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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1940,
AND JANUARY TERM, 1941

VOLUME CXXXVIII

HENRY P. STODDART
OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1940

ETHEL ROSS, ADMINISTRATRIX, APPELLANT, V. EDWARD H. CARROLL ET AL., APPELLEES.

291 N. W. 726

FILED APRIL 26, 1940. No. 30733.

1. **Evidence.** "A party is ordinarily bound by the testimony of his own witness on the question of negligence, unless the circumstances or the evidence of other witnesses would warrant the jury in disregarding the evidence of such witness." *Zimman v. Miller Hotel Co.*, 95 Neb. 809, 146 N. W. 1030.
2. **Appeal.** "In reviewing a direction to the jury at the close of plaintiff's evidence to return a verdict in favor of defendant, the appellate court will assume the existence of all material facts which competent evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences from such facts." *In re Estate of Skade*, 135 Neb. 712, 283 N. W. 851.
3. **Automobiles: NEGLIGENCE.** "A motorist driving at such speed that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision is usually negligent." *Hardung v. Sheldon*, 133 Neb. 427, 275 N. W. 586. This rule applies to a driver of a motor vehicle when approaching and going around curves.
4. ———: ———. The speed at which a motor vehicle may be driven around a curve, in the exercise of ordinary care, is generally less than may be required in other places. Negligence in that regard is usually a question for the jury.

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

Kenneth S. Wherry, for appellant.

Chambers, Holland & Locke and *T. J. Kiesselbach, contra.*

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

SIMMONS, C. J.

This is an action to recover damages for the death of plaintiff's husband resulting from the collision of two trucks on a public highway. The defendants are copartners, owners of a truck involved in the collision, and their employee, the driver of the truck. The sufficiency of the pleadings is not questioned. Plaintiff alleged that the defendants were guilty of negligence in that (1) their truck was driven into an intersection and around a blind corner at an excessive rate of speed; (2) that no signal was given while their truck was approaching or was in the intersection; (3) that the defendants' truck was being driven on the left or wrong side of the highway at the time of the collision.

At the close of plaintiff's case, defendants separately moved for an instructed verdict on the ground that there was no evidence to show negligence of the defendants to have been the proximate cause of the accident. This motion was sustained and a verdict directed for the defendants. Plaintiff appeals.

This situation requires an examination of the evidence.

There is no serious dispute about the following facts. The collision occurred about 9:30 a. m., June 20, 1938, upon a state highway in Gage county, Nebraska, at a point where the highway turns from a north and south course to an east and west course. A dirt highway continues to the north. The state highway is slightly curved as it makes the turn; as it approaches the curve, from the south going north, there is a slight elevation in the grade; the roadway is banked at the turn to the southeast; and as it goes east, the highway slopes slightly into a down-grade. The highway is graveled on the traveled surface, and on the day of the accident was dry and in good condition. In the con-

struction of the road, a cut was made in the hill which left a bank to the southeast of the curve. Wheat, ready for harvest, was growing upon this elevated land. This created a situation where cars immediately approaching the turn from either side were hidden from view of cars approaching from the other direction except for the restricted view directly in front. Plaintiff's husband and her brother were driving west in a Ford "pick up" truck (hereinafter called the Ford). The Ford was owned by the brother, who was driving. The plaintiff's husband was a passenger. Their speed is not shown. They had traveled over about two-thirds or three-fourths of the curve when the collision occurred so that the Ford at the moment of impact was headed more south than west. The defendant Neff, in the course of his employment, was driving a large freight truck (hereinafter called the truck), 20 feet long, 12 feet high, and 8 feet wide, north along the highway, and had started to make the turn when the collision occurred. The truck's direction was more north than east. Neff, one Carel, and a 10-year-old boy were occupants of the truck. There is a "turn" sign some 500 feet to the south. At that point, the truck began to slow down, and was traveling about 30 miles an hour as it started into the turn. The truck gave no warning of its approach as it went around the turn. No showing is made as to whether or not a warning was given by the Ford. The truck driver first saw the Ford when it was 30 to 40 feet away from him (it could not have been seen before that time), put on his brakes with force, and had almost stopped when the collision occurred. The Ford did not slacken its speed nor vary to the left. The two vehicles came together with the left front wheel of each vehicle receiving the direct force of the impact. The truck was knocked back three feet and turned on its right side, with the right rear top corner of the body resting against the bank on the east side of the road. The Ford was almost demolished. The left front wheel was broken and torn from the axle, the axle, dropped to the ground, dragged about one and one-half feet making a mark in the highway. The

crank case was broken, and the oil dripped out upon the ground, making a spot a foot or more across, and ran down to the southeast along the slope of the highway. The right front wheel of the Ford was not seriously damaged. Glass from both vehicles was upon the highway, and there was blood near the oil spot. One occupant of the Ford was thrown clear of the car and was picked up several feet away from it. The other occupant was beneath the wreckage of the Ford. Parts of the car were moved to free him, but the chassis was not moved at that time. The said occupants were rendered unconscious immediately and died the same day without regaining consciousness.

The apparent conflict in the testimony is as to the exact location of the two vehicles at the moment of impact and goes to the question as to whether they were on their right side of the highway. There were no eyewitnesses except the occupants of the two vehicles. Plaintiff called as her witness, Carel, a passenger in the truck and apparently a friend of the defendant Neff. He testified as to some of the facts already recited and, further, that the truck was proceeding on its right half of the highway, that in making the turn it was not more than four feet away from the bank on the south and east, that the Ford was "hugging the inside of the curve," was on the defendants' right side of the road, that the cars came together "head on," and that both vehicles came to rest on the defendants' (right) side of the highway. The damage to the left front wheels indicates that the Ford was largely to the west of the truck at the moment of the impact. At one point in his testimony, the witness Carel says the Ford after the collision was to the "north and west" of the truck and within three feet of it. Plaintiff's other witnesses, who reached the scene of the accident shortly thereafter, place the north and front end of the truck out into the highway, headed north and west and across the center line of the traveled portion of the highway. These same witnesses put the fragments of glass and the oil and blood spots all west of the center line of the highway.

This apparent conflict in the evidence largely disappears

upon an examination of a photograph of the vehicles taken following the accident. Over objections of the plaintiff, it was put in evidence by the defendants on cross-examination of the witness Carel. The photographer who took the picture did not testify as to the usual foundation facts. The witness Carel testified that it was a clear and accurate reproduction of the way the truck and the Ford looked immediately after the accident and before either were moved. We need not now determine the question of the sufficiency of the foundation. The testimony of the witness Carel is that the truck was "knocked back about three feet" by the impact and tipped over. There is no evidence as to the movement of the Ford following the impact except that as to the left front axle. The picture was taken from several car lengths to the south and from a point to the west of the south-bound lane of travel. Had the picture been taken from the east side of the highway, looking directly north, it might have shown the truck headed northwest as plaintiff's witnesses, including Carel, testify. The picture shows the body of the truck lying on its side with its top to the east and its underside facing west, with the right wheels on the ground and the left wheels in the air. It shows the right lane of travel and the *right front wheel* of the truck touching the worn tracks made by the *left wheels* of vehicles that have traveled east. It also shows the *right* rear wheel of the truck touching the worn tracks made by *right* wheels of vehicles that have traveled east. The truck is eight feet wide. If the truck were put back on its wheels in the position in which it was before tipping over, it would follow that the rear wheels of the truck would be in their lane of travel, the left front wheel of the truck would be some six or seven feet to the west of its lane of travel, the truck body would be diagonal thereto, and the front end conceivably in the lane of travel of the Ford going south. The witness Carel, in explaining what happened, said: "As we was coming around the curve we was traveling I imagine thirty miles an hour and *so we was kind of going over,* Neff took his foot off the foot feed and kind of glided down the hill

and we was coming around the curve, I imagine we was going thirty miles an hour, we seen this truck about thirty or forty feet ahead, then when Neff seen the truck he slammed on his brakes and they come on head-on right into us; we was on the right-hand side of the road and they was hugging the inside of the curve." What did the witness mean by "we was kind of going over?" The statement could relate to speed. However, considering the speed, the size of the truck, and the turn, might it not also mean "we was kind of going over" the turn? Unexplained, it is for the jury, not for the court, to say what was meant. This latter interpretation of the statement of the witness Carel and of the photograph is strengthened by the fact that only the right rear top corner of the truck was resting against the bank. Obviously, the front end of the truck was not as close to the bank as the rear end, and, accordingly, must have been nearer the center of the road and diagonal to its lane of travel. If the latter meaning is the correct one, then we must also recognize the fact that the truck at the time of the impact was at least three feet further north and three feet further into the Ford's lane of travel than the picture shows. So interpreted, the picture largely removes the conflicts in Carel's testimony between his statement above quoted and his other testimony and that of other witnesses on that same question.

Under the circumstances here presented, the plaintiff is not bound by the unfavorable statements of the witness Carel to the extent that those statements control over all other evidence offered, including Carel's own statements.

"A party is ordinarily bound by the testimony of his own witness on the question of negligence, unless the circumstances or the evidence of other witnesses would warrant the jury in disregarding the evidence of such witness." *Zimman v. Miller Hotel Co.*, 95 Neb. 809, 146 N. W. 1030.

"Also, if all the favorable evidence, both direct and circumstantial, produced by plaintiff fairly tends to prove the material facts necessary to make a *prima facie* case, the fact that there were inconsistencies or contradictions in some of

the testimony of himself or his witnesses will not justify the court in sustaining a demurrer to the evidence." 64 C. J. 388, and cases there cited. See, also, *Merchants Bank v. Dunn*, 41 N. M. 432, 70 Pac. (2d) 760; *Davis v. Wallace*, 169 Okla. 497, 37 Pac. (2d) 602.

Is the evidence sufficient to make a *prima facie* case against the defendants?

"In reviewing a direction to the jury at the close of plaintiff's evidence to return a verdict in favor of defendant, the appellate court will assume the existence of all material facts which competent evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences from such facts." *In re Estate of Skade*, 135 Neb. 712, 283 N. W. 851.

Under the above rule, this evidence is sufficient to support a finding that the defendants' truck was driven upon the wrong side of the road into a blind corner, where visibility was limited to 40 feet ahead, at a speed of thirty miles an hour, without the sounding of a horn, and that the Ford in which plaintiff's husband was riding as a passenger was upon its own side of the road.

"A motorist driving at such speed that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision is usually negligent." *Hardung v. Sheldon*, 133 Neb. 427, 275 N. W. 586. See, also, 5 Am. Jur. 652, sec. 269.

"No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, * * *." Comp. St. Supp. 1939, sec. 39-1193.

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. (b) The following speeds shall be *prima facie* lawful, but in any case when such speed would be unsafe, it shall not be lawful: (1) Twenty miles per hour in any business district; (2) Twenty-five miles per hour

in any residence district; (3) Sixty miles per hour between the hours of sunrise and sunset * * * upon any highway outside of a city or village. (c) The fact that the speed of a vehicle is lower than the foregoing *prima facie* limits shall *not relieve the driver from the duty to decrease speed when approaching and going around curves,* when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, *and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance* on or entering the highway in compliance with legal requirements and the duty of all persons to use due care." Comp. St. Supp. 1939, sec. 39-11,101.

"(b) No vehicle shall, in overtaking and passing another vehicle, or at any other time, be driven to the left side of the roadway under the following conditions: (1) When approaching the crest of a grade or *upon a curve* in the highway where the driver's view along the highway is obstructed." Comp. St. Supp. 1939, sec. 39-11,103.

"What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances." 42 C. J. 926.

"Generally speaking, the speed at which a car may be driven around a curve in the exercise of ordinary care is less than may be required in other places. Some statutes limit the speed in going around a corner or a curve where the operator's view is obstructed and provide that a speed in excess of that fixed shall be *prima facie* evidence of negligence. Other statutes require the driver to have his vehicle under control, without specifying the effect of violation of the statute. Negligence in this regard, however, is usually held to be a question for the jury." 5 Am. Jur. 686, sec. 342.

"When a motor vehicle is approaching or rounding a corner or curve there is a special necessity for keeping to the right-hand side of the road and the driver has not the right to drive on the left-hand side relying upon having time to turn to the right if a car approaching from the opposite direction comes into view." 42 C. J. 906. See, also, 42 C. J. 931; 5 Am. Jur. 686, sec. 341.

"Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet." Comp. St. Supp. 1939, sec. 39-1170.

"The driver of a motor vehicle traversing defiles, canyons or mountain highways shall hold such motor vehicle under control and as near the right-hand side of the highway as reasonably possible *and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway shall give audible warning with a horn or other warning device.*" Comp. St. Supp. 1939, sec. 39-1157.

These statutes require not only the installation of warning devices on motor-propelled vehicles, but that they shall be used to apprise travelers of the approach of an oncoming car. *Christoffersen v. Weir,* 110 Neb. 390, 193 N. W. 922.

"The duty to sound a signal of the approach of a motor vehicle depends largely on the circumstances of the particular case. A special necessity exists where the car is on the wrong side of the highway, * * * *or is approaching a curve* * * *." 42 C. J. 917.

Defendants contend that this case is controlled by the holding of this court in *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514, where the rule is stated:

"Where undisputed physical facts demonstrate that collision out of which injuries arose was not caused by negligence of defendant, the evidence is not sufficient to support a verdict for plaintiff.

"If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court shall direct a verdict against him."

However, that rule applies only where the undisputed facts demonstrate that the collision was not caused by the negligence of the defendant. *Dederman v. Summers*, 135 Neb. 453, 282 N. W. 261; *Hill v. Interstate Transit Lines*, 137 Neb. 110, 288 N. W. 508.

With reference to the testimony as to the glass, oil and blood spots being on the west side of the road, defendants argue that this feature of the case is controlled by the reasoning in *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N. W. 445. The evidence there showed the position of the vehicles after the collision. However, in that case, "nothing in the evidence tends to reasonably identify the point of collision, with reference to the center boundary of the highway. The actual problem presented by the record in its present form is one of the resolution of forces, and we would be required to determine from the position of the two motor vehicles at the conclusion of the incident, just where they actually collided. With no evidence before us as to the weight, speed, location on the highway, or direction of movement thereon, of either truck or bus at the moment of impact, obviously this cannot be done."

The distinction in the facts presented is obvious, for here there is positive evidence as to the movement of the truck following the impact, and evidence that "tends to reasonably identify the point of collision, with reference to the center boundary of the highway."

The rule in the *Anderson* case might be applicable to the position of the Ford following the impact, for we find no evidence showing the movement of the Ford body following the impact, save the testimony as to the left front axle mark in the road.

It follows that the evidence offered was sufficient to require a submission of the case to the jury, and that the trial court erred in sustaining defendants' motion for a directed verdict.

REVERSED AND REMANDED.

MESSMORE, J., not participating.

JOHNSEN, J., dissenting.

I have hitherto followed the practice of not filing a written dissent, where I merely disagreed with the writer of an opinion upon his statement or interpretation of the facts. It has been my view that, if I was unable to convince my associates, in the consultation room, of the correctness of a factual analysis of a case, it was advisable, generally speaking, to bow to their judgment, or, at most, simply to enter on the record a notation of my dissent. Written expressions of judicial disagreement on facts ordinarily can serve no useful purpose, except to gratify a defeated litigant and his counsel. Such expressions obviously are of no value in the development of jurisprudence, and any manifestation of discord or lack of unanimity in reading and interpreting the facts of a record may only weaken public confidence in the soundness of judicial decision. On principles of law, however, and their applicability to a particular case, I have never hesitated to make a full expression of my individual views.

It is with some reluctance and regret that I make an exception and departure from the foregoing principles in this case. I must do so, however, or make a compromise with my conscience, which to me is impossible. The majority opinion seems to me to so utterly ignore the inexorable facts of the situation that I cannot let it pass unchallenged. If it were possible to have some of the photographs, which are in the record, printed in the published reports, I would not have to waste time in further discussion. Exhibits 1 and 4 fully tell the story of the collision. To me, they demonstrate conclusively that the vehicles met head-on as they were rounding the curve, and that after the collision both of them were still entirely on defendant's side of the highway. Defendant's truck never was and never could have been on the left side of the highway. After the accident it continued to face northeast, the direction in which it had been traveling, except that it had tipped over against the bank. Some of the plaintiff's witnesses confusedly referred

to the truck's direction as northwest, but the photographs leave no possible ground for any misunderstanding here.

The majority opinion says: "Plaintiff's other witnesses, who reached the scene of the accident shortly thereafter, place the north and front end of the truck out into the highway, headed north and west across the center line of the traveled portion of the highway. These same witnesses put the fragments of glass, and the oil and blood spots all west of the center line of the highway." "The picture was taken from several car lengths to the south and from a point to the west of the south-bound lane of travel. Had the picture been taken from the east side of the highway, looking directly north, *it might have shown* the truck headed northwest as plaintiff's witnesses, including Carel, testify." "If the truck were put back on its wheels in the position in which it was before tipping over, it would follow that the rear wheels of the truck would be in their lane of travel, the left front wheel of the truck would be some six or seven feet to the west of its lane of travel, the truck body would be diagonal thereto, and the front end *conceivably* in the lane of travel of the Ford going south." "The damage to the left front wheels indicates that the Ford was largely to the west of the truck at the moment of the impact." "* * * this evidence is sufficient to support a finding that the defendants' truck was driven upon the wrong side of the road into a blind corner * * * and that the Ford in which plaintiff's husband was riding as a passenger was upon its own side of the road."

The photographs, as I have indicated, not only fail to substantiate these statements, but they utterly disprove them. I do not think it is proper to conjecture on what some imaginary photograph, not in the record, "might have shown." Certain it is that the photographs in evidence do not warrant the assumption that, if the truck were put back on its wheels, its front end would be in the lane of travel of the Ford,—either "conceivably," or any other way. It was not the left front wheels of the vehicles that collided, for the motor and the whole front end of the Ford are

shown demolished. The testimony of the eyewitness called by plaintiff was that it was a head-on collision. The statements of relatives and friends of the deceased that the front end of the truck protruded beyond the center of the highway after the collison cannot be accepted against the incontrovertible evidence of the photographs. The same is true of the statement that there was an oil patch on the Ford's side of the highway. The oil had dripped from the Ford after the impact, and only by moving the Ford where the photographs show it was not can the oil patch be placed beyond the center of the highway. The evidence indicates that glass was scattered all over the highway and the fact that some of it flew beyond the center of the road certainly is of no evidentiary significance. The conclusion that "the defendants' truck was driven upon the wrong side of the road * * * and that the Ford * * * was upon its own side of the road" can only be reached by using a judicial derrick to move the cars from the place where the photographs conclusively establish them to have been.

The opinion, to my mind, is based wholly on unwarranted speculation and artificial reconstruction of the obvious physical facts.

CARTER, J., concurs in the dissent.

WILLIAM M. WILSON, APPELLANT, V. CITY OF OMAHA, APPELLEE.
291 N. W. 732

FILED APRIL 26, 1940. No. 30786.

1. **Municipal Corporations.** The city council of Omaha, a city of the metropolitan class, has power to create a sewerage district and construct therein a sewerage system, but the exercise of such power is discretionary. Comp. St. 1929, sec. 14-352; *Adams v. City of Omaha*, 119 Neb. 753, 230 N. W. 680.
2. ———. "Cities of the metropolitan class are not liable for damages caused by surface water, because its storm sewers are of insufficient capacity to carry all of such water." *Adams v. City of Omaha*, 119 Neb. 753, 230 N. W. 680.

3. ———. In an action against the city of Omaha for flood-water damage to residence property, evidence outlined in opinion *held* insufficient to make a case in favor of plaintiff on the issue of actionable negligence of the city in constructing and maintaining a sewerage system in a sewerage district.

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

Anson H. Bigelow, for appellant.

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

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

ROSE, J.

This is an action by William M. Wilson, plaintiff, for alleged negligence of the city of Omaha, defendant, in damaging by flood waters the house and lots and some personal property owned by him at 3323 Boyd street near the intersection thereof with Thirty-third street.

The petition contains two counts. In the first cause of action damages resulting from a flood June 9, 1936, were alleged to be $1,127.50 and in the second cause of action damages resulting from a flood July 18, 1937, were alleged to be $1,660, or a total of $2,787.50.

The negligence for which plaintiff claims damages seems to be the construction and overloading of the main sewer in an inadequate sewerage system in the sewerage district for a watershed or drainage area of 1,320 acres of land devoted to parks, boulevards, streets, alleys, residences in city blocks and to other purposes. The natural channel of drainage through this area is generally west to east from Fontenelle Park not far from the western boundary of the watershed to or near the intersection of Thirty-third and Boyd streets, the lowest point in the surrounding territory or outlet to the Missouri river; Thirty-third street running north and south and Boyd street east and west. The main sewer is in an old creek bed, the natural course of drainage,

now occupied by Paxton boulevard. Lateral sewers in the area drained empty into the main sewer, some from the southwest and some from the northwest.

The city pleaded in defense to the action that, in locating and constructing the sewers in the drainage area, it adopted and acted on the best available engineering advice, that the sewers were adequate for all normal and ordinary purposes of the drainage district and sewerage system, and that the damages to plaintiff's property were caused by unusual and excessive rains and resulting floods June 9, 1936, and July 18, 1937, and denied any actionable negligence of the city as alleged in the petition.

At the close of plaintiff's evidence, the district court, on motion of defendant, excused the jury and dismissed the case for insufficiency of the evidence to prove municipal negligence causing, or contributing to, the damages pleaded in the petition. Plaintiff appealed.

The controlling question presented by the appeal is the sufficiency of the evidence to make a case for damages on the issue of the city's negligence.

The evidence adduced by plaintiff tends to prove that the intakes at the storm sewers did not collect all the water that fell during the floods; that flood waters flowed over the intakes, on the streets and alleys, and were 150 feet wide at Thirty-third and Boyd streets; that the hydraulic pressure of the water in the main sewer at the intersection there exploded the sewer, which plaintiff alleged to be 15 feet in diameter, and threw water and paving materials into the air; that there were logs, twigs, garbage cans, and other débris all over the streets; that water backed up Boyd street 150 feet into the basement of plaintiff's house where it was four feet deep, damaged the foundation and deposited two inches of mud on the basement floor and on the lawn.

An engineer with a long professional experience in the service of the city was called to the witness-stand by plaintiff, explained the typography of the watershed, described the sewerage system, and said in substance: The sewers in the drainage area were located and constructed in accord-

ance with the best engineering practice at the time. The sewer system was designed for a carrying capacity sufficient to "handle a continuous, uniformly distributed rain of about one inch per hour"—or about the same carrying capacity as the outlet of the lowest spot in the surrounding territory at Thirty-third and Boyd streets. There is also evidence to the effect that it had rained continuously for about an hour before the flood waters reached plaintiff's house. Another witness for plaintiff, born and reared in Omaha, who had resided with his family as a tenant in plaintiff's house for two years, testified that the rains were unusual and said: "With the exception of those (June 9, 1936, and July 18, 1937) I never saw any rains of that nature in that vicinity."

From undisputed evidence the necessary deduction is that rain waters entered the intakes and washed the sewers for about an hour before plaintiff's property was damaged. The damages, therefore, were caused by flood waters, whether pouring from the break in the sewer or flowing on the surface of the ground, on streets and on alleys, carrying logs, twigs, garbage cans and mud.

As already shown, plaintiff's damaged property was situated near the lowest point in the natural channel of drainage before the city created a sewerage district or installed a sewerage system. The evidence shows that the rains which damaged plaintiff's property were unusual and excessive to an extent not necessarily to be anticipated when the sewerage system was planned. Moreover, the evidence fails to show that the floods would not have caused damages to the same extent in absence of municipal sewers. The city charter provides:

"The city council shall have power to lay off the city, or parts thereof, into suitable districts for the purpose of establishing a system of sewerage and drainage; to provide such system and regulate the construction and repairs and use of sewers and drains." Comp. St. 1929, sec. 14-352.

