case then the application shall be made to that court."

We are unable to accept the argument that, where a court has once entered an award, section 48-142 is intended to give it a perpetual and unexpiring jurisdiction, without limitation as to time, to make additional allowances for any subsequent increase in disability. It should be noted that whatever authority is granted by the section is applicable by its terms, not merely to formal awards entered by the compensation or district court, but to voluntary settlement agreements between the parties as well, made in accordance with the provisions of the law. It is provided that "the amount of any agreement or award payable periodically for

more than six months may be modified," etc. There may be some force in the contention made by defendant, that, from the language employed and the rule applied in parallel legal situations, the section is intended to have application only to agreements or awards on which periodical payments are still being made at the time a modification is sought. Under such a construction, where the payments on a settlement agreement or an award, payable periodically for more than six months, have been completed, additional compensation for an increased disability could only be claimed, if at all, in an independent proceeding. We are not disposed, however, to take this narrow a view of the statute, for the process employed would in either event, for all practical purposes, be the same. In any proceedings had under section 48-142, it is provided that the same procedure shall be followed as in section 48-139, governing initial proceedings to recover compensation, "except that after the district court has entered order, award or judgment in the case then the application shall be made to that court."

We therefore hold that proceedings may be brought under section 48-142, to recover additional compensation for an increased disability, after the payments under a valid agreement or a previous award have been completed, but that a common sense and workable construction of our compensation law requires that the limitation provided in section 48-138 be held to be as much applicable thereto as to a proceeding to recover compensation for a latent disability. And so, a proceeding under section 48-142, Comp. St. Supp. 1935 (*Id.*, Comp. St. Supp. 1939), to modify a previous settlement agreement or an award of the compensation or district court, payable periodically for more than six months, on which the payments have been completed, and to recover additional compensation for an increase in disability, can only be brought within one year from the time the employee knows or is chargeable with knowledge that his condition has materially changed, and that there has been such a substantial increase in his disability as to entitle him to additional compensation.

The argument of plaintiff has been predicated chiefly upon *Johnson v. Iverson,* 175 Minn. 319, 221 N. W. 65, and other cases from that jurisdiction. The Minnesota statute governing modification, however, by its terms, has application only to formal awards, and does not include voluntary agreements between the parties, as does section 48-142. But even if the Minnesota statute were identical with ours, it would still be our duty to think and reason for ourselves and to attempt to make our own construction,—rational, workable, and as much in harmony as possible with our previous decisions. Mere priority of decision must not be translated into exclusiveness in judicial wisdom.

It has been the contention of defendant that additional compensation for an increased disability should never be allowed to be recovered in any case, except where proceedings have been brought within one year from the date of the last compensation payment. Such a construction would result in many cases in an obvious injustice. Equitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury and subject to the application of the limitation provision of the statute in the manner we have indicated above. In *Dunlap v. City of Omaha,* 131 Neb. 632, 269 N. W. 422, and *Kurtz v. Sunderland Bros. Co.,* 124 Neb. 776, 248 N. W. 84, as well as the other cases cited by defendant, the specific question here discussed was not involved, and there is nothing in the facts of these cases that is out of harmony with the principle we have announced, or that would require that plaintiff's right to recover for an increased disability be limited to one year from the date of the last compensation payment under the award.

No question is raised as to the sufficiency of the process employed to give the court jurisdiction over the state of Nebraska, and we accordingly shall not consider it.

The compensation court and the district court properly dismissed plaintiff's proceeding on the ground that it was barred as a matter of limitation.

AFFIRMED.

EDNA PETERSON ET AL., APPELLEES, V. DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLANT.

289 N. W. 370

FILED DECEMBER 20, 1939. No. 30692

Eminent Domain. Where private property is condemned by the state for a public improvement and a warrant, evidencing the award of the appraisers, is deposited with the county judge of the county in which the land is situated, and he immediately turns over the warrant to the owners of the land at the direction of an engineer in charge of the project, and the evidence fails to disclose that the engineer was a duly authorized agent of the state for the purpose of adjudicating condemnation awards, and the county judge had knowledge, by letter, of the intention of the department of roads and irrigation to appeal; *held,* such action on the part of the county judge and the alleged agent of the state did not deprive the state of the right to appeal.

APPEAL from the district court for Webster county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

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

McNeny & Sprague, contra.

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

FALLOON, District Judge.

This action was brought for the condemnation of certain real estate for state highway purposes by the department of roads and irrigation of this state. The proceedings were commenced in the county court of Webster county. There is no dispute about the notices given, appointment of appraisers, or the return of their award on March 15, 1938. Notice of appeal was given by the department on April 19, 1938, and on May 6, 1938, transcript was filed in the district court for said county.

Warrant for $900, amount of the appraisers' award, was sent by department of roads and irrigation to and received

by the Webster county judge on April 28, 1938, and by him turned over to appellee landowners the next day. The letter from the department inclosing warrant contained the following paragraph: "It is our understanding that having paid the appraisers' allowance to you as county judge, we now have the right to use the land condemned, even though we are appealing this case to the district court."

The plaintiff landowners in the district court moved to dismiss the appeal as the matter involved had been settled and award paid and also because an appeal bond had not been filed as provided in section 26-711, Comp. St. 1929. Motion was sustained "on all grounds" and the case brought here for review by the appellant department of roads and irrigation. As to the above facts and record, there is no dispute.

Evidence was offered by the plaintiffs, appellees here, and the testimony of one of the appellees and of the Webster county judge taken and the original notice of appeal filed in the county court as well as the letter from the appellant department of date April 28, 1938, are preserved in the bill of exceptions. No testimony was offered by the defendant, appellant in this court. The evidence has been painstakingly read and proves that the appellees would not allow any construction done by the appellant on the premises in dispute until the award was paid into court. It further shows that an engineer by the name of Gould was in charge of project and that he told the county judge, after he received the award money, to turn it over to the appellees. It utterly fails to show any authority on behalf of the engineer to bind the appellant or to authorize the turning over of the award money, which should have remained on deposit in the office of the county judge.

Agency is never presumed but must be proved. The mere fact that the project engineer is an employee of the state is not of itself sufficient to bind the state. The burden of proof, when an agency is asserted, is on the person making the assertion. A governmental agency is not bound by one of its employees unless it manifestly appears that the latter

acted within the scope of his authority. The evidence in this case wholly fails to do this.

Section 26-711, Comp. St. 1929, provides that the party appealing in condemnation proceedings must give bond in 30 days, but section 20-2231, Comp. St. 1929, provides that, when the state or its agencies are a party, it is unnecessary. This first section was passed in 1927 and the latter at the special session in 1930. This question of whether a state or any of its official departments should give an appeal bond was passed on by this court in *State v. Odd Fellows Hall Ass'n,* 123 Neb. 440, 243 N. W. 616, and the requirement of an appeal bond by the state obviated.

There is no other requirement to obtain jurisdiction by the district court except to file within 60 days in the said court a certified transcript of the proceedings including all papers relating to or connected therein from the county judge. This was done.

The statute provides further, not for the purpose of an appeal, but that there may be no delay in the prosecution of work of public improvement, that the award may be paid to or deposited with the county judge, in which case the work is not delayed but may proceed. This deposit shall remain with the county judge until a final decision is had. This payment to or deposit of the award with the county judge does not deprive the condemnor of the right to appeal. See *Cleveland, C. C. & St. L. R. Co. v. Nowlin,* 163 Ind. 497, 72 N. E. 257, and *Chicago, S. F. & C. R. Co. v. Phelps,* 125 Ill. 482, 17 N. E. 769. Also, *Madisonville, H. & E. R. Co. v. Ross,* 126 Ky. 138, 103 S. W. 330.

The appellant did all that was necessary to perfect its appeal. The payment of the award into court was necessary to expedite the construction work, but added nothing to the right of appeal. While it would have been proper to have made warrant payable to the county judge, rather than to appellees, it makes no difference in the decision rendered. Courts will not read into a statute on appeal a requirement that is not there. The payment of the deposit to the appellees without adequate authority by the county

judge does not deprive the appellant of its right to be heard upon appeal. There is no competent evidence to prove that the appeal had been abandoned.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

OWEN FRANK, APPELLEE, V. TERRY CARPENTER ET AL., APPELLANTS.

289 N. W. 538

FILED DECEMBER 23, 1939. No. 30844.

1. **Taxation.** Matters which might have rendered an unconfirmed tax sale voidable in the scavenger suit on the ground of fraud cannot be made the subject of a collateral attack.
2. ———. Tax sale certificates in a scavenger proceeding may be surrendered for cancelation at any time, in order to clear the public records and give the effect of a redemption from the sale, even after the expiration of the time in which the purchaser can acquire title to the property. Comp. St. 1929, sec. 77-2129.

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

Frank L. Glebe, Willard F. McGriff and *Mothersead & York*, for appellants.

Floyd E. Wright, contra.

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

JOHNSEN, J.

This case challenges the validity of the tax scavenger proceedings discussed in *Marker v. Scotts Bluff County*, p. 360, *post*, 289 N. W. 534, with respect to another piece of real estate. Most of the questions raised are settled by that decision.

Plaintiff sued defendant Carpenter for specific performance of a contract to purchase the property involved. Car-

penter set up as his reason for nonperformance that plaintiff had failed to discharge the tax liens against the property. The taxes involved were principally those for the years 1920 to 1927, inclusive, aggregating approximately $1,500, without accumulated interest. He asked that he be authorized to pay the taxes out of the balance of the purchase price, as far as possible, and that he be given judgment against plaintiff for any additional amount necessary to be advanced by him to discharge the liens. He further asked that Scotts Bluff county be impleaded as a defendant and be required to set up the tax liens against the property on behalf of itself and as trustee for the other interested governmental units. Scotts Bluff county filed a cross-petition alleging that, while the taxes in question had been included in the tax scavenger suit brought by the county attorney in 1928 (which is discussed in the *Marker* case), the proceedings had were void and the taxes were therefore still a lien against the property which it was entitled to have foreclosed. The trial court entered a decree in favor of plaintiff and dismissed the cross-petition of Scotts Bluff county. Defendants have appealed.

In this case the property involved was purchased by plaintiff's father, at the scavenger sale, on May 8, 1929, for the sum of $1, and a tax sale certificate was issued to him. No steps were ever taken to have the sale either vacated or confirmed, except that in November, 1932, the county treasurer, on his own motion and without notice to any of the parties, had the court enter an order authorizing him to cancel the taxes in question on his records, on the ground that they had been duly extinguished by the foreclosure proceedings. The tax sale certificate remained outstanding until March 15, 1939, when it was surrendered by the father to the county treasurer, with a letter stating, "I am sending you this Certificate of Tax Sale for cancelation under 77-2129 of the 1929 Statutes." Section 77-2129 provides that, where a certificate has been returned by the holder and canceled, "such cancelation shall have the effect of a redemption from such tax sale."

The foreclosure and the sale in the scavenger proceedings cannot be attacked in this suit, for the reasons which have been set out in the *Marker* case, unless they are utterly invalid. The county charges that the property was bid in by the father under a collusive agreement with the plaintiff, and that this, together with the nominal amount for which the property was purchased, constituted a direct fraud. Plaintiff and his father testified that there had been no conversation or agreement between them regarding the purchase of the property, although it was shown that plaintiff in turn had bid in some property which was owned by the father. It appears that prior to the sale the father had forwarded a check to the county treasurer with the request that some properties be selected and bids made for him by the county treasurer.

The situation does not have a particularly wholesome aspect, with the father and son, both of whom were delinquent in their taxes, purchasing each other's properties, and with the county treasurer undertaking to place a bid of $1 in the father's behalf upon a piece of the son's property, against which there existed $1,500 in taxes, without accumulated interest. But, even if the sale could be branded as collusive and fraudulent, it would still not be void, but merely voidable. A dollar has always been held to be a sufficient consideration in the eyes of the law to support a sale. This does not, of course, prevent the court, in scrutinizing a judicial sale, from taking into account the inadequacy of the sale price as one of the factors in determining whether the sale should be vacated or confirmed. But this matter, as well as any matters of conduct which may have tinged the sale, can only be considered by the court in a direct attack upon the sale proceedings. They cannot be raised in a collateral proceeding. In the absence of any attempt on the part of the county to vacate the sale in the scavenger proceedings, in the ten years that have elapsed, we must, for the purposes of this suit, accept it as valid.

It should perhaps be suggested, in connection with tax

scavenger proceedings throughout the state in the future, that the county attorney owes the duty of examining the sales and of taking prompt steps to attempt to vacate any sales where it appears that questionable practices have been indulged in to the probable prejudice of the public. The court will not hesitate to exercise its plenary equitable powers in such a situation. *Prudential Real Estate Co. v. Battelle*, 90 Neb. 549, 134 N. W. 161.

The county raises one other point that requires consideration. It contends that the holder of a tax sale certificate cannot surrender it for cancelation, so as to give it the effect of a redemption, after the expiration of the time limited for the acquiring of title. It argues that the father's failure to take title or to surrender his certificate before this right expired made the certificate a nullity. If the rights of a certificate-holder are to be deemed to have lapsed for all purposes, after the time has expired for acquiring title under the certificate (which we need not determine), the lapse would have to be held to operate primarily in favor of the property owner and not of the government. But whether the rights under the certificate in such a situation might still be enforced as a lien by an independent foreclosure in equity, or whether they have wholly expired, there is nothing in the statute, in either event, that prevents their surrender at any time for the purpose of clearing the public records and of giving "the effect of a redemption from such sale."

We are obliged to affirm the decree of the trial court.

AFFIRMED.

HENRY MARKER, APPELLEE, V. SCOTTS BLUFF COUNTY ET AL., APPELLANTS.

289 N. W. 534

FILED DECEMBER 23, 1939. No. 30846.

1. **Taxation.** A decree in a tax scavenger suit will not be held void at the instance of the plaintiff therein because the notice is not directed to "All Whom It May Concern," where those

owning or having an interest in the real estate involved have made no objection to the defect and have, on the contrary, ratified the proceedings by the assertion of rights under them.

2. ———. A sale in a tax scavenger suit is not void because the proof of notice thereof is not filed in the office of the clerk of the district court before the sale is held.

3. ———. A statutory provision that the holder of a certificate of tax sale in a scavenger suit may surrender it to the county treasurer with a request for its cancelation, and that such cancelation shall have the effect of a redemption from the tax sale, is not a provision for the release or commutation of taxes within the prohibition of section 4, art. VIII of the Constitution.

4. **Judicial Sales.** An unconfirmed judicial sale is not a nullity, and, as against a collateral attack, will be treated as valid for every purpose possible.

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

Frank L. Glebe, Willard F. McGriff, Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for appellants.

Morrow & Miller, contra.

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

JOHNSEN, J.

Plaintiff seeks to have it decreed that the lien of certain taxes upon 160 acres of land in Scotts Bluff county was extinguished by scavenger proceedings under article XX, ch. 61, Comp. St. 1922 (Comp. St. 1929, ch. 77, art. 21), and to have his title quieted against any further claim for such taxes on the part of the state, the county, and the school district. Defendants' contention is that the scavenger proceedings were a nullity, and the county, by cross-petition, prays that the lien of the taxes be confirmed and again foreclosed. From a decree in favor of plaintiff, the county and the school district have appealed.

The taxes involved were for the years 1919 to 1927, inclusive, upon 80 acres of the land, and for the years 1922 to 1927, inclusive, upon the other 80 acres. They totaled

approximately $975, without accumulated interest. In 1928 scavenger proceedings were instituted by the county attorney against a large number of tracts of real estate in Scotts Bluff county upon which the taxes were delinquent, including the two 80-acre tracts here involved, which were then owned by Grace I. Waters and Harry W. Drawbaugh, respectively. A decree of foreclosure was entered by the district court in such proceedings, and, at a sale held thereunder in May, 1929, R. G. Harvey bid in each of the 80-acre tracts here involved for $25, and had two certificates of tax sale issued to him. He later assigned one of the certificates to I. E. Adkins, and, in November, 1930, he and Adkins, after paying the 1928 and 1929 taxes upon the property, surrendered the certificates to the county treasurer, for cancelation under section 6132, Comp. St. 1922 (Comp. St. 1929, sec. 77-2129). No formal order of confirmation was ever entered by the court. An order was entered in November, 1932, on motion of the county treasurer, without notice, however, to any of the parties, authorizing him to cancel the taxes in question on his records, on the ground that they had been duly extinguished by the foreclosure proceedings.

Section 6132, Comp. St. 1922 (Comp. St. 1929, sec. 77-2129) provides: "Whenever the owner or holder of any certificate of tax sale shall return the certificate to the county treasurer and request a cancelation of such certificate, the same shall be taken up by the county treasurer and preserved, and an entry shall be made upon the tax record that the certificate has been returned and canceled and such cancelation shall have the effect of a redemption from such tax sale: *Provided,* no cancelation of premium sale certificates shall be made until the premium period shall have expired."

Plaintiff, who acquired title through mesne conveyances on the part of the then record owners, contends that the surrender of the tax sale certificates by the holders, with the intention that they should be canceled, operated, under the statute, as a redemption from the sale and an extinguishment of the lien. Defendants argue that the scavenger pro-

ceedings were ineffectual to extinguish the lien, for the following reasons: (1) The published notice was not in the exact language of the statute and so was insufficient to give the court jurisdiction to enter a decree. (2) The sale was a nullity because the proof of notice was not filed in the district court until after the sale was held. (3) The surrender of the certificates by the holders operated merely to vacate the sale, and not as a redemption and a cancelation in favor of the landowners, since such a construction would make section 6132 a means of releasing taxes, which the legislature is prohibited from doing under section 4, art. VIII of the Constitution. (4) The sale could not be given any judicial recognition in this proceeding, because it had never been confirmed.

The contention that the published notice was insufficient to give jurisdiction rests on the fact that it uses the words "Notice—You will take notice," etc., instead of being directed to "All Whom It May Concern," as provided in section 6110, Comp. St. 1922 (Comp. St. 1929, sec. 77-2107). Whatever merit, if any, this contention might have, if made by the owner or one having an interest in the property and no knowledge of the proceedings, it is clear that it is without force in the mouth of the plaintiff therein, where the only party against whom it can possibly be said to be defective, as a basis for imparting notice, recognizes its sufficiency and claims rights under the proceedings that are predicated on it. A seemingly technical variance from the provisions for notice in tax proceedings may under certain circumstances constitute such a substantial defect as not to impart constructive notice, but where the parties whom it is sought to bind by the notice make no objection to the defect, and, on the contrary, ratify the proceedings had, by the assertion of rights under them, such provisions will not be made ritualistic, in order to enable the party by whom the proceedings were instituted to escape some of the subsequent effects of them. Section 6148, Comp. St. 1922 (Comp. St. 1929, sec. 77-2145) expressly provides: "Throughout all of the proceedings it shall be the duty of the county (court)

to disregard all informalities or irregularities which may have occurred from the inception of every state, county or city general tax up to final confirmation of sale."

The contention that, since the proof of notice of sale was not filed in the office of the clerk of the district court until after the sale was held, the sale was void is also sufficiently answered by section 6148, just quoted. Section 6121, Comp. St. 1922 (Comp. St. 1929, sec. 77-2118), merely requires that such proof "shall be presented, with the affidavit attached, by the county treasurer to the clerk of the district court, and * * * shall be filed and preserved as a part of the records of the court." The time of filing is not specifically prescribed, and there is nothing that makes such filing a condition precedent to the right to hold the sale. Where the notice has been duly published, failure to file the proof thereof before the time of the sale would be at most a mere irregularity, which, under the statute, would have to be ignored.

Defendants' next contention is that the surrender of the certificate by the holders thereof, in 1930, did not operate to redeem the property from the sale and to extinguish the lien of the decree, but only to vacate the sale. Section 6132, which has been set out above, provides that the return of a tax sale certificate to the county treasurer, with a request for cancelation, "shall have the effect of a redemption from such tax sale." The term redemption, in a literal sense, means the act of buying back or repurchasing. Webster's New International Dictionary (2d ed.); *Murphy v. Casselman*, 24 N. Dak. 336, 139 N. W. 802. In law, it is applied specifically to the buying back or regaining of one's property after it has been sold. Ballentine's Law Dictionary, 1101. The statutory provision that a return of the tax sale certificate with a request for cancelation shall have the effect of a redemption from the tax sale cannot, therefore, by any ordinary construction, be held to mean that it merely operates to vacate the sale and to restore the lien of the decree. It must be held to mean what it in plain terms says, that such procedure shall have the effect of a redemption

from the tax sale. The property necessarily in this situation is not further subject to the lien of the decree.

Defendants argue that this construction makes section 6132 violative of section 4, art. VIII of the Constitution, which prohibits the legislature from making provision for the release or commutation of taxes. There is a distinction, however, between the release of taxes as such, and the extinguishment of the lien of a decree, into which they have been merged, by judicial sale proceedings. To the layman this may seem a technical distinction, but in law it is one that nevertheless soundly exists. Thus, it has been said that "a redemption of the land is not a payment of the tax." *Lindsay v. Fay,* 28 Wis. 177. And so, where taxes have been merged into a decree, and a public sale has been held, provisions may validly be made by the legislature for a redemption and a satisfaction of the decree, which could not be made if they were applied directly to the taxes themselves.

In *Woodrough v. Douglas County,* 71 Neb. 354, 98 N. W. 1092, the court said: "In a foreclosure the liens do not continue as encumbrances on the land, but by operation of law they are extinguished. In the proceeding to foreclose tax liens provided for in this act the liens are extinguished, and are not released either by the legislature or by the voluntary act of any public officer acting under authority from that body. * * * The judicial sale of property under a decree of foreclosure, for what it will bring, although it be less than the amount of the taxes assessed and delinquent against it, cannot be said to be a commutation of taxes within the Constitution." The rights of the public are sufficiently protected by an unimpeachable sale, and the provision which the statute makes for increased or premium bids. Where the highest amount which the property will bring has finally become settled, the public has no great concern about how the purchaser intends to realize upon the transaction. Its interest lies in obtaining as much revenue as possible from a fair public sale, and in getting the property back onto the tax rolls as a producer of current revenue. Where no bad faith is involved in the proceedings, it can

make no difference to the public, therefore, whether the purchaser is required to complete his title before he will be permitted to sell the property back to the former owner, or whether he is permitted to make a deal with the owner, after the sale and before issuance of treasurer's deed, by which the latter is enabled to retain the title and to discharge the lien. The fact that the legislature has made provision for the surrender of a tax sale certificate for cancelation, with the legal effect of a redemption from the sale, without requiring the holder to take title to the property in order to extinguish the lien of the certificates and the decree, does not make the statute an attempt to release or commute taxes.

Defendants' final contention is that the sale proceedings and the certificates issued thereunder cannot be given judicial recognition in this case because the sale was never confirmed. While a judicial sale does not become final or complete until it has been confirmed (*Smith v. Carnahan*, 83 Neb. 667, 120 N. W. 212), it is not a nullity merely because it lacks confirmation. 35 C. J. 44. Like all judicial proceedings, it is presumptively valid, and it must be so treated for every purpose possible. In a scavenger proceeding, an unvacated sale is valid for every purpose, without confirmation, except the termination of redemption rights and the obtaining of title. In the absence of any attempt to vacate it in the original proceedings, it must be recognized as valid for the purposes of this suit. Without a direct attack upon it, it is proper in this collateral proceeding to assume a conclusive acquiescence in it. Indeed, there is authority to the effect that failure to file objections to a sale may in some circumstances constitute such a ratification or acquiescence as to dispense with the necessity for a confirmation or to give rise to the presumption that an order of confirmation was made, of which the evidence has been lost. 2 Freeman, Executions (3d ed.) sec. 304a. In any event, while, of course, the surrender of certificates in connection with a sale that is subsequently vacated cannot operate as a valid redemption, such a surrender must, in the

absence of any attempt to vacate the sale, be treated as a valid redemption for purposes of this suit.

The decree of the trial court was proper under the circumstances.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1940

RALPH E. AREHART, APPELLANT, V. SCHOOL DISTRICT NO. 8, HITCHCOCK COUNTY, APPELLEE.

289 N. W. 540

FILED JANUARY 5, 1940. NO. 30725.

1. **Schools and School Districts.** The power of a school board to employ a teacher and to transact the business of the school district for school purposes implies the power to dismiss him for sufficient cause before expiration of the term of employment, especially where the contract provides that he shall not be entitled to compensation after dismissal for cause.
2. ———. A school board is a public body empowered by law to transact the business of the school district for school purposes and in that capacity the members thereof act as representatives of the district and not as individuals.
3. ———. In summoning a school-teacher for misconduct, in inquiring whether he is performing his contract and in determining his fitness for continued service, a school board acts in a quasi-judicial capacity and its dismissal is generally upheld after a hearing unless shown by the teacher to be fraudulent or otherwise without justification.
4. ———. In absence of a statute authorizing the dismissal of a school-teacher at the pleasure of the school board, a dismissal terminating the contract of employment without sufficient cause may be redressed in an action by him against the school district to recover damages for breach of the contract.
5. ———. A fist fight in the office of a superintendent of schools in a public school building by the superintendent and a high-school teacher in a subordinate position *held* sufficient to justify the school board in dismissing the former for cause, after notice and hearing.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Carl H. Swanson and *J. F. Ratcliff*, for appellant.

Butler, James & McCarl, contra.

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

ROSE, J.

This is an action by Ralph E. Arehart, plaintiff, to recover from School District Number 8, Hitchcock county, defendant, $1,800 with interest for breach of his contract of employment as teacher and superintendent of schools.

Plaintiff entered into a written contract with defendant March 20, 1936, to serve as superintendent of defendant's schools for two years commencing September 7, 1936, at an annual salary of $1,800, and acted in that capacity for one year. The school board prevented him from performing the duties of his employment for the second year. These facts were pleaded at length in the petition in which it was alleged further in substance that plaintiff was a duly-qualified teacher, was ready and willing to comply with the contract during the second year and offered to do so. A copy of the contract is attached to the petition and provides that plaintiff shall not be entitled to compensation after his dismissal for cause.

The answer of defendant to the petition admits the execution of the contract and that the school board prevented plaintiff from teaching pursuant to its terms between September 6, 1937, and May 6, 1938, and alleges in effect that plaintiff and E. C. Pancoast, a teacher in defendant's high school, engaged in a fist fight in the superintendent's office in the school building; that the best interests of the schools required plaintiff's dismissal; that on April 5, 1937, at a regular meeting, plaintiff and Pancoast were summoned to appear before the school board at a hearing for the purpose of determining whether or not their misconduct required their dismissal in the interest of the public schools;

that they both appeared before the board and were accorded a fair and open hearing at which each told his story; that at the conclusion of the hearing the board unanimously determined that their services should be terminated at the end of the school year in May, 1937; that they were requested to resign, but refused to do so, and plaintiff was prevented by the board from teaching in defendant's district for the school year beginning September 6, 1937.

In a reply to the answer plaintiff admitted that an altercation between him and Pancoast occurred in the superintendent's office in the school building March 15, 1937, but alleged that Pancoast made an unlawful assault on plaintiff who engaged in the altercation only to the extent necessary to self-defense. Plaintiff alleged further in his reply that after the meeting April 5, 1937, the minutes of the board recited:

"As a result of fight in professor's office between R. E. Arehart and Edw. Pancoast the board heard Mr. Arehart's side of story and then Mr. Pancoast's side of story. After hearing both sides of story the board decided unanimously that both teachers should resign at end of school year."

The reply admits also that plaintiff and Pancoast were summoned before the board April 5, 1937, and that both then appeared and that the board determined that the services of plaintiff should be terminated at the end of the school year in May, 1937, but alleged that such action was arbitrarily taken because of the bias, unfairness and prejudice of the board, and was without authority of law and void.

Upon a trial of the action for damages on the issues raised by the pleadings, the district court excused the jury and ordered a dismissal. Plaintiff appealed.

On appeal plaintiff argues that the action of the school board in dismissing plaintiff before his term of employment expired was not final; that just cause for the dismissal was a question for the court; that the burden of proving justifiable cause for such action was on the school district; that in absence of such proof plaintiff is entitled to damages

for the wrongful termination of the contract. In connection with these propositions, plaintiff invoked the following rule:

"If a teacher duly employed in the public schools for a specified period is dismissed by the school board prior to the expiration of the term of employment, without being shown to be incompetent, or for other good reasons, the district is liable therefor." *Wallace v. School District,* 50 Neb. 171, 69 N. W. 772.

Plaintiff proved his qualifications to teach when employed. He proved also the making of the contract and a year's service pursuant to its terms. His testimony shows that he was present at the board meeting when requested to resign; that he appeared before the board at the hearing; that he told his story; that Pancoast appeared and told his side of the controversy; that the board requested both to resign.

There is no statute permitting the school board to dismiss duly-employed teachers at its own pleasure, but the power of the board to employ a teacher and to transact the business of the school district for school purposes implies the power to dismiss him for sufficient cause before expiration of the term of employment. *Bays v. State,* 6 Neb. 167; *Wallace v. School District,* 50 Neb. 171, 69 N. W. 772; *Baird v. School District,* 41 Wyo. 451, 287 Pac. 308, and cases cited therein. The contract provides by its own terms that plaintiff shall not be entitled to compensation after his dismissal for cause. This is recognized by both the law and the contract. Sufficient cause for dismissal by the school board was shown by plaintiff in his reply. While he called the fight an "altercation" in his reply and alleged that he participated therein only to the extent necessary to defend himself from an unlawful assault, he also pleaded in his reply a recital in the minutes of the board, after it heard both combatants, to the effect that they had a fight in "professor's office." The record contains no evidence whatever that plaintiff participated in the fight only to the extent necessary to protect himself from an unlawful assault

or that the board in dismissing him was prompted by prejudice, bias, caprice, fraud or by any other improper motive. The school board is a public body empowered by law to transact the business of the school district for school purposes. The members act in a representative capacity, not as individuals. Compulsory attendance of children of school age is required. Preparation for citizenship and right living is a mission of the public schools under the existing system of government. Whether misconduct of a teacher unfits him for such service is in the first instance a question for the school board having general control of school affairs in the interest of the public. In summoning a school-teacher for misconduct, in inquiring whether he is performing his contract and in determining his fitness for continued service, a school board acts in a quasi-judicial capacity and its dismissal is generally upheld after a hearing unless shown by the teacher to be fraudulent or otherwise without justification. In absence of a statute authorizing the dismissal of a teacher at the pleasure of the school board, a dismissal terminating a teacher's contract without sufficient cause is not beyond judicial scrutiny, as held in *Wallace v. School District,* 50 Neb. 171, 69 N. W. 772.

Plaintiff, the superintendent, admitted in his reply, and the evidence shows without contradiction, that he and Pancoast, a high-school teacher, had a fist fight in the office of the superintendent. The school building and the office of the superintendent were not constructed and equipped by the public for fist fights. Plaintiff used these public school facilities for an unbecoming private purpose inimical to the best interests of the public schools. The fist fight evidenced a lack of cooperation between the superintendent and a teacher in the high school and a want of discipline—important factors in school management. The example and influence of the fist fight were well calculated to lessen the respect of pupils for their teachers. Of course a different question would have been presented had the superintendent proved that he made only an effort to repel an unprovoked

and unlawful assault upon him by a teacher in a subordinate position, as pleaded in his reply.

As disclosed by the pleadings, the facts shown by the undisputed evidence and the law applicable thereto, plaintiff did not make a case for compensation after he was discharged. The trial court, therefore, did not err in dismissing the action.

AFFIRMED.

IN RE ESTATE OF MYRTLE SHEERER.
JULIA DONOHUE, APPELLANT, V. HARVEY E. SHEERER, APPELLEE.

289 N. W. 529

FILED JANUARY 5, 1940. No. 30690.

1. **Executors and Administrators.** "In a petition to the county court for administration on the estate of a deceased person, the only averments essential to the jurisdiction of the court are, that such person died intestate, and was at the time of his death a resident or inhabitant of the county where the petition is filed; or, in case he was at the time of his death a nonresident of the state, that he left an estate in such county to be administered." *In re Estate of Pollard*, 105 Neb. 432, 181 N. W. 133.
2. ———. In such a case, where a petition has been filed and statutory notice has been duly given, and the objector has, in addition, actual knowledge of the pendency of the proceeding in ample time to have filed objections thereto prior to the hearing therein, but failed to do so until more than one year after the appointment of an administrator was made, no objection to the jurisdiction of the court to appoint such administrator can be predicated upon the fact that the petitioner was not legally married to the deceased or has no beneficial interest in the estate.
3. ———. After thirty days have elapsed, following the death of the deceased, no right of preference exists in favor of the widow or next kin of deceased, or the persons designated by them for appointment of administrator of the estate of deceased.

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

Lloyd E. Chapman, for appellant.

Joseph J. Cariotto, contra.

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

EBERLY, J.

This is an appeal by Julia Donohue from a judgment of the district court for Lancaster county, entered in the above entitled cause on November 8, 1938, which reversed and set aside a final order of the county court entered in this case, then pending therein, on May 13, 1938. By such order of May 13, 1938, it was adjudged by the county court "that Harvey E. Sheerer be and he hereby is removed as administrator of the above estate, and that the letters of administration heretofore granted herein to the said Harvey E. Sheerer be and the same hereby are revoked and annulled." The judgment of the district court, in effect, fully restored to Sheerer his rights as administrator duly appointed of the estate of Myrtle Sheerer, deceased.

The facts out of which this litigation developed include the following, viz.: Myrtle Sheerer, also known as Myrtle Dodd, for many years at and prior to her death, was an inhabitant and resident of Lincoln, Nebraska. She died in Lincoln, Nebraska, on February 5, 1937, and at the time of her death was the owner of $1,450 in cash and deposits in financial institutions, all located in Lincoln, Nebraska, and also an insurance policy of $1,000. In addition, she owned certain Iowa lands which had been purchased by her, the fee simple title of which was vested in deceased as "Myrtle Dodd Sheerer" by the terms of the deed of conveyance which she in her lifetime had accepted and received; also, her undivided interest in 76 acres of land in Iowa inherited from her deceased father's and mother's undivided estate, and the decree of distribution therein vested in her by the name of Myrtle Dodd Sheerer, which appears to have been done at her direction.

From appellant's petition filed in the county court and the proceedings thereon, upon which the action to remove Sheerer as adminstrator is based, we gather that on or about

February 8, 1937, Harvey E. Sheerer filed a petition in the county court of Lancaster county stating that he was the widower of Myrtle Dodd Sheerer (who had departed this life on February 5, 1937, a resident of Lincoln, Nebraska, owning personal property therein), and designating her as Myrtle Sheerer, and praying that letters of administration be granted to him upon the property of said deceased. The sufficiency of this petition so far as shown upon its face is unchallenged by appellant (see *Larson v. Union P. R. Co.*, 70 Neb. 261, 97 N. W. 313), and neither is the sufficiency of the notice of the pendency of this petition for appointment of an administrator in any manner questioned herein. In addition, a letter from the attorney at Lincoln, Nebraska, employed to settle up this estate, which was dated February 15, 1937, properly addressed to appellant at Stanton, Iowa, and put in the mail at Lincoln, Nebraska, on February 15, 1937, at 12 p. m., and received by her in due course of the mails, was produced by her and introduced in evidence at the trial in the district court. The first paragraph of this letter reads as follows, viz.:

"Dear Mrs. Donohue: You will want to know that the hearing on the petition for the appointment of an administrator in the matter of your sister's estate has been set by the county judge for March 8, 1937, at 9 o'clock a. m. It will not be necessary for you folks to come to Lincoln to attend this hearing, unless you want to. The court will grant letters of administration to Mr. Sheerer, upon which he will file his oath and his bond as administrator. This being done he will have the authority to collect and assemble the assets. An inventory can be filed at once. I'll send you copies of all court findings. No doubt you have the copy of the petition filed last week. I handed one to Mr. Donohue." "Mr. Donohue" referred to in this letter, the record indicates, was her then husband.

On the 8th day of March, 1937, it appears, the county court of Lancaster county, at a hearing duly had pursuant to proper notice, granted the prayer of Sheerer's petition, and issued letters to him and he thereupon duly qualified, as

provided by law, and entered on the duties imposed by the appointment. On March 10, 1938, appellant, Julia Donohue, filed in this cause in the county court of Lancaster county her petition to remove the administrator and revoke letters of administration issued to Harvey E. Sheerer. The sole ground for such removal, set forth in said petition, is based upon a statement alleged to have been contained in Sheerer's original petition for appointment as administrator of the estate of Myrtle Sheerer, deceased, that "he was the widower of the said Myrtle Dodd (therein designated as Myrtle Sheerer)." As to this statement, appellant alleges that it is "wholly false and untrue," "and the said Harvey E. Sheerer is but an interloper and pretender; that no marriage was ever solemnized between the said Harvey E. Sheerer and the deceased by any person authorized by law to solemnize marriages, and no license has ever been obtained for such a marriage." Appellant, in effect, in this pleading alleges that this act constitutes a fraud, and because thereof the county court was without jurisdiction to grant such letters of administration; that the letters granted were procured by fraudulent representations and are wholly null and void.

To this petition Harvey E. Sheerer filed his answer consisting of, (1) a general denial, (2) affirmative allegations that a valid marital relation existed between himself and the deceased at the time of her death.

It will be noted that maladministration by Sheerer as administrator is not alleged by appellant.

On hearing in the county court of Lancaster county on May 13, 1938, that court determined, viz.:

"1. That there never was any marriage of the said Harvey E. Sheerer to the deceased.

"2. That the letters of administration heretofore issued to the said Harvey E. Sheerer herein on or about March 9, 1937, are wholly null and void and should be revoked and annulled.

"3. That the deceased was an unmarried woman, and that the names, ages, and residences of the sole and only heirs at law of said deceased are as follows:

Name	Age	Residence	Related to Deceased
Julia Donohue	49	Stanton, Iowa	Sister
Frank Dodd	52	Red Oak, Iowa	Brother
Ernest Dodd	42	Unknown at the present time	Brother."

And the county court adjudged "that Harvey E. Sheerer be and he hereby is removed as administrator of the above estate, and that the letters of administration heretofore granted herein" be "revoked and annulled." On appeal by Sheerer from this order, and on trial *de novo* in the district court, that court reversed and set aside this judgment of the county court, and adjudged that Harvey E. Sheerer was entitled to remain and continue as administrator of the said estate.

The real question which was presented to the county court at the time of the entry of its order of May 13, 1938, is not who succeeded to or inherited the property of the deceased, but who, under the conditions existing at the date of making that order, was entitled to administer or continue to administer the same. No matter what may be the ultimate determination of the disputed marital relation, the appointment as originally made and the administration proceedings following are not "void." We really have here presented only a question of who is entitled to the fees and commission.

The deceased was a resident of Lancaster county at and prior to the date of her death. Her personal property was located here. A petition in due form was properly filed; statutory notice was given; and actual knowledge of the proceedings was fully and fairly communicated to the complaining party long prior to the consideration of the petition and the making of the appointment of the administrator prayed for therein. Our county court is a court of record. Its orders, decrees and judgments can be known by their record alone, which necessarily imports absolute verity and can neither be questioned nor falsified; from which it

follows that the county court is bound by the decree it renders, and can neither change nor disregard its orders and judgments after the term at which they were rendered, except strictly in the manner provided by statute and the law of the land. 1 Woerner, American Law of Administration (3d ed.) 493, sec. 146, note 3.

The general principles which seem to be controlling in questions of jurisdiction, as well as reasons sustaining the same, are well epitomized in the following:

"Jurisdiction is obtained over the estates of decedents, wards, bankrupts and insolvents, by the filing of a petition containing certain allegations, with a prayer, express or implied, for the appointment of an officer to take charge of the estate. This officer is variously called an administrator, executor, curator, guardian, tutor, assignee, trustee, commissioner or receiver. The duties of all being the same —namely, to settle and distribute the estate under the orders of the court—the principle governing the validity of their appointment, when collaterally assailed, must be the same in all. The statutes generally prescribe the order of appointment among the relatives or creditors; but, on principle, a deviation from such order will not make the order appointing void, for two reasons—namely, First: The subject-matter involved is the rights of the various persons in the estate. At present, we assume those persons to be in court, and the *power to declare and fix their rights* constitutes the jurisdiction over the subject-matter. The appointment of persons to carry out the orders and directions of the court in the process of settling those rights, is simply a part of the procedure necessary to conduct the proceedings to a final conclusion in an orderly manner, *where the jurisdiction is unquestionable.* Second: Whether A, B, or C, is thus appointed to assist the court, in no manner affects the merits of the cause, and courts should hesitate long before holding their proceedings void, to the detriment of innocent persons, on account of non-meritorious matters. These officers are merely agents or servants of the court, like the clerk and sheriff, appointed to carry out

and enforce its orders. They have no actual interest in the matter. By being appointed or recognized by the court, they become officers *de facto,* with the power of the state at their command, the same as the clerk or sheriff, and, on principle, no error in their appointment or removal can make the subsequent action of the court void." Van Fleet, Collateral Attack on Judicial Proceedings, 615.

In line with the principles thus stated, it has been held that the appointment of an administrator on insufficient or illegal evidence is not void. *Brubaker v. Jones,* 23 Kan. 411; *Stackhouse v. Zuntz,* 36 La. Ann. 529; *Brown v. Landon,* 30 Hun, 57, affirmed in 98 N. Y. 634.

Also, it has been held that the appointment of the wrong person, such as a nonresident, or a stranger before the widow had renounced her right, or an alien, as administrator, is not void, and his official acts prior to removal remain binding thereafter. *Brubaker v. Jones,* 23 Kan. 411; *Emery v. Hildreth,* 2 Gray (Mass.) 228; *Pick v. Strong,* 26 Minn. 303, 3 N. W. 697; *Garrison v. Cox,* 95 N. Car. 353; *Ramp v. McDaniel,* 12 Or. 108, 6 Pac. 456; *Semine v. Semine,* 2 Lev. (Eng.) 90; *Wilson v. Packman,* 1 Cro. Eliz. Part 1, 459 (38 Eliz.); *Hobson v. Ewan,* 62 Ill. 146; *Martin v. Tally,* 72 Ala. 23; *Maybin v. Knighton,* 67 Ga. 103; *Lyle v. Siler,* 103 N. Car. 261, 9 S. E. 491; *Berney v. Drexel,* 12 Fed. 393.

So, where the statute provided that letters of administration should issue to the widow, or to a person she might select, the appointment of such person chosen by the alleged widow was not void because she had another husband living and was not the lawful widow. *Francisco v. Chicago, M. & St. P. Ry. Co.,* 35 Fed. 647.

The approved practice on this subject in this state appears to be in harmony with the principles above enunciated. As to preferential right of appointment as administrator our statute prescribes: "First: The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust. Second: If the widow, or next of kin, or the persons selected

by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect, for thirty (30) days after the death of the intestate, to apply for administration, or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it. Third: If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the judge of probate may think proper." Comp. St. 1929, sec. 30-314.

It will be noted that the "30-day preference" is *eo nomine* accorded to the widow only, but she shares this right with the "next of kin." The widower has no preference as to appointment of administrator of his wife's estate unless embraced in the statutory phrase "next of kin." The primary meaning of the term the "next of kin" of a decedent is the persons nearest in degree of blood surviving him. Query: Does the term "next of kin" of a deceased wife, as employed in this statute, embrace or include her husband, and if the husband is not of the "next of kin," what materiality may be attributed to the allegation in Sheerer's original petition for appointment on which appellant predicates her right of relief in the instant case?

Waiving the question suggested, as a résumé of the facts here involved, we note that the deceased departed this life on the 5th day of February, 1937; that Sheerer was appointed administrator by an order entered by the county court of Lancaster county on the 8th day of March, 1937, more than thirty days after the death of the deceased; and thereafter no objection was made thereto by appellant or the next of kin, or any creditors of deceased, and no person selected by appellant or any other person interested in said estate was presented for appointment as administrator thereof to the probate court of Lancaster county until on March 10, 1938, thirteen months and five days after the death of deceased, and more than a year after the appointment and qualification of Sheerer as such administrator.

We are committed to the view that after the thirty days

have elapsed, following the death of the deceased, no right of preference exists in favor of the widow or next of kin of the deceased, or the persons designated by them for appointment of administrator of the estate of such deceased. *Atkinson v. Hasty*, 21 Neb. 663, 33 N. W. 206; *Spencer v. Wolfe*, 49 Neb. 8, 67 N. W. 858.

The opinion of this court in *In re Estate of Pollard*, 105 Neb. 432, 181 N. W. 133, is illuminative. Lester S. Pollard died November 14, 1918, leaving surviving him as his only heirs two minor children, aged, respectively, 8 and 6 years. His wife had died a few days previous. On November 27, 1918, John C. Pollard, neither of the next of kin nor an heir of deceased, filed a petition in usual form praying for his own appointment as administrator. The county court gave notice of the pendency of the petition, and fixed December 23, 1918, as a day for hearing. On December 20, 1918, Amanda Forsythe Murray, the maternal grandmother of the minor children, filed objections to the petition and to the appointment of John C. Pollard, which included a challenge to the jurisdiction of the county court to appoint an administrator on the petition of John C. Pollard, for the reason that he was neither the next of kin or a creditor, and also that his petition was filed within thirty days next following the death of the deceased. These questions were finally presented to this court on appeal. We held the filing of the petition for appointment of administrator by Pollard within thirty days next following the death of the deceased, proper, and determined that, "In such case, no objection to the jurisdiction of the court to appoint an administrator can be predicated upon the fact that the petitioner has no beneficial interest in the estate." This court, under the facts in that case, denied Mrs. Murray relief, and sustained the appointment.

In view of the authorities cited and discussed, it follows that the county court of Lancaster county had actual and ample jurisdiction to enter its order of March 8, 1937, appointing Harvey E. Sheerer as administrator of the estate of Myrtle Sheerer, deceased. Such appointment was not

void. Indeed, at least after the conclusion of the term of the county court ending April 30, 1937 (Comp. St. 1929, sec. 20-2009), its order or judgment so entered was binding upon itself as well as against all the world. *Stone v. Jensen,* 118 Neb. 254, 224 N. W. 284.

True, in Nebraska, by statute (Comp. St. 1929, secs. 20-2001, 20-2009), and by virtue of inherent powers possessed independent of statute, upon proceedings being properly instituted therein, county courts possess power to vacate such proceedings when procured by fraud. This necessarily involves an affirmative proceeding equitable in its nature, with accompanying pleadings, supported by proper proofs, sustained by competent evidence, which clearly establish the material fraud charged. *In re Estate of Kelly,* 103 Neb. 524, 175 N. W. 653.