An exercise of this power was not mandatory, but was discretionary with the city council. *Adams v. City of Omaha,*

119 Neb. 753, 230 N. W. 680. In that case it was held: "Cities of the metropolitan class are not liable for damages caused by surface water, because its storm sewers are of insufficient capacity to carry all of such water." In the discussion of this question it was said in the opinion:

"For aught that appears, no more water came to or upon plaintiff's premises than would have naturally reached them if no sewer had been constructed. In fact, the inference is that less water was precipitated upon his premises than would have been, had no sewer been constructed. The law authorizes, but does not require, cities of the metropolitan class to construct storm sewers. If no storm sewer had been constructed, plaintiff's damage would not have been less and might have been greater. Plaintiff's plight is no worse because of the insufficiency of the sewer, and it is to be inferred that it is somewhat better.

"A somewhat similar question was presented in *City of Atchison v. Challiss*, 9 Kan. 603, 611, where in the opinion it was said: 'Now, if a city is not bound to construct a drain of any kind, by what system of reasoning can it be made to appear that if it shall construct a drain it must construct one that shall be sufficient in all cases, and for every emergency? Any drain is better than no drain. Any drain instead of being an injury to a party is, so far as it operates, a positive benefit. If it carries off half the water that falls upon his premises, instead of the whole, how can that be said to be an injury? Is it not an actual benefit to the extent that it operates? And if a benefit, upon what principle can the city be made liable?' If failure to construct storm sewers to carry off any of the surface waters was not negligence, certainly the construction of the sewer that carries away a part of the water would not be actionable." *Adams v. City of Omaha*, 119 Neb. 753, 230 N. W. 680.

The reasoning in the opinions of the Nebraska and Kansas courts in the cases cited was adopted in *Deschner v. City of Ipswich*, 59 S. Dak. 456, 240 N. W. 487.

Upon consideration of all the competent evidence in the record and offers of proof rejected, the conclusion is that

plaintiff did not make a case for damages on the issue of actionable negligence of the city. Having reached this conclusion, the rejection of photographs and other evidence tending to show the effect of the flood waters on the premises of plaintiff is immaterial.

AFFIRMED.

WALTER S. WHITTAKER ET AL., APPELLANTS, V. NELL HANIFIN ET AL., APPELLEES.
291 N. W. 723

FILED APRIL 26, 1940. No. 30805.

1. **Negligence.** In an action for injuries sustained in an automobile collision, where plaintiff first observed the defendant's automobile 150 feet from the intersection, and observed that the defendant did not see him, but failed to give any warning signal, assuming that defendant would slow down and give plaintiff the right of way, the plaintiff was guilty of sufficient negligence as a matter of law to bar any recovery.
2. ———. Where the evidence shows beyond reasonable dispute that plaintiff's negligence was more than slight as compared with defendant's negligence, the jury should be instructed to find for the defendant.

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

Beatty, Maupin, Murphy & Davis, for appellants.

Halligan, McIntosh & Halligan and *Beeler, Crosby & Baskins, contra.*

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

PAINE, J.

This action grew out of an automobile collision, in which Walter S. Whittaker, one of the plaintiffs, suffered very serious injuries. At the close of plaintiffs' evidence, each of the defendants separately moved the court to discharge the jury and enter judgment for defendants. The jury

were discharged, and the motion sustained and the action dismissed. The plaintiffs appeal.

There is but little conflict in the evidence in this case. Plaintiff Walter S. Whittaker was 22 years of age, and was driving an International half-ton truck, loaded with 1,000 pounds of meat, into North Platte from the plant of the North Platte Packing Company. The accident occurred about four or five blocks east of the city limits of North Platte on an extension of East Eighth street, which road leads to stockyards and this packing plant. There is heavy traffic on East Eighth street at all times.

The defendant Harry Gutherless was 19 years of age, and on June 2, 1938, was employed by Miss Nell Hanifin, the other defendant, who owned Milady Shop. Gutherless was driving his own 1934 Ford V-8 car, which had run over 50,000 miles, on Bryan avenue, accompanied by Miss Aubrey Hosford, who had bills of Milady Shop which they were trying to collect.

The accident occurred about 11 o'clock in the morning on June 2, 1938, on a clear day, with perfect visibility. The plaintiff had loaded his truck with meat at the packing plant, and started to deliver it to a merchant in North Platte. He had to run in intermediate for at least half a mile before he was able to get his engine into high speed, and was running at about 40 or 50 miles an hour on East Eighth street toward the city when the collision occurred.

The defendant was going south on Bryan avenue, which crossed East Eighth street at right angles. The defendant and the lady with him, in trying to find the house of a certain debtor, were intently examining the number on the house they had just passed, and were giving little or no attention to the traffic on the highway they were about to cross. The plaintiff, being on the main-traveled road, and heavily loaded, did not slacken his speed, although he saw the defendant's car approaching the intersection when 150 feet away. The plaintiff testified that he expected that the car would slow down and let his truck pass, and therefore did not sound his horn, and never applied his brakes. When

plaintiff discovered that the car, which was going nearly as fast as he was driving, was not going to stop, he tried to turn his truck into the ditch to avoid a collision, but it was too late, and a terrific crash occurred, wrecking both vehicles. The plaintiff was badly injured, had compound fracture of the jaw, with many teeth knocked out, and his skull was fractured and required three operations.

The defendant testified that his eyes were fastened on the house he was passing, to get the number, and he never looked to see if a car was coming into the intersection, and drove into the intersection without applying his brakes. The plaintiff's reason for not attempting to stop his truck was that traffic on the highway on which he was traveling, between the city of North Platte and the packing plant and stockyards district, had in his opinion the right of way, as cars coming in from the side streets were in the habit of stopping for the heavier traffic on this road, and, therefore, while he saw the Ford approaching, and even noticed that they were not looking where they were driving, he made no effort to stop until the instant before the crash, when he turned the truck towards the ditch.

In reference to these two roads, neither one is an arterial highway. They are both graveled roads, but the defendant had the right of way, as he was approaching from the right side. "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right." Comp. St. Supp. 1939, sec. 39-1148.

The plaintiff insists that one who has negligently placed himself in a situation of imminent peril, and is either unconscious of the situation, or unable to avoid the danger, or both, may nevertheless recover damages of the defendant who negligently inflicts injury, if the defendant could have avoided the injury after discovering the plaintiff's peril, citing 4 Blashfield, Cyclopedia of Automobile Law and Practice, 536, and Restatement, Torts, sec. 479.

However, as the court views this case, the evidence does not support the theory that plaintiff was unable to avoid the

peril, for he saw defendant coming when 150 feet away, and did nothing; nor does the evidence indicate that the defendant had time to do anything after discovering plaintiff's peril.

Plaintiffs' counsel also argues that this court has held that the failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is, under the circumstances of this case, gross negligence as a matter of law, citing *Nelson v. Plautz*, 130 Neb. 641, 265 N. W. 885, and *Nielsen v. Yellow Cab & Baggage Co.*, 130 Neb. 457, 265 N. W. 420. Even though this is all true, it does not relieve the plaintiff of his negligence under the facts herein.

In *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N. W. 158, this court said: "If, on the trial of an action 'brought to recover damages for injuries to a person or to his property caused by the negligence of another,' plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith." See, also, 17 Neb. Law Bulletin, 71.

This court has held many times that, where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but where the evidence shows beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant. *Sindelar v. Hord Grain Co.*, 116 Neb. 776, 219 N. W. 145.

The evidence in the case at bar clearly shows that the plaintiff was guilty of more than slight negligence, which defeats a recovery, in which case it is proper to sustain a motion for an instructed verdict for the defendant. *McDon-*

ald v. Omaha & C. B. Street R. Co., 128 Neb. 17, 257 N. W. 489.

In our opinion, the evidence offers no foundation for the application of the doctrine of the last clear chance, urged by plaintiffs. *Diehm v. Dargaczewski*, 135 Neb. 251, 280 N. W. 898.

The negligence of the plaintiff was more than slight, and therefore, as a matter of law, the trial court was right in not submitting the case to the jury, for under the circumstances the plaintiff is not entitled to recover in law.

AFFIRMED.

STATE, EX REL. CONSUMERS PUBLIC POWER DISTRICT, RELATOR, v. WALTER A. BOETTCHER, RESPONDENT.
291 N. W. 709

FILED APRIL 26, 1940. No. 30886.

1. **Municipal Corporations.** A municipality is bound by contracts relating to its business or proprietary interests, even though such contracts may continue long after the officers signing them have gone out of office.
2. ———. A revenue bond is a negotiable obligation, payable entirely from the revenues of a public utility.
3. ———. Revenue bonds do not come within the constitutional provisions limiting the amount of indebtedness of a city.
4. ———. The purchase of an electric system is not entered into by virtue of the governmental functions of a city, or under its police power, but is entered into as a municipal business enterprise.
5. ———. A city cannot contract away powers conferred upon it by statute in the interest of the taxpayers.
6. ———. Future city councils cannot be legally bound to a price fixed in advance by a formula depending on amount of bonds outstanding and allocation of earnings, when the statute leaves the determination of the reasonableness of the price to be fixed by agreement or condemnation proceedings at the time of the determination by the city to buy the electric light and power system.

Original proceeding in mandamus by the state, on the

relation of Consumers Public Power District, against Walter A. Boettcher. *Writ denied.*

C. N. McElfresh, for relator.

Munger & Rhodes, for respondent.

Clarence T. Spier, W. D. Deakins, Jr., Zelma D. Derry, George A. Munro, Paul C. Holmberg, Harold M. Shultz, Philip H. Robinson and *H. D. Hunter, amici curiæ.*

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

PAINE, J.

This is an original action in mandamus. The relator is the Consumers Public Power District, of Columbus, Nebraska, and such relator prays that an alternative writ of mandamus should issue, requiring its own secretary, in accordance with a resolution duly passed, to sign, execute and deliver a memorandum of agreement, exhibit C, dated November 20, 1939, which is supplementary to a memorandum of agreement, dated September 6, 1939, marked exhibit B, also attached to the petition, which the secretary has duly signed. The sole question at issue is whether this supplementary agreement, which the secretary refuses to sign, is valid.

The relator is organized under Senate File 310, ch. 86, Laws 1933, as amended, and found in sections 70-701 to 70-719, Comp. St. Supp. 1939, being an act relating to irrigation, and also to the generation, distribution, transmission, sale, and purchase of electric energy for lighting, heating, power, and other purposes, and to provide for the creation and incorporation of public power districts.

The relator, Consumers Public Power District, was organized August 5, 1939, the electors of said relator district being exactly the same as electors of the city of Columbus.

The application for mandamus was filed January 2, 1940, by the Consumers Public Power District against Walter A. Boettcher, its secretary, and sets out, in brief, the following facts: That the Consumers Public Power Dis-

trict was organized August 5, 1939, and the nature and purpose of its business includes the leasing, purchasing, or otherwise acquiring of the Northwestern Public Service Company, a Delaware corporation, including generating plant and distribution systems in the counties of Platte, Butler, Colfax and Merrick, and the Columbus division of the company, with all of its real and personal property; that the boundaries of the Consumers Public Power District are the same as the boundaries of the city of Columbus; on August 12, 1939, the relator entered into a lease agreement with the Northwestern Public Service Company for the lease and purchase of its Columbus division, said lease being contained in a printed book of some 41 pages, attached to the petition as exhibit A; on August 21, 1939, the mayor and council of the city of Columbus passed an ordinance granting a franchise, in the form proposed in said agreement, exhibit A, to the Northwestern Public Service Company, and on September 25, 1939, said ordinance, to run for 25 years, was duly and regularly approved by the electors of the city at a special election; on October 15, 1939, the relator district entered into possession and took over the operation of all the properties of the Columbus division of the Northwestern Public Service Company, in accordance with the terms and provisions of the lease agreement, and is now in possession and operation thereof; on September 6, 1939, an agreement was entered into by the relator district and the city of Columbus with respect to the sale of the distribution system of the Columbus division to the city, said agreement consisting of two typewritten pages, marked exhibit B, and attached to the application filed herein; that on November 20, 1939, a memorandum of agreement, exhibit C, between the relator district and the city of Columbus was agreed upon for the purpose of clarification of paragraph No. 2 of the agreement, exhibit B, and copies of said clarification agreement and the resolutions with reference thereto are attached to said petition as exhibits C, D and E; that the resolution adopted by the city of Columbus, being exhibit D, provided that the

mayor and city clerk be authorized to execute, attest and deliver said memorandum of agreement on behalf of the city of Columbus, but that, as it was desirable to clarify the contract so as to show that it was the intention of the parties that the price paid should in no wise exceed the amount specified, a new paragraph No. 2 was substituted for the original paragraph No. 2, which substituted paragraph provided that, in the event the relator district should exercise the right retained in the aforesaid lease to pay the full purchase price for the property leased from the Northwestern Public Service Company under said lease, and thereby acquire full title to said property, then the city agrees to buy from the district, and the district agrees to sell to the city, all of said properties located within the corporate limits of the city of Columbus, upon the following terms and conditions: (a) Notice by city to district, in writing, 90 days prior to date fixed in said notice for taking title, of the city's intention to acquire the facilities; (b) payment by the city to the district, in cash, of an amount which, when applied by the district to the payment of indebtedness incurred by the district in the purchase of said properties, or to the redemption of the bonds of the district issued for the purpose of paying for said purchase price, will reduce the unpaid portion of such indebtedness, or the amount of such bonds then outstanding, to an amount such that the revenues of that portion of the properties remaining in possession of the district will be sufficient to pay the balance due on the principal and interest on such indebtedness or all debt service charges on such bonds outstanding subsequent to such redemption according to the terms of the bonds as the same shall fall due, and all other pledges, liens, charges, and expenses whatsoever incurred, payable from said revenues prior to the payment of said amount. That exhibit E, attached to the petition, is the resolution adopted by the board of directors of the relator district, providing that the president and secretary of said district be authorized and directed to execute and deliver said memorandum of agreement for and on behalf of said dis-

trict. That immediately following the execution, attestation, and delivery of said agreement by the mayor and city clerk on behalf of said city to the relator district, the same was presented by the relator to the president, Charles B. Fricke, of said district for execution and delivery on behalf of the district in accordance with the resolution, exhibit E, whereupon the said Charles B. Fricke, president, signed the same, and the respondent, Walter A. Boettcher, secretary of said district, refused to sign the same, by reason whereof the memorandum of agreement remains unexecuted and undelivered by the relator district. That demand has been made upon the respondent Boettcher to execute and deliver the same in accordance with the resolution adopted by the board of directors of the relator district of which he is secretary, and that Secretary Boettcher has refused, and continues to refuse, to execute and deliver the agreement, which refusal results in prejudice to the district, and in order to facilitate and expedite and make possible the issuance and sale of the bonds of the relator district, and thus accomplish a saving to the district of approximately $9,000 a year in interest over a long period of years, the relator district prays for an alternative writ of mandamus, requiring that the respondent-secretary should sign, execute and deliver said memorandum of agreement in accordance with the resolution of November 20, 1939, adopted by the relator district.

On December 28, 1939, Walter A. Boettcher, respondent, filed a showing in this court in opposition to the proposed mandamus writ, which sets out: (1) That the questions involved are of great public interest, and important, and should be speedily decided; (2) that in order to inform the court upon the proposed issues the respondent attaches a copy of the answer which the respondent will file if the court takes jurisdiction of the case, wherefore the respondent prays that, if this court takes jurisdiction, he may be permitted to file his answer and be given opportunity to be heard by written briefs and oral argument.

The answer attached to the showing by the respondent

admits each and all of the allegations of fact as set out in the alternative writ and application, and for his defense alleges that the proposed contract is *ultra vires*, illegal and void as against public policy for the following reasons: (1) That the city council and district board have attempted to bind future councils and boards of the Consumers Public Power District as to the price to be paid for the distribution system, whereas the statute of Nebraska leaves the determination of the reasonableness of the price to the board of the power district and the city council at the time of the determination of the city to acquire the distribution system; (2) that the price for the property to be determined under the contract does not conform to the requirements of the statutes that it be fair and reasonable, for no fixed price is set; (3) that the formula agreed upon for arriving at the price is arbitrary and capricious, and not proper in that it is not based upon the fair value of the physical assets, but is to be determined solely upon the amount of debt of the relator district incurred for the purchase of the system, and the amount of revenues available to the district for the retirement of the debt; (4) that the provisions of the contract as to the purchase price of power by the city of Columbus from the relator power district after the acquisition of the system is in restraint of trade and against public policy; (5) that the formula contained in the contract for arriving at the purchase price of electric energy to be purchased by the city from the district is arbitrary, and not fair and equitable, in that it is not to be determined according to the value or cost of the production of the energy, but solely upon the amount of the debt of the district outstanding and the revenues available from other sources for the retirement of the debt.

The respondent in his answer further alleges that he would be subject to personal liability in a large and unknown amount if he executed and delivered the proposed contract, which is *ultra vires*, illegal and void as against public policy for the reasons hereinabove set out. Wherefore, respondent prays that the court may deny the issuance

of any writ of mandamus against him, and for judgment in favor of the respondent.

It is necessary to call attention to a few points in exhibit A, the printed lease of 41 pages, which lease recites the property owned by the Northwestern Public Service Company in the counties of Butler, Colfax, Merrick and Platte, which properties are said to have an agreed value of $1,259,000; that all of said properties are specifically described as to real estate and personal property in exhibit A, attached to said lease. It was provided in paragraph 4 that the lease and none of its provisions should become effective until a new valid 25-year franchise was granted to the Northwestern Public Service Company by the city of Columbus in substantially the form set out; that the Central National Bank of Columbus is appointed trustee, and may appoint such bonded employees or agents as are satisfactory to both parties; that the monthly income shall be disbursed by the trusfee on the 15th of each month by paying, first, to Guy C. Myers, $524.58 each month for 60 months, and to the company $7,327.47 each month for 60 months and $7,852.05 each month thereafter for the use of the properties.

In this printed lease, exhibit A, paragraph 8 provides that the title to everything, including additions, replacements, and improvements, shall at all times remain in the Northwestern Public Service Company unless and until the district shall have paid in full and in cash the sum of $1,259,000, with 5 per cent. interest, at which time the title shall be conveyed to the district.

Paragraph 14 provides that, on the other hand, the Consumers Public Power District holds the company harmless of all liability after date possession is given.

The ones who drafted this lease did not overlook the fact that the cities have had in Nebraska the right to acquire such electric light properties by eminent domain, and therefore provided in paragraph 16: "It is agreed that this lease agreement shall not and cannot prevent condemnation proceedings of part or all of the leased properties by any of the

villages or cities served by such properties, and that if part or all of such properties are acquired by any of such cities or villages by statutory condemnation proceedings, the proceeds thereof shall be paid to the company immediately, and applied upon the payments last due under the lease. The interest payments under the lease to be reduced in proportion to the amount so paid."

Paragraph 21 gives the district the right at any time during the term of the lease to purchase the leased properties at a price of $1,259,000, with interest at 5 per cent. from the date possession of the leased premises was delivered to the district.

Paragraph 22 states that, when the full purchase price, with interest at 5 per cent., is paid in cash, the company agrees to sell and convey to the district, its successors or assigns, for the sum of $10, all of the leased properties, with improvements and additions thereto, together with a release of the trust indenture, dated January 1, 1927, and given to the Equitable Trust Company of New York and another as trustees, to secure first mortgage gold bonds in the amount of $7,758,500, which bonds are due January 1, 1957.

Paragraph 39 provides that the district shall comply with the provisions of Legislative Bill No. 168, 1939 session, and shall annually pay out of its revenues to the state, counties, cities, villages and school districts in which the leased properties are located, in lieu of taxes, a sum equal to the amount that was received during the year immediately preceding the purchase of said property by said district.

Exhibit B, attached to said petition, is the agreement of September 6, 1939, between the Consumers Public Power District and the city of Columbus, and provides as follows: That at a meeting of the mayor and council on August 21, 1939, with the officers of the district, it was agreed that, in the event the Consumers Public Power District acquired said properties, it would, upon the payment of the indebtedness of the district incurred in such purchase, transfer and convey to the city that portion of said properties of the

Columbus division consisting of the distribution system within the corporate limits of the city for a consideration of $1, and it was agreed:

"1. In the event District makes default in any of its obligations under said lease, which is not cured within the period specified in said lease, City, as assignee of District, shall have the concurrent right to purchase the properties referred to in said lease in accordance with the provisions thereof.

"2. City shall also have the right to acquire the distribution system within the corporate limits of the City of Columbus at any time upon payment by it of the proportionate unpaid balance of the purchase price of said distribution system under said lease, in which event District shall convey to City all of its right, title and interest in and to said properties.

"3. Upon payment of the indebtedness of District incurred in such purchase, District shall upon affirmative request of the Columbus City Council transfer and convey to City that portion of said Columbus Division, consisting of the distribution system within the corporate limits of City, for a consideration of One Dollar ($1.00)."

Exhibit C, attached to the petition, is the vital memorandum of agreement between the Consumers Public Power District and the city of Columbus to modify and clarify paragraph 2 of the agreement hereinabove set out. It provides that, if the district buys the properties leased from the Northwestern Public Service Company, the city of Columbus agrees to buy from the district, and the district agrees to sell to the city, all of the properties used in the distribution of electric energy to consumers, both wholesale and retail, located within the city of Columbus, upon condition that the city shall pay to the district an amount which would reduce the unpaid portion of the indebtedness incurred in the purchase by the district of said properties, or the amount of bonds then outstanding, to an amount such that the revenues of that portion of the properties remaining in the possession of the district would be sufficient to pay the

balance due on such indebtedness, or all debt service charges on the bonds outstanding as the same shall fall due, together with all other pledges, liens, charges, and expenses whatsoever theretofore incurred and payable from said revenues prior to the payment of said amount.

In *Drummond v. City of Columbus*, 136 Neb. 87, 285 N. W. 109, it was held by this court under section 18-1601, Comp. St. Supp. 1939, that a city election, held in Columbus to purchase a portion of this same public utility, was void. The ballot failed to state clearly the substance of the proposition submitted to the voters, who were thereby misled as to the material questions of fact upon which they were voting. It now appears that there were continued negotiations respecting the purchase of the Northwestern Public Service Company's plant in the city of Columbus, and finally a price of $1,259,000 was agreed upon, and all of the details relating to the purchase of this private power company's property had been worked out prior to the organization of the Consumers Public Power District in the case at bar.

Many questions are raised by the record set out in this case. It may be questioned whether the present city council has the right to bind future city councils by the agreement, which can run as long as 25 years.

Could the city contract to buy this electric system when the formula in reality fixes no definite price to be paid and the statute requires that the price shall be fair and reasonable? The price to be paid under the formula depending upon the amount of bonds outstanding and the allocation of earnings.

Can the present city council of Columbus surrender its clear statutory power to purchase this electric system by the exercise of its power of eminent domain and fixing its value by a court of condemnation?

As to the first question above, the general rule seems to be that, as to the binding effect of legal contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction between governmental and

business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist. 3 McQuillin, Municipal Corporations (2d ed.) 952, sec. 1356.

"If the contract in question is valid, it constitutes a bargaining away of a right given to the city, to be constantly exercised for the welfare of the city. It is difficult to see what changes the future may demand and require." *Connersville Hydraulic Co. v. City of Connersville,* 95 Ind. App. 234, 173 N. E. 641.

It has been very evident that cities have been greatly handicapped by limitations upon the power to borrow, imposed by constitutional and statutory provisions, which have proved to be serious obstacles in securing the share of millions of dollars being expended by the federal government. An effective method of avoiding constitutional limitations has been the revenue bond, which is a negotiable obligation, payable entirely from revenues of a public utility constructed with the proceeds. Courts have held that a revenue bond does not come within constitutional provisions limiting the amount of indebtedness. 10 So. Cal. Law Review, 333 (March, 1937) ; 22 Cornell Law Quarterly, 64 (Dec. 1936).

The most comprehensive discussion of revenue bond financing which has come to our attention is that written by E. H. Foley, Jr., general counsel of the Federal Emergency Administration, and found in 35 Mich. Law Review, 1-43.

England and Scotland used revenue bonds for public financing much earlier than did the United States. The Leith Dock Commission, Clyde Navigation Trust, Dundee Harbor Commission, and Glasgow Harbor Commission all issued revenue bonds as early as 1817. 12 Ind. Law Journal, 266 (April, 1937).

Perhaps the first decision upon the validity of revenue obligations in the United States was by the supreme court of Washington in 1895, in the case of *Winston v. City of Spokane,* 12 Wash. 524, 41 Pac. 888. The bonds were to be paid out of 60 per cent. of the receipts of the waterworks system, and the court held the obligations were not debts of the municipality.

When municipal revenue bonds are issued, provisions of the Constitution and statutory law in force when they are issued become part of the bondholders' contract in all respects, in the same manner as the statutory law becomes a part of the contract evidenced by a municipal tax obligation. *Brewer v. City of Point Pleasant,* 114 W. Va. 572, 172 S. E. 717.

The law in reference to a city acquiring an electric light and power plant is found in sections 19-701 to 19-707, Comp. St. 1929. It provides briefly that, whenever the electors of a city vote to acquire an electric system located within said city, or partly within and partly without, even though its franchise may not have expired, the city shall have the power and authority, by an exercise of the power of eminent domain, to appropriate and acquire, for public use of such city, such electric system. If 60 per cent. of the votes cast at the special election are in favor of the purchase thereof, the city council shall certify such result immediately to the supreme court, which court shall within 30 days appoint three district judges of the state to constitute a court of condemnation, and such court shall find the value of the system by taking evidence of witnesses, and has the power to require the production of all books and papers and everything deemed necessary for a full investigation and ascertainment of the value of said system. Upon the fixing of the value of such system by said court of condemnation, appeals may be taken, and upon final judgment being pronounced said city shall have the power to issue and sell bonds to pay the amount of the value and judgment without a vote of the people.

There can be no question but that the legislature antici-

pated over 20 years ago that the electors of a city might vote to acquire an electric system, and definitely prescribed in our statute, in the sections just summarized, a method by which it could be accomplished.

This law, which has been in effect since 1919, provides that a city of the first or second class may acquire private property for public utilities by eminent domain and a court of condemnation, as set out in sections 19-701 to 19-707, Comp. St. 1929, and we are now faced with the recent law enacted in 1933, and amended in 1937 and 1939, which provides that a public power district may be organized in a municipality according to the plan followed in the organization of the Consumers Public Power District of the city of Columbus, and that such public power district may purchase private corporations engaged in public utility business, and may finance such purchase by the issuance of revenue bonds, hypothecating its revenue, incomes, receipts or profits to pay either the federal government or others to whom it owes for the purchase of such systems, and in this section 70-712, Comp. St. Supp. 1939, a complete and detailed plan has been set out by our legislature, whereby such public power district may sell to any city any electric systems which it has so purchased when and if the board of directors of such public power district and the city shall agree upon such terms as each may deem fair and reasonable. Such section further provides that, if the public power district and the city fail to agree, the city shall purchase from the public power district through the provision for acquiring the same through eminent domain.

We are, therefore, faced with the fact that the legislature in 1933 provided an alternative method to be used only in case a city desired to purchase a public utility system of a public power district, in which case alone the terms of such purchase could be arrived at by the agreement of the parties. There is no indication that the latter statute repealed the former by implication, but there is clear evidence that the subsequent legislation is not inconsistent with the former, because, in case of a failure to agree upon the

terms of purchase, the law of 1933 directs that the purchase shall then be made through the power of eminent domain possessed by the city in such cases.

We reach the conclusion that there is no conflict between the two statutes, but the last one gives the right to a city, when buying a system from a public power district, to reach the terms of the sale by agreement, and not by condemnation, and if this should be considered as a conflict between the two methods provided by these laws the earlier enactment must give way to that extent to the later, but in this case it is better to take the position that the later act is simply cumulative, and gives a new method for doing the same thing. 1 Lewis' Sutherland, Statutory Construction (2d ed.) 461, sec. 247, and 540, sec. 280.

In the brief of the respondent it is insisted that *Grantham v. City of Chadron,* 20 Fed. (2d) 40, is directly in point, and adds: "A careful search of the authorities has failed to disclose any other case where the facts are close to the case at bar and where the same question of law was directly involved, and relator cites none in its brief. It is therefore contended that the above cited case is entitled to great respect and persuasive force as an authority which might be followed by this court in this case upon the fundamental question of whether the statutory right to condemn at fair and reasonable value can be contracted away for all future time either by providing a fixed price which is mandatory or by making a formula which will do the same thing or at least is not based on the then fair and reasonable value standard."

We will, therefore, examine with care this *Grantham* case. It was decided by the circuit court of appeals of the eighth circuit in 1927. It was appealed from the United States district court of Nebraska, J. W. Woodrough, judge. The city of Chadron, Nebraska, proceeded by regular ordinance to make appropriations for a right of way for a pipe line for a water system under the law now known as sections 16-601 and 16-602, Comp. St. 1929. In the condemnation proceedings the appraisers awarded $600 as the

damages for the right of way. An appeal was taken to the district court of the United States, and appellants filed a petition, setting up a conveyance by them to the city of Chadron of the right of way under a contract between them and the city for the submission to arbitrators, containing an award of $5,000 for the right of way over the premises, and alleged the invalidity of the condemnation proceedings, and asked specific performance of $5,000 under the agreement with the city. The answer of the city alleged that the contracts were executed by the city without due authority, and that the award was void and unenforceable, and that the same was obtained by fraud. The special master entered a finding that the contract upon which the appellants relied was never officially approved by the city of Chadron, and recommended a dismissal of the petition for want of equity. The report of the master was approved by the district court, and upon appeal this judgment was reversed by the circuit court of appeals for this district, with directions to remand the case to the district court for Dawes county. The circuit court of appeals held that the city, in obtaining the right of way for a pipe line by condemnation, was exercising a right conferred upon it by statute as a police power, and that the effect thereof was a repudiation of the alleged contract of arbitration, and that a repudiation of a contract was not an impairment of the contract under the Constitution of the United States.

It is our understanding that all the authorities agree with this *Grantham* decision that municipal and water supply systems, being entirely in the interest of public health and safety, are handled by the city under its police power. 11 Am. Jur. 1020, sec. 271. But, on the contrary, it is held that the purchase of an electric light and power system is not entered into by virtue of the governmental functions of the city, or under its police power, but is entered into as an ordinary business enterprise. This court has recently held in *City of Curtis v. Maywood Light Co.*, 137 Neb. 119, 288 N. W. 503, that the business of operating a municipal light plant is wholly outside the governmental powers and

functions of such city, and is bound by all the rules of law and procedure applicable to any other private corporation engaged in a like enterprise.

The case of *City of Omaha v. Omaha Water Co.*, 218 U. S. 180, 30 S. Ct. 615, is in point in the discussion of the proper elements to consider in arriving at the price to be paid. The ordinance of 1880, giving the privately owned water company a franchise, provided that the city might buy it at any time after the expiration of 20 years at an appraised valuation ascertained by three engineers, the majority of whom fixed the value of the system at $6,263,295.49. Justice Lurton said: "There is not the slightest evidence in the record of partiality, bad motive or misconduct affecting the action of the board. Its members appear to have been gentlemen of high character professionally and otherwise. * * * In the absence of any evidence of actual bad faith we do not hesitate about agreeing with the circuit court of appeals in the conclusion that there was no such misconduct as to vitiate the valuation." It was held that the legislature may authorize a city to purchase a water system to extend beyond the limits of the city, and to supply water to adjacent sections. A transaction of great magnitude will not be defeated because of minor obstacles.

Cities of the first and second class have the power, after an affirmative vote of their electors, to acquire electric light and power plants located in or partly within their corporate limits by eminent domain. Comp. St. 1929, sec. 19-701. Under this act, the municipality was required to pay the amount found due by the condemnation court.

Under section 18-1601, Comp. St. Supp. 1939, a city may purchase electric light systems when authorized by a vote of the electors, and pay for the same only by revenue bonds payable out of the earnings of the plant.

In the case at bar, the Consumers Public Power District was created by virtue of Senate File 310, Laws 1933, as later amended, and found as sections 70-701 to 70-719, Comp. St. Supp. 1939, which law permits a city to buy an electric system from a public power district, at a price to

be fixed by agreement, or, if they fail to agree, the price to be fixed by eminent domain, and to pay for the same by giving revenue debentures, notes, warrants, or other evidences of indebtedness payable solely from the revenues, income, receipts, and profits from the operation of the plant.

The crux of the case at bar is found in the single-page memorandum of agreement, attached to the petition as exhibit C, which memorandum the secretary of the power district refuses to sign, and the purpose of this action being to compel him to sign it, we will examine it with some care. This agreement, exhibit C, instead of giving the city an option to purchase from the power district, provides that, in the event the district buys and pays the full purchase price to the Northwestern Public Service Company, then the city agrees to buy from the district that part of the distribution system located within the corporate limits of Columbus by giving notice 90 days prior to the time of taking over the title, and, further, by the city paying to the district in cash an amount which, if applied by the district in the payment of its indebtedness to the Northwestern Public Service Company, will reduce the unpaid portion of such indebtedness, or the amount of such bonds then outstanding, to an amount such that the revenues of that portion of the properties outside of the city of Columbus will be sufficient to pay the balance due for principal and interest on such indebtedness or all debt service charges on such bonds outstanding according to their terms as the same shall fall due, and all other pledges, liens, charges, and expenses whatsoever theretofore incurred and payable from said revenues prior to the payment of said amount.

It will be seen by a careful examination that this supplemental memorandum of agreement, exhibit C, changes entirely the simple procedure by which the Consumers Public Power District purchases the property in the Columbus division from the Northwestern Public Service Company, and pays for the same by revenue bonds, which are a first lien upon the income of the utility, and when

such utility is paid for to give it to the city of Columbus as a going concern for one dollar, and by this exhibit C it appears that the city of Columbus is bound to take over as assignee the properties lying within the city of Columbus in case the Consumers Public Power District defaults in its payments, and the city in that case agrees to pay all of the items which have hereinbefore been set out.

According to the agreement, the city of Columbus does not agree to buy the property at some time in the future, at a fair and reasonable price to be determined by a court of condemnation at that time, nor does the city agree that, when it does take over the plant now being operated by the power district, it will pay for the same only by revenue bonds issued against the earnings thereof, as provided in section 70-712, Comp. St. Supp. 1939, but, on the other hand, exhibit C obligates the city to pay an amount to be computed at the time the city takes it over, under the terms of a very intricate and complicated formula.

The purpose of this formula appears to the court to bind the city to make full and complete payment according to the terms of the lease-purchase agreement between the Northwestern Public Service Company and the public power district, not out of income of the plant and liquidation of revenue bonds, but to pay everything then due according to the original contract.

By this purchase, under such an involved formula, it appears that the court is called upon to approve and confirm a plan by which the city of Columbus guarantees the purchase price, not out of revenues of the plant, but by an obligation which courts might enforce the city to pay by judgment levies to be paid by the taxpayers. In our opinion, if this is the purpose and effect of the formula, as we believe it is, it is invalid and void.

WRIT DENIED.

SIMMONS, C. J., and CARTER, J., concur in the result.

JOHNSEN, J., dissenting.

Under section 70-712, Comp. St. Supp. 1939, a city has the right to purchase, and a public power district is re-

quired to sell, any "electric distribution system, situated within or partly within such city or village, but not within the corporate limits of any other city or village." If the city and public power district are unable to agree upon a price and terms, the city may resort to condemnation proceedings under the general statute.

So far as the facts in this case are concerned, it is unnecessary to decide whether the purchase must be a present one, or whether an agreement may validly be made to purchase at some future time, definite or indefinite. No such situation is here involved. The city did not enter into a contract to purchase; all that the contract and modification agreement did was to give it an option or right to purchase in a particular manner and on a particular basis. It was not obligated to take over the distribution system on this basis, since it was not required to exercise its option. Its option right could obviously not be a purchase, if it was never exercised. So long as it was not a purchase, the city had the right at any time to enter into further negotiations on any other basis, and, if it failed to agree with the district on price and terms, to resort to condemnation.

The majority opinion is predicated upon the view that the contract and modification agreement did not constitute a mere option. On that point, however, I cannot see how there can be any sound disagreement. The brief of respondent and that filed by various city attorneys as *amici curiæ* recognize it as such. While the modification agreement recites that the city hereby agrees to buy from the district, and the district hereby agrees to sell to the city, it provides further that such agreement is subject to and upon the condition that the city must give 90 days' notice to the district of its intention to acquire the facilities. In addition, the modification agreement leaves in full force the third paragraph of the original agreement, which provides: "Upon payment of the indebtedness of District incurred in such purchase, District shall upon affirmative request of the Columbus City Council transfer and convey to City that portion of Columbus Division,

consisting of the distribution system within the corporate limits of City, for a consideration of One Dollar ($1.00)." Thus, the purpose and legal effect of the entire agreement are that the city agrees that, if it elects to exercise its option, it will do so by giving 90 days' notice and will then take the property over on the basis provided in the contract. If it does not choose to exercise its option, it may simply wait until the district has entirely paid for the property and then demand a conveyance of the facilities within its corporate limits on payment of the sum of one dollar. It is still free to ignore its option and attempt to enter into further negotiations with the district, and, until it has made a definite purchase, it is not precluded from exercising its power of condemnation.

The result of this view is to preserve to the city whatever benefits may exist in its favor under the option agreement and to have future city authorities free to exercise it, if they determine, on the basis of the price formula, before the option is exercised, that it is to the advantage of the city at any time to do so.

This is where the agreement of the parties leaves them, whether it accomplishes what they had in mind or not. The city is entitled to have saved to it whatever advantage there is in the contract, and the objections made by respondent are not valid against such an analysis. In this situation, and without consideration of the propriety of the form of the remedy, as to which no question is raised, a writ of mandamus should be granted.

JOHN WENTINK, APPELLANT, V. RUTH FARNHAM TRAPHAGEN, TRUSTEE, ET AL., APPELLEES.
291 N. W. 884

FILED MAY 3, 1940. No. 30756.

1. **Negligence.** One who voluntarily walks about in total darkness in a strange place must of necessity know that he faces the danger of obstructions, pitfalls, accident, and injury.

2. ———. Darkness alone calls upon a person to exercise greater caution for his own safety than is ordinarily required.
3. ———. Where light has failed, obstructions have been encountered, and there are no especial circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery.

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

Lloyd E. Chapman, for appellant.

Baylor, TouVelle & Healey, Peterson & Devoe and *J. J. O'Dowd, contra.*

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

SIMMONS, C. J.

This is an action wherein plaintiff seeks to recover for personal injuries. The plaintiff was an employee of the Hardy Furniture Company. The employer is made a defendant because it is paying workmen's compensation to the plaintiff and is subrogated to, and interested in, plaintiff's cause of action. The defendants Traphagen and Farnham own the premises where the accident occurred. The defendants Mason are tenants of a part of the premises.

The plaintiff alleged the facts recited herein. The defendants landlord and tenant, answering separately, denied generally, and alleged that, if plaintiff suffered damage, it was proximately caused, and contributed to, by his own negligence, and that the plaintiff had assumed the risk of injury. After plaintiff had rested his case, the trial court dismissed the action as to the tenants. At the close of all testimony, the trial court directed a verdict for the defendant landlords. Plaintiff appeals.

The building where the accident occurred is a three-story structure with a basement. The defendant tenants occupied the second and third floors. An automatic gas water heater in the basement, owned by the defendant

tenants, served the two upper floors of the building. A first-floor tenant used the basement for storage.

The basement was 80 feet long, 16 feet wide, and 7 feet high. The floor was of dirt. The entry to the basement was through a trapdoor in the sidewalk. A stairway led down into a small room under the sidewalk, and a door opened from this antechamber into the basement proper. Gas meters, serving the tenants, were in the south end of the basement. A small window opened from the antechamber into the basement. On the day of the accident it was dirty. The only natural light into the basement was through the openings above described. Fifteen feet from the south end, there was an electric light which turned on at the bulb; beyond that a few feet were racks from which clothing was hanging. At the north end of the basement was a pit 10 feet wide, 16 feet long, and 5 feet 2 inches deep in which the furnace and gas water heater were placed. On either side of the pit, there was a strip of basement floor 4 feet in width, running north and south. The top of the pit wall was even with the floor, except that, along the south side and for a short distance along the west side from the southwest corner, the dirt floor was 2 or 3 inches below the top of the pit walls. There were no guard rails around the pit wall. The hot water heater was in the northwest corner of the pit, and pipes lead from it up to the ceiling.

Because of defendants' motions and the rulings thereon, plaintiff is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence. *Moncrief v. Interstate Transit Lines,* 129 Neb. 168, 261 N. W. 163.

On the morning of the accident, plaintiff delivered two gas ranges to the building for the tenant to be exchanged for other stoves then in use. It was customary for the merchant to connect the new stoves with the gas line if the purchaser so requested. The plaintiff was requested by the tenant to make the necessary connections, and he agreed to "change the stoves." It was customary to first

shut off the gas at the water heater and then at the meter before an old stove was disconnected and a new one connected to the gas line. It is not shown that the defendants knew of this custom. The plaintiff asked the location of the gas valve and the valves of the hot water tank. The defendant told him they were in the basement and to go into the basement through the steel door on the outside of the building. Plaintiff said, "all right." Nothing else was said.

Plaintiff had never been in the basement before. He entered the basement and found the meter without difficulty. He saw and turned on the drop light, went back to the door, looked for a light switch and found none. At that point, he "couldn't see very good." He then started north along the center of the basement, came to and went around the clothes on the west side, and beyond them, walked back to the east, looked around for lights and could not see any. He felt in his pocket for matches, found two and lit those, one at a time, and "flared around to see where the tank was." He saw the top of the tank and the pipes and heard the noise of the tank, which indicated to him where the burner was located. He walked northwest 6 or 8 steps while the matches were burning. At the point where his last match went out, he was 4 to 7 feet from the pit. Although he saw the top of the burner across the pit, from the light of the matches, he did not "necessarily" know that the burner was installed below the surface of the basement floor. He saw nothing to indicate a pit. He was looking for pipes, did not look down at the floor, although, had he looked down at that point, he supposes he "would have" seen the pit—"maybe not." If there was a reflection from the burning gas at the base of the heater, he did not see it because he was "looking at the top." When his last match went out, he did not turn back for more matches or other light, but figuring he "could make it," in the darkness, walking slowly, feeling with his feet, he took 2 or 3 more steps forward, and fell into the pit at the southwest corner.

There was no emergency or peril requiring plaintiff to go forward, or need for speed in making the connection. The plaintiff was not led into a false sense of security. On the contrary, his testimony shows that he realized there was possible danger ahead. That the pit was dangerous to one walking about in the dark is apparent. It is likewise apparent that it was not dangerous to any one properly going about the basement when ordinary means of artificial lighting were used.

Plaintiff contends that he was an invitee and that the defendants were negligent in maintaining the pit unlighted and unguarded, and without warning the plaintiff of the unsafe and dangerous condition of the premises.

Defendants, by their motions, presented, among others, the propositions that the evidence shows that the plaintiff's negligence was the proximate cause of his injuries, and also that, under the comparative negligence statute, plaintiff was barred from recovery.

That plaintiff was seriously injured is not questioned.

"Negligence is not actionable unless it be the proximate cause of the injury to the complaining party." *Wagner v. Watson Bros. Transfer Co.*, 128 Neb. 535, 259 N. W. 373. "Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury." *Anderson v. Byrd*, 133 Neb. 483, 275 N. W. 825. See, also, *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887. "Two acts of independent source are not concurrent in causing an injury, if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. In such case the latter and not the former is the proximate cause of such injury." *Johnson v. Mallory*, 123 Neb. 706, 243 N. W. 872.

Section 20-1151, Comp. St. 1929, is set out in full in *Mundt v. Chicago, R. I. & P. R. Co.*, 136 Neb. 478, 484, 286 N. W. 691, and was construed in *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N. W. 158, where it was held that, "if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery."

"The question of whether or not an act or omission is negligence is for the jury to decide when reasonable minds may honestly say from the evidence under a proper definition of negligence that it was, and is not to be submitted to the jury if there is not sufficient evidence to support a finding in the affirmative." *Johnson v. Mallory, supra.* See, also, *McDonald v. Omaha & C. B. Street R. Co.*, 123 Neb. 17, 257 N. W. 489; *Johnson v. City of Omaha*, 108 Neb. 481, 188 N. W. 122; *Guthrie v. Missouri P. R. Co.*, 51 Neb. 746, 71 N. W. 722.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." 45 C. J. 942. See *Eaton v. Merritt*, 135 Neb. 363, 281 N. W. 620. "Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence." *Welsh v. City of South Omaha*, 98 Neb. 148, 152 N. W. 302. A duty rests upon a person to exercise ordinary care for his own safety. *Gardner v. Metropolitan Utilities District*, 134

Neb. 163, 278 N. W. 137. "A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care." *Kerwin v. Thompson, Belden & Co.*, 110 Neb. 251, 192 N. W. 692.

Applying the above rules, the conclusion is reached that the proximate cause of plaintiff's injury was his own acts, and that he acted without the due care for his own safety that the law requires.

Assuming, but not deciding, that defendants were negligent and that their negligence contributed to plaintiff's injury, the negligence of plaintiff contributed directly thereto as the moving cause of the accident, and because thereof, plaintiff cannot recover.

Of course, if the defendants were not guilty of actionable negligence, plaintiff's negligence was not, strictly speaking, contributory negligence, but, in either event, the trial court properly directed a verdict, and the result is the same. *De Honey v. Harding*, 300 Fed. 696.

This conclusion is amply supported by the holdings of this court in *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N. W. 393, wherein it was not shown that the lack of lights was the proximate cause of an accident, and in *Sodomka v. Cudahy Packing Co.*, 101 Neb. 446, 163 N. W. 809, where the plaintiff backed into an elevator shaft without looking, and it was held that his negligence was so gross in comparison with the defendant's that a recovery was barred. The court stated: "His relying upon a custom when nature had given him eyes is not excusable."

Cases from other jurisdictions more nearly in accord with the factual situation and denying recovery are: *Schabel v. Onseyga Realty Co.*, 251 N. Y. Supp. 280, (233 App. Div. 208), involving a fall down a dark stairway, holding that "danger lurks in groping about in strange place in darkness" and that a "greater duty" rests upon one under those circumstances to exercise care; *Benton v. Watson*, 231 Mass. 582, 121 N. E. 399, holding that "one who walks in the total darkness of a strange hall is likely

to encounter obstructions to his passage and pitfalls to his feet," and denying recovery "because, as a matter of law, the plaintiff was not in the exercise of due care;" *Weller v. Consolidated Gas Co.*, 198 N. Y. 98, 91 N. E. 286, where a plaintiff proceeded into a darkened space, holding that he did so at his own risk and that he failed to exercise the degree of care essential to a recovery; *Steger v. Immen*, 157 Mich. 494, 122 N. W. 104, where a plaintiff groped along a corridor, opened an unlocked door, stepped into the dark, and fell down a shaft, holding it to be an "act of folly" barring recovery "to enter on a cruise of exploration and discovery without stopping to determine whether it was safe to proceed;" *Brugher v. Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420, where there was no "special stress of circumstances" requiring a person to go on a "tour of discovery" in the dark in a strange building, holding that there was a "duty of exercising greater caution or of refraining from proceeding" and that to proceed was contributory negligence barring recovery; *Hudson v. Church of the Holy Trinity*, 250 N. Y. 513, 166 N. E. 306, where plaintiff proceeded in the darkness of an unlighted, strange hallway and fell downstairs, holding that she, having elected to proceed in the darkness, was guilty of contributory negligence as a matter of law; *Kurre v. Graham Ship By Truck Co.*, 136 Kan. 356, 15 Pac. (2d) 463, where plaintiff, following a voice, proceeded along a dock, feeling his way with his feet and fell, holding that it was his duty to refrain from proceeding into the darkness of strange surroundings without finding out where he might safely go, that he proceeded at his peril, and when he met with an accident, was guilty of negligence as a matter of law.