In these proceedings, the following principles are applicable and controlling, viz.:

"Fraud is never presumed but must be clearly proved by the parties pleading it and relying upon it." *Fritsche v. Turner,* 133 Neb. 633, 276 N. W. 403. See *Saffer v. Saffer,* 133 Neb. 528, 274 N. W. 479; *Hampton v. Webster,* 56 Neb. 628, 77 N. W. 50; *Kernan v. Modern Woodmen of America,* 120 Neb. 333, 232 N. W. 590.

In a fraud action, the burden of alleging and proving the existence of the elements thereof is upon the party seeking relief from fraud. *Leichner v. First Trust Co.,* 133 Neb. 170, 274 N. W. 475.

The record in the instant case discloses that the sole allegation contained in appellant's petition for the removal of Sheerer as administrator, which charges him with fraud, is the inclusion by him in his original petition for appointment as such, of the statement "that the said Harvey E. Sheerer was the widower of said Myrtle Dodd (therein designated as Myrtle Sheerer)." This, appellant charges is "wholly false and untrue." No other fraud or fraudulent representation is charged. Does this amount to a legal fraud, a material fraudulent representation? A false representation "must relate to a matter material to the

transaction involved." 26 C. J. 1103. It admittedly constituted no essential part of the pleading in which it was incorporated, and had it been omitted the omission would in no manner have affected the validity of the petition involved. Then too, the record discloses that the sole complainant in this action had been furnished a copy of this petition long prior to the hearing thereon on March 8, 1937, and had been fully advised of the impending appointment of Harvey E. Sheerer on the date last named in ample time to have presented proper objections thereto. In addition, she then had full knowledge of the alleged facts as to the marital relations existing between Sheerer and her deceased sister, upon which she seeks to sustain her present attack upon the appointment then made. She offered no objection then whatever, permitted the appointment of the administrator to be made unopposed, the administrator to qualify, and the administration of the estate to proceed in the usual course. Her first objection is voiced and first claim made on March 10, 1938. Even if it be conceded *arguendo* that her objection, if timely made, might have possessed merit, it is too late now. The entire situation, in view of the actual issues here presented, invokes the application of the equitable maxim, that "equity aids the vigilant, not those who slumber on their rights." By the application of this maxim to the solution of controversies, courts have protected one who by superior diligence has obtained a legal advantage, or by denying relief to one whose danger was created by his own neglect. 21 C. J. 193.

In addition, a careful examination and consideration of the competent evidence of the entire record, especially in view of the acts and business transactions of the deceased, which were evidenced by writings executed in her lifetime, inevitably lead to the conclusion that the allegations set forth in the petition of Harvey E. Sheerer as to the marital relations existing between himself and the deceased, Myrtle Sheerer, at and prior to her death, were made honestly and in good faith, and thus believed by him to be true. We are committed to the view that fraud will not be imputed where

circumstances and facts upon which it is based may be consistent with honesty of purpose. *Clemens v. Brillhart*, 17 Neb. 335, 22 N. W. 779.

It follows that the original jurisdiction to make the appointment of March 8, 1937, is unassailable; that on the charge of the alleged fraud the complainant, Julia Donohue, has wholly failed to sustain the burden of proof. The county court erred in the entry of its order of May 13, 1938, removing Harvey E. Sheerer as administrator and canceling his letters of administration and appointing his successor. This order of May 13, 1938, is hereby reversed, set aside, canceled and annulled, and Harvey E. Sheerer will be fully reinstated in his office as administrator and continue the administration of said estate in due course of law.

The judgment of the district court, in so far as consistent with the findings and judgment here entered, is approved. The action is thereupon remanded, with directions to the district and the county courts for further proceedings in harmony with the determination here made. Costs of the appeal are to be taxed to appellant.

AFFIRMED.

GEORGE E. PARISH, APPELLANT, V. COUNTY FIRE INSURANCE COMPANY, APPELLEE.

289 N. W. 765

FILED JANUARY 5, 1940. No. 30695.

Appeal. Where, on appeal, a reversal is entered in this court, if the record discloses that at the first trial the facts in issue have not been fully developed, or definitely settled, or may be said to be obscure, indefinite, uncertain, or otherwise unsatisfactory, though indicating that the party aggrieved has sustained actual damage, the trial court, upon remand, in absence of specific directions to the contrary, will accord to the litigants a retrial of the cause of action generally.

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

George Evens, for appellant.

Ramsey & Welpton, contra.

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

EBERLY, J.

This is an action upon an insurance policy to recover damages to a house, alleged to have been caused by cyclone, tornado, windstorm and hail, in the sum of $2,000, occurring on the 17th day of May, 1936. The defendant admitted the ownership of the insured property, its own corporate capacity, and that it was engaged in the business of writing and selling policies of insurance, by the terms of which it insured the policyholder against losses occasioned by fire, cyclone, tornado, windstorm and hail. The due issuance of the policy in suit was established. The defendant also admitted the occurrence of a windstorm and hailstorm on the 17th day of May, 1936, and admitted that "plaintiff has submitted to the defendant due notice of the loss herein sued on, alleged to have been occasioned to him." As a third paragraph of defendant's second amended answer, a provision of the policy in suit is set forth, and it is alleged that thereunder "any loss or damage occasioned to the property involved herein as a result of the storm occurring on May 17, 1936, was caused by high water, overflow, or cloudburst; or by water or rain which did not enter the building through openings in the roof or walls made by the direct action of the wind, and that, accordingly, said loss or damage was not covered or insured by the policy here in suit." Defendant's amended answer also contained a general denial of "all other allegations contained in said petition." The plaintiff joined issue by a reply, in form a general denial. In the district court a trial to a jury resulted in a verdict for plaintiff for the sum of $2,000, upon which judgment was entered. On defendant's appeal, this court, in an opinion written by Paine, J., (134 Neb. 563, 279 N. W. 170) set aside this verdict and judgment so entered, this

opinion closing with the words, "and the judgment of the trial court is hereby reversed." The following is an excerpt from the judgment of reversal entered by this court (Journal DDD, page 189) as its disposition of this cause:

"It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, reversed and cause is remanded for further proceedings according to law."

Thus, in neither the opinion, the judgment of reversal, nor the mandate conveying the orders of this court to the trial court, is there specific direction to the trial court to enter judgment in favor of the defendant upon the causes of action stated in plaintiff's petition as an entirety. On the contrary, there is in the opinion a specific declaration that, as to a part of the amount sued for, the plaintiff had sustained damages, the exact extent of which the evidence in the record of the case then before the court may be said to be obscure, indefinite, and uncertain. This court, in its opinion, made no finding that the physical facts, as established by the evidence in the case then made, were inconsistent with the existence of all elements of damages involved in the suit, but only as to a part thereof. In fact, it contained an express admission that the prevailing party in the court below had actually suffered damages within the protection of his policy, the amount of which the opinion of this court does not attempt to determine. Under this situation, the fact that the verdict, as an entirety, could not be sustained does not by necessary implication negative the right of plaintiff to a retrial of the case so far as the elements of damages actually suffered by him entitle him to relief.

The rule applicable in this jurisdiction appears to be that, upon reversal in this court of a judgment, if the facts in issue have not been fully developed, or definitely settled, though indicating that the party aggrieved has sustained actual damage, the appellate court, in reversing, will order a new trial. *Greer v. Doriot,* 137 Va. 589, 120 S. E. 291; *Hennessy v. Board of Chosen Freeholders of Burlington*

County, 91 N. J. Law, 693, 102 Atl. 672; *Meehan v. Kaplan*, 184 N. Y. Supp. 578; *Delaney v. Wyman*, 232 App. Div. 607, 251 N. Y. Supp. 5; *Wisconsin Nat. Loan & Bldg. Ass'n v. Webster*, 119 Wis. 476, 97 N. W. 171.

This is a general rule of appellate practice applicable not only in this jurisdiction, but one generally observed in all jurisdictions. It has been applied where the evidence before the appellate court is obscure, indefinite, uncertain, or otherwise unsatisfactory. *Farmers State Bank v. Weisenhaus*, 50 N. Dak. 949, 198 N. W. 673; *Kuykendall v. Merchants Nat. Bank*, 58 N. Dak. 396, 226 N. W. 533; *Wilkins v. Bank of Commerce*, 95 Fla. 85, 116 So. 13; *P. E. Anderson & Co. v. Barton*, 175 N. Y. Supp. 496; *Williamson v. Maynard*, 236 Ky. 33, 32 S. W. (2d) 538; *Leonard G. Kirk Co. v. Albert*, 113 N. Y. Supp. 1; *Branning Mfg. Co. v. Norfolk-Southern R. Co.*, 138 Va. 43, 121 S. E. 74; *King v. Tallmadge*, 45 N. Dak. 530, 178 N. W. 280.

As to the questions of disputed fact involved in this record (the amount of damages actually suffered) the plaintiff, after reversal and upon retrial, was entitled to his constitutional right of trial by jury, of which the record discloses no waiver. It therefore follows that when the trial court, on its own motion, entered judgment upon the mandate for an amount certain, and denied to appellant the right to prove his cause of action to, and have the same determined by, a constitutional jury, reversible error was committed. *Walters v. Village of Exeter*, 78 Neb. 222, 110 N. W. 631.

The plaintiff, under the rule above referred to, is entitled to a retrial of his cause of action generally, with the undoubted right to introduce further competent evidence to establish the actual extent of the damages sustained which are within the scope of the contract of insurance.

The judgment is, therefore, reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, APPELLEE, V. THE ARAHO ET AL., APPELLANTS.
289 N. W. 545

FILED JANUARY 5, 1940. No. 30541.

1. Nuisance. "A place kept for gambling purposes is a public nuisance." *Hill v. Pierson*, 45 Neb. 503, 63 N. W. 835.
2. ———. The amendment of section 24, art. III of the Constitution of Nebraska, to permit the pari-mutuel method of betting on the horse races when conducted by licensees within a race track inclosure at licensed horse race meetings, did not throw down the bars to permit gambling in Nebraska establishments upon horse races held in every state in the Union, as well as in foreign countries.
3. ———: INJUNCTION. The fact that the public nuisance against which equitable relief is sought constitutes a criminal act does not oust the jurisdiction of equity to enjoin the same.
4. ———. The remedy in equity is purely preventive. Equity does not punish the defendant for what he has done; that is left to the criminal courts.

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

O'Sullivan & Southard, McKenzie & Dugan and *William N. Jamieson,* for appellants.

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

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

PAINE, J.

This is an appeal from an injunction entered in a suit brought by the state of Nebraska on the relation of the attorney general against many defendants, restraining and enjoining them from conducting or operating illegal betting or gambling on horse races in their places of business in the city of Omaha.

The petition was filed February 24, 1938, and named as defendants Nebraska News Service, Inc., and then followed some ten pages of defendants, setting out the place of

business, its location, and certain individuals conducting each place of business. It was charged in said petition that each and all of the defendants were wilfully violating the statutory and constitutional provisions of the state of Nebraska prohibiting gambling, betting, or otherwise gaming for money or other valuable property, and were carrying on, maintaining, and operating unlawful horse race betting establishments and gambling rooms at some 76 designated places, all in Douglas county, Nebraska.

The petition further alleged that said gambling establishments were open to the public generally, and the public invited to enter and place bets on horse races being held daily throughout the United States and in other countries. In paragraph 5 of the petition there are 76 sections, describing in detail each one of said establishments, and the persons operating, maintaining, and conducting the same.

The prayer of the plaintiff is that the court shall issue a restraining order forthwith, upon which a hearing shall be had, at a time fixed by the court, for the purpose of making said restraining order effective as a temporary injunction, and that upon the final hearing said injunction be made perpetual, and for such other and further relief as might be deemed just and equitable.

Certain motions were filed by the defendants, which were overruled, and a temporary injunction was granted by the district judge. Thereafter demurrers were filed, and submitted without argument to the court, and were overruled, and ten days allowed to answer. The defendants deny each and every allegation, and charge that the temporary injunction was granted in violation of the First Amendment to the Constitution of the United States, and is also contrary to, and in violation of, section 1 of the Fourteenth Amendment to the Constitution of the United States, and to section 5, art. I of the Constitution of the United States, and to section 5, art. I of the Constitution of Nebraska, relating to freedom of speech, and further allege in said answer that ordinance No. 14469 of the city of Omaha was in full force and effect at all times mentioned

in the petition, providing for an occupation tax of $500 for the very type of business in which the appellants were engaged, which tax had been fully paid by the defendants.

In addition to said answer, the defendants filed a request for a jury trial, on the ground that the charge against each of the defendants is the commission of a crime, and that each of said defendants is entitled to have such accusation submitted to a jury for its determination. Various other answers were filed by some of the separate defendants, embodying practically the same allegations.

The cause came on for trial, whereupon the plaintiff and defendants joined in the offer of a written stipulation, exhibit No. 1, and asked that it be made part of the bill of exceptions. All of the evidence is, therefore, contained in such stipulation, of some 14 typewritten pages, duly signed by counsel for plaintiff and all defendants, and the county attorney of Douglas county. It first sets out that the Nebraska News Service, Inc., a Nebraska corporation, is a subsidiary of the Nationwide News Service, an Illinois corporation, which last-named corporation gathers news pertaining to the weather conditions, the condition of track, race track odds on various horses prior to each race, final result of races at all of the various race tracks throughout the United States, and transmits such information by telegraph to various subscribers; that the Nebraska News Service, Inc., receives such information in its office in the Woodmen of the World building in Omaha, and transmits the same through the facilities furnished by the Northwestern Bell Telephone Company to each of the establishments named as defendants herein, and collects a weekly charge from each of the stipulating defendants, and that such service is identical in each establishment, and is simultaneously received by each of them as per contracts therefor, and that the hearing of this cause as to said Nebraska News Service, Inc., is continued to a date to be hereafter agreed upon.

It was further stipulated that the action was instituted by the attorney general for and on behalf of the state of

Nebraska; that all other defendants except the Nebraska News Service, Inc., operated and maintained establishments, as designated in paragraph 5; that the public generally was invited to enter such establishments, by means of electric signs and other means, and to place bets of money with the defendants on horse races being held daily in various places outside the state of Nebraska and in the United States and in other countries; that race horse forms and scratch-sheets were provided, and blackboards, charts, and other paraphernalia were in such places of business, and that all information of every kind concerning the horses and races, and the results thereof, were given to the patrons.

It was further stipulated that the losses and winnings of the patrons of each establishment were wholly dependent upon the chance outcome of the horses participating in each race, and the selections made by the patrons, and the bets of money made pursuant to such selections.

Some of the defendants named herein, it was stipulated, maintained and operated the establishments described in connection with lunch stands, beer parlors, taverns, cocktail lounges, drugstores, grocery stores, and other types of business.

It was further agreed that a great many persons visited said establishments during the hours of each day when the horse races were conducted, many to place bets on the outcome of such races, and as a result large sums of money were wagered each day by patrons in said establishments, and that said establishments were generally patronized by both men and women; that in some bets were accepted as low as 25 cents, while others accepted no bets less than 50 cents; that in some of said establishments minors of high school age were allowed to enter and place bets and participate in betting upon horse races.

Paragraph 8 of said stipulation reads as follows: "That none of said establishments which are named as defendants in this action and who are participating in this stipulation were conducted in or located within any race track inclosure

at licensed race meetings here in the state of Nebraska."

It was further set out in said stipulation that on February 23, 1937, the city council of Omaha passed an ordinance, being No. 14469, levying an occupation tax of $500 a year for the business of maintaining and conducting the kind of establishments described in the petition, and that each of the places named in the petition herein had duly paid to the proper officer of the city of Omaha the said $500 occupation tax.

After certain defendants suffered their defaults to be taken, then trial was had upon the pleadings and the facts as set out in said stipulation, and decrees were duly entered by the court.

In the decrees it was ordered, adjudged, and decreed that each and all of the defendants, their agents, officers, servants, and employees, be perpetually enjoined from carrying on, or operating, or engaging, or participating in any way, in illegal betting or gambling on horse races by and through, or in connection with, their places of business, or in any other manner, and by any other means or method, and from suffering, or permitting, or allowing illegal betting or gambling on horse races in, or in connection with, their places of business in Douglas county, Nebraska.

The errors relied upon by the defendants for reversal of this case can be briefly stated as follows:

1. That the decree is not supported by sufficient evidence, and is contrary to the evidence.

2. That the decree is contrary to law, because the petition does not state a cause of action for equitable relief; because it does not charge the commission of acts within the cognizance of a court of equity, or which would confer jurisdiction on a court of equity to grant an injunction; because the constitutional amendment, and the legislative Act of 1935 legalizing pari-mutuel horse race betting within racing inclosures, declared a new public policy of the state of Nebraska, and in effect repealed all existing statutes with reference to horse race betting, and rendered such statutes ineffectual, and any decisions of the Nebraska

supreme court holding that such betting constituted a lottery are contrary to the now declared public policy of the state of Nebraska.

3. That the decree is contrary to law because the relief prayed for and the injunction granted is an attempt to vest in courts of equity criminal jurisdiction. The only inadequacy of the remedy at law alleged is that to prosecute for such crimes openly would involve a multiplicity of suits, and would be expensive and ineffectual. By this method of injunction, a court of equity violates the statutory right of every defendant to a trial by jury, guaranteed by section 6, art. I of the Constitution of Nebraska, to the effect that the right of trial by jury shall remain inviolate, and section 11, art. I of the Constitution of Nebraska, which guarantees that in all criminal prosecutions the accused shall have the right to public trial by an impartial jury.

4. That the decree is contrary to law because the courts have no authority to proceed by injunction to abate the alleged nuisance until the appellants severally have been tried and convicted of the crime of maintaining a public nuisance, as set out in section 28-1017, Comp. St. 1929.

5. That the decree is contrary to law because, under the home rule charter granted by the legislature to the city of Omaha, said city has a right to declare what are nuisances, and to regulate the same, and in the absence of an allegation that such city has neglected to exercise that function, and in view of the fact that the evidence affirmatively shows that the city, under this grant of power, had licensed the very business which the defendants were conducting, and which this action seeks to enjoin.

In reference to the first error alleged, this court is of the opinion that the stipulation of facts upon which the case was to be decided was sufficient to sustain a finding that defendants' places of business were public nuisances. This court has long been committed to the rule that gambling houses are public nuisances. "The evidence discloses that the rooms on the second or upper floor of the building occupied were used for gambling and open to the public

and resorted to for such purpose. One of the questions argued and presented for determination is, whether a house kept for gambling is a common or public nuisance. This must, in view of the authorities bearing upon it, be answered in the affirmative. See Roscoe, Criminal Evidence, 821; Garrett, Nuisances, 227; *Rex v. Rogier,* 1 B. & C. (Eng.) 272; Wood, Nuisances, 63; *Rex v. Dixon,* 10 Mod. (Eng.) 336; 8 Am. & Eng. Ency. of Law, 1073." *Hill v. Pierson,* 45 Neb. 503, 63 N. W. 835. See, also, 5 Pomeroy, Equity Jurisprudence (2d ed.) 4296, sec. 1893; 46 C. J. 707.

The second error relied upon for reversal by the defendants charges that the injunction was granted contrary to law, in that the people of this state, by amending the Constitution, had in effect repealed all former laws with reference to horse racing and betting thereon.

Section 24, art. III of the Constitution of the state of Nebraska, as set out in Comp. St. 1929, reads as follows: "The Legislature shall not authorize any games of chance, lottery, or gift enterprise under any pretense, or for any purpose whatever." Under this section of our Constitution, an original action was brought in this court to enjoin the Ak-Sar-Ben Exposition Company from conducting an unlawful betting scheme, and in the opinion announced in *State v. Ak-Sar-Ben Exposition Co.,* 118 Neb. 851, 226 N. W. 705, it was held that the pari-mutuel system of betting on race horses is a game of chance, a lottery, likewise gambling, and is unlawful under the Constitution of the state of Nebraska, and a temporary injunction was allowed, and such temporary injunction was made perpetual by this court in *State v. Ak-Sar-Ben Exposition Co.,* 121 Neb. 248, 236 N. W. 736. See, also, *Ak-Sar-Ben Exposition Co. v. Sorensen,* 119 Neb. 358, 229 N. W. 13.

At the general election held in November, 1934, an amendment to the above section of the Constitution was submitted to the voters of the state, and was carried, and thereafter section 24, art. III of our Constitution, as amended, has read as follows: "The Legislature shall not authorize any games of chance, lottery or gift enterprise; but nothing in this

section shall be construed to prohibit the enactment of laws providing for the licensing and regulation of wagering on the results of horse races by the pari-mutuel or certificate method, when conducted by licensees within the race track inclosure at licensed horse race meetings." Because of said amendment, the defendants in the case at bar insist that this amendment declared a new policy in our state with reference to betting on horse races, and had the effect of repealing any existing statutes with reference to horse race betting, and rendered former court decisions, holding that such betting constituted a game of chance and a lottery, of no effect as against the new declared policy of the state, as shown by the adoption of the amendment by the people of the state.

Acting on the authority given in said amendment, the legislature at its session of 1935 adopted laws governing the state racing commission and horse racing with pari-mutuel wagering, and the same is found set out in sections 2-1501 to 2-1519, as set out in Comp. St. Supp. 1935, and thereafter. The same legislature also amended sections 2-208, 28-942, 28-962, and 28-963, Comp. St. 1929, by adding thereto provisos that nothing therein should prohibit pari-mutuel wagering on horse races.

Section 2-1513, Comp. St. Supp. 1935, sets out that the purpose of the act was to encourage agriculture and horse breeding in the state of Nebraska, and that at each race meet there should, if possible, be at least one race on each racing day limited to horses foaled in Nebraska, and that 3 per cent. of the first money of every purse won by a horse bred in Nebraska should be paid to the breeder of such horse. This law clearly and specifically sets out the purpose of pari-mutuel racing in Nebraska, and nothing therein indicates that the bars are to be thrown down, as the defendants argue, to permit gambling in Nebraska upon horse races which may be held in every state in the Union and in foreign countries, as it must be evident that such widespread gambling upon horse races was not within the scope of the amendment, adopted by the majority of the

voters of Nebraska, to permit only pari-mutuel betting and gambling, or in the minds of the members of the legislature, who adopted section 2-1513, *supra,* but it only permitted a definite form, known as pari-mutuel horse race betting, and required that the same must be conducted under license duly issued by the state racing commission, and be conducted in strict accordance with the conditions and limitations as set out in said law, which requires that it be conducted by licensees within the race track inclosure at licensed horse race meetings.

In our opinion, nothing in the amendment to the Constitution of Nebraska, or in the laws passed to carry said change into effect, supports the contention of the defendants that the bars are now down on all forms of games of chance, betting, and gambling in connection with horse races of any kind, wherever held.

The third error relied upon by the defendants for reversal is that the injunction granted is an attempt to vest in courts of equity criminal jurisdiction, and that it also violates the right to a jury trial guaranteed by our Constitution.