This opinion will not be further extended by a digest of additional decisions. We cite, however, the following, which have been reviewed in reaching the conclusion here announced: *Murphy v. Cohen*, 223 Mass. 54, 111 N. E. 771; *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. 308; *Medcraft v. Merchants Exchange*, 211 Cal. 404, 295 Pac. 822; *Massey v. Seller*, 45 Or. 267, 77 Pac. 397; *De Honey v. Harding, supra;*

Johnson v. Washington Route, 121 Wash. 608, 209 Pac. 1100.

The plaintiff not being entitled to recover in any event, it is not deemed necessary to discuss those features of the case that present questions of the legal liability of the defendants as owners and tenants toward an invitee on the premises.

The judgment of the district court is

AFFIRMED.

LAUREL ANN MAXWELL, APPELLEE, V. HAZEL V. HAMEL ET AL., APPELLANTS: LEONARD HAMEL ET AL., APPELLEES.
292 N. W. 38

FILED MAY 3, 1940. No. 30781.

1. **Courts.** As precedents, the controlling features of an opinion are the rules of law necessarily reached and stated in determining the issues presented based upon the facts found in the record.
2. ———. The opinion controls the syllabus, the latter being merely explanatory of the former and having no more force and effect than the statements made in the opinion upon which they are based.
3. **Quieting Title.** Statutes authorizing parties to bring actions to quiet title are enabling acts, and where authorizing suit, by one out of possession, are intended to enlarge and extend the equitable remedy. They are not penal, restrictive, nor destructive.
4. **Life Estates.** Although, under the provisions of section 76-401, Comp. St. 1929, a remainderman has the right to bring an action to quiet title during the pendency of the life estate, he is not required to do so in order to protect his remainder estate from a claim of adverse possession made by a grantee of the life estate who is in possession under said grant.
5. ———. The period for which adverse possession may be computed begins from the date when a right of entry and a right of possession exist, and not from the date when the remainderman has a right to bring an action to quiet title as to his future interest.
6. ———. A party holding real estate by permissive possession under a conveyance from a life tenant cannot hold adversely as against the remainderman during the period of the life tenancy,

where both the remainderman and the alleged adverse possessor are without actual notice of the rights of the remainderman in the premises.

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

Wagner, Wagner & Albert, August Wagner and *C. N. McElfresh,* for appellants.

Sidner, Lee & Gunderson, Franklin L. Pierce and *Philip M. Wellman, contra.*

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

SIMMONS, C. J.

This action is based upon plaintiff's claim of ownership of a one-fourth interest in 76 acres of Platte county land. Plaintiff prays for a determination of "the rights of the respective parties in and to said premises," for partition, an accounting of rents and profit, a cancelation of liens, and for equitable relief. The defendant Hazel V. Hamel claims to own by adverse possession and prays that her title be quieted. The defendant Loup River Public Power District holds an easement received from the defendant Hamel. The defendant Federal Land Bank of Omaha claims a mortgage lien given by the defendant Hamel. The trial court found in favor of the plaintiff. Defendants Hamel and the Power District appeal.

In 1884 the land here involved was conveyed to Willis G. Decker, Sr., and *Katie* Decker. The deed was recorded at that time. The land was their homestead. The plaintiff is one of the two children of these parties. Katie Decker died in 1892. Willis G. Decker, Sr., became the owner of an estate for life in the premises, and the plaintiff and her brother, Willis G. Decker, Jr., each inherited an undivided one-fourth interest therein subject to their father's life estate. The plaintiff was 17 months old at the time of her mother's death. About 1894 Willis G. Decker, Sr.,

remarried, his second wife's given name being *Catherine*. The defendant Hazel V. Hamel (hereinafter called the defendant) is the child of the second marriage.

March 1, 1920, the defendant and her husband went into possession as tenants of defendant's father, her parents having moved to town. August 21, 1920, Willis G. Decker, Sr., and *Catherine*, his wife, executed a warranty deed purporting to convey the entire premises to the defendant. Said deed recites: "This deed is subject to the following encumbrance, to wit: A certain lease given by Willis Decker to Hazel V. Hamel, running from August 1, 1920, until the death of said Willis Decker, bearing an annual payment of $500 rent, which said encumbrance the grantee in this deed assumes and agrees to pay," and "also subject to the taxes for the year 1920 and thereafter." The deed was recorded August 23, 1920. The "certain lease" was not produced and its general contents not revealed. At the same time, a similar lease and deed were made to Willis G. Decker, Jr., for other land. The defendant has been in possession continuously since 1920. In 1920 and thereafter the defendant made extensive repairs to the improvements and put new ones thereon at a cost of $920. Likewise, the defendant paid the taxes, insured the premises, made the annual payments to her father, etc. It appears that, under the "certain lease," she was to pay the taxes, and it may fairly be determined from the testimony of the defendant and Willis G. Decker, Jr., that the lease required the defendant to insure and keep the buildings in repair. Although the defendant testified that after the deed was executed she remained in possession under the lease, the evidence shows that the father had nothing to do with the farm after 1920, and that the lease did not say what the father could do in case of default. The father, Willis G. Decker, Sr., died September 11, 1931.

The plaintiff knew of the deed in 1920 and that the defendant was in possession, repairing and making new improvements, and farming the land. There is evidence by the defendant, denied by the plaintiff, that, shortly

after the deed was given, the plaintiff protested the conveyance to the defendant and "wondered where she" (the plaintiff) "came in." The defendant mortgaged the land to the Land Bank in 1933 and granted an easement to the Power District in 1937. In 1938 an effort was made by the defendant to secure an additional loan, and it was then discovered, for the first time, so far as any of the parties to this litigation are concerned, that *Katie* Decker died seised of an undivided one-half interest in this land, and that plaintiff had inherited an undivided one-fourth interest therein. This litigation has resulted.

The right of the plaintiff by inheritance to the undivided interest in this property is admitted. What rights to the property did the defendant receive by the deed of 1920? At the time of his conveyance to the defendant in 1920, the father was the owner of an undivided one-half interest in fee and the owner of a life estate in the remaining one-half interest. By the provisions of section 76-106, Comp. St. 1929, every conveyance of real estate passes all the interest of the grantor therein unless a contrary intent can reasonably be inferred from the terms used. By the provisions of section 76-109, Comp. St. 1929, it is the duty of the court to determine from the whole instrument the true intent of the parties and to carry that intent into effect, so far as such intent is consistent with the rules of law. See *Blochowitz v. Blochowitz,* 130 Neb. 789, 266 N. W. 644. The conveyance here was by general warranty deed. A life estate was not reserved. A certain lease calling for "an annual payment of $500 rent" until the death of the grantor was an "encumbrance" upon the land which the grantee (defendant) assumed and agreed to pay. This charge became a lien on the real estate. See *Bankers Life Ins. Co. v. Ohrt,* 131 Neb. 858, 270 N. W. 497. It is not apparent that the "annual payment" bore any fixed relationship to the value of the life estate of the grantor. There is testimony that the defendant, having entered possession as a tenant, continued in possession after August, 1920, under the lease referred to in the deed.

That evidence, however, is in the nature of a conclusion on the witness' part. The testimony also is that the father did not "have anything more to do" with the land after the deed of 1920. We conclude that the effect of the conveyance of 1920 was that the defendant received a fee title to an undivided one-half interest and the grantor's life estate in the other one-half interest, all subject to the lien of the annual rent charge of $500, and that the defendant held possession thereafter under that conveyance.

The evidence establishes that all parties acted in good faith, that the father intended that the defendant should have this property to the exclusion of the plaintiff, and that the defendant accepted the conveyance and went into possession with like intent.

This action was commenced in January, 1939. Defendant filed her answer in February, 1939. It is apparent, therefore, that, in order to establish adverse possession for a period of ten years or more, defendant must tack her possession since the death of her father onto her possession prior thereto, or base it upon the alleged adverse possession during the period of the existence of the life tenancy.

The question to be determined then is: Can a party holding real estate by permissive possession under a conveyance from a life tenant hold adversely as against the remainderman during the period of the life tenancy, where both the remainderman and the alleged adverse possessor are without actual notice of the rights of the remainderman in the premises?

Under section 20-202, Comp. St. 1929, an action for recovery of title to, or possession of, lands can only be brought within ten years after the cause of action has accrued. *Parkin v. Parkin,* 123 Neb. 836, 244 N. W. 638.

When did plaintiff's cause of action accrue?

Section 76-401, Comp. St. 1929, clearly gives to a party claiming an interest in real property the right to bring an action to quiet title whether the party is in or out of possession. *Morse v. Cochran,* 131 Neb. 424, 268 N. W. 307.

Section 76-406, Comp. St. 1929, provides: "Any person

or persons having an interest in remainder or reversion in real estate shall be entitled to all the rights and benefits of this act." This section gives the right to remaindermen to bring the action during the existence of the life estate, for, after that time, they will not be remaindermen.

Similar statutory provisions, somewhat more restricted than sections 76-401 and 76-406, Comp. St. 1929, were before this court in *Foree v. Stubbs*, 41 Neb. 271, 59 N. W. 798. It was there pointed out that "any person claiming title to real property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting title." The rule there announced has been repeatedly followed by this court. In *Hall v. Hooper*, 47 Neb. 111, 66 N. W. 33, it was held: "Such an action may be maintained by a remainderman during the continuance of the particular estate." This holding has also been repeatedly followed by this court.

It follows that plaintiff had the right to bring an action to quiet title during the period beginning with August, 1920. She then had knowledge of the deed and the possession of the defendant, who, believing she held full title, subject to the payments to her father, was making improvements and exercising every right of an owner. However, such an action, had it been brought prior to the father's death, could have established only the fact that plaintiff had a remainder interest in the property, and that right is one which is not and could not have been questioned.

All parties cite and "confidently" rely upon the case of *Criswell v. Criswell*, 101 Neb. 349, 163 N. W. 302.

Because of its application to this case, and for the benefit of the profession generally in determining the consideration to be given to adjudicated cases, it may be well to state the proper weight to be given to syllabus and statements of law made in the opinions of this court.

A judge, in writing an opinion, must be permitted a certain latitude in stating his reasons for the conclusions

that are reached. It quite often happens that statements are made and conclusions announced in the body of an opinion that are not necessary for a decision of the questions presented and are not directly applicable thereto. These statements are also sometimes carried in the syllabus of the case, which is prepared by the writer of the opinion. Writers of opinions endeavor to prevent those occurrences. When they do occur, they are not considered to be controlling, although they are often helpful and likewise are often later adopted by the court by subsequent reference thereto. Because of these situations, there have evolved the rules now followed by this court, to wit: As precedents, the controlling features of an opinion are the rules of law necessarily reached and stated in determining the issues presented based upon the facts found in the record. The opinion controls the syllabus, the latter being merely explanatory of the former and having no more force and effect than the statements made in the opinion upon which they are based.

Discussions of these matters will be found in *Holliday v. Brown*, 34 Neb. 232, 51 N. W. 839; *Williams v. Miles*, 68 Neb. 479, 96 N. W. 151; *Brumbaugh v. Jones*, 70 Neb. 786, 98 N. W. 54; *Dempster v. Ashton*, 125 Neb. 535, 250 N. W. 917; *Douglas County v. Vinsonhaler*, 82 Neb. 810, 818, 118 N. W. 1058; *Mathews v. Hedlund*, 82 Neb. 825, 833, 119 N. W. 17; *Reams v. Clopine*, 121 Neb. 86, 236 N. W. 158; *Carlsen v. State*, 129 Neb. 84, 92, 261 N. W. 339.

In the *Criswell* case, *supra*, the party claiming title by adverse possession was the purchaser at an administrator's sale; he was a stranger to the title and did not enter by virtue of the widow's life tenancy; and the deed was void because the land was a part of the homestead. The defendant had been in possession, and the life tenant had been out of possession, for over 23 years. The action was brought within ten years of the death of the owner of the life estate, some of the heirs suing to recover possession, others to quiet title and for rents and profits. Three of the children who had not been of age for 10 years when the

action was brought asked to have title quieted in them. As to them, it was agreed that the statute of limitations had not run. As to other heirs, more than 10 years had elapsed since they became of age, and it was admitted that an action to quiet title was barred as to them. This last group of heirs asked a recovery of the land. The plaintiffs contended that their action to recover possession was not barred until 10 years after the death of the life tenant. That was the controversy. The distinction between the *Criswell* case and the instant case is apparent.

The holding made in determining this feature of the action was that, where land is held by a stranger to the title, his possession is construed to be hostile and adverse to the remaindermen so as to commence the running of the statute barring action for the recovery of title or possession from the time the remainderman knows that the possessor claims the entire estate in his own right, or from the time when, in the exercise of reasonable care for his own rights, he should have known that the land was so held by the one in possession.

It is obvious that statements in the opinion concerning contests between a remainderman and a life tenant, or one in privity with the life tenant, are discussions of matters not then before the court for decision, and are not precedents in this action.

The plaintiff relies upon the following cases to establish her contention that the possession of the holder of the life estate and his grantee will not be construed to be hostile and adverse to that of the remainderman until such knowledge is clearly brought home to the remainderman. *Maurer v. Reifschneider,* 89 Neb. 673, 132 N. W. 197; *Anderson v. Miller,* 103 Neb. 549, 172 N. W. 688; *Bretschneider v. Farmers Nat. Bank,* 131 Neb. 495, 268 N. W. 278. The plaintiff relies upon *Criswell v. Criswell, supra,* to establish the rule that "the presumption of fact is that the possession of the life tenant, or one holding under or through the life tenant, is lawful and not adverse;" and upon *Chase v. Lavelle,* 105 Neb. 796, 181 N. W. 936, to establish the rule

that, "as between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title other than mere possession, and knowledge thereof brought home to the owner of the land." The plaintiff further relies upon *Bohrer v. Davis*, 94 Neb. 367, 143 N. W. 209, and in particular upon the statement in the first paragraph of the syllabus.

The defendant relies upon the following cases to establish her contention that the plaintiff's action could have been brought in 1920, and that, under the facts here, the statute began to run against the plaintiff's action at that time. *First Nat. Bank of Perry v. Pilger*, 78 Neb. 168, 110 N. W. 704; *Lyons v. Carr*, 77 Neb. 883, 110 N. W. 705; *Criswell v. Criswell, supra*, and Nebraska cases cited and discussed therein.

The defendant states that *Criswell v. Criswell, supra*, is "a complete brief on behalf of the defendants," and relies upon the general holding in *Criswell v. Criswell, supra*, upon statements therein, and in particular, upon the proposition that said case establishes that the statute begins to run against the remainderman from the time he knows, or in the exercise of reasonable care should have known, that the land was being held adversely.

It is apparent that confusion existed in the opinions of this court on this question prior to the decision in the *Criswell* case. See articles by Dean Henry H. Foster of the University of Nebraska College of Law, 3 Neb. Law Bulletin, 397-399, and Prof. William P. Sternberg of Creighton University, 17 Neb. Law Bulletin, 348-349. When the *Criswell* case is properly weighed, under the rule here announced, it is apparent that that conflict still exists. It must also be recognized that the *Criswell* case states the minority rule if defendant's construction is accepted.

All of our decisions have been fully reviewed. We are convinced that sound reasoning and justice alike require that the law on the question here presented be restated in this state.

Restatement, Property, 893, states the proposition as follows:

"Future interests present a dilemma in the law of limitation of actions. If the courts focus their attention upon the protection of future interest holders by refusing to permit the statutory period to run against them until their estates become present interests, the effectiveness of the statutes as means of quieting titles is greatly impaired. On the other hand, if the focus is upon the security of long continued possession, it is certain that some holders of future interests will lose their estates through adverse claims of which they have never had knowledge. Predominantly the courts have chosen to give full protection to future interest holders, although, as indicated in secs. 226 and 227, some concessions to the security of adverse possessory claims have been made. In a very few states this trend has been reversed by statutes declaring a *bona fide* claimant under certain circumstances to be 'the legal owner' at the end of the statutory period (sec. 220, Comment *c*) and by decisions that a right of action to quiet title causes the statutory period to commence running even though the person having the right of action owns only a future interest (see sec. 222, Comment *d*, stating the law to be contrary to these decisions). These few statutes and decisions may indicate a tendency to reexamine the major premises of the law of limitations as applied to future interests, but at the present time they have not enlisted sufficient support to be treated otherwise than as variations from current practice and opinion."

We note further that in the Tentative Draft No. 6 of Restatement, Property, 152, the authors recognized that Nebraska and Iowa had reached a result contrary to that announced as the rule in the final draft of the Restatement (citing *First Nat. Bank of Perry v. Pilger, supra*) and *Murray v. Quigley,* 119 Ia. 6, 92 N. W. 869, and *Crawford v. Meis,* 123 Ia. 610, 99 N. W. 186. These Iowa cases will be referred to later herein.

Defendant's contention is that, since plaintiff had the

right to bring an action to quiet title (Comp. St. 1929, sec. 46-401) beginning in 1920, her cause of action arose at that time, and hence is barred by the statute of limitations. This contention is fully answered in Restatement, Property, 902, sec. 222:

"Frequently the owner of a future interest as such can establish his ownership by a suit in equity to quiet title or to remove a cloud upon title or by analogous statutory proceedings legal or equitable. It might be reasoned that this fact should require him to avail himself of these rights of action and that the statutory period should thenceforth run, not only upon these equitable and statutory proceedings, but also upon the action of ejectment which might be brought when the interest becomes present. However, these equitable and statutory proceedings are considered to be created for the additional protection of the owner of the future interest; and to hold that their existence causes the statute of limitations to run upon ejectment proceedings would in considerable measure reduce the protection accorded to the future interest holder when his estate becomes present. It is therefore immaterial in computing the statutory period in an action of ejectment or similar proceeding that, before the plaintiff's estate became a present interest, he could have brought suit to quiet title or to remove cloud on title or could have commenced a statutory proceeding analogous to one of these."

Statutes authorizing parties to bring action to quiet title are enabling acts (4 Pomeroy, Equity Jurisprudence, 3310, sec. 1397; 51 C. J. 136); where authorizing suit by one out of possession they are intended to enlarge and extend the equitable remedy (51 C. J. 139); and they are not penal, restrictive nor destructive (*Armor v. Frey*, 253 Mo. 447, 474, 161 S. W. 829).

In *Armor v. Frey, supra,* the supreme court of Missouri had a case where it was contended that remaindermen, not under disability, who failed to sue to quiet title within ten years after their right to bring such suit accrued, were barred of their estate in remainder. The court refused to

follow *Murray v. Quigley, supra,* and *Crawford v. Meis, supra* (followed in *First Nat. Bank of Perry v. Pilger, supra*), and pointed out that the proceeding to quiet title is an action wherein the court is asked "to ascertain and determine, define and adjudge the title, estate and interest of the parties. It does not ask for the recovery of real estate or the possession thereof. It does not ask affirmative relief. It seeks simply an ascertainment of the *status quo* of the title * * * to the property. * * * the mere failure for ten years to sue under the statute after the right to sue has accrued does not bar the right to so proceed thereafter, and such failure of a remainderman does not bar his estate in remainder." (Pages 475, 476.)

In *Hayden v. Hill,* 128 Ark. 342, 194 S. W. 19, it was contended that an action by a remainderman was barred because he could have brought an action to establish his title during the life tenancy. The court held that the statute was a practice act, referring to the sufficiency of the evidence, and was not a statute of limitations. The court further said: "* * * the right of entry, and therefore the right of action, does not accrue to the remainderman or reversioner, until the death of the owner of the particular estate."

In *Jefferson v. Bangs,* 197 N. Y. 35, 90 N. E. 109, it was assumed that the plaintiff could have brought an action to quiet title before her right of possession accrued, but she was not required to do so to avoid the bar of the statute. To the same effect is *Groves v. Groves,* 57 Miss. 658; also, *Aiken v. Suttle,* 72 Tenn. 103, wherein it was held that the remainderman could have brought an action during the life estate to quiet title, yet she was not bound to do so until a right of possession accrued. See, also, *Duncan v. King's Admr.,* 163 Ky. 577, 174 S. W. 34, wherein it was held that the statute did not begin to run until the expiration of the life estate, although the remainderman might before that time have quieted title against an adverse claim.

Iowa had a statute, similar in language and purpose to that in Nebraska, by which an action to quiet title could be brought by a remainderman not entitled to possession. See

Murray v. Quigley, supra. This decision is cited and followed in *First Nat. Bank of Perry v. Pilger, supra.* It was cited and not followed in *Bohrer v. Davis, supra.* In discussing the *Murray v. Quigley* case, the supreme court of Iowa said that doubtless the remainderman might bring an action under the statute to determine questions of title, "but it does not follow that the remainderman under all circumstances is compelled to do so." *Gates v. Colfax Northern Ry. Co.*, 177 Ia. 690, 711, 159 N. W. 456, 464.

The defendant was in possession from 1920 to 1931 as the grantee of the life estate. She had a present interest and claims to have held adversely as against the plaintiff's ownership of the remainder. Restatement, above cited, states the applicable rule as follows: "* * * since the owner of the present estate is entitled to possession and the owner of the future estate is not, no adverse possession by the former against the latter is possible until the future interest becomes a present interest. It is immaterial that the present owner claims a larger interest under color of title, or informs the future owner that he claims an estate in fee simple absolute, or does both. The statutory period commences to run against the owner of the future estate as soon as such estate becomes a present interest, whether this occurs by expiration of the preceding estate by its own limitation or by the happening of some event causing the future estate to take effect as an executory interest." Restatement, Property, 905, sec. 222.

The following illustration is given: "A, owning Blackacre in fee simple absolute, transfers Blackacre 'to B for life, remainder to C and his heirs.' B purports to transfer an estate in fee simple absolute in Blackacre to D. D believes in good faith, but erroneously, that he has an estate in fee simple absolute in Blackacre and so informs C. B dies. In an action by C against D to recover possession of Blackacre the statutory period is computed from the date of B's death." Restatement, *supra*, 906.

See, also, 2 C. J. 161; 2 C. J. S. 669; 1 Am. Jur. 805, sec. 25, 860, sec. 121; 1 R. C. L. 743, sec. 63; 3 Thompson, Real

Property, 658, sec. 2536; Warvelle, Ejectment, 505, sec. 452; Tyler, Ejectment and Adverse Enjoyment, 946.

Cases holding that neither a life tenant, nor his grantee in a deed conveying the absolute title, can hold adversely, during the life of the life tenant, as against the remainderman, are based upon the proposition that the remainderman does not have a right of entry and possession during the existence of the life estate. Adverse possession begins to run when a right of entry and a right of possession exist in the remainderman and not when the remainderman has a right to bring an action to quiet title as to his future interest. *Maring v. Meeker*, 263 Ill. 136, 105 N. E. 31; *Cassem v. Prindle*, 258 Ill. 11, 101 N. E. 241 (holding that possession is adverse to the world except the remainderman); *Ashbaugh v. Wright*, 152 Minn. 57, 188 N. W. 157 (citing *Bohrer v. Davis, supra*); *Content v. Dalton*, 121 N. J. Eq. 391, 190 Atl. 328; *Id.* 122 N. J. Eq. 425, 194 Atl. 286; *Akley v. Bassett*, 189 Cal. 625, 209 Pac. 576; *Newport v. Hatton*, 195 Cal. 132, 231 Pac. 987; *Hooper v. Leavitt*, 109 Me. 70, 82 Atl. 547; *Boggess v. Crail*, 224 Ky. 97, 5 S. W. (2d) 906; *Smith v. Maberry*, 148 Ark. 216, 229 S. W. 718; *May v. Chesapeake & O. Ry. Co.*, 184 Ky. 493, 212 S. W. 131; *Farmer v. Reed*, 335 Ill. 156, 166 N. E. 498; *Daley v. Daley*, 14 N. E. (2d) (Mass.) 113; *Webster v. Railroad Co.*, 78 Ohio St. 87, 84 N. E. 592; *Cross v. Janes*, 327 Ill. 538, 158 N. E. 694.

We therefore conclude that plaintiff's cause of action did not accrue so as to begin the running of the statute of limitations until she had a right of entry and possession, which in this instance began with the death of her father in 1931, and that plaintiff's action is not barred. All decisions of this court in conflict herewith are overruled so far as the determination of the issues of this case requires.

We have examined the additional assignments of error and find no reason for disturbing the holding of the trial court thereon.

AFFIRMED.

JOHNSEN, J., dissenting.

The decision in this case is in conflict with the rule an-

nounced in *Criswell v. Criswell*, 101 Neb. 349, 163 N. W. 302, L. R. A. 1917E, 1103, and what has been regarded as the settled law of this state since that case was decided. While the court has the right to change the rule and to bring Nebraska into line with the majority of other states, such change should not be permitted to affect title rights that have fully ripened while the rule in *Criswell v. Criswell* was in effect.

Since the remedy provided by section 76-401, Comp. St. 1929, does not distinguish between adverse possession by a total stranger and that by a life tenant or his privies, the rules announced in the fourth and fifth syllabus points necessarily must be construed to mean that a remainderman is not obliged, under any circumstances, to take steps to protect his estate against the running of the statute of limitations, until after the death of the life tenant. But more than this, the effect of the decision is that the court refuses to recognize and enforce rights that have ripened under our former decisions, by ten years completed adverse possession prior to the adoption of the opinion in this case. It is the latter position especially to which I object.

FARMERS STATE BANK OF EUSTIS, APPELLANT, V. GRACE WHEELER ET AL., APPELLEES.
291 N. W. 887

FILED MAY 3, 1940. No. 30782.

1. **Husband and Wife.** A 5,000-dollar bequest by testator to his married daughter is no part of a separate estate pledged by her as surety on a promissory note for a debt of her husband, where the note was executed eleven years before the death of testator.
2. ———. "Authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman does not include an inheritance acquired after the making of a contract by her." *Kocher v. Cornell*, 59 Neb. 315, 80 N. W. 911.

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

F. J. Schroeder, for appellant.

Hamilton & Landis and *Cloyd E. Clark, contra.*

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

ROSE, J.

This is a suit in equity for an injunction preventing Grace Wheeler, one of the defendants, from assigning or otherwise transferring, prior to the satisfaction of plaintiff's claim, a legacy of $5,000 bequeathed to her by her father, John Rupe, deceased, and to prevent Fred Rupe, her brother, another defendant, as special administrator of the estate of decedent and as executor of his will, from turning her legacy over to her.

The petition contains pleas that plaintiff, in an action on a note, recovered a judgment against Grace Wheeler and her husband, Charles B. Wheeler, for $1,285.62 November 16, 1936; that the judgment is unpaid; that Grace Wheeler pledged her separate estate for payment of the debt evidenced by the judgment and promised to pay the debt; that resort to her legacy is the only means of enforcing payment; that she is estopped to deny liability for the debt.

In her answer, Grace Wheeler admitted plaintiff recovered judgment on the note signed by her and her husband but denied unadmitted allegations of the petition; pleaded coverture; alleged she signed the note as surety for her husband and bound only the separate estate then possessed by her for payment of the debt; alleged further that her subsequent legacy cannot be subjected to the payment of plaintiff's judgment for the debt of her husband.

Upon a trial of the cause, the district court found that plaintiff was not entitled to any equitable relief and dismissed the suit. Plaintiff appealed.

The question presented by the appeal is the asserted equitable right of plaintiff to impound in the hands of the executor enough of the legacy to pay the debt of the husband and apply the impounded fund to the satisfaction of the judgment.

Established facts relating to Grace Wheeler's obligation on the note of her husband may be summarized as follows: When Charles B. Wheeler was an unmarried man October 3, 1919, he borrowed from the Farmers State Bank of Eustis, plaintiff, $225, and E. O. Rupe, a brother of Grace Rupe, now Grace Rupe Wheeler, signed as surety the note evidencing the loan. Neither of the Rupes received any of the borrowed money. The note was renewed 14 times with E. O. Rupe as surety until the debt, with interest and increase in loans, amounted to $762.57 September 12, 1928. In the meantime Grace Rupe became the wife of Charles B. Wheeler, February 25, 1920. September 12, 1928, an officer of the bank went to the home of Grace Rupe Wheeler and asked her for her signature on a renewal note of that date for the amount stated in addition to the signatures of her husband, Charles B. Wheeler, and her brother, E. O. Rupe. At that time Grace Wheeler and a brother, Grover Rupe, owned a section of land in Banner county, each having a half interest therein. The banker considered this half interest of Grace Wheeler "was part of her paying ability," when soliciting her signature. She declined to sign a renewal note bearing the signature of her husband and her brother, E. O. Rupe, but said she would take the place of the latter as surety on the note, if he were released, and her brother Grover Rupe's interest in the Banner county land held not bound for her obligation as signer of notes to the bank. An agreement thus protecting Grover Rupe was reduced to writing and signed by her, Grover Rupe and the bank. September 12, 1928, she signed, with her husband, the note for $762.57. It bore no other signatures. The bank then surrendered to Grace Wheeler the old note of which the new one was a renewal. On the note of September 12, 1928, the bank recovered a judgment against the Wheelers November 16, 1936, for $1,285.62. Execution thereon was issued February 18, 1939, and returned *nulla bona* February 20, 1939. The Banner county land owned by Grace Wheeler and her brother Grover was mortgaged when the note of September 12, 1928, was executed and the former lost her half interest

by subsequent foreclosure. When the Farmers State Bank of Eustis, plaintiff, applied for equitable relief in the case at bar, neither of the judgment debtors owned any property subject to execution, but the executor of the will then had in his hands sufficient funds bequeathed to Grace Wheeler to satisfy the debt owing by her husband to plaintiff, if available for that purpose, but her legacy did not become her property until her father died February 11, 1939, eleven years later after she had pledged by note her separate estate as surety for her husband's debt. The foregoing facts are shown by the evidence without dispute.

The cashier of plaintiff, however, testified that, in the negotiations resulting in the release of the brothers of Grace Wheeler, she said, "If you will leave my brother Ed off the note, I will sign the note in Ed's place and see that it is paid." An oral promise to see that the note is paid was denied by her and the circumstances tend to substantiate her denial. The cashier himself testified she said she would sign, "if you will leave my brother Ed off the note." This was in harmony with her own testimony. Her brother Ed's place on the note was that of surety for her husband as shown by the evidence. She expressed a natural wish to release him and stated her purpose frankly. The cashier was an experienced banker and took the precaution to insert in the note the recital that she bound her separate estate. He signed an agreement that her brother Grover's interest in the Banner county land would not be held for her husband's debt, but he did not reduce to writing any oral promise by her to see that the note was paid. Nothing was said about a prospective inheritance. The preponderance of the evidence on the disputed fact is in favor of Grace Wheeler. She did nothing to deceive or mislead the cashier or to estop her from denying she was a principal debtor on the note. The evidence does not prove fraud or estoppel and arguments by plaintiff for a reversal on such grounds, though plausible, are found to be without merit. The legacy was not included in the pledged estate and was not property belonging to the married woman when the pledge was made. The case is controlled by the following principles of law:

"The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract.

"A mere hope of succession to an estate is not property.

"Authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman does not include an inheritance acquired after the making of a contract by her." *Kocher v. Cornell,* 59 Neb. 315, 80 N. W. 911.

Proof of facts showing an exception to these rules in the case at bar has not been found in the record. There is no error in the proceedings and judgment of the district court.

AFFIRMED.

CHARLES F. SANDERS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

292 N. W. 35

FILED MAY 3, 1940. No. 30787.

1. **Carriers.** A carrier is not liable for an assault on a passenger by an intruder if it does not appear that the employee of the carrier has been negligent in failing to anticipate or prevent his act of violence.
2. **Trial.** An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established.
3. ———. Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party.

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

Mothersead & York, J. W. Weingarten and *W. P. Loomis,* for appellant.

William Morrow, contra.

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

PAINE, J.

This is an appeal from a verdict and judgment for $1,000 damages for personal injuries to the plaintiff from an assault by one Babcock, an intruder, in the defendant's depot at Torrington, Wyoming. The negligence charged against the defendant, a common carrier, is in failing to protect the plaintiff, a patron, from such assault.

The defendant for reversal relies upon a number of errors. The defendant insists that the evidence is insufficient to sustain the verdict, and that the court erred in overruling defendant's motion for a directed verdict at the close of the evidence. The defendant charges error in the giving of instructions Nos. 1, 2, 3, 5, 10 and 12 upon the court's own motion, and in the court's refusal to give instructions Nos. 3, 6 and 7 requested by the defendant.

There is considerable dispute in the evidence, but the altercation appears to have taken place about as follows:

John Babcock has lived in Torrington, Wyoming, where he has been conducting a dray line for the last seven years. Two of his sons, aged 17 and 15 years, did certain work for the plaintiff in blocking and thinning beets. Plaintiff is 48 years old, and has resided in Torrington since 1936, and has worked as a carpenter, a sheet metal worker, a bricklayer, and also on W. P. A. jobs. On July 15, 1938, plaintiff and his wife went to the depot at about 4:15 p. m. to take the train to Scottsbluff, and at the curb of the Burlington depot they met John Babcock, who walked along beside them for about 70 to 80 feet, the wife walking in the center. The plaintiff went into the waiting-room first, Babcock just behind, and the wife in the rear. When the plaintiff got to the ticket window he asked if the train was on time, and asked for two tickets. As the station agent was reaching for the tickets, John Babcock, in a loud tone, asked, "Where is the boys' money?" The plaintiff replied that "the money was up in Mr. Sawyer's office for the boys," whereupon Bab-

cock said, "If you don't dig up, I will beat the hell out of you," to which the plaintiff replied, "It's up to Sawyer's office, but you'll have to sign and get it." The tickets at that time were lying on the counter, and plaintiff had paid for them. While the plaintiff was picking up the change, Babcock hit him. Plaintiff says that he holloed to the ticket agent to call the police and help.

Plaintiff says that when Babcock "hit the first lick" the ticket agent pulled the window down; that while he was on the floor he kicked at the door and asked the agent to let him in; that Babcock kicked him in the right side and in the head, then plaintiff's wife stepped in front of plaintiff, who got to his feet and wiped the blood from his eyes and nose. There is evidence that Babcock tried to hit him after he was up, but did not succeed; that the plaintiff then went with Babcock to Sawyer's office.

The actual assault and beating was continuous, and of very short duration. The plaintiff's wife did not testify in the case. The plaintiff testified that after the fight he could hardly walk on his right leg, but he went from the station to Sawyer's office, which is up a long flight of stairs; then he walked to the county attorney's office, over the Chevrolet garage, about a block and a half from Sawyer's office, and then his father-in-law came with the car and took him to the courthouse, and from there to the judge's home, where he signed some papers; that he did not call any doctor, but just doctored himself.

He testified in detail just where he worked after this time, putting up a brick chimney, doing carpenter work and brick work, and the amount of money he received for each of these odd jobs, and then told of his work in the sugar mill at Lyman, running a trash catcher, for which he drew 37½ cents an hour for eight hours a day, which sugar campaign ran until the 2d day of December.

Henry Herdt, one of the plaintiff's witnesses, testified that he worked at common labor, and first got acquainted with the plaintiff south of Gering in 1934, where the plaintiff was digging potatoes; that he met him again in 1936 in

a pool hall in Scottsbluff; that on July 15, 1938, he came into the waiting-room just behind them, and stood right behind them at the ticket window; that Sanders asked for two tickets, and the "other guy" asked for the boys' money, and said, "Are you going to pay me off or I am going to beat the hell out of you." Sanders said, "I ain't got anything to do with the money, it is at Sawyer's office;" then the other fellow "hauled off and hit him," and Sanders hit the floor. Sanders was down and kicked at the door, and holloed for the agent to let him in, and the other fellow hit and kicked Sanders "quite a few licks." He testified that Sanders was all bloody and could not walk straight.

On cross-examination he was asked the question: "Did he hit him suddenly? A. Right now. Q. Just hauled off and smacked him, is that right? A. Yes, sir. Q. Did you think that he was going to hit him? A. No. Q. You didn't have any idea that this other man was going to strike him? A. I didn't know they had anything between them, just the deal they talked about. Q. You didn't have any idea that this other man was going to hit him until he hauled off and hit him? A. Never thought of it."

Harry M. Sayre testified that he was the cashier and operator at the Burlington depot at Torrington, Wyoming, and was on duty on July 15, 1938; that there was an iron or metal grillwork, or bars, in front of the ticket window; that he did not notice the plaintiff until he came up to the window and asked for two tickets to Scottsbluff, and he passed them out to him, and he paid for them; that, after he got the tickets and paid for them, Mr. Babcock approached Mr. Sanders and they got into an argument; that he only heard part of their argument, which was over wages due the Babcock children; that the men had walked over between two benches, and Mr. Babcock struck at Mr. Sanders; that just then the train whistled into town, and he walked over to pull the signal board for the train, and testified positively that he never closed the ticket window; that it has a heavy grating in front of it, and he did not shut it at all; that he was the only one in the ticket office at the time the train was

coming in, and as he was required to work the express and baggage, he went out; that after he had worked the train he saw Mr. Sanders, Mr. Babcock, and a woman walking north up the street.

Dr. J. P. Weyrens testified for the plaintiff that he had examined his head September 29, 1938, taking an X-ray; that the right mastoid was entirely destroyed, that is, the one right back of the ear; that he found the hearing left in the ear was reduced to 30 or 40 per cent., and that one ear drum is distorted, wrinkled, and perforated, and gave evidence of a chronic infection. He further testified that the partitions in that mastoid had been destroyed, due to some infection which had been in that bone once upon a time.

The defendant called Dr. Kennith Ohme, who testified that in July, 1938, F. J. Reed, an attorney, of Mitchell, called him up one Sunday afternoon and asked if he would come uptown and see somebody who said he was in an accident; that the plaintiff, Sanders, walked into the office, and had his head bandaged, and did not want him to take the bandage off, but the doctor testified he took the bandage off and did not see anything under it, and so he did not put it back on. On cross-examination he testified that he was not the physician and surgeon for the Burlington railroad at Mitchell.

The law in such cases is that a carrier is not liable for an assault on a passenger by an intruder if it does not appear that the employee of the carrier has been negligent in failing to anticipate or prevent his act of violence. 10 Am. Jur. 274, sec. 1468, also sec. 1466; *Arkansas Power & Light Co. v. Steinheil*, 190 Ark. 470, 80 S. W. (2d) 921.

This court has stated: "The wrongful act of a stranger is not sufficient to make it liable, unless it might reasonably have been foreseen and guarded against by the carrier." *Bevard v. Lincoln Traction Co.*, 74 Neb. 802, 105 N. W. 635.

"The carrier owes a duty to protect passengers from wrongs inflicted by strangers or intruders, if the danger is, or in the exercise of due care may be, known to the carrier's employees, and can be prevented by them, and the car-

rier may be liable for injuries due to a neglect of such duty." 13 C. J. S. 1303, sec. 696.

The defendant insists that prejudicial error occurred in the giving of instruction No. 12 by the court, which told the jury that the evidence shows that plaintiff was at the defendant's station and had purchased a ticket, and that, if the jury find that while in the view of defendant's agent, "where the defendant's agent did see him and plaintiff was without provocation assaulted and knocked down and beaten and kicked, and defendant's agent did not exercise reasonable care and precaution to protect the plaintiff from said assault, and by reason of said assault the plaintiff was injured after defendant's agent had knowledge of said assault, then your verdict should be for the plaintiff and you should assess the amount of his recovery in any such amount as you think will reasonably compensate him for the injuries which he received, if any, and the pain and suffering he endured, if any, and the loss of time that he sustained, if any, only taking into account the extent of injuries he received, if any, after the defendant's agent had knowledge of said assault."

The error in the instruction is that it told the jury, positively and without qualification, that, if the assault was in view of the station agent, and plaintiff was injured after the station agent had knowledge of the assault, then their verdict would be for the plaintiff.

It may be admitted that in instruction No. 9 it was stated that the carrier would not be liable unless, after the agent had knowledge that would lead a reasonably prudent man to anticipate that an assault would be made, and after having obtained such knowledge, he was, in the opinion of the jury, able to prevent the assault; and in instruction No. 10 the jury had been properly told that the defendant company was not liable for the injuries sustained by the plaintiff as a result of the first blow.

It is argued by defendant that this action was brought by plaintiff on the theory that the defendant's agent was negligent in not anticipating and preventing the assault before

it started, but the evidence indicated that the action could not be sustained on that theory, and then the plaintiff endeavored to sustain his claim on the theory that the defendant's agent negligently failed to stop the fight after it started, but in instruction No. 12 the court did not correctly submit that issue, for it told the jury to find for the plaintiff if the plaintiff was injured after defendant's agent had knowledge of the assault, which did not carry to the jury several requirements, among them, to find that the agent could have prevented the assault, or that the injury was not the result of the first powerful blow.

"An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established.

"Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party." *Standard Distilling & Distributing Co. v. Harris,* 75 Neb. 480, 106 N. W. 582. See, also, *Kor v. American Eagle Fire Ins. Co.,* 104 Neb. 610, 178 N. W. 182; *Knapp v. Chicago, K. & N. R. Co.,* 57 Neb. 195, 77 N. W. 656; *Pritchett v. Johnson,* 5 Neb. (Unof.) 49, 97 N. W. 223.

"Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19.

The plaintiff's witness, Henry Herdt, standing immediately behind the parties, never had a thought that there would be an assault on plaintiff, and he had followed the parties into the depot, and had far better opportunity for observation than the ticket agent, looking through the window.

The defendant would not be liable for a sudden attack by an intruder on a passenger if no warning was given and there were no circumstances which would put the ticket agent on guard to prevent it.

Without considering the many other errors set out, which might not occur in another trial, we have reached the conclusion that the giving of instruction No. 12 was prejudicially erroneous, and that the error was not cured by any other instruction.

REVERSED.

FRED L. BURKE, TRUSTEE, APPELLEE, V. WILLIAM H. MUNGER: FIRST NATIONAL BANK OF NORTH PLATTE, APPELLANT.
292 N. W. 53

FILED MAY 3, 1940. No. 30797.

1. **Corporations.** A managing officer of a corporation may not legally pay his individual debts by abstracting from the corporation certain moneys for such purpose.
2. ———. It is not within the authority of a corporation to assent to a loan to one of its managing officers, to be used by him to reduce his private indebtedness. Such a loan is prohibited by section 8-206, Comp. St. 1929.
3. **Appeal.** Where defendant makes a request for a jury trial, contending that the action is one at law, the court denies such request and tries the case as a suit in equity, and an examination of the record discloses that, in any event, the plaintiff would be entitled to a directed verdict, such denial on the part of the trial court is not prejudicial.
4. **Judgment.** "When the second action between the same parties is upon a different claim or demand, or cause of action, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined." 15 R. C. L. 973, sec. 450.
5. ———. "The party relying upon a former adjudication as a defense must aver in his answer in what court the judgment was rendered, and plead facts showing that the recovery was upon the same subject-matter and between the same parties, or their privies, as the suit in which the defense of *res adjudicata* is made, and that the judgment is in full force." *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170.
6. **Payment** is an affirmative defense and must be pleaded in order to be available as such defense.
7. **Bankruptcy.** A trustee in bankruptcy may intervene in proceedings for foreclosure of mortgages, constituting assets of a cor-

poration, adjudged bankrupt, previously assigned as collateral security for a loan to the corporation, to recover the excess over and above the amount of the loan for the benefit of creditors of the bankrupt estate, and, by so doing, is not estopped to bring an action in equity against a bank to trace certain funds, evidencing the loan made to the corporation, into the bank, when a certain part of such loan has been used by a managing officer of the bank to reduce his individual indebtedness to the bank, and to have the same returned to such trustee for the use and benefit of the creditors of the bankrupt estate.

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

E. H. Evans and *Urban Simon,* for appellant.

Hoagland, Carr & Hoagland, contra.

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

MESSMORE, J.

Plaintiff brought this action in the district court for Lincoln county. The case proceeded against the defendant, First National Bank of North Platte. The plaintiff's contention is that the cause is one in equity for the purpose of following assets of the Goodman-Buckley Trust Company into the defendant bank and to have such assets returned to the plaintiff, on the principle that the property of the corporation could not be taken and applied on the private debt of an officer of the corporation. The petition relates facts in support of plaintiff's contention. Such facts shown by the record will be stated when occasion requires. Defendant bank's amended answer contains a general denial, alleges *res judicata,* estoppel, and ratification. The decree and judgment of the trial court were in favor of the plaintiff. Defendant bank appeals.

The record discloses three organizations, all subjects of bankrupt estates, transacting business at the same place with the same clerical help, and so managed as to lend considerable confusion to a proper analysis of the assets and

liabilities of each. The obvious intent was to maintain the solvency of the Goodman-Buckley Trust Company at all times. This latter corporation was organized under the banking laws of Nebraska. The purpose was to secure funds of investors, to be invested in first mortgages. Defendant Newton E. Buckley was the secretary-treasurer of the trust company. The other officers consisted of Edward R. Goodman as president; Grace S. Goodman as vice-president; Nell E. Buckley as assistant secretary-treasurer; and Edward R. Goodman, Grace S. Goodman, Nell E. Buckley, R. D. Rasmusson and Newton E. Buckley as directors. Grace S. Goodman and Nell E. Buckley were sisters. In 1923 Edward R. Goodman moved to Denver, and thereafter Newton E. Buckley was the managing officer of the Goodman-Buckley Trust Company.

Defendant Newton E. Buckley operated a real estate and insurance business as his personal business under the trade-name of Bratt, Goodman & Buckley. The Goodman-Buckley Trust Company at all times carried on its business at the offices maintained by Bratt, Goodman & Buckley; the latter owning the office fixtures and equipment and paying all operating expenses of the trust company. In addition to the two foregoing concerns, Edward R. Goodman and Newton E. Buckley carried on a partnership business under the name of Goodman & Buckley. They also incorporated a holding company, known as the Goodman-Buckley Company, the officers of which were identical with those of the Goodman-Buckley Trust Company. All of the businesses appear to have been treated more or less by Goodman and Buckley as one. When one was short of cash, funds would be transferred to it from one of the others. The business of these firms became so involved that they and the individual officers took voluntary bankruptcy and were so adjudged on or about November 18, 1933. The plaintiff was appointed trustee in bankruptcy January 27, 1934. The transactions involved in the instant case occurred August 13, 1932. Newton E. Buckley had been at different times personally indebted to the defendant bank in large sums of money. On

or about the date in question this indebtedness to the bank exceeded $8,000.