The defendants in their brief cite 5 Pomeroy, Equity Jurisprudence (2d ed.) 4291, sec. 1890, wherein it is said: "A court of equity is in no sense a court of criminal jurisdiction. Its primary province is the protection of property rights. Hence, an injunction will not be granted to restrain an act merely criminal, where no property right is directly endangered thereby. Thus, an act morally wrong, such as gambling, will not be enjoined at the suit of an individual; nor will a violation of a Sunday law; nor a violation of a statute where no property rights are involved." However, in the same text, page 4296, section 1893, it is said: "As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it. Hence, it follows that the government can obtain an injunction to restrain a public nuisance, without showing any property right in itself. The duty of protecting the property rights of all its citizens is sufficient to warrant issuing the

injunction. Therefore, wherever a public nuisance is shown, equity must enjoin it at the suit of the government. 'Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance.' "

It has been held in many states that equity has jurisdiction in a suit by the state, and in the absence of statute, to abate a liquor nuisance, although the acts constituting the nuisance amount to a crime. A careful annotator cites the following cases: *Walker v. McNelly*, 121 Ga. 114, 48 S. E. 718; *Mugler v. State of Kansas*, 123 U. S. 623, 8 S. Ct. 273. Prize fighting may also be enjoined, although it constitutes a crime. *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; *State v. Fanning*, 97 Neb. 224, 149 N. W. 413.

In the case of *State v. Chicago, B. & Q. R. Co.*, 88 Neb. 669, 130 N. W. 295, this court held that a court of equity had jurisdiction to enjoin a railroad from serving intoxicating liquors on its dining cars, and in the text it seems to hold that the open, public, repeated, continuous, and persistent violation of law constituted a public nuisance which a court of equity could enjoin. See *State v. Omaha Motion Picture Exhibitors Ass'n*, 133 Neb. 89, 274 N. W. 397.

"If equitable grounds exist, as a general rule the fact that the nuisance against which equitable relief is sought constitutes a criminal act does not oust the jurisdiction of equity in the premises. The criminality of the act neither gives nor ousts the jurisdiction of the court of equity. The jurisdiction is exercised over the act as a nuisance as distinguished from the mere crime." 46 C. J. 762.

The equity court's jurisdiction to abate a nuisance is not affected by the fact that the creation or maintenance of the nuisance is a crime under the common law or by virtue of statutory enactment. 19 Am. Jur. 136, sec. 141.

In the case at bar, the defendants stressed at length that the granting of the injunction in this case deprived them of their constitutional right to a trial by jury, and to the right to be confronted by witnesses, and to be acquitted

unless proved guilty beyond a reasonable doubt, and deprived the defendants of the presumption of innocence, and also other safeguards provided in the trial of a person charged with the commission of a crime.

The facts as stipulated in the case at bar support the contentions that there is a wholesale, wilful, and continuous violation of the laws of the state of Nebraska, and that, even though the violation is but a misdemeanor, that fact will not oust the courts of equity of jurisdiction when the acts of the many defendants complained of clearly constitute a public nuisance under our law. *Hill v. Pierson,* 45 Neb. 503, 63 N. W. 835; *Kittle v. Fremont,* 1 Neb. 329.

The fourth error set out by the defendants is that courts have no authority to proceed by injunction until defendants have been tried and convicted of maintaining a public nuisance under section 28-1017, Comp. St. 1929.

The defendants call our attention to the fact that, before the amendment of the Constitution permitting pari-mutuel betting, such act was punishable as a crime, under sections 28-942 to 28-948, Comp. St. 1929, also under section 28-1017, *supra. State v. DeWolfe,* 67 Neb. 321, 93 N. W. 746.

"It is a general rule that, where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by injunction to prevent their commission, as they will not exercise their power for the purpose of enforcing criminal laws, but there is a well-recognized exception to the general rule, namely, that where the acts complained of constitute a nuisance and endanger the public health and welfare, and where a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may, at the instance of properly constituted authorities, afford relief by injunction." *State v. Heldt,* 115 Neb. 435, 213 N. W. 578.

The remedy in equity is purely preventive. The chancellor does not punish the defendant for what he has done; this is left to the criminal courts. *Respass v. Commonwealth,* 131 Ky. 807, 115 S. W. 1131, 21 L. R. A. n. s. 836; *Pompano Horse Club v. State,* 93 Fla. 415, 111 So. 801, 52

A. L. R. 51; *State v. Fox Beatrice Theatre Corporation,* 133 Neb. 392, 275 N. W. 605.

The fifth error relied upon by the defendants for a reversal is that the decree is contrary to law because the city of Omaha, under its home rule charter, had passed an ordinance recognizing the specific business conducted by the defendants, and licensing the same for a fee of $500.

Section 5, art. XI of the Constitution of Nebraska, provides that any city having a population of more than 100,000 may adopt a home rule charter by a majority vote of its qualified electors. However, a municipal corporation has only such powers as are expressly conferred upon it, in matters of strictly municipal concern. But even in such cities state legislation is not excluded upon such subjects as pertain to state affairs. There being no strict test or guide for distinguishing municipal concerns from state affairs, the court passes upon each case as it arises. It held that education was a matter of state concern in *Carlberg v. Metcalfe,* 120 Neb. 481, 234 N. W. 87. See, also, 10 Neb. Law Bulletin, 474; *State v. Temple,* 99 Neb. 505, 156 N. W. 1063; *Eppley Hotels Co. v. City of Lincoln,* 133 Neb. 550, 276 N. W. 196; *State v. Halbert,* 115 Neb. 194, 212 N. W. 33; *Sandell v. City of Omaha,* 115 Neb. 861, 215 N. W. 135.

In section 4 of the Omaha ordinance No. 14469, it provides: "This ordinance is enacted solely as a revenue measure of the city of Omaha." So it is quite clear, by its own terms, that the purpose of the ordinance was not to regulate or control horse race gambling establishments, which the Constitution of our state expressly prohibits in section 24, art. III. It was, therefore, a question of state-wide interest.

The defendants in their brief also charge that the petition "prays for a personal injunction in perpetuity against individuals to enjoin each of them personally from committing a crime on the property described but not made a party defendant, *or elsewhere in Douglas county, Nebraska.*"

"The chancellor will not enjoin the mere commission of a crime; but, when property is used in such a way as to

become a nuisance, the continuance of this nuisance may be enjoined. There is a manifest distinction between enjoining an individual from committing a crime and enjoining the owner of property or its possessor from allowing his property to injure others. In the latter case the chancellor only regulates the use which may be made of the property, restraining the defendants from so using their property as to make it a nuisance to others. If the use of the property is such as to require that it should be restrained by injunction, the chancellor's jurisdiction is not affected by the fact that this use may be also a criminal offense. The remedy in equity is purely preventive. The chancellor does not punish the defendant for what he has done. This is left to the criminal courts. The only thing that he determines is that the defendants must not in future so use their property as to be a nuisance. The judgment does not convict them of any offense. It merely restrains them in future from so using their property as to make it a nuisance. The judgment deals merely with the use of the property in question. The chancellor may not enjoin the defendants from operating a poolroom anywhere; but he may enjoin them from so using the property referred to in the judgment as to make that property a public nuisance. The court of chancery will not restrain personal conduct, but it will restrain the unlawful use of property." *Respass v. Commonwealth,* 131 Ky. 807, 115 S. W. 1131.

We are rather inclined to the view that the decree as entered by the trial court was too broad. In our opinion, the decree should be modified to read as follows: It is therefore ordered, adjudged and decreed that the defendants, and all agents, officers, servants, and employees acting through and under them, be and they hereby are perpetually enjoined from in any way or manner carrying on or operating or maintaining such a public nuisance or public nuisances by engaging or participating in any way in illegal betting and gambling on horse races, or by suffering or permitting or allowing illegal betting or gambling on horse races to be carried on by, in, through, or in connection with

their place or places of business described in plaintiff's petition.

The decree as so modified is hereby affirmed.

AFFIRMED AS MODIFIED.

IN RE ADOPTION OF HARRIET CARLSON.
RAYMOND I. FOUTS ET AL., APPELLEES, V. HARRY CARLSON, APPELLANT.
289 N. W. 764

FILED JANUARY 5, 1940. No. 30665.

Adoption. When it appears that the conduct of a parent evidences a settled purpose to forego all parental duties and relinquish all parental claims to his child, a decree of adoption may be awarded without his consent under subdivision 6 of section 43-102, Comp. St. 1929, if other requirements of the statute are met.

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

George W. Leamer and *A. W. Johnson,* for appellant.

Malcolm R. Smith, contra.

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

CARTER, J.

This is an appeal from a decree of adoption entered by the district court for Dakota county. Harry Carlson, the father of the child, appeals.

The record discloses that the child involved in these proceedings, Harriet Carlson, was born on May 14, 1926. In the spring of 1929 Carlson's wife left him, and in the divorce proceeding which followed, the custody of Harriet and two younger children was given to the father. At the time of the separation, however, Harriet was placed in the care of the petitioners, Raymond and Goldie Fouts. The two younger children were placed with another family and have never since been in the actual custody of the father.

It appears from the evidence that Goldie Fouts is an aunt of Harry Carlson, the father of Harriet. From the time that Harriet Carlson was placed in care of Raymond and Goldie Fouts until the filing of the petition for adoption on September 9, 1936, she has been cared for and treated as a daughter by them. The father, during this period, never contributed to the child's support, never communicated with the child, and after the first year or two never saw the child until he attended his grandmother's funeral on June 10, 1936. It is shown that the father, during the five years immediately before the trial of this suit in the district court, was amply able to contribute to the child's support had he cared to do so. It is not disputed in the record that the child had been properly clothed, fed and cared for by the petitioners. The child had also become greatly attached to the applicants and the applicants had likewise become much attached to the child. That the applicants are proper persons to have the care and control of a child of tender years is satisfactorily established by the evidence. The petition to adopt was filed on September 9, 1936. The mother of the child, Rene Carlson Nelson, filed a relinquishment and consent to the adoption of the child by the petitioners. The father, Harry Carlson, never consented to the adoption of the child and filed objections thereto. The question to be determined is whether the court, under the facts herein set out, may properly enter a decree of adoption without a relinquishment and consent to adoption by the father.

The portion of the statute applicable is as follows: "Any one of the following classes of persons may relinquish the custody and control of a minor child and consent to its adoption in the manner hereinafter prescribed, to wit: * * * Sixth. Any person, corporation or association that shall have had the lawful custody or control of any minor child for the period of six months last preceding, for the support of which neither parent shall without just cause or fault have contributed anything whatever during such period, may consent to its adoption." Comp. St. 1929, sec. 43-102.

The effect of the foregoing provision is to provide that complete abandonment of a child for a period of six months by the parents will warrant the adoption of such child by a person who has had the lawful custody or control of it for a like period of time without procuring a relinquishment and consent to adoption from the parents. Whether or not there has been an abandonment is a question of fact which must be determined by the evidence. It cannot be questioned that our adoption statute is primarily based on the consent of parents, if living and accessible, and an adoption without such consent must come clearly within the exception contained in the statute. *Tiffany v. Wright*, 79 Neb. 10, 112 N. W. 311. But we think the evidence in the instant case brings it within the exception hereinbefore quoted. For more than seven years the father made no effort to support, care for or look after the best interests of his child, athough he admits his ability to do so during the last five years of the period. He has permitted the full responsibility for the maintenance and care of this child to fall upon these petitioners. He has permitted a relationship to grow between the child and petitioners that any court would hesitate to disturb. The father has become a stranger to his daughter because of his failure to carry out the legal and moral duties which he owed to her. He has remarried and has a child by the second wife. He has made no provision for his other children and they have not been brought back to his home. We are convinced that the trial court was justified in finding that the conduct and actions of the father are sufficient to establish an abandonment of the child on his part. The evidence shows conduct on the part of the father which evidences a settled purpose to forego all parental duties and relinquish all parental claims to his child. This, in our opinion, imports an abandonment of the child and brings the case within the section of the statute quoted. *Winans v. Luppie*, 47 N. J. Eq. 302, 20 Atl. 969.

We conclude that the decree of adoption was properly entered.

AFFIRMED.

MARJORIE HOLBERG, APPELLANT, V. CHARLES W. MCDONALD, APPELLEE.

289 N. W. 542

FILED JANUARY 5, 1940 No. 30674.

1. **Automobiles.** In a civil action arising out of a motor vehicle accident, the character or reputation of either party as a motor vehicle driver is irrelevant and is not admissible in evidence to prove or disprove negligence.
2. **Appeal.** A case will not be reversed for errors against a party not entitled to succeed in any event.
3. **Record** examined. *Held* insufficient to support a finding of gross negligence on the part of the driver of defendant's car.

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

Morrow & Miller, for appellant.

Neighbors & Danielson, contra.

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

ELLIS, District Judge.

In this case the plaintiff, a minor, sues to recover for personal injuries sustained while riding in the automobile of defendant as a guest of his son.

The cause is necessarily controlled by the guest statute, section 39-1129, Comp. St. Supp. 1937.

At the close of plaintiff's evidence defendant moved for a directed verdict on the ground that the evidence failed to show gross negligence on the part of the driver of defendant's car. This motion was overruled and at the close of all the evidence the cause was submitted to the jury who returned a verdict for the defendant. From the overruling of plaintiff's motion for new trial and dismissal of plaintiff's cause of action this appeal was taken.

Errors assigned will be stated in connection with discussion following.

The plaintiff complains of the trial court's ruling permitting answer to the following question put to the defend-

ant while a witness in his own behalf: "Q. From your experience as a driver and observing Donald drive do you know whether or not he is a prudent and careful driver? Mr. Morrow: Objected to as incompetent, irrelevant and immaterial. The question is what he did on this occasion. The Court: Overruled. A. He was a careful driver."

We think the overruling of the objection and admission of the answer was clearly erroneous. "In a civil action the character or reputation of a party is deemed by the law to be irrelevant in determining the merits of the controversy." Jones, Evidence (4th ed.) 257, sec. 148. The reputation of a driver and his conduct at other times and places are not reliable or safe criterions by which to determine what his conduct was at a particular time and place.

Most automobile drivers operate their vehicles over many thousands of miles without accident and in the presence of the ever-present hazard of other traffic, and yet we are appalled by too many thousands of serious accidents. This situation justifies the conclusion that most motor vehicle accidents chargeable to man-failure are due to lapses from the customary skill and care of the drivers involved. A very poor or careless driver may have been wholly free from fault in the particular instance involved and, likewise, the most skilful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion. In either situation, to hold that the rights and liabilities of the parties should be determined, not solely by what they did, but by their conduct on other occasions and in different situations would put us on a tortuous trail—tedious, difficult and expensive to follow, and leading in the end only to intolerable injustice.

The appellee cites no cases from this jurisdiction directly supporting his contention that the evidence was properly admitted. We have examined the cases cited from this jurisdiction, which appellee contends support the trial court's ruling, and conclude that they are not analogous in principle and do not conflict with our conclusion herein. The appellee cites cases from other jurisdictions which appear to directly

support his position. As to these, we can only say that we do not agree with the conclusions therein reached and are unwilling to adopt the rules therein announced as rules applicable to this state.

We conclude that the ruling complained of was erroneous and that ordinarily the ruling would require reversal. However, this conclusion does not necessarily require reversal. Comp. St. 1929, sec. 20-853. By reason of the statute which imposes a salutary rule upon the court, we are not required to reverse a cause if the ultimate result reached is the only one that could be reached on the record and uninfluenced by errors that may be found. This court has frequently held that, where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. See *Patrick v. Shallcross*, 123 Neb. 742, 243 N. W. 907, and cases cited therein. The error above discussed occurred while defendant was putting in his evidence and therefore did not prejudice the plaintiff in the presentation of her evidence.

The other errors complained of relate to the given or refused instructions. We will therefore proceed to a consideration of plaintiff's case with a view to determining whether it is sufficient to entitle plaintiff to go to the jury or recover in any event, bearing in mind that plaintiff was under the burden imposed by the guest statute of showing such negligence on the part of defendant's son as would justify a jury in finding that it constituted gross negligence.

The accident in question occurred November 28, 1937, at about 10:15 o'clock in the evening about 1½ miles west of Morrill on a straight, level, oiled highway. The night was clear, but no moon was shining. The defendant's car collided with the rear end of a truck with a dark green beet-box on it. The truck had stopped because of light failure with at least the left wheels on the pavement. The cab of the truck was a green or gray color. The driver of the truck had not had time after stopping to put out his flares and the evidence affirmatively shows that the truck had no

lights burning. The rear of the box had a red glass reflector on the left side, but it was 4 or 5 feet or more above the pavement. The right-hand windshield and door post of defendant's car struck the left rear corner of the beet-box and the truck was moved forward by the impact 20 or 25 feet. After the impact the defendant's car moved to the left past the truck and then to the right, ending up in the borrow pit on the right side of the road some distance ahead of the truck. The box on the truck was about 4 or 4½ feet above the pavement. There was no damage to the radiator of defendant's car, indicating that the car was either turned so that the radiator did not come in contact with the box or else the radiator passed under the box.

The defendant's son and a young lady were riding in the front seat and plaintiff and another young man were riding in the back seat. The plaintiff testified that they stopped at a stop sign on the west edge of Morrill, that the driver shifted gears and then put his arm around the young lady riding in the seat with him. This was the last thing plaintiff remembered. Likewise, the other young lady remembered nothing after the driver shifted gears following the stop for the stop sign and the driver put his arm around her. When asked if she told him to take his arm from around her, she answered that she did not because she did not have time. If this incident occurred immediately following the shifting of gears following the stop for the stop sign on the west side of Morrill, it must have been a mile or more from the point of the collision. Perhaps there was time for such a request. This young lady did not see the truck, but she did not remember whether she was looking down the road or not.

On the evidence, considered in the light of the many decisions of this court involving the guest statute, we think the trial court should have sustained defendant's motion for directed verdict on the ground that as a matter of law it was insufficient to show gross negligence on the part of defendant's son, as required by the statute. The most that can be claimed for plaintiff's evidence is that the driver was

negligent in not seeing the truck in time to avoid a collision with it. Considering the color of the truck cab and box, the height of the box from the pavement, the entire absence of lights and the movement of the car at and immediately following the impact, we conclude that the negligence of the driver did not reach the degree required by the statute.

The law of this state provides that head-lamps of a motor vehicle shall be deemed to comply with legal requirements "if none of the main bright portion of the head-lamp beam rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands and in no case higher than *forty-two inches,* seventy-five feet ahead of the vehicle." Comp. St. Supp. 1937, sec. 39-1176. (Italics ours.) The law does not contemplate that unlighted vehicles shall be standing on highways at night, and if the driver's lights were on the high beam as he approached the truck with the bulk of its body above the high beam, we do not think his failure to see it rises above ordinary negligence upon such a finding by a jury.

The car in which the plaintiff was riding was traveling west and plaintiff's evidence discloses that a car going east passed the truck just as the truck driver was "going to stop." This car must have met the defendant's car and very shortly before the collision. In the absence of evidence to the contrary, there arises a presumptive inference that defendant's driver complied with the law by dimming his lights on meeting the other car. If, following this operation, he had not restored his lights to the high beam, there would be yet more reason for our conclusion.

So far we have refrained from considering any of the evidence offered by the defendant. With reference to it, it will suffice to say that disinterested drivers who approached the truck from the west at and immediately following the collision stated their own failure to see the truck until right upon it, confirmed the extremely low visibility of the truck and dimming of the lights on defendant's car. One witness thought the driver of defendant's car dimmed his

lights before the driver of the car in which the witness was riding and this 200 yards away. The collision followed almost immediately.

In *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N. W. 623, this court said: "Where an object on a highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish it until quite close, it cannot be said, as a matter of law, that such person was guilty of more than slight negligence in his failure to see it in time to stop his car or to prevent running against it." See, also, *Giles v. Welsh,* 122 Neb. 164, 239 N. W. 813.

The appellant cites the case of *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340, as supporting her contention that defendant's son was guilty of gross negligence as a matter of law. We think the following facts from that case clearly distinguish it from plaintiff's case: In that case the night was clear and the moon was shining. The defendant's car had good lights and was traveling at high speed—40 to 50 miles an hour. The defendant's car struck the parked car squarely and carried it 100 feet. The defendant was not meeting any other car. *There was a sharp conflict in the evidence as to whether there were lights on the parked car.* The occupants of other cars passing the parked car before the accident saw it and saw it distinctly enough to recognize a household mattress tied on the back of it.

Concluding, as we do, that there was no error prejudicing the plaintiff in the presentation of her evidence and that the verdict of the jury was the only one that could be sustained on that evidence, the judgment of the trial court is

AFFIRMED.

LU ETTA MAY GUGELMAN, APPELLEE, V. KANSAS CITY LIFE INSURANCE COMPANY, APPELLANT.

289 N. W. 842

FILED JANUARY 19, 1940. No. 30664.

1. **Appeal.** "In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited." *Cox v. Kee*, 107 Neb. 587, 186 N. W. 974.
2. ———. "Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness." *Union P. R. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062; *Lautenschlager v. Lautenschlager*, 134 Neb. 577, 279 N. W. 200.
3. **Insurance.** The record is examined, and *held* that it does not establish, as a matter of law, that the insured was not in good health at the time of the issuance and delivery of the policy in suit.

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

Cheney & Cheney, for appellant.

Butler, James & McCarl and *Frank B. Morrison, contra.*

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

SIMMONS, C. J.

This is an action to recover the death benefits provided for in a policy of life insurance. Plaintiff prevailed in the court below. Defendant appeals.

Plaintiff alleges the application for and the issuance of a policy of life insurance to one Lawrence I. Gugelman, hereinafter called the insured, payment of the first and second annual premiums, the death of the insured while the policy was in force, proof of death, the full performance of all conditions and provisions of the policy, and defendant's refusal to pay. In its answer, the defendant admits the issuance of the policy, the payment of the premiums, the death of the insured during the period for which the premiums were paid, and alleges that less than five months prior to his application for insurance the insured was treated for

heart trouble and was advised of his physical condition; that, in answer to three questions in the application, the insured falsely and fraudulently omitted information relative to his condition and treatment therefor; that the answers were material to the risk assumed; that they were taken to be true and were relied upon; that the defendant first learned of the falsity of the answers subsequent to the death of the insured; that defendant would not have issued the policy had the questions been truthfully answered; that the insured was not in good health when the policy was delivered, and that, by reason thereof, defendant is not liable. Defendant tendered the return of the premiums paid.

The plaintiff replied, and alleged that the defendant's agent propounded the questions to the insured; that true answers were made; that, if any part of the application was false (which plaintiff denied), it was so written by the defendant's agent with full knowledge of the facts; and that defendant is estopped to claim that any answer contained in the application is false.

Trial was had to a jury. After both parties had rested, the defendant moved for a directed verdict. The motion was denied. The motion will be set out later herein. The jury's verdict was for the plaintiff.

Defendant assigns two errors upon which it relies for reversal.

The doctor's deposition was taken and offered by the defendant. The first assignment is the refusal of the trial court to permit the reading in evidence of the doctor's answer to the following question: "And was he," (the insured) "at that time, advised that he was being treated for a condition of the heart?" The record does not disclose that the defendant made an offer as to what the doctor's answer would be if his answer were admitted.

This court has held: "In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited." *Cox v. Kee*, 107 Neb. 587, 186 N. W. 974.

The record reveals that this question was subsequently asked: "Do you recall that you did advise him as to the condition of his heart at that time?" The answer was admitted, as follows: "I think I did tell him what his trouble was * * *."

This court has held: "Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness." *Union P. R. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062; *Lautenschlager v. Lautenschlager*, 134 Neb. 577, 279 N. W. 200. The defendant's first assignment of error is not sustained.

Defendant's second assignment is that the trial court erred in overruling its motion for a directed verdict. This contention is based upon the proposition that "a provision that a policy shall not take effect unless the insured is in good health upon the date of issuance, is a condition precedent without which there is no liability under the policy."

At the time the application for insurance was signed, the insured paid the agent $11.75 in cash, and gave him a note for $11.75. The clause in the application, which defendant now argues is a condition precedent to liability, is as follows: "If this application is not accompanied by the first premium in cash it is agreed that the company assumes no liability whatever until a policy of insurance is actually delivered to me during my lifetime and while I am in good health * * *."

The defendant's motion for a directed verdict was as follows:

"The defendant moves for a directed verdict on the ground that the undisputed evidence shows that Lawrence I. Gugelman was treated for heart trouble five weeks before signing his application for insurance with the defendant company; that he interviewed Doctor Brewster twelve days before signing his application; that he knew the cause for his treatment. That at the time of signing of the application he stated that he was in good health; that the statement was false. That he accepted the policy with that ques-

tion in the application, a photostatic copy of which was attached to the policy; and that he accepted the policy with that question and answer in the same and made no objection; and that he died of heart failure."

It appears to the writer that the above motion went to, and directed the court's attention to, the truth or falsity of the answers to the questions contained in the application, and did not direct the court's attention to, and was not based upon, the clause in the application above set out. However, it will be treated as having raised the question now presented.

We have carefully examined the testimony offered dealing with this proposition. The application for the insurance was dated May 4, 1937. The policy was dated May 12, 1937. The evidence is not specific as to the date of the delivery. The most definite statement is that it was delivered about two weeks after the application, which would be about May 18. What, then, is the evidence as to the condition of insured's health *at that time?*

The insured was examined by Dr. F. A. Brewster, of Holdrege, Nebraska, on January 27, 1937. The doctor's record shows that at that time the insured complained of "pain in region of heart and shoulder and arm, short of breath on exertion." His blood pressure was 130/70. His urine was normal. The record further recites that the physical examination showed "heart enlarged" and that he "advised rest."

The doctor stated that he then advised against heavy work and as to his diet. At that time he prescribed a tonic.

The insured went to the doctor "for treatment" on February 24, 1937, March 26, 1937, and April 22, 1937. The findings in the February examination are not disclosed. The March examination indicated a high blood pressure and a heavy duty on the heart as a result thereof. The doctor's record did not indicate a "worse condition" at that time. The April examination showed the blood pressure to be less than it had been at the time it was recorded in either January or March. The doctor recalled no advice given the insured at that time about his condition.

At various times the doctor told the insured not to work so hard. Defendant's other evidence as to the condition of the health of the insured is the statement of the mother (plaintiff) on the "proof of death" that the cause of the death was "heart failure." In answer to the question, "When did last illness begin?" the answer was "Two hours before death." Death occurred May 15, 1938, or a year and three days following the date of the issuance of the policy. The doctor who attended the insured at the time of his death did not testify.

The plaintiff's evidence in rebuttal shows that the insured worked about his farm at all times from January, 1937, to the time of his death; that he was not incapacitated, never complained, that his appetite was good, and that he slept "good." When the application was made by the insured, he made no complaint about being in bad health; he appeared to be in good health and to have a strong constitution.

This court has held:

"The delivery of a life policy, the acceptance of premiums, and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in sound health on the date of the policy.

"The burden of proving *as a defense* that insured at the date of the policy was not in sound health is upon insurer." *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624.

Good health is a generic expression, resting mostly in opinion. *Hinnenkamp v. Metropolitan Life Ins. Co.*, 134 Neb. 846, 858, 279 N. W. 784. Good health "is a comparative term, and means that the insured has no important or serious disease; in other words, that he is free from any ailment that seriously affects the general soundness or healthfulness of the system, as distinguished from mere temporary indisposition, which does not tend to weaken or undermine the constitution, though existing at the time." 1 Couch, Cyclopedia of Insurance Law, 244, sec. 130. See, also, 37 C. J. 402.

The fact that insured had an enlarged heart in January, 1937, and high blood pressure in March, 1937, and died of

"heart failure" in May, 1938, does not show, as a matter of law, that the insured was not in good health at the time of the delivery of the policy in May, 1937. This is particularly true in view of the fact that the evidence indicates that he was "working right along" at the time the policy was taken out; that, from April, 1937, until the time of his death, it does not appear that he had consulted a doctor or was in need of medical treatment; and that defendant did not establish, as a matter of direct evidence, that, if the agent had correctly stated in the application the facts regarding the insured's visits to and the findings of Dr. Brewster, it would have refused to issue the policy.

The defendant's second assignment of error is not sustained.

The judgment of the trial court is

AFFIRMED.

MINNIE H. KELKENNEY, APPELLANT, V. KATHERINE GETSEY, SPECIAL ADMINISTRATRIX, APPELLEE.

289 N. W. 795

FILED JANUARY 19, 1940. No. 30732.

1. **Executors and Administrators.** The functions of a special administrator appointed by the probate court are to possess, control and preserve the estate of decedent until the granting of letters testamentary or of administration.
2. **Divorce.** In a supplemental proceeding in a divorce suit to reform the decree of divorce to allow alimony, the district court is without jurisdiction to substitute as a party a special administratrix for a deceased husband who had procured a divorce from his wife on the ground of desertion, where no claim for alimony was pleaded, tried or adjudicated in the original action.

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

Hotz & Hotz and *William F. Dalton,* for appellant.

Max Fromkin, contra.

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

ROSE, J.

This is a proceeding by Minnie H. Kelkenney, defendant, against Katherine Getsey, special administratrix of the estate of James B. Kelkenney, deceased, plaintiff, to so reform a decree of divorce as to allow alimony for defendant, the divorced wife of decedent. This relief is sought in the original action in which the husband, as plaintiff, was granted a divorce from his wife, as defendant, on the ground of desertion without any reference to alimony in the pleadings or decree.

The parties to the action for divorce were married January 6, 1911, and lived together as husband and wife for about 10 years. The petition for divorce was filed in the district court for Douglas county October 1, 1921. The divorce was granted by default November 5, 1921, after personal service of summons on the wife, but prior thereto the husband had entered into an oral agreement with her to pay her for life alimony of $1,000 a year in monthly instalments of $83.33 each and to have the agreement incorporated in the decree. He performed the oral contract for about 10 years but failed to have his obligation to pay alimony inserted in the decree of divorce. After 1930 he was in default and excused nonpayment on account of the economic depression. He died May 3, 1938, and she thereafter discovered for the first time that the agreement for alimony had not been inserted in the decree for divorce.

The facts thus briefly outlined were stated at length in the petition to reform the decree. Thereupon, Minnie H. Kelkenney, defendant in the original suit for divorce, presented therein a motion to substitute for plaintiff Katherine Getsey, special administratrix of the estate of James B. Kelkenney, deceased, and to so revive the action.

The special administratrix objected to the jurisdiction of the court for the reasons that the action is one for divorce wherein a final decree was entered November 5, 1921,

without any judgment other than for a divorce, and that the statutes of Nebraska do not authorize the substitution of the special administratrix for the deceased plaintiff or a revivor of the action. The trial court sustained the special appearance and defendant appealed.

The functions of a special administratrix appointed by the probate court are to possess, control and preserve the estate of decedent until the granting of letters testamentary or of administration. The powers and duties of a special administrator are defined by statutes containing, among provisions not applicable to the present inquiry, the following pertinent legislative enactments:

"When there shall be a delay in granting letters testamentary, or of administration, occasioned by an appeal from the allowance or disallowance of the will, or from any other cause, the judge of probate may appoint an administrator to act in collecting and taking charge of the estate of the deceased, until the question of the allowance of the will, or such other question as shall occasion the delay, shall be determined, and an executor or administrator be thereupon appointed." Comp. St. 1929, sec. 30-316.

"An administrator, appointed according to the provisions of the preceding section, shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who may afterwards be appointed, and for that purpose may commence and maintain suits as an administrator, and may sell such perishable and other personal estate as the county court may order to be sold." Comp. St. 1929, sec. 30-317.

"Such special administrator shall not be liable to an action by any creditor, to be called upon in any other way to pay the debts against the deceased." Comp. St. 1929, sec. 30-318.

According to plain provisions of the statutes quoted, the special administratrix is not authorized to appear in the divorce suit in defense of the claim of defendant against the estate of the deceased plaintiff for alimony. The administratrix as such is not liable in the divorce action for the

alleged debt of decedent. She was therefore not a proper party defendant for the purpose of determining the liability of the estate for alimony under an oral unadjudicated agreement by the husband to pay it. It follows that the district court was without jurisdiction to substitute the special administratrix for decedent as plaintiff in the divorce suit and that the action could not be revived in her name in that capacity. In this view of the law the district court did not err in sustaining the objection to jurisdiction and in overruling the motions to substitute the special administratrix for decedent as plaintiff and to revive the action in her name as such.

The same conclusion necessarily would have to be reached if defendant had awaited the granting of letters testamentary or of administration and pursued the executor or administrator for alimony on the oral promise of her divorced husband to pay it. The record contains a copy of the petition in the divorce suit. The husband was plaintiff. He alleged that his wife had deserted him and he procured the divorce on that ground. He did not plead an oral promise to pay alimony or his ability and willingness to pay it or cause such an obligation to be inserted in the decree. Alimony was not mentioned in the petition. No issue as to such a claim was tried or adjudicated. The wife was duly summoned to appear in the divorce court and plead but failed to do so. Alimony was not mentioned in the decree granting the divorce to the husband. There was therefore no allowance for alimony that could be reformed in this supplemental proceeding. Every issue in the divorce case had been adjudicated more than 17 years before the application for a supplemental decree was made. Since the claim of defendant for breach of an oral promise to pay alimony cannot now be adjudicated in the divorce case, the judgment of the district court is

AFFIRMED.

DORENE LARSON, APPELLEE, V. LEROY STORM, APPELLANT.
289 N. W. 792

FILED JANUARY 19, 1940. NO. 30719.

1. **Automobiles.** Gross negligence has been defined as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
2. ———. The continued failure of the driver of an automobile to maintain a proper lookout along the road ahead of him, when driving at high speed in the nighttime on a country road, is a fact which the jury should consider in determining whether gross negligence had been proved.

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

Clyde R. Worrall, Cook & Cook and *Wear, Boland & Nye,* for appellant.

Schiefelbein & Donato and *McKenzie & Dugan, contra.*

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

PAINE, J.

This is an action for personal injuries in an automobile accident, the plaintiff being the guest of the defendant. The first trial resulted in a mistrial. The jury returned a verdict for the plaintiff for $3,500 on the second trial, and the defendant appealed from the judgment entered upon the verdict.

The plaintiff and defendant resided on farms not far from each other. The plaintiff was a rural school-teacher, 20 years of age, and the defendant a young farmer, 23 years of age, and they had been keeping company for something over a year, attending various social functions together. They went to a dance at Memphis, in Saunders county, in his 1930 Model A Ford coupé on Saturday night, and the accident occurred early Sunday morning, January 9, 1938, in returning from the dance. Memphis is about ten miles

from plaintiff's home. The accident occurred about six miles therefrom.

At the time of the accident, as they were traveling east on an ordinary country road, they went down a slope some 220 yards to a wooden bridge 71 feet long, and at the end of this bridge the road immediately curves slightly towards the north, and beyond that a large concrete pipe goes under the road for drainage purposes as a culvert, and the ends of it projected out on each side of the road. The bridge was old, had two railings on each side, and had been repaired by putting in at least one new plank, which projected a short distance above the planks on either side of it, where the wheels had worn down the older planks.

The defendant's testimony was to the effect that he was going 35 to 40 miles an hour, and struck this new plank, and that this caused a blow-out in the right front tire, and the two right wheels ran off the road and ran along in the ditch. He attempted to bring the car back up into the road, but failed, and in jerking the car the plaintiff was thrown out of the car when defendant struck the end of this cement pipe. Both the plaintiff and defendant testified they heard no noise of a blow-out.

The plaintiff testifies that, as they were leaving the dance, defendant suddenly became angry at a man and whirled around to face him, knocking the plaintiff down with his elbow, but, before the men got to fighting, Kris Kalb, the uncle of defendant, stopped the quarrel. In returning from the dance they followed Mr. Kalb's car, which was going about 35 to 40 miles an hour, but after several miles, when they reached the top of the hill, the defendant increased his speed, and ran around his uncle and went down the hill. The plaintiff complained, and said she told him he was driving too fast, and should slow down; that she said this in a loud voice, because she was frightened. She testified that the defendant turned his head, and kept looking at her as he crossed the bridge at 50 to 55 miles an hour; that he failed to make the slight turn at the end of the bridge, and lost control of the car, and the wheels on the right side

went down about two feet toward the ditch; that his speed was not slackened, and when the right front wheel hit the end of the projecting cement pipe the car bounced up, the door flew open, and she was thrown out onto the frozen ground and injured. She testified that defendant picked her up, laid her on the seat of his car with her feet hanging out, while he went to get his uncle, Kris Kalb, who came, and they lifted her into his car, and she was taken home. She said she screamed with pain as they took her in the house, where she remained until January 21, when she was taken to the Bryan Memorial Hospital in Lincoln, where X-rays disclosed a badly fractured pelvis and sacrum, the bones being splintered and having slipped over each other. Her hips were placed in a canvas belt with weighted pulleys attached, in which she remained eight weeks, according to the testimony of Dr. Charles Arnold. In three and a half months she was able to walk, and to resume her teaching position.

Kris Kalb testified that he was an uncle of the defendant, and lived about six miles from the plaintiff. He testified that the new plank in the bridge did not project over a quarter of an inch above the old planks; that early the next morning he went down to where defendant's car was, and that there had been no blow-out, as the front tires were not down when he got there. He said the hood was thrown about eight or ten feet from the car.

An expert tire man brought a spreader before the court, and showed the jury that there was a defect on the inside of the tire, but it was not a blow-out in the usual and accepted use of that word. The expert admitted that, if it had been a blow-out and then ran 280 feet on hard, frozen ground, the tube would show many cuts, whereas the tube showed no cuts.

Plaintiff testified that the defendant said to her after the accident, "If anything happens to you it's all my fault because I thought I was smart passing my uncle." The defendant denies this.

The defendant testified that there was a blow-out on the

right front tire when it hit the new plank in the bridge, which was two inches higher than the old planks. He was not supported by the other evidence on these points. He testified it was about 66 feet from the bridge to where the car stopped against an old tree stump. Other evidence indicated it was 280 feet.

As to the use of intoxicating liquor, plaintiff testified that when they arrived at the dance they both had a pint bottle of beer, and that she had no more, but did not know whether he got more when he went downstairs several times with the other men. The defendant testified that he had one more bottle of beer. The mother of the plaintiff testified that she detected very strong liquor on his breath when he brought the daughter home, that he acted "dumpy," and would not talk. The father of the plaintiff at once accused him of drinking, and defendant admitted he had some beer. In leaving the dance, as detailed above, the defendant had an altercation with another man, which nearly resulted in a fight.

In spite of all this evidence in reference to the defendant drinking, the court gave instruction No. 18, as follows: "The jury is instructed that there is no competent evidence offered by the plaintiff to sustain the allegation in her amended petition that the defendant was intoxicated or under the influence of intoxicating liquor at the time of said accident. That issue has been withdrawn by the court." This instruction was instruction No. 2 offered by the defendant, and given in a slightly modified form by the court.

Defendant, for reversal, assigns the alleged error of the trial court in overruling defendant's motion for a directed verdict in his favor at the close of plaintiff's evidence, and again at the close of all the evidence. He also assigns as error the refusal to give instruction No. 1, requesting an instructed verdict. Further error is charged in overruling defendant's motion for a new trial.

This action is governed by the Nebraska guest statute, being 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 defendant cites all of the recent decisions of this court in which plaintiff has failed to recover in personal injury cases resulting from automobile accidents, and from them argues that there can be no recovery here. We will examine several in which judgments have been recovered.

In *Black v. Neill,* 134 Neb. 764, 279 N. W. 471, the defendant turned his head to the left and pointed out a tree which had blown down upon a porch, forgetting about the stop sign on Grace street. To make the stop, he applied the brakes so suddenly that the plaintiff was thrown into the windshield of his car and injured. It was stated in the opinion that turning the head, taking the eyes off the road, under some conditions and circumstances might constitute gross negligence.

In *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, it was held: "Gross negligence * * * means negligence in a very high degree, or the absence of even slight care in the performance of a duty." See, also, *Heesacker v. Bosted,* 131 Neb. 42, 267 N. W. 177.

In our opinion, the case of *Sterns v. Hellerich,* 130 Neb. 251, 264 N. W. 677, is closely in point. Four young folks were late, and in hurrying to get to a weiner roast went over the top of a hill at 50 to 55 miles an hour, and did not slacken speed, and crashed through the side of a bridge. The driver was warned that there was a bad place at the bridge. We said in that opinion: "Adolph was driving the car at night on a curving road down a steep hill and approaching a narrow bridge, of which he was aware, at a speed of 50 miles an hour, when he had been warned that there was a dangerous place in the road ahead. He chose to disregard the warning and continued the reckless driving,

with the disastrous results indicated. We think that, under the circumstances, the question of gross negligence was one for determination by the jury."

Other Nebraska cases which we believe will support a verdict in the case at bar are: *Howard v. Gerjevic,* 128 Neb. 795, 260 N. W. 273; *Kovar v. Beckius,* 133 Neb. 487, 275 N. W. 670; *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823; and the cases involving the Iowa guest statute, *Bailey v. Bryant,* 127 Neb. 843, 257 N. W. 241, and *Jennings v. Biurvall,* 122 Neb. 551, 240 N. W. 757.

"Gross negligence, within the meaning of these statutes, has been variously defined—as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.' " 5 Am. Jur. 635, sec. 241.

"The continued or protracted failure of the operator to maintain a proper lookout along the road ahead of his vehicle may constitute gross negligence." 4 Blashfield, Automobile Law (Perm. ed.) 129, sec. 2327. See, also, *Kaley v. Huntley,* 333 Mo. 771, 63 S. W. (2d) 21; *Richards v. Richards,* 86 N. H. 273, 166 Atl. 823.

In a case in which the driver of the car negligently turned her head away from the road, and was looking in a direction almost opposite to which she was traveling, it was held that a directed verdict for the defendant should be reversed, as such conduct and inattention amounted to gross negligence. *Pitcher v. Curtis,* 43 Ga. App. 622, 159 S. E. 783.

We have set out the substance of the evidence, which was conflicting, but on which the jury found against the defendant on the questions of fact and returned a verdict for the plaintiff.

The question of gross negligence is for the jury where the evidence relating thereto is conflicting, and from which reasonable minds might draw different conclusions. If plaintiff warned the defendant to drive more slowly and, in dis-

regard of such warning, defendant lost control of the car, this would be one of the facts which the jury could consider in determining whether gross negligence existed. The district judge seems to have conducted this trial with great care, and to have protected the defendant in all the rights to which he was entitled. We have held many times that, where the evidence was conflicting, a verdict of a jury based thereon will not be disturbed unless it is clearly wrong. We find no prejudicial error which would warrant a reversal of this judgment, and the same is

AFFIRMED.

CARTER, J., concurs in the result.

STATE BANK OF JANSEN, APPELLEE, V. PETER J. THIESSEN, APPELLANT.

289 N. W. 791

FILED JANUARY 19, 1940. No. 30694.

Wills. A devise of real estate to a designated person "and his heirs forever," without power to sell, mortgage or otherwise encumber, vests such designated person with a fee simple title. The restraints against alienation contained therein are repugnant to the estate devised and are therefore void.

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

Hartigan & Skultety, for appellant.

W. J. Moss and *Melvin Moss, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and JOHNSEN, JJ., and FALLOON, District Judge.

CARTER, J.

This is an appeal from a decree of the district court for Jefferson county requiring the defendant to specifically perform the terms of a contract for the sale of real estate by accepting the title and paying the purchase price due by its terms.

The question to be decided arises out of the following

state of facts: On October 25, 1917, one Ferdinand Ackmann died, leaving a will by which he devised the property in question to Earnest Ackmann in the following words: "To my son Earnest Ackmann, subject to the rights of my wife set out in paragraph two hereof, and without any power or right in the said Earnest Ackmann to sell, mortgage or otherwise encumber said land, I give, devise and bequeath the (lands involved herein) to have and to hold subject to said conditions to the said Earnest Ackmann and his heirs forever." The life estate devised to the wife of Ferdinand Ackmann was extinguished by her death on June 11, 1929. The will of Ferdinand Ackmann has been duly probated and his estate settled, completed and closed.

On December 23, 1932, Earnest Ackmann and wife mortgaged the land to plaintiff for the sum of $3,500. The mortgage was subsequently foreclosed and the sale thereof to plaintiff confirmed. On February 16, 1939, plaintiff sold the land to the defendant for $4,000, in which contract plaintiff agreed to furnish an abstract of title showing a marketable title in the seller. The defendant refused to accept the title as marketable for the reason that the provision of the will through which plaintiff claims title restrains the devisee from selling, mortgaging or otherwise encumbering said lands and that the mortgage given to plaintiff was therefore void and of no force and effect. The question for determination, therefore, is the nature of the estate devised to Earnest Ackmann by the will of his father, and the effect of the restrictions against alienation with which the testator attempted to qualify it.

It is a fundamental rule when an estate in fee simple is devised that an attempt by the testator to prevent alienation is ineffective and void for the reason that it is repugnant to the estate devised. *Yates v. Yates,* 104 Neb. 678, 178 N. W. 262; *Myers v. Myers,* 109 Neb. 230, 190 N. W. 491. Therefore, if the estate taken by Earnest Ackmann under the will was in fee simple, the restrictions against alienation contained therein are void, and plaintiff has a marketable title.

A person is a purchaser, or takes land by purchase, irrespective of whether the conveyance is based on a consideration, when his interest is derived from a conveyance operating directly in his favor, by virtue of which the interest is created in him. If his interest is derived by inheritance from another person, he takes by descent and not by purchase. Whether in a given conveyance a limitation to the heirs of a designated person creates an estate in such heirs as purchasers, or whether such a limitation operates to create an estate in fee simple absolute, depends upon the form of the limitation. If there is no expression of an intent to create one estate in the designated person and a separate estate in his heirs, then the use of the word "heirs" serves merely to determine the extent of the estate created in the designated person. Thus, in the usual limitation of an estate to a designated person and his heirs forever, the phrase "and his heirs forever" are words of limitation and not of purchase, and operate to create an estate in fee simple absolute in such designated person. Restatement, Property, sec. 30, comment *c*. In the case before us this result must obtain, whether the rule in *Shelley's* case or the intent statute (section 76-109, Comp. St. 1929) be applied.

We necessarily hold that Earnest Ackmann took a fee simple title absolute in the lands devised to him by the will of his father, Ferdinand Ackmann. Consequently, the restraints against alienation attempted in the devise are void. The trial court therefore correctly decreed that plaintiff was entitled to have its contract with the defendant specifically performed.

AFFIRMED.