William H. Munger, cashier of the defendant bank, and in such capacity obviously acquainted with the accounts of the respective concerns, as each transacted business with the bank, and consequently in a position to know the status of Newton E. Buckley's personal account with the bank, sought to have Buckley reduce his personal indebtedness to the bank. The manner in which it was finally arranged, in substance, follows: Munger was the guardian of one Mooney, a mental incompetent; as such, he had money of his ward to invest. After consulting with the attorneys representing the guardianship, and obtaining an order from the county court, he, as such guardian, loaned to the Goodman-Buckley Trust Company $6,000, which was approved by the members of the board of directors of the bank and of the trust company, taking as security an assignment of two real estate mortgages belonging to the trust company, totaling $7,325. The $6,000 was deposited to the account of the trust company and a check drawn thereon to Bratt, Goodman & Buckley. Newton E. Buckley signed a check of Bratt, Goodman & Buckley for the money, to apply on his personal note to the bank, the amount involved being $4,200. Authorization for the transfer of this amount from Goodman-Buckley Trust Company to Bratt, Goodman & Buckley does not appear to have been given; it is shown as a temporary loan. Munger based his reason for the transaction on his knowledge of the personal financial responsibility of Newton E. Buckley, previous property statements made by Buckley to the bank, and also stating that a large portion of Buckley's personal fortune went into the different business enterprises, and Munger further believed the Goodman-Buckley Trust Company to be solvent. Testifying as an expert and by examination of the books of the firms here involved, Munger concluded the $4,200 had been repaid by Newton E. Buckley to the Goodman-Buckley Trust Company, with the exception of $400.

A great part of the record consists of the bankruptcy pro-

ceedings and accounts, to show the solvency or insolvency of the Goodman-Buckley Trust Company. A résumé of this evidence would unnecessarily lengthen this opinion. We conclude, from a careful examination of the record, that all of the businesses herein mentioned were bankrupt prior to the time of the adjudication thereof. The manner of transacting the different businesses and of the intermingling of the funds is significant.

The defendant bank assigns as error that it was denied the right to a jury trial, contending that the case is, in fact, an action at law, wherein the plaintiff seeks to recover a money judgment, and based on the proposition that, where the fraudulent intent in making a transfer of a debtor's property is to be determined by evidence collateral to the writing, such question is determinable alone by a jury, citing authorities.

The purpose of the present action has been previously stated. The money loaned by Munger, representing defendant bank as cashier and the guardian of the incompetent's estate, became the property of the Goodman-Buckley Trust Company, and the security given therefor was the two mortgages. When the Goodman-Buckley Trust Company loaned the money to Bratt, Goodman & Buckley, that is, the amount of $4,200, the latter sum became the property of Newton E. Buckley. This amount reduced his private indebtedness to the defendant bank. The effect of the transaction would be to add to the liability of the trust company to pay on an individual obligation of one of its managing officers to the bank.

Officers of a corporation may not pay their individual debts by a transfer or encumbrance of the corporation property. See *Bordy v. Goodman-Buckley Trust Co.*, 131 Neb. 342, 268 N. W. 286. In that case Bordy took a mortgage of the trust company direct, to secure the debt which Buckley owed him, and in the instant case Buckley had the trust company give an assignment of two mortgages, constituting assets of the trust company, to the guardian making the loan to the trust company, and subsequently Bratt,

Goodman & Buckley; in fact, Newton E. Buckley, used $4,200 of the original loan to pay the bank, to reduce his private indebtedness, with the knowledge of all concerned as to the complete transaction. The similarity of the cases is apparent. It is not within the power of the trust company to assent to a loan to one of its officers, such a loan being within the prohibition of section 8-206, Comp. St. 1929. See, also, *Buckley v. State,* 131 Neb. 752, 269 N. W. 892. The 4,200-dollar item, reducing the private indebtedness of Newton E. Buckley, remained at all times in the control of Munger. The bank received the benefit of the transaction, was out nothing, and parted with no consideration.

Whether this action is one in equity or one at law need not be determined. If it is one at law, wherein the relief asked is for a money judgment against the bank, we conclude that the facts and circumstances would entitle plaintiff to a directed verdict in the event of a jury trial, and that therefore no prejudice would result to defendant bank by a judgment as rendered herein.

Defendant bank further contends that the matters litigated are *res judicata.* The action was originally instituted in the district court of the United States, where motions to dismiss, filed by defendants, were sustained. The court held that there was no adequate allegation of the insolvency of the trust company at the time, so that the trustee stood in the position of the creditors of an insolvent corporation, at the time of the transfer, to recover the fraudulent conveyance; that the court had no jurisdiction of the controversy except under section 70 (e) of the act. Section 110 (e), title 11, U. S. C. A. (p. 442) as far as applicable reads: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. * * * For the purpose of such recovery any court of bankruptcy as defined in this

title, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The plaintiff's contention is that the action was brought in the state court to obtain the benefit of section 70 (a) of the national bankruptcy act, being section 110 (a), title 11, U. S. C. A. (p. 441). Said section provides: "The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * to all * * * (4) property transferred by him in fraud of his creditors; * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property." In the state court the plaintiff pleaded that on August 13, at the time of the transaction in controversy, both the trust officer, Buckley, and the trust company were wholly insolvent, and the moneys and properties involved were trust funds and trust property, for the investors in said trust company at that time, who are now the creditors, and on whose behalf this action is maintained by the plaintiff. The action brought in the federal court was a suit by the trustee in bankruptcy, to set aside the assignments of the mortgages to the Mooney estate because of the illegal transfer in fraud of the trust company. This constituted a direct conveyance of the trust company to the Mooney estate which was being attacked. It would be subject to rules of estoppel and any other defenses that the trust company was not injured; therefore, it must be alleged that the bankrupt was insolvent, and the petition was deficient in this regard. The present action was in the state court for the purpose of following the money abstracted by the trust officer from the trust funds and turned over to the bank to pay a private debt of the trust officer. This was not a conveyance to the bank by the trust company itself. Such action may be maintained under section 70 (a) of the bankruptcy act. The two actions are entirely different, as heretofore pointed out.

"When the second action between the same parties is upon a different claim or demand, or cause of action, it is

well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined." 15 R. C. L. 973, sec. 450.

The defendant bank, in an amended answer, alleges: "In an action begun in the District Court of the United States District of Nebraska, North Platte Division wherein the parties thereto were identical to those in the instant cause of action, the said cause of action was by the court dismissed and such action is now binding upon this court and the same is *res adjudicata.*"

"The party relying upon a former adjudication as a defense must aver in his answer in what court the judgment was rendered, and plead facts showing that the recovery was upon the same subject-matter and between the same parties, or their privies, as the suit in which the defense of *res adjudicata* is made, and that the judgment is in full force." *Thomas v. Thomas,* 33 Neb. 373, 50 N. W. 170.

Tested by the foregoing rule, the amended answer in the instant case fails to state a defense of *res judicata.* It merely discloses that a suit was brought in the United States district court between the same parties, and that the suit was dismissed and is binding on the plaintiff. No facts are pleaded showing that the recovery was upon the same subject-matter. Such facts must be pleaded under the rule. The amended answer is insufficient to raise the defense of *res judicata.*

Defendant bank contends that no funds were withdrawn or misappropriated, but were merely loaned and repaid to the corporation prior to bankruptcy by Newton E. Buckley, the managing officer and general manager, having authority so to do. The amended answer of the defendant bank does not plead payment, an affirmative defense, and, in order for the bank to avail itself of such defense, the same must be pleaded. See *Cady v. South Omaha Nat. Bank,* 46 Neb. 756, 65 N. W. 906; *Union Stock Yards Nat. Bank v. Haskell,* 2 Neb. (Unof.) 839, 90 N. W. 233.

A further contention is that the case of *Buckley v. State, supra,* determined that $1,315 of the funds of the Goodman-

Buckley Trust Company were wrongfully appropriated by Buckley for his own use, with the intent to defraud the trust company of such amount; that this constitutes a limitation upon the plaintiff's recovery in the present action, and, further, that there can be no recovery from the bank in any event, for the reason that the bank had made inquiry and believed both Goodman-Buckley Trust Company and Newton E. Buckley to be solvent. The substance of this evidence and an analysis thereof have been previously stated. In the case of *Buckley v. State, supra,* involving the same transaction, this court held that it was not within the power of the trust company to consent to a loan to one of its officers, such a loan being within the prohibition of section 8-206, Comp. St. 1929.

We are convinced that any accounting had, disclosing the amounts that may be found to be due Buckley from the Goodman-Buckley Trust Company, or *vice versa,* and the relationship of any of such amounts that he may have appropriated to his own personal use from the Goodman-Buckley Trust Company, is a matter between the Goodman-Buckley Trust Company and Newton E. Buckley, and not a matter as between the trustee in bankruptcy and the defendant bank. It must be remembered that at all times the bank had the use of the $4,200 which reduced Newton E. Buckley's private obligation to the bank. This amount has never been paid back into the Goodman-Buckley Trust Company by the bank, or to the trustee in bankruptcy. The sole question to determine in this respect is whether or not the defendant bank, under the circumstances and evidence in this case, received this $4,200 legally, in such a manner as to warrant it in retaining the amount for the bank's benefit, to reduce the personal indebtedness of Newton E. Buckley.

This court, in a recent case, *Kuhns v. Live Stock Nat. Bank,* 137 Neb. 459, 289 N. W. 893, a law action brought by a trustee in bankruptcy against the bank to recover funds credited by the bank to the indebtedness of an officer of the corporation in payment of his private debt, in substance, held the money to be recoverable by the trustee, in that the

bank was charged with such knowledge of the facts as devolved upon it the duty of making inquiry. In the instant case, the defendant bank concedes that it made and relied upon inquiry, concluding that the Goodman-Buckley Trust Company and Newton E. Buckley were solvent. We are convinced that defendant bank knew the financial status of each and every company and individual here considered, and that, if it had properly acted upon such inquiry made by it, the bank would have learned that Newton E. Buckley, as managing officer of the corporation, had no authority to use corporate funds for the payment of his own personal obligation to it, and the bank, under such circumstances, would not have taken the $4,200 here in question.

In *Kuhns v. Live Stock Nat. Bank, supra,* are cited the cases of *McCullam v. Buckingham Hotel Co.,* 199 S. W. 417 (198 Mo. App. 107), holding: "One accepting corporate checks drawn by an officer in payment of his private obligations must return the proceeds if corporate funds were thereby misapplied;" and *Boyle v. Lewiston Trust Co.,* 136 Atl. 292 (126 Me. 74), wherein it was said: "A trustee in bankruptcy represents the creditors and hence is not estopped from recovering corporation funds used to pay an officer's personal obligations, even though the directors or stockholders consented to such payment;" the opinion in the Nebraska case adding that "the trustee represents the creditors of the corporation and they are not estopped because the directors acquiesced in or consented to such payments."

With reference to the trustee in bankruptcy intervening in the foreclosure of the mortgages assigned in the guardianship matter and later foreclosed by the personal representative of the deceased Mooney, and receiving the excess over and above the amount of the loan, such action on the part of the trustee does not amount to, nor is it a ratification of, the acts of the Goodman-Buckley Trust Company, Newton E. Buckley, or the defendant bank. The trustee was merely doing his duty in obtaining what assets he could belonging to the Goodman-Buckley Trust Company for the creditors of the bankrupt estate. This action on his part does not constitute estoppel.

We conclude that the trial court correctly entered judgment against the defendant bank in the sum of $5,838, and costs of action.

AFFIRMED.

LINCOLN COUNTY ET AL., APPELLANTS, V. WILLIAM E. SHUMAN ET AL., APPELLEES.

292 N. W. 30

FILED MAY 3, 1940. No. 30940.

1. **Taxation.** In the foreclosure of a tax sale certificate brought by a county under sections 77-2040 and 77-2041, Comp. St. 1929, where sale of the property is confirmed, subject to the right of the owner to redeem within two years from the date of confirmation, and an application to redeem is filed and with it tendered to the clerk of the court the amount for which the real estate was sold at the foreclosure sale, together with interest at 12 per cent. from date of sale, and costs of suit; *held*, redemption under the circumstances, and as provided for in section 77-2041, Comp. St. 1929, may be had.
2. ———. The sale of land to satisfy a tax sale certificate thereon is an extinguishment of the lien for taxes, becomes merged in the title conveyed, and does not constitute a release or commutation of taxes, as contemplated by section 4, art. VIII of the Constitution.
3. ———. The foreclosure of a tax sale certificate instituted by a county under the provisions of sections 77-2040 and 77-2041, Comp. St. 1929, distinguished from an interpretation of section 77-2039, Comp. St. 1929, as made in the case of *City of Plattsmouth v. Hazzard*, 132 Neb. 284, 271 N. W. 801. The tax sale certificate foreclosed in the instant case is exclusively within the provisions of sections 77-2040 and 77-2041, Comp. St. 1929.

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

S. S. Diedrichs, George B. Dent, Jr., and *Lowell C. Davis*, for appellants.

Bert L. Overcash, contra.

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

MESSMORE, J.

This case appears in this court on stipulation as a case stated, and for the purpose of this appeal may be summarized briefly as follows:

This is an action brought by the county of Lincoln to foreclose a certain tax sale certificate, covering delinquent real estate taxes and special assessments upon a vacant lot in the city of North Platte, owned by defendant Shuman. A decree of foreclosure was entered, the real estate duly and legally advertised and sold by the sheriff to Harvey L. Clarke, and sale confirmed, subject to the right of the owners, defendants Shuman, to redeem within two years from the date of said confirmation. Thereafter, defendants Shuman filed application to redeem and tendered to the clerk of the court the amount for which the real estate was sold at the foreclosure sale, together with interest at 12 per cent. from the date of sale, and costs of suit. The plaintiffs filed objections to defendants' application to redeem, which objections were overruled. On December 11, 1939, the court granted the defendants' application and entered an order permitting defendants to redeem for the amount tendered. From this order an appeal was taken to this court by the county of Lincoln and Harvey L. Clarke, the purchaser. This presents the only question to be determined on appeal, stated as follows:

In a suit to foreclose a tax certificate under sections 77-2040 and 77-2041, Comp. St. 1929, does the property owner have a right to, and is he legally entitled to, redeem the real estate from tax sale foreclosure by decree, by paying the amount bid and paid at the tax sale thereof by the purchaser, with interest on said amount at 12 per cent. from the date of sale to the date of redemption, or must the defendants, in order to effect redemption, pay the full amount of the decree of foreclosure, with interest thereon as set forth in the decree, and the costs of the action, together with interest at 12 per cent. on the amount paid by the purchaser in the tax foreclosure sale?

The appellants contend that the court erred in overrul-

ing the objections of the county of Lincoln and Harvey L. Clarke, the purchaser, to the application of defendants, William E. Shuman and Florence Shuman, his wife, to redeem, and in sustaining the application, permitting the defendants to redeem upon payment of the amount for which such land was sold at said tax foreclosure sale, with interest and costs.

This action was brought under section 77-2041, Comp. St. 1929. Said section must be read in conjunction with section 77-2040, Comp. St. 1929. The latter section provides in part: "Whenever the county board of any county * * * shall have purchased any real estate for delinquent taxes of any kind, or become the owner by assignment of any tax sale certificate * * * such county * * * shall be deemed to be the * * * owner of * * * liens for taxes of the state, county, city, village * * * and may instead of demanding a deed therefor * * * or in case a deed shall have been issued by surrendering the same in court, proceed by suit in equity in the district court of the county in which such land is situated to foreclose such lien, and cause such real estate to be sold for the satisfaction thereof and all prior or subsequent tax liens thereon, in all respects as far as practicable in the same manner and with like effect as is provided for the foreclosure of real estate mortgages."

Section 77-2041, Comp. St. 1929, provides in part: "Such action for the foreclosure of such tax sale certificate may be brought by any county, city, * * * immediately after the purchase thereof, or where such taxes have been heretofore purchased, may be brought immediately after the passage and approval of this act, or at any time thereafter, except as above provided, and when brought before the time for redemption for such tax sale has expired, the owner of the lands described in such tax sale certificate, or any person having a lien thereon, or interest therein, may redeem the same at any time within two years from the date of sale under such foreclosure proceedings by paying to the clerk of the district court, for the use of the purchaser at such foreclosure sale, his heirs or assigns, the amount for which

such land sold at such foreclosure sale, with interest thereon at the rate of twelve per cent. *per annum* from the date of such purchase at such foreclosure sale to the date of redemption, and the cost of suit."

The appellants cite the case of *City of Plattsmouth v. Hazzard,* 132 Neb. 284, 271 N. W. 801, as controlling in tax foreclosure proceedings, and suggest that, under the rule of *stare decisis,* the doctrine of redemption announced in such case should be adhered to and control in the case at bar, especially where, as here, property rights would be greatly affected by departure therefrom.

In the above case the city of Plattsmouth foreclosed tax liens on real estate owned by a savings and loan association. At the sale the city bid less than the decree, and the defendant was permitted to redeem by paying the amount of the bid. The contention was that the court erred in permitting the defendant to redeem for the amount of the bid which was less than the decree for taxes. This court held: "The redemption from a tax lien foreclosure by the city under section 77-2039, Comp. St. 1929, cannot be made by paying the amount of the bid, but may be made only by paying the full amount of the taxes due with interest."

Section 77-2039, referred to above, was passed in 1903, and until 1919 contained redemption provisions as follows: "In case of the foreclosure of said lien and sale thereunder, the owner of any tract or lot of land so sold, shall have the right to redeem the same from such sale within two years from the date thereof by paying the amount for which sold with interest and costs to the date of redemption." Laws 1903, ch. 73, sec. 231. We cite the foregoing section for the importance that may be attached thereto in recognition of property laws here involved. Such section of the statute, so far as redemption is concerned, now requires the payment of the full amount of the decree, with interest to date of redemption, costs of suit and 12 per cent. interest on the money actually paid by the purchaser on his bid. This section provides the only complete, independent method for the foreclosure of delinquent tax liens by a county, in case no

administrative sale has been had prior thereto. See *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.*, 121 Neb. 493, 237 N. W. 575. In that case this language was used (p. 500): "Foreclosures of tax certificates purchased by counties or by individuals are conducted under sections 77-2041 to 77-2047, Comp. St. 1929, and should not be confused in any way with the procedure now under discussion." The foregoing case was cited in *City of Plattsmouth v. Hazzard, supra.* The contention of the appellants is that section 77-2039, Comp. St. 1929, refers to tax liens by a county, and no other governmental subdivision or private individual may proceed thereunder, and that the tax sale certificate foreclosed in the instant case is exclusively within the provisions of sections 77-2040 and 77-2041, *supra.*

The motion for rehearing in *City of Plattsmouth v. Hazzard, supra,* is asked to be considered, wherein attention is called to the fact that section 77-2039, Comp. St. 1929, applies only to foreclosure of delinquent tax liens by a county, and that the city of Plattsmouth could not, under any circumstances, have instituted its foreclosure under this section, and the only procedure available to the city or governmental subdivision, other than the county, for foreclosure of a tax lien acquired by it is by virtue of sections 77-2040 and 77-2041, *supra.* Therefore, appellants contend, *City of Plattsmouth v. Hazzard, supra,* is either authority for their contention in the case at bar, or it is wrong and should be overruled, so that a clear and definite rule of property may be adopted and the doctrine of *stare decisis* is applicable, to insure uniformity, certainty and stability in the law.

The instant case was properly brought under sections 77-2040 and 77-2041, Comp. St. 1929, and was brought by the county and not by the city. It is our duty to construe and interpret the statute now before us. The most that can be said with reference to the case of *City of Plattsmouth v. Hazzard, supra,* is that the court may have applied the wrong statute, but did properly interpret the provisions of the statute (section 77-2039) appearing in the opinion.

We now address our attention to section 4, art. VIII of

the Constitution, which reads: "The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

The contention of appellants is that section 4, art. VIII of the Constitution, is cited in the case of *City of Plattsmouth v. Hazzard, supra,* in support of the interpretation of section 77-2039, Comp. St. 1929, and if the redemption as required by section 77-2039 is supported by the constitutional provision, obviously sections 77-2040 and 77-2041 are governed thereby; and it is conclusive that the constitutional provision invalidates sections 77-2040 and 77-2041, in so far as redemption is concerned, and prohibits the redemption as contained therein.

While sections 77-2040 and 77-2041, Comp. St. 1929, with the redemption provisions as contained therein, have not been tested with reference to the constitutional provision above referred to, statutes comparable to such sections, containing redemption provisions similar thereto, have been so tested. We refer to certain sections of the statute under the scavenger act containing redemption provisions.

The term "redemption," in a literal sense, means the act of buying back or repurchasing. Webster's New International Dictionary (2d ed.). Section 77-2121, Comp. St. 1929, provides for the sale of real estate for tax purposes under that procedure for less than the amount of the decree and provides for the distribution of proceeds on a *pro rata* basis. Section 77-2123, Comp. St. 1929, also makes provision for the sale of real estate for less than the amount of the decree. Section 77-2127, Comp. St. 1929, contains certain provisions for tax redemption by the property owner under various contingencies. The redemption provision in the latter section is similar to the one found in section 77-2040, *supra.*

In *Woodrough v. Douglas County,* 71 Neb. 354, 98 N. W.

1092, suit was brought to enjoin the county treasurer under the scavenger act. It was alleged that this act was unconstitutional, and the constitutional provision against commutation of taxes (Const. art. VIII, sec. 4) was urged as a ground for invalidating the act. We quote from the opinion as follows (p. 361): "The sale of land to satisfy a tax lien thereon is an extinguishment of the lien, which becomes merged in the title thus conveyed. Therefore it is not a release or commutation. * * * An extinguishment is a discharge by operation of law; a release is a voluntary relinquishment of a lien and right of action or an obligation. * * * 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 meaning of the Constitution."

In the case of *Marker v. Scotts Bluff County*, 137 Neb. 360, 289 N. W. 534, which involved an interpretation of section 77-2129 of the scavenger act, and its construction, the argument was made that said section was violative of section 4, art. VIII of the Constitution. This court said: "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. * * * 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."

The provision of the Constitution herein cited appeared first in the Constitution of 1875, and has so remained until the present time without change in language. Our present tax foreclosure statutes date from the year 1903, when a complete revision of our revenue laws was made. From our analysis, redemption, as contained in section 77-2041, Comp. St. 1929, is constitutional and not a violation of property law.

In the case of *Moffitt v. Reed*, 124 Neb. 410, 246 N. W.

853, appearing also in 131 Neb. 696, 269 N. W. 621, this court held (131 Neb. 696): "Redemption may be made from the sale of property at a tax foreclosure sale upon the payment to the purchaser of the amount of his bid, with 12 per cent. interest per annum to the time of such redemption, together with the amount of subsequent taxes paid by defendant, with interest thereon at the statutory rate of interest on such taxes." The above case sustains the conception of redemption as contained in section 77-2041, *supra*.

Section 77-2039, Comp. St. 1929, provides an independent means of foreclosing a tax lien without a tax certificate. This section specifically provides that, in order to redeem, the owner must at all times pay to the clerk of the court the amount of the taxes found due thereon, the amount of subsequent taxes paid by the purchaser and interest thereon, together with court costs. It will be observed that this section of the statute is quite different from section 77-2041, *supra*, with reference to tax sale certificate foreclosure. Accordingly, if any county has a preference as to which redemption provisions would be the best to follow, it can, in advance, determine which statutory procedure will be followed in tax matters. Thus, if a county has any objection to the redemption provision of section 77-2041, it can proceed under section 77-2039.

It is pointed out in appellees' brief, with reference to property law, the existence of section 20-1530, Comp. St. 1929, originally enacted in 1875, and not amended. Said section reads: "The owners of any real estate against which a decree of foreclosure has been rendered in any court of record, or any real estate levied upon to satisfy any judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be confirmed by a court of competent jurisdiction by paying into court the amount of such decree or judgment, together with interest and costs; and in case the said real estate has been sold to any person not a party plaintiff to the suit, the person so redeeming the same shall pay to said purchaser twelve per cent. interest on the amount of

the purchase price from the date of the sale to the date of redemption, or deposit the same with the clerk of the court where the decree or judgment was rendered."