FRED MEYERS, JR., APPELLEE, V. FORREST NEELD, APPELLANT.
289 N. W. 797

FILED JANUARY 19, 1940. No. 30740.

Automobiles. Where the evidence and circumstances fail to disclose that either party is at fault, when an accident occurs, then the

accident is unavoidable and no recovery may be had. The mere fact that an accident occurs raises no presumption that it was the negligence of either party which caused the injuries complained of.

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

Henry F. Schepman and *John C. Mullen,* for appellant.

Jean B. Cain, contra.

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

MESSMORE, J.

This is an action for damages wherein the plaintiff charged the defendant with negligence, proximately causing injuries to him as the result of a collision with defendant's automobile while plaintiff was riding a horse. The cause was submitted to a jury, resulting in a verdict for plaintiff, assessing his damages in the sum of $1,250, and finding against the defendant on his cross-petition. Motion for a new trial was overruled, and defendant appeals.

The record discloses that about 4:30 o'clock in the evening of January 27, 1938, the plaintiff, a farmer, was riding a saddle-horse, 10 or 12 years old, weight about 1,100 pounds, carrying a saddle weighing 60 to 70 pounds, north on the east or right-hand side of paved highway No. 73, on the dirt shoulder thereof. He had traveled the highway on many occasions, taking cattle to and from the pasture each morning and evening. Just prior to the accident, he proceeded around a concrete spillway, which the horse would not jump, and, as he did so, he looked back, saw the defendant's automobile approaching from a distance of 200 feet at a speed of 35 or 40 miles an hour. Defendant and his wife were proceeding north on the highway to Verdon, where they lived.

The plaintiff's testimony with reference to the accident is in substance as follows: The horse shied a little bit at a card-board box lying in a ditch; the horse's foot slipped off the edge of the curb of the pavement; defendant's car hit

the horse, caught its left hind leg and threw the plaintiff and the horse backward; the plaintiff fell to the pavement on his elbow, resulting in permanent injury to his arm. Knowing his arm was broken, he got up, telling the defendant to catch the horse and tie it to a fence on the east side of the road, which he did. Defendant then took the plaintiff to his home.

Defendant, in relating his version of the accident, testified: They were following at a distance of about 12 feet behind a truck which was proceeding north. The horse apparently became frightened at a big box, shied into the truck, "jerked the handle off the truck," causing the horse and rider "to come back." The truck stopped the horse and rider temporarily; they then came back and struck the right-hand side of defendant's car, damaging a lamp; the car moved across the pavement eight or ten feet before it stopped. Defendant's wife corroborated his testimony, stating that she saw plaintiff riding his horse along the edge of the road ahead of their car, which was traveling slowly; that all of a sudden the horse "started to shy with its back, rear end to the west and it just kept on going sideways and backed, and there was a truck just ahead of us and it was coming into the truck and it just kept coming and it sort of sideswiped our car when he hit the lamp on the side, he sort of slipped down on his hind feet and he got his footing again and then he just backed to the car; * * * my husband just stopped it, he was off the pavement on the west side of the pavement; my husband jumped right out and helped him;" that the plaintiff was pulling back on the reins; the car stopped with the left front wheel on the west side of the pavement, and plaintiff and his horse were back of the car.

The only disinterested eyewitness, one Stouffer, testified that he was riding in the rear end of a telephone truck, proceeding south on the highway; that he was facing north; that they passed the plaintiff, who was on the "east side of the road on the shoulder, edge of the road;" that as plaintiff got by 50 to 100 yards, a car passed; that about that time the horse became frightened at something and started back-

ing onto the pavement. In response to the question: "Did the horse and car collide?" the witness replied: "Well, yes; not right at that time though; more to the west side of the pavement and the horse continued backing across and the way I could see it and the way it looked to me as though the horse backed into the car;" the truck did not hit the horse. Other evidence is to the effect that admissions were made by the defendant to the plaintiff, his father and his wife, that he hit the horse and rider, and his subsequent denial of such statement, by saying that the truck struck the horse.

Defendant's version of the accident, as to the truck traveling north, is not sustained by the evidence. Likewise, the evidence as to whether the horse had been dragged along the east side of the pavement for 30 feet or more is not clear. The eyewitness did not see the car carrying or dragging the horse, and, under the circumstances, this evidence is highly questionable. The evidence is conclusive that the horse could not run after the accident, but could hobble on three legs; its left hind leg was broken in two places, and out of joint at the hip. Plaintiff's testimony also shows the width of the pavement to be 18 or 19 feet, leaving the entire distance thereof to permit the defendant to drive around the horse. No contention is made as to either party being placed in a position of peril, nor was the doctrine of the last clear chance pleaded or contended for.

Negligence consists in the doing of some act, under circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken. The evidence shows that both the plaintiff and the defendant were acquainted with and knew the propensities of horses. It would seem clear that the rider of the horse in the instant case could not anticipate or expect that a paper box, flying through the air or lying in a ditch, would frighten the horse and cause it to shy. There is no evidence to show that the horse was a fractious horse and easily frightened.

The evidence fails to show any negligence on the part of the plaintiff.

The only time the plaintiff judged the speed of defendant's car was when he glanced back as he was maneuvering the horse around the spillway. The scene of the accident is approximately 25 to 30 feet north of the spillway, indicating that the defendant's car traveled a distance of over 200 feet, while the plaintiff and his horse traveled 25 to 30 feet. The deduction is, therefore, that the evidence fails to show excessive speed of defendant's car. There is no other evidence with reference to speed of the car than that herein related. No act on the part of the defendant in operating his automobile caused the horse to become frightened, to shy or walk backwards, or slip with his right hind foot off the shoulder of the road. The defendant could in no way anticipate the actions of the horse, under the circumstances, as he sought to pass it. Both the horse and its rider had a right to use that portion of the highway that they were using; likewise, the defendant and his wife had a right to use that part of the highway on which they were traveling at the time of the accident; so, we have no negligence in this respect.

In order that plaintiff may recover, it must be established by a preponderance of the evidence that, except for the negligence of the defendant, the accident would not have occurred. The most that can be said, under the facts in this case, is that the accident was unavoidable, and the mere fact that the accident happened raises no presumption that it was the negligence of either party which caused the injuries complained of. It frequently happens that accidents are unavoidable. The evidence fails to disclose which party, if either, is at fault.

"It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable; no liability exists for an unavoidable accident." 5 Am. Jur. 594, sec. 162.

"Where it is impossible to infer negligence from the established facts without reasoning irrationally and con-

trary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant." *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976.

As stated in *Turner v. Bennett*, 161 Ia. 379, 142 N. W. 999, we are not disposed to open the door of mitigation to heedless conduct on the part of any automobile driver. In an emergency it is often true that he has the advantage over the rider of a horse. But the right of each to use the road is precisely equal to that of the other. Neither can be held liable for a mere accident occurring through no fault on his part.

We conclude that the trial court was in error in submitting the cause to the jury. Its judgment is therefore reversed and the cause remanded.

REVERSED.

ROSE, J., dissenting.

As found by the jury on ample competent evidence, defendant, in my judgment, was guilty of actionable negligence in driving his automobile at an excessive speed in a place of danger close to the east curb of the pavement against plaintiff's horse, when nearly all of the paved roadway was a place of safety, being entirely free from traffic at the time.

Plaintiff had a right to ride horseback on the pavement, but rode on the unpaved shoulder of the highway except while going around the concrete spillway which was too wide for the horse to jump. It shied at a paper box; upon returning to the shoulder of the highway, its left rear hoof slipping back over the curb to the pavement. The horse's left rear leg and hip were broken when struck by defendant's automobile close to the east curb. Before leaving the shoulder of the pavement to make the short curve around the spillway, plaintiff looked backward and saw defendant's car approaching at a distance of about 200 feet. Except for the negligence of defendant, plaintiff would have avoided danger by going around the spillway. Defendant negligently drove his car into the place of danger without any excuse

for doing so. He was in the rear where he could see the horse and the rider and the roadway. The driving of the automobile close to the horse at the time and place under the circumstances was negligence for which the jury properly found defendant liable for resulting injuries and damages suffered by plaintiff.

Defendant was a farmer and knew the inherent tendency of a horse to shy suddenly when frightened, or was chargeable with such knowledge. Scientists account for this wild trait in the domesticated horse by the tendency of progenitors to shy when in panic from fear of ancient enemies in the native habitat of the aborigines. The rattle of reeds and the swish of long grass, where powerful wild animals waited in ambush to pounce upon their prey, were signals for the wild horse to jump aside and flee for life. The rattle of paper or the sight of a strange object may produce the same fear. This natural tendency to shy, jump aside and run to escape danger as the result of fright has been transmitted through domestication to the remotest progeny of the equine family. Whatever may have been the origin of this wild trait, the fact of it in the domesticated horse is common knowledge chargeable to motorists on the highways. Entertaining these views, I cannot concur in the opinion of the majority of the court. The judgment should have been affirmed.

JAY J. SHAMBAUGH, APPELLEE, V. BUFFALO COUNTY, APPELLANT.

289 N. W. 873

FILED JANUARY 26, 1940. No. 30723.

1. **Pleading.** By moving for a judgment on the pleadings, plaintiff admits the facts well pleaded by the defendant.
2. **Counties.** Under the provisions of section 33-131, Comp. St. 1929, the annual salary which a county treasurer is entitled to receive depends upon the population of the county for the year in question.
3. ———. In the absence of a judicial determination of the popu-

lation of a county for a year in question, the matter becomes a question of fact to be determined the same as other fact questions.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

O. A. Drake, for appellant.

M. H. Worlock and *I. D. Beynon, contra.*

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

SIMMONS, C. J.

This is an action to recover salary alleged to be due the plaintiff as a county officer. Judgment on the pleadings was rendered for the plaintiff. Defendant appeals.

The amended petition of the plaintiff alleges the legal organization of defendant county; that the plaintiff was elected county treasurer of defendant county for a term of four years commencing in January, 1931; that he duly qualified for said full term; that on December 12, 1916, and again on December (November) 19, 1924, the board of supervisors of defendant county adjudged and determined that the population of said county exceeded 25,000, which judgment remained in full force and effect from that time forth; that by statute the plaintiff was entitled to a salary in the sum of $3,000 per annum during the entire term of office; that he was paid a salary on said basis until July 1, 1931; that on July 15, 1931, the board of supervisors adopted a resolution to the effect that the population of said county was 24,318, and that the county officers be paid from said day as provided by law on the basis of said population; that, pursuant to said resolution, the plaintiff was thereafter paid a salary of $2,000 per annum; that a salary balance was due the plaintiff of $3,458.33 which had not been paid; that in an action commenced by this plaintiff in the district court for Buffalo county, and finally determined in this court on appeal, the action taken by the defendant's board of supervisors on July 15, 1931, purporting to find and adjudge that the population of Buffalo county was less than 25,000, was declared to be null and void (see *Sham-*

baugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207) ; that plaintiff filed a claim against the defendant with its county clerk for said sum of $3,458.33, which claim was disallowed July 15, 1936; and that said action disallowing plaintiff's claim was appealed from. Plaintiff prayed for judgment against the defendant for said sum together with interest.

By amended answer, defendant alleges that the allegations of plaintiff's petition are insufficient to constitute a cause of action; admits its organization, the election of plaintiff as county treasurer, that he qualified for the full term, the payment of salary as alleged in the petition; and denies all other allegations except those specifically admitted and those not consistent with the allegations of the answer. Further answering, defendant alleges that any cause of action which plaintiff claims to have is barred by the statute of limitations; admits that the board of supervisors of defendant county adopted the resolutions of December 12, 1916, November 19, 1924, and July 15, 1931, as referred to in plaintiff's petition, and attaches copies thereof and incorporates them in the answer; admits the filing of the claim, its rejection and disallowance; and denies that it is indebted to the plaintiff in any amount. Further answering, the defendant alleges that the three resolutions set out constitute the only proceedings of any kind whereby the defendant ever attempted to fix or establish the population of the county; that each resolution is void because it fails to disclose personal notice to any one, or published notice in any form, of a private or public meeting, or to disclose that any officer whose compensation was at stake appeared, or to disclose the name of the supervisors, or to disclose the presence of a quorum. Further answering, defendant alleged that, during the four years previous to the plaintiff's term commencing in January, 1931, the defendant's board of supervisors did not ascertain or determine the number of inhabitants of defendant county for classifying and fixing compensation of officers, and that during each of the years, 1930 to 1934, inclusive, there were less than 25,000 inhabitants in Buffalo county.

Further answering, defendant alleges that, subsequent to the resolution of July 15, 1931, the plaintiff continued to perform his duties, received the reduced salary, that not until he filed his claim, did the plaintiff object or protest the amounts paid to and received by him, and that the plaintiff is now estopped to question or challenge the validity of said proceedings or claim any further amounts to be now due him.

By way of cross-petition, defendant alleged a loss of county money because of deposit in a bank that subsequently failed. (The issues presented by this cross-petition are not involved in this appeal.) Defendant prayed that plaintiff's petition be dismissed, that it have and recover from the plaintiff the sum so alleged to be lost and costs.

Plaintiff replying denies all allegations of the answer; denies that the resolutions adopted in 1916 and 1924 are void; and alleges that both of said resolutions have been involved in previous litigation in which the defendant was a party, to wit: *Buffalo County v. Bowker*, 111 Neb. 762, 197 N. W. 620, and *Gordon v. Lowry*, 116 Neb. 359, 217 N. W. 610; that it was therein adjudged and determined that said resolutions were valid and constituted a legal determination of the population of defendant county; that the validity of said resolutions is *res judicata* as to defendant county; that in *Shambaugh v. Buffalo County, supra*, the defendant county alleged it had previously been determined by the board of supervisors of defendant that the population of said county exceeded 25,000 in number and that salaries were paid pursuant thereto; that in the case of *Gordon v. Lowry, supra*, the defendant alleged that, on November 19, 1924, the board of supervisors of defendant county investigated and determined that the defendant county had a population exceeding 25,000, and that these allegations constitute judicial admissions conclusive upon the defendant as to the validity of the determination of population in the resolutions of 1916 and 1924. The plaintiff denied that during the years 1930 to 1934 there were less than 25,000 inhabitants in Buffalo county, and alleged that,

by reason of the determination in the resolutions of 1916 and 1924, the population had been determined at over 25,000 during said years; that said resolutions were in full force and effect during plaintiff's term of office; that the plaintiff was entitled to a salary of $3,000 per annum as fixed by statute, and that he was entitled to recover said salary by virtue of section 3, article I, and section 19, article III of the Constitution. Plaintiff further answered as to defendant's cross-petition.

Plaintiff moved for judgment on the pleadings "as to plaintiff's amended petition, defendant's amended answer, and plaintiff's reply." The trial court found that, "upon the statements contained in plaintiff's amended petition, the amended answer of the defendant, and plaintiff's reply, the plaintiff is entitled by law to judgment in his favor herein for * * * $4,344.52." A jury was waived as to the issues made by the cross-petition, trial was had to the court, and a finding made that there was due the defendant from the plaintiff the sum of $1,497.88. Judgment was rendered for the plaintiff in the sum of $2,846.64 and costs.

Defendant's motion for a new trial was overruled.

The applicable statute fixing the salary of a county treasurer is as follows: "In counties having more than six thousand five hundred population and less than twenty-five thousand population, the county treasurer shall be entitled to receive the sum of two thousand dollars per annum * * *; in counties having more than twenty-five thousand population and less than sixty thousand population the county treasurer shall be entitled to receive the sum of three thousand dollars per annum. * * * No county treasurer shall be entitled to draw (in) any one month more than one-twelfth of the total annual compensation provided for himself * * *." Comp. St. 1929, sec. 33-131.

By the provisions of the foregoing statute, the plaintiff was entitled to receive an annual salary, the amount of which depended upon the population of defendant county during each year that plaintiff served as county treasurer.

The amount of salary does not depend upon what the population previously had been, nor upon what it subsequently might be.

In *O'Connell v. Sioux County,* 94 Neb. 826, 144 N. W. 779, this court said: "The salary of the county attorney for any year depends upon the number of inhabitants of the county during that year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances." Applying that language to the instant case: The salary of the county treasurer for any year depends upon the number of inhabitants of the county during the year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances. See, also, *Buffalo County v. Bowker, supra.*

By moving for a judgment on the pleadings, plaintiff admits the facts well pleaded by the defendant. *Abrahams v. Studebaker Corporation,* 113 Neb. 721, 204 N. W. 786.

The affirmative allegations of the answer are: (1) Bar by the statute of limitations; (2) that the resolutions of 1916, 1924, and 1931 are void, and that the population had not been otherwise determined; (3) that from 1930 to 1934 the population was less than 25,000; (4) estoppel of the plaintiff by the acceptance of the reduced salary without objection or protest.

Plaintiff contends that the findings and determination of the board of supervisors of defendant county made in 1916 and 1924 were judicial determinations of population, not subject to collateral attack, and are conclusive as to those to whom they apply until set aside or vacated by the board, or some other forum of competent jurisdiction, in a direct proceeding instituted for that purpose (see *Buffalo County v. Bowker, supra*); and that the defendant is making a collateral attack thereon. Defendant contends that the orders of 1916 and 1924 are void for want of jurisdiction and subject to the attack here made.

We do not find it necessary to decide the above question. Assuming, but not deciding, that plaintiff's theory is cor-

rect, and that the 1916 and 1924 resolutions are in full force and effect, it does not follow that plaintiff was entitled, as a matter of law, to judgment on the pleadings.

Defendant's answer specifically presented the issue of the population of defendant county from 1930 to 1934, inclusive. It alleged "that during each of the years of 1930, 1931, 1932, 1933 and 1934 there were respectively less than 25,000 inhabitants in Buffalo county." The December 12, 1916, resolution declared that the population of defendant county on November 7, 1916, "did and now does exceed the number of twenty-five thousand inhabitants." The resolution of November 19, 1924, declared that the population of defendant county "then (November 1, 1924) and now does exceed the number of 25,000 inhabitants." The most that can be claimed for the resolutions of 1916 and 1924 is that they determine the population as of those dates. They are not judicial determinations of what the population will be at some future date. A conclusive determination of the population as of 1916 and 1924 is not a conclusive determination of the population as of 1930 to 1934. We cannot close our minds to the obvious fact that populations in counties increase and decrease from many causes—change in number is constant. Obviously, over a period of years there will be change in the population of defendant county.

The changing status of population has been recognized throughout our decisions. In *Shambaugh v. Buffalo County, supra,* this court in discussing the 1931 resolution said: "For anything appearing in the record, plaintiffs may have been ready, able and willing to prove conclusively that numbers sufficient to increase the population far beyond 25,000 became residents of Buffalo county after the census was taken and before the resolution was adopted, thus showing the fact to be contrary to the recital therein." Applying the above language to the instant case, for anything appearing in the record, defendant may have been ready, able and willing to prove conclusively that numbers sufficient to decrease the population far below 25,000 had ceased to be residents of Buffalo county after the resolutions of

1916 and 1924 were passed, thus showing the fact to be contrary to the recital therein. See, also, *Kokes v. State,* 55 Neb. 691, 76 N. W. 467; *State v. Long,* 17 Neb. 502, 23 N. W. 337. (The above statement must not be construed as a determination of the question of where the burden of proof rests. That matter is not before us.)

There is then no judicial determination by the board of supervisors, or other forum, of the population of the defendant county for the years in question. The matter then becomes a question of fact to be determined the same as other fact questions. *Gordon v. Lowry, supra*; *Kokes v. State, supra*; *State v. Long, supra.*

There is no conflict in the conclusion here reached with that in *Buffalo County v. Bowker, supra.* There, compensation was fixed upon the basis of the population as determined by the 1916 resolution. But this court there pointed out: "Since that date, up to and including the year 1920, the county board allowed all officers of the county to retain fees and salaries based upon a population of 25,000, and has fixed salaries of deputies and clerks in county offices based upon such population." There the county board had recognized a continuing population of 25,000 down to and including 1920, and this court accepted that recognition as establishing the fact of population as of 1920. In the instant case, the county board have not so recognized the population figure there determined for the years 1932, 1933, and 1934.

Neither does this conflict with the holding in *Gordon v. Lowry, supra,* for there the defendant by answer alleged that the defendant county "had a population of more than 24,000, ever since prior to November 1, 1924, and now has a population exceeding 24,000." (Quote taken from the transcript.) That allegation was admitted by the plaintiff's demurrer.

It follows that the trial court erred in sustaining the plaintiff's motion for judgment on the pleadings. Other matters presented need not now be determined.

REVERSED.

FARMERS STATE BANK OF EWING, APPELLANT, V. LYLE P. DIERKS ET AL., APPELLEES.

289 N. W. 860

FILED JANUARY 26, 1940. No. 30730.

Fraudulent Conveyances. This is an action to set aside a conveyance of land. On trial *de novo* in this court, the evidence is examined, established principles of law are applied thereto, the conveyance is found to be fraudulent as to the plaintiff, and the decree of the trial court is reversed.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed.*

Jackson & Rice, for appellant.

J. J. Harrington and *John M. Dierks, contra.*

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

SIMMONS, C. J.

The plaintiff, a judgment creditor of the defendant M. H. Dierks, brought this action to set aside a conveyance of land from its debtor, M. H. Dierks, to his son, Lyle P. Dierks, a defendant. The defendants prevailed in the court below, and plaintiff appeals. For convenience, in reciting the evidence, the judgment debtor will be referred to herein as the father and his grantee as the son.

In its petition plaintiff alleges its corporate capacity; a loan to the father of $3,700, evidenced by promissory notes, the maturity of the notes, its demand for payment and his refusal to pay; suit upon said notes, the recovery of judgment thereon, that the judgment is final and unpaid; the relationship of the parties; the conveyance by the father to the son, after the maturity of the notes, but prior to the judgment, of approximately 4,000 acres of land in Holt and Wheeler counties "for the sole purpose and intent of hindering, delaying and defrauding the creditors of said M. H. Dierks, of their lawful rights and debts, and especially for the purpose and with the intent of hindering,

delaying and defrauding plaintiff herein in the collection of the aforesaid judgment and indebtedness;" that, by reason thereof, the conveyance is absolutely void as against the plaintiff. Plaintiff prayed that, as against it, the conveyance be annulled and set aside, that its judgment be decreed to be a lien upon the real estate superior to the interest and lien of the son, and for equitable relief.

The son (and his wife), answering plaintiff's petition, admits plaintiff's corporate capacity, the recovery of the judgment against the father, the relationship of the parties, the conveyance of the land in controversy from the father (and wife) to the defendant son, and the recording of the deed; and generally denies all other allegations of plaintiff's petition. Further answering, defendant son and his wife allege the sale and purchase of the land for a valuable and adequate consideration; that the son paid the full and fair market value for said land (reciting an alleged consideration to which he later testified); that the debts of the father to the son were actual, subsisting, and just obligations; that, in purchasing the land, he acted in good faith and for no other purpose than to secure his just demands owing him by the father; and that since October, 1937, the son has been the owner of the property. The son prays that plaintiff's action be dismissed.

The father, answering separately, admits that plaintiff recovered judgment against him; that no part of the judgment has been paid; the relationship of the parties; that the land was conveyed by him to his son and the deed recorded; and denies all other allegations of plaintiff's petition. Further answering, the father alleged that the conveyance in question here was made in good faith, for a fair and adequate consideration; that at the time of the conveyance he was indebted to the son (and sets out the alleged consideration in detail, to which he later testified); that the son is the owner of the land in fee simple; that the conveyance was made for the sole purpose of paying his obligations to his son, which were then "actual, honest and existing and just." The father prays that plaintiff's action be

dismissed. The reply was a denial of new matter in the answer.

The trial court found generally in favor of the defendants; that the transaction was in good faith; that the son paid the full and market value of the land; that the plaintiff's judgment is not a lien upon the real estate here involved, and dismissed plaintiff's action, at its cost.

Plaintiff filed a motion for a new trial, which was overruled.

At the beginning of the trial, it was stipulated that the value of the land, subject to the encumbrances of record at the time of the conveyance, was $8,794.39.

The trial court properly ruled that the burden of proof was upon the defendants. With one exception (noted hereafter) all evidence was offered by the defendants. The testimony of father and son may be summarized as follows: The father inherited this and other land from his father; the father was 66 years old at the time of trial, and all his life had been engaged in general ranching operations on the land here involved. His entire ranch was once free of indebtedness; in 1923 or 1924 he borrowed $25,000 from the Federal Land Bank and secured it by a mortgage on the entire property. In 1929 the father "had to have more money," so the ranch was "split" into what will be referred to herein as the north and the south ranch. At that time, the father conveyed the south ranch to the son. The title to the south ranch is not in issue in this action; however, that transaction and the handling of that land enter into the problem here presented. The north ranch, plus seven or eight hundred acres of unencumbered land, is the land involved in this action. This entire tract will be referred to herein as the north ranch.

As to the conveyance of the south ranch to the son, the father testified: "I was trying to get by with the Federal Land Bank." "I had to have more money, and the only way to get it was the Federal Land Bank would let us take sixteen hundred acres of that south ranch; * * * he (the son) could get ten thousand on that." The son borrowed the

$10,000 on the south ranch and turned that money over to his father. He made no other payment to his father for the conveyance of the south ranch. The father testified that, under oral lease from his son, he continued to operate the south ranch until 1934, when the son took over its operation. There were 800 acres of pasture and 800 acres of hay land on the south ranch. After the conveyance, the father used the pasture and paid the taxes on the entire south ranch "for the use of the pasture." (The disposition of the hay and the payment of interest on the land bank mortgage on the south ranch will be set out later herein.)

At the time of the conveyance of the south ranch to his son, the father borrowed $23,000 on the north ranch (excluding the unencumbered land), and in 1936 made a commissioners' loan thereon.

In 1937 the father was again behind in taxes and interest (he had never been able to meet his current obligations after he borrowed the first money); his cattle were mortgaged for more than their market value to an Omaha bank and were sold by it in June, 1937. That year the father discussed the matter of his loans with the plaintiff's cashier, who suggested that the father go to Omaha and discuss them with the land bank officials. That was done. Officials of the land bank suggested that the father "turn this land over to" his son, that his son kept his payments up and was young; that the father was "going to be around there anyway." The father and son studied it over and the father "deeded this land over to him" in October, 1937. The father, at that time, owed the plaintiff the debt upon which this action is based. The consideration recited in the deed was $6,566.77. Revenue stamps in the sum of $8.50 were attached to the deed.

The actual consideration claimed was the surrender to the father by the son of a promissory note made by the father payable to the son, dated March 10, 1932, for $5,566.77, due December 1, 1933, bearing interest at 5 per cent. *from maturity.* No interest or principal had been paid on the note, and the computed interest due was in excess of $1,000,

but figured in the settlement at $1,000. The principal sum plus $1,000 interest makes the alleged consideration recited in the deed. The other consideration claimed was the assumption and payment by the son of back taxes *on the land* and delinquent interest on the mortgages *on the land.* These four items making a total of more than $8,500, to which defendants add $21,849.39 and $5,000 principal due on the mortgages, reach a grand total in excess of $35,500 (approximately $9 per acre) which defendants contend the son paid for the land. The son testified that he assumed the obligations to the land bank and the commissioners' loan. However, the deed recites that the conveyance is subject to those encumbrances, unpaid interest, unpaid taxes, and tax liens.

The original note introduced in evidence by the defendants does not show an indorsement of payment. The history of the note and the consideration therefor testified to by the defendants is as follows: The father testified that he owed the son for three years' hay and three years' wages, and that he gave the son the note in March, 1932, "for what I owed him then." The note was made out by the son and signed by the father. The son worked for the father on a salary from February, 1929, to February, 1932. The father testified "I was paying him $100 a month." The son testified that his salary was "estimated." In any event, the father testified that he owed the son $3,600 for those three years' wages. The other alleged consideration for the note was the purchase by the father from the son of the son's share of the hay on the south ranch estimated at 350 tons for each of the years 1929, 1930, and 1931, figured at $5 a ton for 1929 ($1,750), $5 a ton for 1930 ($1,750), $8 a ton for 1931 ($2,800), a total of $6,300 for hay, to which defendants add the $3,600 for wages, making a grand total of $9,900 that the father testified he owed the son in March, 1932.

As against that total, credits were allowed first for payments of wages to the son. Payment was by check. The checks were destroyed. The check stubs were produced, but

not admitted in evidence, and it was stipulated that the father paid the son $900 in wages in 1929, $1,300 in 1930, $650 in 1931, and $50 in February, 1932 (a total of $2,900 in wages that had been paid). This leaves $700 alleged to be due as wages. It was also stipulated that the father paid interest to the land bank upon the mortgage debt on the south ranch of $181.25 in 1929, $625.48 in 1930, and $626.50 in 1931. The total of taxes and wages paid amounts to $4,333.23, for which the father claimed credit against his son in March, 1932, when the note was alleged to have been given. The father testified: "I paid him" wages and "I paid interest on his loan * * * on his land, because he had nothing but what he was getting from me to pay with." When the above credits are deducted there is a balance of $5,566.77, for which the note was given.

The hay which the father claims to have purchased from the son was harvested from the south ranch which the father conveyed to the son in 1929. The father testified that his son "put hay up on all my stuff and his own too, and he was getting half of the hay; they always put hay up at that time on halves." (This, however, was during the time that the son was being paid the "going wages" as ranch foreman for his father.) "There was eight hundred acres of hay at that time down on Lyle's (son) place; then I would pay him whatever this hay was worth; there was about three hundred and fifty tons of it, we figured each year * * *." The son testified that his father "bought half of my hay each year; he got the first half for putting it up and the second half he bought from me each year." As to the value of the hay, the son testified "he paid me $5 a ton for the hay" the first two years and "the third year hay was high and we estimated that the hay would be worth about $8 a ton."

On cross-examination, the father identified, and there were received in evidence, his property statements, showing assets and liabilities, given to the plaintiff and to the Omaha bank during the years here in question. The property statement given by the father to the Omaha bank on November

18, 1929, lists among his assets "1,500 T hay $6,000" ($4 per ton as against the $5 per ton calculated in arriving at the amount of the note). The property statement given the plaintiff by the father, dated November 16, 1931, shows "1,400 T hay $6.00 840.00" (should be $8,400); the property statement given the Omaha bank, dated January 30, 1932, shows "800 tons hay @5. $4,000," and a similar statement of November 1, 1933, shows "1,200 tons hay at $5.00 $6,000.00." (These values in the property statements are to be contrasted with the $8 per ton "estimated" as the value of the hay in calculating the amount of the note.)

These property statements were made for the purpose of bolstering credit for renewal and securing of loans. The land involved in this action is shown as an asset in the statements. The father testified that they were made out by plaintiff's and the Omaha bank's cashier. Obviously, they would show the father's assets in the best light; the father testified, "It wasn't unusual they made them out to make it look good to get your money." None of these statements shows the alleged indebtedness of the father to his son as evidenced by the note (however, it was testified that other unsecured indebtedness also was not shown). The father testified that he was told to put in the property statements only what he owed the banks and things of record; that "it would make it look better" to keep the "other stuff" out.

There is no testimony that the father ever told the plaintiff of this alleged indebtedness to the son. The plaintiff's cashier testified that he did not know of the alleged debt of the father to the son until after the deed here in question was recorded. There is no evidence that any one except the father and son ever saw the note or knew of its existence or the existence of the debt it is alleged to represent. Although the son denied knowledge of this debt of the father to the plaintiff, the evidence establishes that the son knew of his father's business conditions generally, that the father was insolvent when this conveyance was made, and that the son knew of that insolvency.

The son made no personal tax returns prior to 1934, did not at any time list this note for taxation, and did not make an income tax return to the federal government for 1937, the year the note was alleged to have been paid by the conveyance here in question.

Neither the father nor the son kept any books or other records of their indebtedness to each other. The credits which the father claimed as against the $9,900 alleged debt to the son were all shown by check-book stubs, as having been paid to or for the son.

Both father and son categorically testified that it was not their intention and that the conveyance was not made for the purpose of cheating, defrauding, hindering, or delaying the father's creditors in the collection of their debts.

The father further testified: "I couldn't keep it up so I *turned* it to him; the land had always been in my father's name and it was handed down; and I thought maybe he could work it out until he could hold it; I couldn't keep it any longer." The son testified that his father "had no way of carrying it, and I have had to assume the responsibility, and I had to have something to do it with;" and again, "I had put about fifteen years of work in there; I got my spending money for a while out there, and then my salary was estimated later on; but year after year I worked out there without any wages or anything but spending money."

After the conveyance of this land to the son in 1937, the father had no property left in his name and had no property at the time of the trial. He was asked, "And you don't ever intend to pay this debt, do you?" He answered, "It is according to what will happen, if *we* happen to have a downpour with plenty of rain and things pick up * * *."

The father now looks after both ranches for the son.

Upon a trial *de novo,* does equity require a cancelation of the deed as to the plaintiff?

"Every conveyance * * * in writing or otherwise, of any estate or interest in lands * * * made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands * * *

as against the persons so hindered, delayed or defrauded shall be void." Comp. St. 1929, sec. 36-401.

"The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." Comp. St. 1929, sec. 36-405.

"A debtor in failing or insolvent circumstances may prefer one creditor notwithstanding the fact it may be to the exclusion of others, and this rule may include relatives of the debtor who are his creditors." *National Bank of Commerce v. Chapman,* 50 Neb. 484, 70 N. W. 39.

However, "A deed by a father to his son is presumptively fraudulent as to an existing creditor, and in litigation between him and the parties to the conveyance over its alleged invalidity the burden is on them to establish the good faith of the transaction by a preponderance of the evidence." *Lincoln Trust Co. v. Sweeney,* 124 Neb. 686, 248 N. W. 67. See, also, *Riggs v. Hroch,* 133 Neb. 260, 274 N. W. 598.

"It is a well-established rule that, where a transfer of land is made by a debtor to a near relative in consideration of a past-due indebtedness, the burden rests upon the grantee in a creditor's suit to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. Such transactions are looked upon with suspicion, and the suspicion continues until the grantee shows the good faith of the transfer by clear and satisfactory evidence. Generally, when the transaction is in fraud of creditors, knowledge thereof rests only with the near relatives, or others in privity with the debtor. *When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion.*" *Flint v. Chaloupka,* 78 Neb. 594, 111 N. W. 465.

We have then a conveyance that is presumptively fraudulent. Two considerations are claimed: One is the taking

of the land subject to certain past-due indebtedness and taxes which the son has subsequently paid. This, however, is in the same category as the mortgages against the property. It is not in the classification of a payment moving from the son to the father. The other alleged consideration is a past-due indebtedness, and is the only consideration referred to in the deed. The major consideration for the note was the hay which the son is alleged to have sold the father. This hay was harvested on land which the father conveyed to the son in order that it might be used to secure a loan which a lender would not make to the father, but would make to the son. The father received the entire proceeds of the loan, and thereafter, for the period covered by the transaction involved in the note, the father paid the taxes on the land and the interest payments to the mortgagee. These are charges which the father would have been called upon to pay had he personally secured the loan and continued as the record owner. The father continued to operate the south ranch after the conveyance. The father's testimony indicates that the hay, claimed to have been purchased from the son, was the son's share for harvesting the hay. This testimony is inconsistent with the claim that the son was an employee of the father, and is in conflict with the son's statement that the father received half of the hay "for putting it up" and bought the son's (landlord's) share, being the other half. There are the following additional facts that cast doubt upon this transaction and the execution of this note, alleged to have been made five and one-half years before the conveyance, and upon the testimony that the note was given for the consideration shown and at the time claimed. (1) The difference between the price of the hay, "estimated" in arriving at the amount of the note, and the value of hay shown on the property statements. (2) Neither father nor son kept any books of record, every credit given the father was evidenced by payment by check, and not one cent was credited otherwise. (3) The note did not provide for the payment of interest for the first 20 months. (4) Without the note, the alleged

debt would have been barred by the statute of limitations at the time of the conveyance—a circumstance which we have the right to consider in determining the good faith of the transaction (27 C. J. 539). (5) The secrecy surrounding the transaction and the existence of the alleged debt and note evidencing it. (6) The original note, in evidence, bears no indorsement of payment at the time of its surrender to the father. (7) There was no change, known to any one except father and son, in the operation of the south ranch following the conveyance of 1929, and no shifting from the father to the son of the primary task of meeting current obligations thereon. This evidence considered as a whole points to the conclusion that the hay belonged to the father, not the son, and that the alleged sale of the hay to the father was an afterthought in time of trouble.

There remains the matter of a balance of $700 which both father and son testify was owing to the son for wages. The defendants' testimony as to the origin of this balance of the debt, as set out herein, is far from satisfactory. It is intermingled with and subject to the same criticism that we express as to the hay transaction. However, accepting the claim of wages due, it can be but for $700 and interest as against a stipulated value of $8,794.39 for the land conveyed. As to that, this court has held:

"In a contest between a vendee and creditors of the vendor, the adequacy of the consideration, if it be a valuable consideration, will not be inquired into except for the purpose of throwing light on the intention of the parties." *Jones v. Dunbar*, 52 Neb. 151, 71 N. W. 976.

However, "It is not proper for a creditor to receive in settlement of his debt against an insolvent debtor property materially greater in value than the debt paid thereby." *Slosburg v. Hunter*, 136 Neb. 324, 285 N. W. 563.

Gross inadequacy of consideration is a badge of fraud and a circumstance tending to show knowledge of fraud and participation in it. 27 C. J. 484.

We reach the conclusion that there is no adequate consideration shown for the conveyance from the father to his son.

"Fraudulent intent may be established by proof of facts from which such inference may be reasonably drawn." *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678; *Riggs v. Hroch, supra.*

"'A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.' 27 C. J. 415." *Butke v. Nachschoen,* 133 Neb. 366, 275 N. W. 318; *Farmers Elevator Co. v. Peck,* 134 Neb. 305, 278 N. W. 499.

"We do not understand the rule to be that it is necessary to prove a specific intent. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands." *Becker v. Linton,* 80 Neb. 655, 666, 114 N. W. 928.

"As to an existing creditor, a conveyance by the debtor to delay collection of the debt is declared by statute to be void. Comp. St. 1929, sec. 36-401." *Lincoln Trust Co. v. Sweeney, supra.*

What was the intent and the effect of this conveyance? Looking at the situation generally, we have a father who inherited land from his father and who desired to pass it down to his son. Once prosperous, he became financially involved and conveyed a part of his land to his son to secure needed finances. Repeated losses continued an inability to meet his obligations as they accrued and finally produced insolvency, the sale of his cattle, etc., by secured creditors, and the conveyance of his remaining land to his son. The testimony shows that the conveyance was to withdraw the land from the reach of unsecured creditors, to preserve the land from secured creditors, and to preserve an admitted equity therein for the son, if not for the father and son. The evidence of the origin of the debt that constitutes the foundation of the claim of the son is unsatisfactory and unconvincing. It is obvious that the conveyance to the son

has not only delayed, but, if permitted to stand, has the effect of entirely preventing the plaintiff from the collection of its judgment by execution at law.

Such is its natural and obvious result. The proper conclusion is that the father and son intended that such a result would follow from the conveyance. The law wraps a presumption of fraud around a transaction of this character. The defendants have failed to overcome and remove that presumption. It follows that the conveyance, as against this plaintiff, is void, and that the plaintiff was entitled to the relief for which it prayed.

The decree of the district court is reversed, and, as against the plaintiff, the conveyance to the defendant Lyle P. Dierks of the land described in plaintiff's petition is declared null and void, and is annulled and set aside. All costs are taxed to the defendants Lyle P. Dierks and M. H. Dierks.

REVERSED AND REMANDED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. FRANK B. HUGHES ET AL., APPELLANTS.

289 N. W. 866

FILED JANUARY 26, 1940. No. 30722.

1. **Bills and Notes.** A statutory rule of pleading provides that, in an action on a promissory note, it shall be sufficient to produce a copy of the instrument, with all the credits and indorsements on it, and to state that there is due thereon to plaintiff from defendant, the maker, a specified sum which is claimed with interest. Comp. St. 1929, sec. 20-837.
2. **Attachment.** In a civil suit for the recovery of money, property of a nonresident defendant may be attached at or after commencement of the action. Comp. St. 1929, sec. 20-1001.
3. **Appeal.** On appeal, the proceedings in the district court are presumed to be free from error, in absence of a record showing the contrary.
4. **Mortgages.** "The holder of a note, which is secured by a mortgage, may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged

property primarily liable for the debt." *Grable v. Beatty*, 56 Neb. 642, 77 N. W. 49.

5. ———. "In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim." *Grable v. Beatty*, 56 Neb. 642, 77 N. W. 49.
6. **Evidence.** Nebraska courts may take judicial notice of federal statutes and proclamations of the president.
7. **Constitutional Law.** Where the makers of a promissory note invoke acts of congress to procure a loan evidenced by such note, they are not in a position to question the validity of those acts to prevent repayment of the money thus borrowed.
8. **Bills and Notes.** Where payment is pleaded by defendants as a defense to an action on a promissory note executed by them and delivered to payee, the burden is on them to prove they paid the debt to the holder of the note or to an agent authorized to receive payment.

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

A. R. Oleson, for appellants.

Moodie & Burke, Philip M. Wellman and *Franklin L. Pierce, contra.*

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

ROSE, J.

This is an action at law commenced in the district court for Cuming county on a promissory note dated September 13, 1934. The note provided for payment of $2,300 and interest at the rate of 5 per cent. per annum on the unpaid debt, the principal being payable in 20 semi-annual instalments of $115 each, the first maturing January 1, 1938, and the last July 1, 1947, but all to become due and payable by election of the holder upon default in payment of interest or of any instalment.

The note on its face is payable to "Land Bank Commissioner, acting pursuant to part 3 of the Act of Congress known as the 'Emergency Farm Mortgage Act of 1933,' at

his office in the city of Omaha." It is alleged in the petition that the Federal Farm Mortgage Corporation is the holder of the note. Plaintiff alleges further:

"It is a corporation, duly organized and existing under an Act of Congress, more particularly known as the Federal Farm Mortgage Corporation Act (12 U. S. C. Sec. 1020 *et seq.*) and that the principal place of business and office of the plaintiff is located in the city of Washington, District of Columbia; that the Land Bank Commissioner is an office of the Farm Credit Administration, an executive and administrative agency of the government of the United States of America, which office was created by Sec. 3 of the Federal Farm Loan Act (12 U. S. C. 653), said office at that time being known as the office of the Farm Loan Commissioner and per executive order of the President of the United States of America, 6084, this office was transferred from the treasury department of the United States to the Farm Credit Administration. The name of the office of the Farm Loan Commissioner was changed to that of the Land Bank Commissioner by Sec. 80 of the Farm Credit Act of 1933 (12 U. S. C. 638-a) and all the duties previously conferred upon the incumbent of the office by the Emergency Farm Mortgage Act of 1933 were made subject to the terms and conditions of executive order #6084, by Sec. 80 (a) of the Farm Credit Act of 1933 (12 U. S. C. 637)."

Frank B. Hughes and Mary E. Hughes, defendants, procured the loan and executed and delivered the note. Under an attachment issued by the clerk of the district court, the sheriff seized for the benefit of plaintiff property of defendants who were non-residents of Nebraska.

Defendants assailed the petition by demurrer; moved to dissolve the attachment; pleaded payment, unconstitutionality of the federal statute authorizing the loan, and alleged that plaintiff is not the real party in interest. The reply to the answer was a general denial.

The district court overruled the demurrer and the motion to quash the attachment and upon a trial of the cause gave the jury a peremptory instruction in favor of plaintiff.

From judgment on the directed verdict for unpaid debt and interest amounting to $2,562.11, defendants appealed.

The petition conformed to the statutory rule which provides that, in an action on a promissory note, it shall be sufficient to produce a copy of the instrument, with all the credits and indorsements on it, and to state that there is due thereon to plaintiff from defendant, the maker, a specified sum which is claimed with interest. Comp. St. 1929, sec. 20-837. The petition alleged the corporate capacity of plaintiff; the execution and delivery of the note by defendants; ownership by plaintiff; amount of unpaid debt and interest; default in payment of interest and in payment of instalment due January 1, 1938; election maturing entire debt on account of the defaults; copy of note and indorsements thereon as part of the petition which shows its sufficiency under the statutory rule of pleading. Error in the overruling of the demurrer has not been found.

An assignment of error challenging the overruling of the motion to quash the attachment is also without merit. A Nebraska statute provides that, in a civil suit for the recovery of money, property of a nonresident defendant may be attached at or after the commencement of the action. Comp. St. 1929, sec. 20-1001. As already explained, a valid unpaid claim for money due from defendants to plaintiff is pleaded in the petition. The affidavit and order for the attachment and the return of the sheriff are not in the record for review, but the writ of attachment recites that the necessary affidavit was made. The answer of defendants to the petition shows that defendants are nonresidents. On appeal, the proceedings in the district court are presumed to be free from error, in absence of a record affirmatively showing the contrary. A valid claim and a ground for the attachment are definitely shown without disclosing error.

Defendants contend that foreclosure of a mortgage was the remedy authorized by the note to enforce payment of it in the event of default and consequently that the action at law is not maintainable. The law applicable to this contention was formerly stated as follows:

"The holder of a note, which is secured by a mortgage, may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt.

"In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim." *Grable v. Beatty*, 56 Neb. 642, 77 N. W. 49.

Plaintiff is not seeking any relief under a mortgage. Neither the mortgage to which the note refers nor a copy thereof is in the record. Its terms as to remedy, if any, are not disclosed. The note itself does not contain a stipulation making mortgaged property primarily liable for the debt. It follows that a defense on this ground is not disclosed by the record.

Another contention to defeat a recovery on the note is that plaintiff failed to prove its allegations relating to the powers and duties of the "Land Bank Commissioner," payee, and of the "Federal Farm Mortgage Corporation," plaintiff, under the acts of congress and the executive order cited in the paragraph hereinbefore quoted from the petition. The futility of this contention is shown by the rule that Nebraska courts may take judicial notice of federal statutes and of proclamations of the president. *National Supply Co. v. Chicago & N. W. R. Co.*, 108 Neb. 326, 187 N. W. 917. These sources of power, cited in the petition, show authority for the loan in controversy and for the transfer of the note to plaintiff, including its right to sue thereon.

Federal enactments invoked by plaintiff to maintain its action at law on the note are denounced by defendants as unlawful and void on the ground that the federal government has no power under the Constitution to go into the business of lending money to private individuals for private purposes having no connection with any governmental function.