The above section is, in many respects, analogous to section 77-2047, Comp. St. 1929, with respect to redemption, and affirmative of the redemption provision as contained in section 77-2041, *supra*. Section 20-1530, *supra*, has been on the statute books, without change, from and since the existence of section 4, art. VIII of the Constitution, and during this period of time such statute involving redemption, as herein set out, has not been held to be violative of the constitutional provision, which indicates clearly the status of the property law here involved.

We hold that the trial court did not err in accepting the amount tendered by the defendants and in permitting defendants to redeem the real estate, under the circumstances as here presented.

AFFIRMED.

ANNE RUTH BONZO, APPELLANT, V. LEE BONZO, APPELLEE.
292 N. W. 61

FILED MAY 4, 1940. No. 30916.

Divorce. A husband, being appellee in a divorce case, having failed to pay the costs of appellant's appeal, as awarded by this court, is cited before the court for punishment for contempt. The time for preparing and filing the bill of exceptions having gone by, the appeal being now entirely ineffective, the decree is reversed as to alimony and custody of the sons, from which findings appellant attempted to appeal.

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

Bernard S. Gradwohl and *C. M. Pierson*, for appellant.

Walker & McArthur, contra.

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

PAINE, J.

This cause is before us on motion asking this court to impose punishment for contempt for failure to comply with order of court to pay certain costs of appeal, or to reverse the judgment.

On November 22, 1939, a decree of divorce was granted to the plaintiff, but the custody of the two sons was granted to the defendant. Alimony payments, limited to $30 a month for 12 months, were awarded the plaintiff.

The plaintiff specifically appeals from that part of the decree granting her alimony of but $30 a month for 12 months, and from that provision of the decree granting to the father the custody of the two boys, Lee, born June 6, 1929, and James, born October 14, 1930. The motion for new trial sets out many errors. Appellant gave bond for $75. The transcript was filed in this court February 5, 1940, together with a motion for temporary support, and the following items of costs: Filing motion for new trial, 50 cents; notice of appeal, 50 cents; bill of exceptions, approximate cost of $120; transcript, $7.50; cost of appeal bond, $10; filing bond, $1; filing fee in supreme court, $20; cost of printing appellant's briefs, $50; total, $209.50.

On March 2, 1940, the supreme court directed appellee to pay the sum of $125 to the clerk of the district court "to cover the cost of the bill of exceptions and briefs of appellant."

On March 4, 1940, appellant filed motion for extension of brief day.

On April 15, 1940, Walker & McArthur filed brief of appellee showing that he is financially unable to raise the amount of $125.

The affidavit of Bess A. Richards, court reporter, dated April 11, 1940, is to the effect that the trial occurred on September 11, 12 and 13, 1939, and that, by hiring extra help, she could, if the bill of exceptions was ordered by April 15, have completed same by April 18, and that the cost would be $120.

An affidavit of Mrs. Forrest Gibbs says that on or about August 1, 1939, she has reason to believe Lee Bonzo termi-

nated his employment with Roberts Dairy Company, for the purpose of defeating the plaintiff's appeal, and said that he would never pay plaintiff any alimony.

An affidavit of R. L. Lingle is to the effect that, upon order of E. J. Sias, president of Lincoln Airplane & Flying School, he had locked the door to the office, and would not permit said Lee Bonzo to enter his office, where he had been employed, and has not been employed there since.

In answer and resistance to citation for contempt, Lee Bonzo, defendant and appellee, admits that the court made order March 2, 1940, requiring him to pay $125 for cost of bill of exceptions and briefs in this case, and that he had no money when the order was entered; that he has at all times intended to comply with said order; that appellee has in no manner wilfully or contumaciously refused to pay said sum.

Appellee further states that during February and March, 1940, he has earned only an average of $35 a month, which he has used in support of his two sons and himself; that he has diligently tried to find other employment, and has failed. He alleges that the only property he has to secure funds is a 1931 Model-A Ford automobile; that it is worth only $60, and he must use it in connection with his little acreage.

The appellant sets out the following facts in her affidavit: That the appellee stated to her that if she began divorce proceedings she would never receive one penny from him; that he would terminate his employment, so she could not collect a cent, and that no American court was smart enough to force him to make any payment to her; that she has only received four payments of $5 each as temporary support money; that he received about $100 a month from Roberts Dairy Company, and terminated his employment on the day suit was filed.

It appears that, since the court directed payment of $125, his other job has been discontinued.

The transcript shows that the decree was entered by the district court on November 22, 1939, and the motion for new trial was overruled on December 2, 1939.

Section 20-1140, Comp. St. 1929, permits the district judge

to allow an extension of an additional 40 days from the adjournment of the term of court in which to serve bill of exceptions.

In the case of *In re Estate of Boschulte,* 128 Neb. 316, 258 N. W. 530, this court said: "*Held,* that under section 20-1140, Comp. St. 1929, a trial court is authorized, upon a satisfactory showing of diligence, to enter an order for additional time, not exceeding a total of 80 days from the adjournment *sine die* of that term of court, for the service of the bill of exceptions upon the adverse party, and that such order may be made during such additional time allowed, and after the first 40 days have expired."

In the case of *Scotts Bluff County v. McHenry,* 128 Neb. 613, 259 N. W. 754, this court held that the time for serving the bill of exceptions under any circumstances expires and a court is without jurisdiction to settle the same after 100 days.

It has been held that a court should grant a new trial where a party has been deprived of a bill of exceptions by reason of the inability of the court reporter to furnish the same in time. *Mathews v. Mulford,* 53 Neb. 252, 73 N. W. 661.

A somewhat similar situation is well stated in 17 Am. Jur. 460, sec. 584, which says: "Where the husband is the complainant in a divorce action and the court has made an order requiring him to pay the wife's costs of counsel fees, his suit may be abated until he complies with the order."

In *Brown v. Brown,* 51 L. R. A. n. s. 1119 (22 Wyo. 316, 140 Pac. 829), it was held: "The remedy for failure of one who, having appealed from a decree of divorce, fails to comply with an order requiring payment of his wife's attorneys' fee, is not a proceeding to punish for contempt, but a dismissal of the appeal."

It is insisted that appellee be committed to jail for contempt of court in failing to comply with the order of this court. Under the circumstances, because 100 days have passed, the bill of exceptions cannot now be prepared or filed in this court.

This court is powerless to afford general relief by passing upon all the questions which would have been presented to it if the bill of exceptions had been seasonably filed. This court has abundant authority to require payment of costs in a divorce case (*Reed v. Reed*, 70 Neb. 779, 98 N. W. 73) and appellee should have complied with the order.

Under the unusual circumstances and conditions confronting us for the first time in this court, so far as we have ascertained, and the appellant being, therefore, without fault on her part, deprived of her right to a hearing in this court by the failure of the appellee, we see but one thing to do, and that is, to afford the appellant such relief as is possible by allowing her decree of divorce to stand, but we hereby reverse that portion of the decree from which she has appealed, i. e., the custody of the sons and the award of $360 alimony, and remand the same to the district court for further proceedings.

REVERSED.

SONKEN-GALAMBA CORPORATION, APPELLANT, V. ABRAHAM B. ALPIRN, APPELLEE.

292 N. W. 46

FILED MAY 10, 1940. No. 30825.

1. **Sales.** Where, under a contract for the sale of goods which provides for delivery and payment by instalments, deliveries are made by the seller, the buyer neglects or refuses to make payment of 10 per cent. of the contract price for goods already delivered, and the seller refuses to make further deliveries because thereof and terminates the contract, it depends upon the terms of the contract and the circumstances of the case whether the default is so material as to justify the seller in refusing to complete delivery. Where the situation admits of doubt, a jury question is presented.
2. **Record** examined, and the judgment of the trial court is affirmed.

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

Casey & Corenman, for appellant.

Monsky, Grodinsky, Marer & Cohen, contra.

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

SIMMONS, C. J.

Plaintiff sues to recover balances alleged to be due it for deliveries made under contracts for the sale of scrap metals. Defendant, by cross-petition, prayed for damages for plaintiff's failure to deliver the entire amount of metal covered by the contract. Defendant recovered on his cross-petition, and plaintiff appeals.

Plaintiff alleges: That, on June 18, 1937, it entered into two written contracts with the defendant, whereby the plaintiff agreed to sell, and the defendant agreed to buy, 500 tons of steel scrap iron and 200 tons of stove scrap iron, to be delivered at certain designated points and prices. The terms were "90% sight draft with documents attached, balance to be paid immediately on receipt and verification of material," shipment to be completed within 60 days (other conditions are not involved herein); that, from July 2, 1937, to August 20, 1937, it delivered 8 car-loads of steel, and from July 12, 1937, to August 10, 1937, it delivered 4 car-loads of stove iron to the defendant; that 90% of the purchase price was paid; that said 10% balances have not been paid except for a partial payment made September 7, 1937. Plaintiff prayed judgment for the unpaid balances. (A second cause of action is not involved in this appeal.)

Defendant admits the execution and delivery of the contracts, the delivery of the metal, with some variance as to weights and amounts not paid.

By cross-petition defendant alleged that plaintiff did not deliver all the metal called for by said contracts, that plaintiff breached the contract and refused to complete delivery, and that defendant went upon the open market and purchased metal to complete the contract at an increased price; and prayed for a judgment for damages because of such breach.

Plaintiff's reply and answer was a general denial.

The jury allowed the plaintiff the amount due on its balances and found for the defendant on his cross-petition. The amounts as such are not in dispute on this appeal. The question presented is that of the right of the defendant to recover on his cross-petition, the issue being whether or not plaintiff was justified in refusing to complete delivery because of defendant's failure to make payment of the 10% balances when demanded by plaintiff.

Both plaintiff and defendant are dealers in metals. Defendant purchased the metal to fill prior orders upon which he had contracted delivery. Shortly after the contracts between the plaintiff and defendant were made, there was a marked increase in the market price of these metals. Plaintiff shipped one car of steel on July 2, 1937. Plaintiff did not follow defendant's instructions as to the bank to which the draft was to be sent, and it was not paid the day received, although defendant paid it promptly when he was advised of it. Plaintiff attempted on July 7, 1937, to cancel both contracts because of that fact. Plaintiff proceeded thereafter to ship steel, and from July 21 to August 12 shipped six cars under one contract. From July 12, 1937, to August 10, 1937, plaintiff shipped four cars of stove iron under the other contract. The 90% was promptly paid on all shipments.

Beginning August 2, 1937, plaintiff began to demand the 10% balances on cars shipped. Upon defendant's failure to pay, plaintiff about August 14th refused to make further shipments, and defendant purchased other metal on the open market at an increase in price.

The reason given by the plaintiff for refusing to make additional shipments was that defendant had not paid the 10% balances. After August 12, further shipments were not made except one car which, by mistake of plaintiff's shipping department, was shipped on August 20, 1937.

The 10% balance was by the contract "to be paid immediately on receipt and verification of material." The parties agree that the purpose of this provision was to enable the buyer upon delivery to verify the material as to quality and

weight and to adjust freight charges. The defendant testified that he had the additional purpose of insuring full delivery under the contract. However, when the payments were demanded, the defendant did not give this as a reason for not paying. The evidence does not show when the defendant received verification of the shipments as to quality, weight, and freight, with the exception of the defendant's testimony that usually thirty days elapsed after shipment before verification was received although sometimes it might be more or less. While not very definite, the defendant's testimony further indicates that verification had not been received on any of the shipments at the time plaintiff refused to ship the balance of the metals.

The trial court instructed the jury that it was for them "to decide from the testimony introduced in this trial whether or not the conduct of defendant in the payment or failure to pay the 10% balances justified plaintiff in breaching the contract and in failing to deliver according to the terms thereof." The instructions are not attacked in this court by direct assignment of error, nor did the plaintiff request the giving of specific instructions. However, plaintiff contends that the defendant's failure to pay the 10% balances (coupled with defendant's insolvency, to which contention reference will be made hereafter) was a material breach of the contract; that the trial court erred in failing to instruct the jury that it amounted to a material breach as a matter of law; and that defendant should have been denied recovery on his cross-petition.

The contracts here were treated by both parties as instalment contracts. Section 69-445, Comp. St. 1929, provides: "When there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and * * * the buyer neglects or refuses to * * * pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether

the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken." Discussing this provision, this court stated in *Nebraska Wheat Growers Ass'n v. Smith*, 115 Neb. 177, 187, 212 N. W. 39, that "a total default in payment of an instalment does not *ipso facto* at the election of the injured party terminate a contract of sale, but that its legal effect depends 'on the terms of the contract under the circumstances of the case.' "

"This rule makes the obligation of the innocent party depend upon the materiality of the breach committed by the wrong-doer." 2 Williston, Sales (2d ed.) 1194, sec. 467b. See 1 Uniform Laws Annotated (Sales) 258.

The legislature has "established a new test, which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong." *Helgar Corporation v. Warner's Features*, 222 N. Y. 449, 119 N. E. 113.

It is recognized that, strictly speaking, the contract here may not be one to sell "by stated instalments" and therefore not within the act. However, "the rule of the statute represents an endeavor to formulate what may be called the soundest conclusion from the common law," and, therefore, the problem here presented may be decided by the same test as that stated in the statute. 2 Williston, Sales (2d ed.) 1178, sec. 465b. Such a holding is in accord with the intent and purpose of the legislative act.

"The question of fact presented by a breach, such as is referred to by the statute, should, if the situation admits of doubt, be left to the determination of a jury." 2 Williston, Sales (2d ed.) 1178, sec. 465b.

The evidence, from its most favorable view to the plaintiff, presented a jury question.

Plaintiff complains that the court refused to admit evidence of the defendant's insolvency and reputation for nonpayment of accounts. Plaintiff offered certain Dun & Bradstreet reports on the defendant, and stated that "reliance" on the reports "together with defendant's failure to pay as per the terms of the contract was the cause of plaintiff's

cancelation of the contracts." The trial court sustained objections to their admission. An examination of the tendered reports discloses that they were dated from June 18, 1938, to August 31, 1938. Obviously, reports made from 10 to 12 months after the cancelation of the contracts could not have been relied upon by the plaintiff in determining whether or not to cancel the contracts. No further discussion of that feature of the case is necessary.

No prejudicial error is found. The judgment of the trial court is

AFFIRMED.

IN RE ESTATE OF EDWARD S. ROBINSON. YALE UNIVERSITY, APPELLANT, V. SCOTTS BLUFF COUNTY, APPELLEE.

292 N. W. 48

FILED MAY 10, 1940. No. 30795.

1. **Statutes.** "Where there are different statutes *in pari materia*, though made at different times, or even expired or repealed, and not referring to each other, and though using different language, they shall be taken and interpreted together as one system and as explanatory of each other. Whatever has been determined in the interpretation of one of several statutes *in pari materia* is a sound rule of interpretation for the others." Beal, Cardinal Rules of Legal Interpretation (2d ed.) 351.
2. ———. The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute the court must consider the preexisting law and any other acts relating to the same subject, as well as the general policy which such enactments evidence and disclose.
3. **Corporations.** It is a well-accepted rule of construction that a legislative act granting powers, privileges or immunities to corporations must be held to apply only to corporations created under the authority of that state over which such state has the power of visitation and control, unless a contrary intent is plainly expressed in the terms of such legislation.
4. **Taxation.** "Statutes exempting certain legacies from an inheritance tax should be strictly construed. To be exempt from an inheritance tax, a legacy must come within the strict letter of

the statutory exemption." *In re Estate of Rudge*, 114 Neb. 335, 207 N. W. 520.

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

William Morrow and *Russell E. Lovell*, for appellant.

Frank Glebe and *Willard F. McGriff, contra.*

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

EBERLY, J.

In this case, Yale University, a Connecticut corporation, appeals from the decision of the district court for Scotts Bluff county, which denied the appellant's claim for exemption from the payment of inheritance taxes on its interests in certain Nebraska lands devised to it by the terms of the last will of Edward S. Robinson, deceased. These lands, by the terms of the will of the deceased, upon the termination of the life estate created thereby, were given, devised, and bequeathed "to Yale University, of New Haven, Connecticut, to be its absolutely." The intestate died on February 27, 1937, and his will was duly admitted to probate on July 17, 1937. Upon the probate of the will an appraiser for inheritance tax purposes was appointed by the county judge of Scotts Bluff county, who determined that the share of the devised lands taxable to Yale University was $73,786, and that the inheritance tax, if levied, would amount to $7,154.32 with interest at 7 per cent. per annum from February 27, 1937. On February 6, 1939, the county court denied appellant's claim for exemption as an educational institution under section 77-2201, Comp. St. 1929, as revised in 1931 (Laws 1931, ch. 132) and on that basis levied the inheritance tax complained of. On appeal to the district court, that court affirmed the levy of the inheritance tax as against Yale University, and denied its claim of exemption as an educational institution under such section 77-2201, Comp. St. 1929, as amended.

Appellant's appeal to this court challenges the correctness of the order thus made on the sole ground that it is a corporation organized and operated exclusively for educational purposes without pecuniary gain, and thus is within the protection of the proviso which was added as an amendment to section 77-2201, Comp. St. 1929, by chapter 132 of the session laws of 1931. This proviso is in the following terms, viz.:

"*Provided further,* that all bequests, legacies, devises, or gifts, to or for the use of any corporation, organization, association or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of which is owned or used for financial gain or profit to either the owner or user or inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable or educational purposes, shall not be subject to any duty or tax, and no such duty or tax shall be assessed or collected after the taking effect of this act irrespective of the time of the death of the decedent or the fact of the pendency of his or her estate."

Appellant insists on the general rule repeatedly announced by this court that, where the words of a statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice. *Stoppert v. Nierle,* 45 Neb. 105, 63 N. W. 382; *State v. Heupel,* 114 Neb. 797, 210 N. W. 275; *State v. Life Ins. Co. of North America,* 71 Neb. 320, 99 N. W. 36; *In re Estate of Bayer,* 116 Neb. 670, 218 N. W. 746. And further insists that it is the duty of the court to discover, if possible, the legislative intent from the language of the act (*State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138); and that the statute under consideration is so clear and unambiguous on its face as to preclude any construction whatever by the trial court (*Shamp v. Landy Clark Co.,* 134 Neb. 73, 277 N. W. 802; *State v. First State Bank of Alliance,* 122 Neb. 502, 240 N. W. 747). As applied to the instant case, appellant's contention obviously ignores the situation where two or more statutes are each clear and unambiguous, and each includes

in whole or in part the subject-matter involved, but their terms are mutually inconsistent or conflicting. Likewise, no account is taken of the inherent limitation to which legislative power is properly subjected.

As to the first situation suggested, the rule has been authoritatively expressed in the following language, viz.: "Where there are different statutes *in pari materia,* though made at different times, or even expired or repealed, and not referring to each other, and though using different language, they shall be taken and interpreted together as one system and as explanatory of each other. Whatever has been determined in the interpretation of one of several statutes *in pari materia* is a sound rule of interpretation for the others." Beal, Cardinal Rules of Legal Interpretation (2d ed.) 351. See, also, *Campbell v. Youngson,* 80 Neb. 322, 114 N. W. 415; *Updike v. City of Omaha,* 87 Neb. 228, 127 N. W. 229.

The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute the court must consider the preexisting law and any other acts relating to the same subject, and especially passed at the same session of the legislature. *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688.

There is, however, another principle by which general words of a statute are limited in order that the law may conform to legislative intent. Judge Sutherland thus expresses this view: "An act of parliament provided that the premiums paid on life insurance in certain companies might be deducted from the assessment for the income tax. A later statute extended this privilege to any person insured 'in or with *any insurance company existing on the first day of November, 1844,*' or in or with any insurance company registered pursuant to a certain act. It was held that the words in italics did not include a foreign insurance company in existence on the date specified. Lord Esher, M. R., in course of his opinion, said: 'Now, supposing the words "any insurance company" stood alone, and there were nothing

else in the section to modify the view which one would take of their meaning, would it or would it not be right to say that those words in an English act of parliament would include all foreign insurance companies, wheresoever they might be? What is the rule of construction which ought to be applied to such an enactment, standing alone? It seems to me that, unless parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations, the courts of this country must obey the enactment, the proper construction to be put upon general words used in an English act of parliament is, that parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is so only when parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and, unless it does so in express terms so clear that their meaning is beyond doubt, the courts ought always to construe general words as applying only to persons or things which will answer the description and which are also within the jurisdiction of parliament. If, therefore, those words stood alone, I should be of opinion that the insurance companies mentioned must be insurance companies over which our parliament has jurisdiction, and that the section should be confined to such companies.' " 2 Lewis' Sutherland, Statutory Construction (2d ed.) pp. 951, 952. See, also, *People v. Butler Street Foundry & Iron Co.*, 201 Ill. 236, 66 N. E. 349; *McCullough v. Virginia*, 172 U. S. 102, 19 S. Ct. 134, 43 L. Ed. 382; *National Mutual Bldg. & Loan Ass'n v. Burch*, 124 Mich. 57, 82 N. W. 837; *State v. Holcomb*, 85 Kan. 178, 116 Pac. 251.

In line with the principles above announced, Justice

Cooley employs the following language: "The exemption of charitable societies generally (from inheritance taxes) does not extend to charitable institutions located in other states. Foreign corporations ordinarily are not included in the exemption. An exemption of religious, educational and charitable 'corporations,' without more, does not extend to foreign corporations of such character, but is limited in its operation to corporations created by the state enacting the statute. 'It is a universally accepted rule of construction,' says the supreme court of Illinois, 'that an act of the general assembly of a state granting powers, privileges or immunities to corporations must be held to apply only to corporations created under the authority of that state over which such state has the power of visitation and control, unless the intent that the act shall apply to other than domestic corporations is plainly expressed in the terms of the act.' It has been held, however, that a religious corporation, chartered in different states, among them New York, is a domestic corporation in the latter state and as such exempt from the operation of the New York transfer law, notwithstanding the fact that the will, in naming the corporation, also names its principal office which is in one of the other states. Foreign charitable corporations may be required to pay a collateral inheritance tax, even though charitable corporations of domestic origin are exempt therefrom, without violating the Fourteenth Amendment to the Federal Constitution. The uniformity clause is not violated by exempting domestic but not foreign corporations from the tax on devises or bequests for charitable purposes." 4 Cooley, Taxation (4th ed.) pp. 3472-3474.

It appears that a majority of the states which have adjudicated the question adhere to the view that tax exemption to charitable and educational institutions is confined, in the absence of express provision to the contrary, to domestic corporations. Blakemore & Bancroft, Inheritance Taxes, sec. 257; Gleason & Otis, Inheritance Taxation (3d ed.) 229 *et seq.*

See, also, *Matter of Estate of Prime*, 136 N. Y. 347, 32

N. E. 1091; *Board of Education v. Illinois,* 203 U. S. 553, 27 S. Ct. 171, 51 L. Ed. 314; *In re Estate of Speed,* 216 Ill. 23, 74 N. E. 809; *Morgan v. Atchison, T. & S. F. Ry. Co.,* 116 Kan. 175, 225 Pac. 1029, 34 A. L. R. 625; *Griggs v. Thulemeyer,* 41 Wyo. 36, 282 Pac. 27; *Carter v. Whitcomb,* 74 N. H. 482, 69 Atl. 779; *People v. O'Donnell,* 327 Ill. 474, 158 N. E. 727; *Humphreys v. State,* 70 Ohio St. 67, 70 N. E. 957; *In re Estate of Quirk,* 257 Mo. 422, 165 S. W. 1062; *In Matter of Estate of Hall,* 337 Mo. 658, 85 S. W. (2d) 621; *Minot v. Winthrop,* 162 Mass. 113, 38 N. E. 512.