Defendants, having invoked the acts of congress to procure the loan, are not in a position to question the validity

of those acts for the purpose of evading repayment of the money thus borrowed. *LaBorde v. Farmers State Bank*, 116 Neb. 33, 215 N. W. 559.

Payment was pleaded as a defense, but not proved. The evidence shows that defendants had other federal loans secured by mortgages on different farms owned by them. Several payments had been made, but their application to plaintiff's note herein were not shown, except as indorsed on the note itself and credited on the debt evidenced by the judgment. Where payment is pleaded by defendants as a defense to an action on a promissory note executed by them and delivered to payee, the burden is on them to prove they paid the debt to the holder of the note or to an agent authorized to receive payment.

The assignments of error presented by the brief and argued at the bar have been examined and considered without finding an error prejudicial to defendants.

AFFIRMED.

BARTON H. KUHNS, TRUSTEE, APPELLANT, V. LIVE STOCK NATIONAL BANK OF OMAHA, APPELLEE.

289 N. W. 893

FILED JANUARY 26, 1940. No. 30715.

1. **Bills and Notes.** The payment of a check by the drawee bank is not a negotiation, and does not make the bank a holder in due course.
2. **Corporations.** A resolution of the board of directors of a corporation authorizing a bank to honor instruments, even if drawn to the individual order of certain officers named therein, does not, as a matter of law, relieve the bank from making inquiry if an officer of the corporation offers to pay his individual notes to said bank with a check on the corporation account therein, for if it is an unauthorized use of the funds of the corporation the bank may be held liable therefor.

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

Young & Williams, for appellant.

Dorsey & Baldrige and *Crofoot, Fraser, Connolly & Stryker, contra.*

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

PAINE, J.

This is an action at law, in which Barton H. Kuhns, plaintiff-appellant, as trustee in bankruptcy of Central Bridge & Construction Company, a bankrupt corporation, seeks to recover from the Live Stock National Bank of Omaha the sum of $15,000, being the amount of funds of the said construction company which Elmer G. Risk, its president, transferred to said bank in payment of his personal notes. Both sides moving for a directed verdict, the trial court dismissed the jury, and rendered judgment for the defendant bank, from which the trustee appeals.

Plaintiff trustee filed a petition in the district court for Douglas county on February 26, 1938, alleging that the Central Bridge & Construction Company, a Nebraska corporation, was adjudicated a bankrupt on March 9, 1937, in the United States district court for the district of Nebraska, Lincoln division; that on April 16, 1937, the plaintiff, Barton H. Kuhns, was duly elected and qualified as trustee of said bankrupt estate; that on the date of the adjudication in bankruptcy of the Central Bridge & Construction Company, Elmer G. Risk was, and for many years had been, president and a member of the board of directors of said corporation, and M. E. Carman had been secretary and a member of the board of directors.

Plaintiff further alleged that on January 12, 1937, the Central Bridge & Construction Company deposited with the defendant bank $19,215.39 of its own funds, which defendant bank placed to the credit of the Central Bridge & Construction Company in its open checking account; that the next day, January 13, 1937, Elmer G. Risk and M. E. Carman did wrongfully and unlawfully, and without the authority of the Central Bridge & Construction Company or its board of directors, withdraw and divert from the corpo-

rate funds so deposited the sum of $15,000, which on said day the said Elmer G. Risk turned over to the defendant bank in payment of a personal debt which he owed the said bank, which debt had not yet become due.

Plaintiff further alleged that the bank, knowing said funds to be the property of said corporation and said debt to be the personal debt of said Risk, participated in and benefited by said wrongful and unlawful diversion of corporate funds by receiving the same in payment of Risk's personal debt to the bank, this diversion of funds being made by means of a check dated January 12, 1937, and signed by M. E. Carman, secretary of the Central Bridge & Construction Company, upon its checking account in said bank for the sum of $15,000, payable to the order of E. G. Risk, and by him indorsed to the order of the Live Stock National Bank, which received said check and retained the proceeds thereof out of said corporate funds of the Central Bridge & Construction Company.

It is further alleged in said petition that said diversion and misappropriation of corporate funds was in fraud of the rights of the then existing creditors of the Central Bridge & Construction Company, the said company being insolvent at that time and owing debts which exceeded the value of its assets by more than $100,000; that plaintiff trustee has demanded payment of said sum, of which the bankrupt and its estate were so unlawfully deprived, and said payment was refused, and no part of said sum has been paid, for which reason the plaintiff trustee asks judgment against the defendant bank in the sum of $15,000 with interest at 6 per cent. from January 13, 1937.

The defendant bank filed its amended answer on January 18, 1939, admitting that the Central Bridge & Construction Company was adjudged bankrupt, and that the plaintiff is trustee of its estate; that Elmer G. Risk was president and M. E. Carman secretary of said corporation, and that it deposited $19,215.39 of its own funds in said bank on January 12, 1937.

For further answer, said defendant bank alleges that the

Central Bridge & Construction Company, located at Wahoo, Nebraska, opened a checking account in said bank on July 28, 1932, its signature card authorizing checks on its corporate funds to be drawn on the signatures of the following officers: E. G. Risk, president, W. G. Johnson, vice-president, and M. E. Carman, secretary; that on January 8, 1935, the board of directors of said depositor corporation adopted a resolution, which is set out in full as exhibit A, attached to the amended answer, which duly authorized the three officers of said corporation hereinbefore named, or either of them, to borrow money and execute promissory notes of said corporation and pledge its personal property as security for the payment of said notes, to discount bills of exchange, sign and deliver checks and drafts of the corporation upon said bank, and, quoting from the last paragraph of exhibit A, "said Live Stock National Bank is authorized to honor and pay checks or drafts so signed or drawn by them, or either of them, including drafts or checks to their own order, and said bank shall not be responsible or liable in any event for application of funds paid or withdrawn thereon."

Defendant further alleges that said signature cards and resolution, as set out herein, remained in full force and effect on and after January 12, 1937, when the check for $15,000, payable to the order of E. G. Risk, was drawn and signed by M. E. Carman, secretary, and said bank received the same by mail on January 13, 1937, indorsed on the back, "Pay to the order of Live Stock National Bank, E. G. Risk," inclosed in a letter written on the letterhead of the Central Bridge & Construction Company, of Wahoo, Nebraska, dated January 12, 1937, and, as set out in paragraph 4 of the answer, reading as follows:

"Central Bridge & Construction Co.
Wahoo, Nebraska

January 12, 1937

Live Stock National Bank,
Omaha, Nebraska.

Attention: Alvin E. Johnson, Pres.
Gentlemen:

I am herewith enclosing check for $15,000.00 in payment of my two notes of $7,500.00 each.

You may credit the unearned discount to my account.

Very truly yours,

Elmer G. Risk"

Said bank further alleges that it was without knowledge or notice of any fact or circumstance with respect to the financial arrangements or obligation between the depositor corporation and E. G. Risk, or anything from which to deduce, know, or surmise that Risk was not entitled to the amount of said check from said corporation, and said bank was bound by its contract to act as it did with regard to said check and the proceeds thereof; that said bank mailed its monthly statement to the Central Bridge & Construction Company at its office in Wahoo, Nebraska, on February 1, 1937, which account showed a balance of $4,433.96 after payment of the check of $15,000 on January 13, 1937, and that at no time thereafter did the corporation, or any of its officers or agents, protest the payment of said check of $15,000, and therefore the plaintiff, as its trustee in bankruptcy, is estopped to claim that said $15,000 check was not a proper and authorized debit against said corporation's checking account, as defendant bank had no notice that said depositor corporation was insolvent, or in financial difficulty, or of anything relating to its internal affairs at the time said check was presented for payment and charged against the account, nor at any time until after bankruptcy proceedings were instituted, and therefore the defendant bank prays that the petition be dismissed.

To this amended answer plaintiff trustee filed a reply, admitting that the signature cards and resolutions were duly signed as set out in exhibit A, attached to the amended answer, and alleges that the resolutions were in language prepared and selected by the defendant bank, and denies that there was any contract between the defendant bank

and the construction company for the use by Risk, or by the defendant bank, of the corporate funds in payment of Risk's personal debts to the defendant bank.

It is further denied in said reply that the defendant bank suffered any damage or detriment by reason of any failure of the bankrupt to complain or protest the payment of the $15,000 check. Plaintiff alleges that the bank made no inquiry from any responsible source as to Risk's authority to use said check in payment of his personal debt to said bank, and if it had made inquiry it would have received the information that Risk had no authority to make such use of corporate funds, and alleges that on February 2, 1937, the affairs of the construction company were turned over to a bonding company which had become a surety for said construction company in its construction business in a sum in excess of $100,000; that both the corporation and Elmer G. Risk were grossly insolvent on January 12 and 13, 1937, and at all times thereafter, and denies the other allegations contained in said amended answer.

On February 6, 1939, said cause came on for trial before a jury, and at the conclusion of the plaintiff's evidence a motion was made by the defendant bank that the court direct the jury to return a verdict in its favor, and on February 8, 1939, the said jury was discharged, and after arguments of counsel the case was taken under advisement by the court.

On February 21, 1939, plaintiff trustee filed a request that the court state in writing the conclusions of fact found separately from the conclusions of law, and on March 11, 1939, a request was filed that the court make special findings of fact, to wit: (1) That the court find that the Central Bridge & Construction Company and Elmer G. Risk were insolvent on January 12 and 13, 1937; (2) that Elmer G. Risk's financial condition was such that on January 12 and 13, 1937, and at all times thereafter, his two notes for $7,500 each to the defendant bank were worthless and uncollectible; (3) that Central Bridge & Construction Company had no authority under its articles of incorporation to

apply any of its funds to the payment of the personal debts of Elmer G. Risk; (4) that neither Central Bridge & Construction Company nor its trustee in bankruptcy received any consideration for the $15,000 check.

On March 11, 1939, request of plaintiff was denied, and a motion for judgment for plaintiff on the pleadings was also denied.

On March 13, 1939, an order and judgment was entered, finding that the allegations of fact of the defendant's amended answer have each and all been established by the evidence, and plaintiff is precluded from relief prayed for in his petition, and that defendant is entitled to a dismissal of the action. Among the findings of fact in said judgment is one finding that E. G. Risk borrowed $7,500 from the defendant bank on December 24, 1936, and on December 31, 1936, borrowed $7,500 more, for which he gave his promissory notes to the defendant bank, and that he placed the sum so borrowed to his personal credit in his deposit and checking account in said bank; that the first of said notes was payable January 23, 1937, and the last of said notes was payable January 30, 1937, and that the two notes were paid off January 13, 1937. The court found that the construction company deposited a check of $19,215.39, drawn to its order by Wachob, Bender & Company on January 12, 1937, and that prior to the deposit of said check the balance in the account stood at $218.57.

The court further finds that the Central Bridge & Construction Company was adjudicated bankrupt on March 9, 1937, and E. G. Risk was adjudicated bankrupt on June 22, 1937, and that no part of the $15,000 represented by said check was repaid to the corporation, or to the plaintiff as its trustee in bankruptcy.

The court further finds that, in dealing with said $15,000 check and the application thereof, the defendant bank relied upon the resolution of the board of directors of said corporation, and made no further inquiry as to its authority, or the right of Risk to so apply the same to his own debts.

The court further finds that plaintiff's request to make

special findings of fact, to the effect that on January 12 and 13, 1937, E. G. Risk had withdrawn more than $80,000, not including the $15,000 check of the funds of the corporation in excess of all credits to which he was entitled, without the knowledge or consent of the directors other than M. E. Carman, and that the other directors of said corporation did not know that Risk and Carman were withdrawing corporate funds for Risk's personal purposes, and did not know of the payment of his notes to the defendant bank by means of the $15,000 check until shortly before the corporation's bankruptcy, should be denied because the evidence upon which said requested findings would be made by the trial court was all based upon evidence objected to by the defendant bank as immaterial and without foundation.

It was therefore ordered by the court that, as the plaintiff had failed to establish a cause of action, and because the defendant bank was fully authorized to charge said $15,000 check to the account of the corporation and apply the proceeds thereof in payment of the personal notes of Risk, as directed by him, the defendant is entitled to a judgment, and the petition of the plaintiff trustee is dismissed.

On March 25, 1939, the motion for a new trial, setting out 26 errors of the court, was overruled, and the plaintiff thereupon appealed.

The principal contention in this case is, whether the all-inclusive resolution, a paragraph of which is set out herein, relieved the bank of all liability in applying a corporation check in payment of its two notes for money loaned to the president of the corporation.

"One accepting corporate checks drawn by an officer in payment of his private obligations must return the proceeds if corporate funds were thereby misapplied." *McCullam v. Buckingham Hotel Co.*, 199 S. W. 417 (198 Mo. App. 107). In the decision it was said: "A bankruptcy trustee may recover corporate funds diverted by an officer for paying his private debts while the corporation was in-

solvent, although many creditors' claims represented by the trustee accrued subsequent to such diversion."

In *Boyle v. Lewiston Trust Co.*, 136 Atl. 292 (126 Me. 74), it was said: "A trustee in bankruptcy represents the creditors and hence is not estopped from recovering corporate funds used to pay an officer's personal obligations, even though the directors or stockholders consented to such payment." This is because the trustee represents the creditors of the corporation and they are not estopped because the directors acquiesced in or consented to such payments.

"Banks, being bound to take notice that county treasurer had no power to borrow money for county or school board thereof, became liable to subrogated surety on treasurer's bond for money loaned by them to treasurer individually, deposited in his accounts as treasurer and later repaid by checks on such accounts, as against contention that loans were to county for county and school board purposes and properly payable out of county funds." *Bank of Giles County v. Fidelity & Deposit Co.*, 84 Fed. (2d) 321.

One of the early cases in Nebraska is that of *Mendel v. Boyd*, 3 Neb. (Unof.) 473, 91 N. W. 860. It was an opinion by Commissioner Barnes, concurred in by Commissioners Oldham and Pound. J. C. Watts, cashier of State Bank of Neola, Iowa, speculated with the funds of the bank until he had used the bank's money to the amount of over $46,000. The plaintiff, Mendel, was one of the bondsmen of Watts, and having paid the losses of the bank was subrogated to the rights of the bank, and brought suit against Boyd on the amount of 19 drafts drawn to the order of Watts, and indorsed by Watts to Boyd for payment of transactions, commonly known as "bucket shop" or board of trade deals, through James E. Boyd, of Omaha. In the trial court a verdict was returned for the defendant, which was reversed and remanded in this court, and it was held: "The broker in such transactions will be held liable to the true owner of the funds, even if he has no knowledge of the ownership thereof." On the second appearance of *Mendel v. Boyd* before this court, 71 Neb. 657, 99 N. W. 493, it was held

that, when it appears that a cashier of a bank has issued drafts to himself for his own private purposes, there is no presumption that they were paid for when issued, and the burden is on the party claiming they were thus paid for to prove it.

The appellee bank in its reply brief says it "does not contend that if it had actual knowledge that this check had been drawn by or on behalf of Risk in order for him to individually use corporate funds and not for proper corporate purposes, appellee could avoid liability merely because Risk himself had not executed the check for the corporation. Appellee merely contends that in regard to this check, first, there was some transaction between the corporation and Risk, and that appellee was not required to inquire into that because of the corporate resolution authorizing and directing the bank to honor checks payable to an officer of that corporation, regardless of how they were applied. The check having validly got into the hands of Risk, it operated as an assignment of the corporate funds held by the bank for the corporation. Thereafter the bank stood on the same footing as any other third party who might have purchased this check from Risk." Again, the bank in its reply brief says: "Not being required to look into how or why this was done, the bank then, like any other innocent third party, could buy this check."

These contentions of the bank imply that the bank contends that it was a holder in due course, but remember, the bank was the drawee, and when it pays a check drawn upon it, then it cannot be a holder in due course.

"The payment of a check by the drawee bank is not a negotiation and does not make the bank a holder within sec. 30. The check is extinguished and cannot be put in circulation again so as to bind the drawer or indorsers. *American Hominy Co. v. Millikin Nat. Bank,* 273 Fed. 550 (Ill.); *Aurora State Bank v. Hayes-Eames Elevator Co.,* 88 Neb. 187, 129 N. W. 279; *National Bank of Commerce v. Farmers & Merchants Bank,* 87 Neb. 841, 843, 128 N. W. 522; *Gerlach v. North Texas & S. F. Ry. Co.* (Tex. Civ. App.)

244 S. W. 662." Brannan, Negotiable Instruments (6th ed.) 465, sec. 30.

This same question has been before this court in the case of *National Bank of Commerce v. Farmers & Merchants Bank,* 87 Neb. 841, 128 N. W. 522, in which section 30 of the negotiable instruments law is discussed. The question of what is meant by negotiating an instrument is explained: "If A gives B a check on C bank, and B presents the check at the counter of C, no negotiation is necessary or had; he simply demands and receives payment; but, if B goes to D store and buys a bill of goods and tenders the indorsed check in payment, he negotiates the check. The difference is clear and well defined. The presentation by defendant of the check in controversy, *for payment,* was not a 'negotiation' of the check within the meaning of the statute quoted."

"If a depositor seeks to pay his own debt to a bank by appropriation of funds to his credit in fiduciary capacity, the bank acting as depositary of the trust funds is charged with knowledge of the character of the appropriation and will be compelled to refund, as the bank, in honoring checks payable to itself out of the trust account, participates in * * * committing a breach of trust." *People v. State Bank of Herrick,* 290 Ill. App. 130, 8 N. E. (2d) 71.

"But even if the bank had known that the fund covered by the check constituted a trust in the hands of Mrs. Dunlop, it would not be liable to the owners of the fund merely because it allowed her to deposit the check to her personal account and honored checks drawn against that account, unless it either acquired an advantage or benefit as a result of the diversion of the trust fund or joined in the diversion with actual knowledge that such diversion was intended or was being executed, and thereby become privy to it." *Bank of Vass v. Arkenburgh* (1932) 55 Fed. (2d) 130.

Bliss v. Live Stock Nat. Bank, 122 Neb. 668, 241 N. W. 106, is mentioned and referred to in both briefs. The receiver of the First State Bank of Bethany brought an action against its president and vice-president and the Live Stock National Bank of Omaha, Nebraska, for conversion

of the funds of the bank. There was an impairment of the bank's capital to the amount of $4,000, and this amount was borrowed on a note signed by the president and vice-president of the bank as individuals, and the proceeds of the note passed to the credit of the First State Bank of Bethany. A payment of $500 was made, and later the vice-president directed that the note be charged against the account of the First State Bank in the Live Stock National Bank, and the note so paid was returned to the bank. It was held that the Live Stock National Bank, having received payment of the individual note of the president and vice-president of the First State Bank unauthorized from funds of the bank, with knowledge, is liable for the conversion of the amount so paid, and it was held:

"Where the president and vice-president of a bank make an unauthorized payment of their individual debts out of funds of the bank, the bank may recover from the creditor who received the payment with knowledge that it was so paid.

"The fact that the president and vice-president are personally interested in a transaction is sufficient to put the creditor on inquiry as to their authority to pay their individual debts with funds of the bank."

On the second appeal of this case, in 124 Neb. 880, 248 N. W. 645, the holdings were made even more clear.

In a case in which a certificate was signed by the vice-president and secretary of a corporation, reciting adoption of resolution authorizing defendant bank to honor instruments signed by those named therein *without inquiry,* even if drawn to individual order of signing officer, or tendered in payment of individual obligation, it was "*held* not, as a matter of law, to relieve bank from liability for paying corporation's check, drawn by director to himself as payee, where it had knowledge or was charged with notice of director's conversion of proceeds, particularly where certificate was false. In corporation's action against bank, which paid corporation's check, drawn by director to himself as payee, proceeds of which were converted by him, evidence

that bank was put on inquiry by suspicious circumstances *held* to present question of fact for determination of the jury." *Susquehanna Line v. Auditore,* 229 N. Y. Supp. 181 (223 App. Div. 585). In the opinion it is added: "To carry this respondent's argument to its logical conclusion, such a resolution as therein certified justified the bank and relieved it from liability, if it had gone to the extreme extent of participating in a conversion of the plaintiff's funds."

There is merit in the contention that banks are essential factors of modern business life, and their transactions cannot be clogged, or pace slackened, especially in cities, by unwarranted restrictions. However, in the case at bar there was a loss of $15,000 to an insolvent corporation by the wrongful act of its president in paying his private debt to the bank with the funds of the corporation.

The resolution, doubtless furnished by the bank, and adopted by the board of directors of the corporation, was designed to, and would, protect the bank in each and all of the transactions between the corporation and the bank, with perhaps a single exception. In a clear case, such as this, of loss to the corporation and benefit to the bank in the payment in full of its own notes, which were signed by the president of the corporation in his individual capacity, in our opinion the resolution was insufficient to protect the bank. The resolution authorized the bank to pay checks drawn to the order of certain officers of the corporation, including the president. But when the president of the bank received that letter inclosing a corporation check, being used by the president of the corporation to pay his private notes to that bank, it would be perfectly clear that money was being taken out of the corporation's deposit for personal use. We find nothing in the resolution which authorizes this to be done.

We have reached the conclusion, after a careful examination of the authorities cited and many others, that in such a case there was placed upon that bank the duty of inquiry, but the bank made none. If the bank had made inquiry, it would have learned that the president had no authority to

use the corporate funds for payment of his own debts. The bank's position is the same as if it had actual knowledge of such lack of authority, because it is charged with knowledge of the facts which the inquiry would have developed when it receives the entire benefit of the transaction. *W. L. Chase & Co. v. Norfolk Nat. Bank of Commerce & Trusts,* 151 Va. 1040, 145 S. E. 725; *Union Stock Yards Nat. Bank v. Campbell,* 2 Neb. (Unof.) 72, 96 N. W. 608; *Cady v. South Omaha Nat. Bank,* 46 Neb. 756, 65 N. W. 906; *Allen Dudley & Co. v. First Nat. Bank,* 122 Neb. 443, 240 N. W. 522; *Hinds & Lint Grain Co. v. Farmers Elevator Co.,* 99 Neb. 502, 156 N. W. 1045; *People v. Peoples Loan & Trust Co.,* 285 Ill. App. 552, 2 N. E. (2d) 763; *State v. Farmers State Bank of Hadar,* 111 Neb. 585, 197 N. W. 386; *Roe v. Lahaye* (C. C. A. 8) 64 Fed. (2d) 962; *Fehr v. Campbell,* 288 Pa. St. 549, 137 Atl. 113; *Federal Mortgage Co. v. Simes,* 210 Wis. 139, 245 N. W. 169; *Bordy v. Goodman-Buckley Trust Co.,* 131 Neb. 342, 268 N. W. 286; *Fisher v. National Mtg. Loan Co.,* 132 Neb. 185, 271 N. W. 433.

In our opinion, the burden was upon the defendant to show that the president of the corporation had authority to use corporate funds to pay his notes to the bank. This is so because, where the defendant bank gets the money, no notice or knowledge need be shown other than this: The bank's knowledge that corporate funds were being transferred in payment of the officer's debt. The fact of the officer's personal interest in the transaction puts the bank on inquiry and charges it with notice.

The judgment of the trial court, finding that the plaintiff had failed to establish a cause of action and dismissing plaintiff's petition, is hereby reversed, and the cause is remanded for further proceedings.

REVERSED.