The underlying doctrine on which these authorities largely rest was well expressed by the supreme court of Missouri in the case of *In re Estate of Quirk, supra,* in the following language, viz.:

"The general doctrine seems to be that *prima facie* the law should be held to have reference to persons and things within the territorial jurisdiction of the body enacting it, unless it clearly appears that another and different purpose should be gathered from the act itself. Presumptively the lawmaking power is acting in the interest of persons and things within the state. Presumptively the lawmakers in this case were looking after the interests of Missouri, and not legislating for charities in other states, and especially is this so when they were unloosing our own purse strings by this exemption clause. It means, if given the construction urged by the respondent, that a Missouri lawmaking body was releasing its hold upon a source of revenue for charities outside of the state. To give it that construction, would in effect be to say that the lawmaking body was taking Missouri money to support foreign charities."

It is the view of a majority of the adjudicated cases that the reason or basis for conferring exemption from taxation on educational corporations by legislative provision is the fact that such institutions render service to the state in consideration of which they are relieved of certain tax burdens. *Davis v. Treasurer & Receiver General,* 208 Mass. 343, 94 N. E. 556; *Carter v. Whitcomb, supra*; *People v. O'Donnell, supra*; *Morgan v. Atchison, T. & S. F. Ry. Co.,*

supra. It is quite obvious that this reason usually assigned as the basis for this legislation is, in Nebraska, wholly inapplicable to foreign corporations, not only because of their nonresidence in the state, but as being incompatible with the clearly announced policy of this state. In principle, the question presented in the instant case is one of first impression. However, the conclusions announced by Good, J., in the case of *In re Estate of Rudge*, 114 Neb. 335, 207 N. W. 520, seem to be applicable and controlling in the present controversy, viz.:

"It is a familiar rule that statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute. *Young Men's Christian Ass'n v. Douglas County*, 60 Neb. 642; *Watson v. Cowles*, 61 Neb. 216; *House of the Good Shepherd v. Board of Equalization*, 113 Neb. 489. The same rule should be applied to a statute exempting certain legacies from an inheritance tax. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statute. A careful examination of the statute under consideration does not disclose that a legacy to a religious or charitable society is exempt from an inheritance tax." See, also, *In re Estate of Wheeler*, 119 Neb. 344, 228 N. W. 861.

True, the amendment of 1931 was adopted subsequent to the announcement of the opinion in the *Rudge* case just quoted from, and instead of a legacy the devise here under consideration is the fee simple title to Nebraska real estate. As to the succession of foreign corporations to title to Nebraska real estate, the regulating statute which unmistakably determines our public policy in relation thereto at the time the claimed rights of the appellant were acquired is to be found in section 76-502, Comp. St. 1929. This section expressly declares, in part, viz.: "Aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other

greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided."

This court has interpreted the entire statute, including the part thereof just quoted, as denying to foreign corporations, whether charitable or educational, the right to succeed to the title of Nebraska real estate by the method here employed, and the title so acquired is apparently subject to escheat to the state of Nebraska. *Gould v. Board of Home Missions,* 102 Neb. 526, 167 N. W. 776; *Stork v. Evangelical Lutheran Synod,* 129 Neb. 311, 261 N. W. 552; *Lord v. Shultz,* 115 Neb. 33, 211 N. W. 210.

Certainly, under these circumstances, Yale University, a foreign corporation, cannot assume the rights of exemption from inheritance taxes assessed as a favorite of our revenue laws. It cannot claim an exemption on property which it has actually taken and actually holds, but as to which the public policy of the state denies it the power to take or possess. True, the state alone may question the claim of title thus made (*Lord v. Schultz, supra*), but can the failure of the appropriate officers of the state to enforce its laws and public policy operate to vest the foreign corporation with even greater powers than were possible under the declared policy of the legislative enactment as applied to the actual transaction in suit? It would seem that a claim of tax exemption must be founded upon or arise out of a valid transaction. We do not decide the question thus presented. We determine only the issues actually presented by the pleadings and argued by the parties.

On this basis, we find that the tax exemption claimed is one to which appellant, as a nonresident corporation, is not entitled.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

CARTER, J., dissenting in part.

I agree that a foreign corporation is not entitled to exemption from the payment of inheritance taxes, even though

it is an educational institution. This is the only issue in the case. The escheat statute, discussed in the majority opinion, was not raised by the pleadings, and consequently has no proper place in the opinion. Assuming, however, that this question was raised and the escheat statute properly interpreted in the majority opinion, then this court ought to hold that an assessment of an inheritance tax could not properly be made on property which has escheated to the state. This would necessarily result in the reversal of the case. The effect of the majority opinion as written is to prejudge a possible issue between parties who are not before us in this litigation.

It appears to me that this court should limit its decisions to issues properly before it, and carefully refrain from deciding feigned issues not raised by the pleadings or evidence. To do otherwise merely adds to the body of dicta and unauthoritative statements which already grace our reports.

H. B. LINCH, APPELLEE, V. HARTFORD FIRE INSURANCE COMPANY, APPELLANT.
292 N. W. 27

FILED MAY 10, 1940. No. 30783.

1. **Insurance.** Hail insurance policy construed to be an open policy, recovery thereon to rest upon the actual value of the crops damaged, according to the provisions of the policy.
2. **Damages.** An instruction on measure of damages, which confused the jury as to what amount of damages they would be allowed to return, *held* erroneous.

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

Beatty, Maupin, Murphy & Davis and *Myers & Snerly*, for appellant.

Frank M. Johnson and *R. L. Smith, contra.*

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

PAINE, J.

Plaintiff recovered a judgment for $989.53 for damages by hail on July 30, 1937, to 170 acres of spring wheat in Deuel county, Nebraska. Motion for new trial being overruled, defendant appealed.

The amended petition alleged that plaintiff owned the north half of section 31-13-43, Deuel county, Nebraska, and that the defendant company was authorized to do a hail insurance business in Nebraska; that plaintiff applied to the agent in Big Springs, and was issued a policy of insurance at $6 an acre, or a total sum of $1,020. Plaintiff alleged that his spring wheat was totally destroyed by hail on July 30, 1937, said crop having then a value of more than $6 an acre over and above the cost of harvesting, storing, and marketing; that the defendant refused to pay for the loss, and plaintiff prayed judgment for the full sum of $1,020.

The defendant admitted issuing the policy, and denied that the plaintiff paid the premium of $102, but alleged that he gave only a promissory note. Defendant further denied that the wheat was totally destroyed by hail, although admitting that a hailstorm occurred on July 30, 1937, but alleges that the wheat at the time of the hailstorm had no value over and above the actual cost of harvesting, storing, and marketing the same; admits that defendant has not made any payment.

In the answer the defendant also sets out paragraph 14 of the policy, which provides that the company shall not be liable for loss unless such loss equals 5 per cent. or more of the crop so damaged, nor shall be responsible for any loss to said crop from any other cause or causes which may have injured the crop, and if the crop has been injured or damaged from any other cause, so as to preclude a profit over and above the actual cost, there shall be no recovery under the hail insurance policy.

Defendant further alleges that the crop of wheat was damaged by drouth and hot winds prior to the hailstorm to such an extent as to preclude any recovery under this policy, and that its value at the time of the hailstorm was

not equal to, or in excess of, the cost of harvesting, storing, and marketing the same, for which reason the defendant is not liable to the plaintiff in any sum whatever; and further alleges that any such part of the wheat crop which had not been destroyed by drouth and hot winds had matured prior to the date of the hail, and if plaintiff suffered any loss to that portion of the crop it was suffered by the plaintiff by reason of his failure to cut and harvest the crop prior to the date of the hailstorm.

Defendant says that plaintiff's promissory note of $102, given in payment of the policy for hail insurance, was due and payable on August 15, 1937, and that no part of the note has ever been paid; that on November 22, 1937, defendant tendered to the plaintiff said note and chattel mortgage securing the same upon the 170 acres of wheat, and the plaintiff refused to accept the same from the defendant, but, should the plaintiff recover damages, defendant is entitled to an offset in the sum of $102, with interest at 9 per cent. from August 15, 1937, upon said promissory note.

Plaintiff in his testimony admitted that there were two days of hot winds in the latter part of June, which damaged the prospects to some extent for a wheat crop, but even after the hot winds, and the damage by some two weeks of dry weather, the wheat would still have made ten bushels per acre. On cross-examination plaintiff admitted that the drouth and hot winds did cut down the crop of wheat about 50 per cent.

Plaintiff called as a witness the agent of the company who had written plaintiff's insurance, P. C. Redfern, also A. J. Lane, the adjuster for the insurance company, who lived in Chicago, and rested his case in chief on the evidence of the three witnesses. The defendant thereupon moved the court to instruct the jury to return a verdict in its favor, but said motion was overruled.

The defendant called as witnesses Guy Pidgeon, a farmer, whose property is about three-fourths of a mile from the plaintiff's; Lee Pidgeon, a farmer, whose property is half a mile north of plaintiff's; John Wilson, a farmer, whose

property is located one mile north of plaintiff's property; Otto Brooks, a farmer, who owns two quarters of land north of Chappell, and who was out on the plaintiff's wheat in 1937; Phelix Grant, a farmer, who represents the Farmers Mutual Insurance Company of Nebraska, and who was over the Linch land; Ray W. Harr, who is an independent adjuster, residing at McCook; Herman Johnson, who farmed the land directly west of the plaintiff's land, and had 64 acres planted to wheat. Other farmers who testified for the defendant were Lorenz Ebke, Erick Lief, who farmed about a mile north of plaintiff's land, and August Anderson, a farmer living directly across the road to the north of plaintiff's land.

It would require too long an opinion to outline the testimony given by each of the farmers who testified for the insurance company, but the general effect of their testimony was that the plaintiff's wheat crop had been severely injured by the hot winds, and would not have produced more than a bushel or two per acre if the hail had not struck it. It appeared that the best crop of wheat within two miles of plaintiff's farm produced only five bushels per acre, and the effect of this testimony was that the hot winds and drouth had so seriously affected the plaintiff's wheat crop and shriveled it that it was practically worthless before the hail struck it, to say nothing of the cost of harvesting the same, or cutting it for hay.

The plaintiff on cross-examination brought out that one of the witnesses' wheat crop had been winter-killed, while several admitted they had not carefully examined plaintiff's crop; that the yield was spotted that year, and every field would have to be judged on its own merits. Generally, the testimony of these farmers was considerably modified by their cross-examination, as well as by the rebuttal evidence.

After considering this evidence of the neighbors and wheat growers in that vicinity, eleven members of the jury returned a verdict for $1,045, which was more than the plaintiff had sued for in his petition, which excess was properly remitted by plaintiff.

The defendant insists that the plaintiff claims that the valued policy law applies to this hail insurance policy. As we understand, the plaintiff makes no such claim. He recognizes that the valued policy law of Nebraska, as found in section 44-344, Comp. St. 1929, applies only to real property, and when it is totally destroyed by fire, lightning, or tornado, the amount of the insurance written shall be taken as the amount of the loss.

However, the plaintiff does claim that the same rule does apply to this hail loss, and to support his theory he cites us to 29 C. J. 208, which says: "Where the policy fixes the value of the grain crop per acre, and provides for payment of the loss on the basis thereof, insured may recover on that basis regardless of the actual value of the grain destroyed."

In addition to this authority, plaintiff relies upon three Texas decisions: *St. Paul Fire & Marine Ins. Co. v. Pipkin*, 207 S. W. (Tex. Civ. App.) 360; *Fidelity Union Fire Ins. Co. v. Mitchell*, 249 S. W. (Tex. Civ. App.) 536; *Fidelity Union Fire Ins. Co. v. Hicks*, 250 S. W. (Tex. Civ. App.) 1084; and the above text in Corpus Juris gives the first of these three cases as the authority for its statement, the holding being as follows: "The parties to an insurance contract may agree upon the value of the property insured and the specific amount to be paid for its loss or damage, and, in the absence of fraud, such agreed valuations are conclusive." *St. Paul Fire & Marine Ins. Co. v. Pipkin, supra.*

In the case at bar, section 14 of the policy provided in part: "This company shall not be liable for loss or damage by hail to any crop herein described or any part thereof unless such loss or damage equals five per cent. (5%) or more of the particular crop so damaged, at date of loss; nor, except for such portion as is traceable directly to hail, for any loss or damage to any crop herein described or any part thereof, from any other cause or causes combined with hail, nor for any loss or damage by hail to any crop herein described, or any part thereof, where such crop has been so injured or damaged from any other cause or causes as to preclude a profit over and above the actual cost of harvest-

ing, storing and marketing said crop; nor for any loss or damage by hail resulting from the neglect or failure of the insured to cut, dig, pick, pull or otherwise harvest matured crops."

Paragraph 21 of the policy reads: "In the event that any crop herein described is damaged or destroyed by hail, the amount payable hereunder shall in no event exceed the same percentage of the amount of insurance applying to the particular crop so damaged or destroyed at the date of loss, as the *ascertained percentage* of *loss or damage by hail only bears to the whole of the particular crop* or crops so damaged or destroyed at the date of the loss; nor in any event exceed the actual loss or damage sustained by hail only, nor exceed the amount of insurance applying to the particular crop so damaged or destroyed."

The same contention as to the valued policy rule was made in the case of *Hemmer-Miller Development Co. v. Hudson Ins. Co.*, 59 S. Dak. 129, 238 N. W. 342. In a unanimous opinion, the court discussed the same three Texas cases cited hereinabove, and said there was express provision in the policies in each of the three Texas cases that, in the event of total destruction of crops, "the amount insured per acre would be paid by the insurer, and in the event of partial damage the insurer would pay the same percentage of the amount insured per acre as the crop destroyed bears to the whole crop. The provisions for proof of loss in those policies required proof, not of the actual value of the crops destroyed, but of the 'percentage of damage.'" The South Dakota court held: "Hail insurance policy, indicating parties did not intend fixed valuation of crops insured, construed to be open, and not valued, policy, preventing recovery thereon without proving actual value of crops damaged."

From the quotations from the policy, and an examination of the entire policy, and such decisions as we have found, we have reached the conclusion that the parties in this case did not, by the application, or the terms of the policy, fix the value of the wheat insured against hail in this case, but the

value would be reached by following the plan outlined by the policy.

Another error relied upon by the defendant for reversal of the case states that the court failed to give any instruction to the jury as to the measure of damages applicable in the case at bar. This was a difficult case in which to arrive at the damages suffered solely as the result of the hailstorm, due to the fact of the hot winds and drouth affecting the wheat before the hailstorm struck.

It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which they should take into consideration in arriving at their verdict, otherwise the jury may be confused and misled.

It is possible that the trial judge failed to give an instruction upon the measure of damages on the theory that, if there was a loss by hail, the policy provided for the payment of a full loss of $6 an acre under the terms of the policy. However, the defendant submitted a proper instruction, being defendant's No. 7, which was refused by the court, and read as follows: "You are instructed that the measure of damages for the loss or destruction of a growing wheat crop is the value thereof in the condition in which it exists at the time of its destruction, and where the crop has matured the value is ascertained by computing the market value thereof, less the necessary costs of harvesting, threshing and transporting such crop to market."

This instruction states the elements of loss to be considered, and is supported by *Pulliam v. Miller*, 108 Neb. 442, 187 N. W. 925, and *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, 116 N. W. 859.

As we gather from the twelve pages of instructions given the jury, the pleadings were practically copied in full, and the only assistance given the jury in finding the damages was by quoting and running together a number of sections from the policy. It may be possible for one trained in law to ascertain the method of finding the loss from these pro-

visions cited from the policy, but such an instruction does not well meet the needs of a jury in the difficult task of finding and returning the fair amount of plaintiff's loss, if any, by their verdict.

To sustain the contention that the jury were confused about the measure of damages, affidavits of the foreman and the one juror who refused to sign the verdict were introduced at the hearing on the motion for new trial, and attached to the bill of exceptions as exhibits.

Affidavits of jurors as to their deliberations are incompetent for the purpose of impeaching the verdict. *Trimble v. State,* 118 Neb. 267, 224 N. W. 274; *Bonacci v. Cerra,* 134 Neb. 588, 279 N. W. 314; *Johnson v. Parrotte,* 34 Neb. 26, 51 N. W. 290; *Palmer v. Parmele,* 104 Neb. 30, 175 N. W. 649.

Copying pleadings was disapproved in *First Nat. Bank v. Davis,* 123 Neb. 304, 242 N. W. 655, and in *Merritt v. Ash Grove Lime & Portland Cement Co.,* 136 Neb. 52, 285 N. W. 97, the subject was treated at some length.

In the case at bar, the instructions were not to be commended, and the failure to give a clear-cut, definite instruction on the measure of damages was prejudicial error, and left the jury very much confused.

Twenty-three errors were relied upon for reversal, but, as the case must be retried, many of these alleged errors will doubtless not occur again.

REVERSED.

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

292 N. W. 59

FILED MAY 10, 1940. No. 30741.

1. **Workmen's Compensation.** The liability of a governmental agency of the state, under section 48-116, Comp. St. 1929, where it fails to require a contractor to carry compensation insurance,

as declared in *Standish v. Larsen-Merryweather Co.*, 124 Neb. 197, 245 N. W. 606, reexamined and reaffirmed.

2. ———. Where an injured workman has duly made claim for compensation against his employer, he is not required to make a separate claim against a third party to fix the latter's liability, under section 48-116, Comp. St. 1929, for failing to require such contractor to carry compensation insurance.

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

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

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

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

JOHNSEN, J.

This appeal presents two questions: (1) Is a municipal corporation liable for compensation under section 48-116, Comp. St. 1929, to an employee of a contractor, where it has not required the contractor to carry compensation insurance? (2) If so, is the employee's right to compensation barred, unless he makes a claim against the municipal corporation within six months after the injury, where he has duly made claim against the contractor?

The controversy is between an employee of Associated Asphalt Contractors, Inc., and the village of Ansley. The village made a contract with plaintiff's employer to do some paving work, but failed to require it to carry compensation insurance. Plaintiff lost the sight of his right eye while he was engaged in the paving work. The accident occurred on June 16, 1937. He duly made claim for compensation against his employer, and, on November 3, 1937, instituted proceedings under the workmen's compensation law. On January 24, 1938, presumably upon discovering that his employer was without compensation insurance, he filed another petition joining the village and its compensation insurance carrier with the contractor as defendants. The com-

pensation court, first on a trial before an individual judge, and again on a rehearing before the full court, made an award in plaintiff's favor. On an appeal to the district court, in the nature of an error proceeding, the award was affirmed, and the village and its insurance carrier have appealed.

The liability of a state governmental agency under section 48-116, Comp. St. 1929, where it fails to require a contractor to carry compensation insurance, has already been declared in *Standish v. Larsen-Merryweather Co.*, 124 Neb. 197, 245 N. W. 606. We are asked to reexamine that decision. It is pointed out that, while section 48-114, Comp. St. 1929, makes the general provisions of the compensation law applicable to "the state and every governmental agency created by it," as well as "every person, firm or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession," section 48-116 merely uses the language "any person, firm or corporation." It is argued that the state and its governmental agencies are therefore not intended to be included in the liability created by this section.

In *State v. Boone County*, 78 Neb. 271, 110 N. W. 629, it was said: "The sovereign power is not bound by general words in a statute, but only when included expressly or by necessary implication." The legislature has expressly declared, in section 48-114, that the state and its governmental agencies "shall constitute 'employers' subject to the provisions of this article." The term "article" has reference to the whole workmen's compensation law. Sections 48-114 and 48-116 have been parts of the compensation law from the time it was enacted. We would hesitate in this situation to allow the loose language of one section to curtail or defeat, by technical construction, the general intent which the legislature has declared as to the entire statute. In all questions under the workmen's compensation law, it is our duty to avoid rules of technical construction as much as possible, and to determine the intention of the legislature from the language of the act as a whole, rather than from

the loose words or phrases of isolated paragraphs. We are accordingly satisfied with the correctness of the conclusion in *Standish v. Larsen-Merryweather Co., supra,* that section 48-116 was, by necessary implication, intended to apply to the state and its governmental agencies. It may be added that, if the conclusion in that case were not in accord with legislative intent, the legislature, in the four sessions that have been held since the decision was rendered, would probably have taken occasion to amend the statute.

The second contention made by the village and its insurance carrier is that plaintiff was not entitled to maintain this proceeding against the village, for the reason that no claim for compensation had been made against it, under section 48-133, Comp. St. Supp. 1937, within six months after the injury. The liability of a third party, under section 48-116, Comp. St. 1929, for failing to require a contractor to carry compensation insurance is an imputed one, in the sense that none can exist against him, if none exists against the employer. In this situation, the notice of accident and claim for compensation required as against the employer should operate to fix the imputed liability of the third party. Any other construction would nullify, in part at least, the liability intended to be created by section 48-116, since it would make the statute ineffectual in cases where the employee did not learn within six months of his injury that his employer had failed to carry compensation insurance. Every provision in the compensation law should be made as fully workable as it is soundly possible to do, by reasonable construction. Plaintiff was accordingly not barred from maintaining this proceeding because no claim for compensation had been made directly against the village within six months after his injury.

Plaintiff will be allowed an attorney's fee of $100, for services in this court, under section 48-125, Comp. St. Supp. 1939. No penalty for waiting time will be allowed, since the contentions of the village, with respect to its liability, present a reasonable controversy. *Hiestand v. Ristau,* 135 Neb. 881, 284 N. W. 756.

AFFIRMED.

GEORGE G. DYCK, APPELLEE, V. MABEL C. WILLIAMS SNYGG, APPELLANT.
292 N. W. 119

FILED MAY 17, 1940. No. 30818.

1. **Vendor and Purchaser.** "A purchaser of land, to justify a rescission on account of a misrepresentation, must show in some manner that it was material and misled him to his injury and damage." *Realty Investment Co. v. Shafer*, 91 Neb. 798, 137 N. W. 873.
2. **Fraud.** "Misrepresentation of the value or condition of real estate in order to be remedial must have been made under such circumstances that the injured party had a right to rely thereon." *Musgrove v. Eskilsen*, 127 Neb. 730, 256 N. W. 883.
3. ———. "The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie." *Osborne v. Missouri P. R. Co.*, 71 Neb. 180, 98 N. W. 685.

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

Carl F. Benjamin, for appellant.

Abrahams, McGrath & Frenzer, contra.

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

PAINE, J.

This is an appeal in an equity action by George G. Dyck, plaintiff and appellee, against Mrs. Mabel C. Williams Snygg, defendant and appellant, to rescind a contract for the exchange of properties, and to set aside deeds which had been delivered. Court found for plaintiff Dyck, and that he was induced to convey his property by fraudulent representations made by E. G. Severin, who was agent of, and acting for, Mrs. Snygg. Directed that the contract be set aside and deeds canceled.

Prior to the filing of the petition in this case, Mrs. Snygg had brought an action at law against Mr. Dyck because of his failure to carry out the terms of his contract to furnish her a piece of property free and clear of all encumbrances.

In the answer filed by Dyck in the law action, practically the same allegations were made as in the petition filed by him in the case at bar. The trial judge decided to try the two actions together in the district court, a jury being waived, and Mrs. Snygg finally dismissed the law action for damages, and the decree was entered in the equitable action for rescission.

The petition in the case at bar alleges that on September 9, 1938, a contract was entered into for the exchange of properties, which provided that the plaintiff agreed to purchase the Snygg property, being lots 1 and 2, block 6, Patrick's Second Saratoga Addition to the city of Omaha, located at 5004 North Twenty-second street, said property being subject to a first mortgage not to exceed $2,000, and agreed to pay for the same by conveying to Mrs. Snygg lots 116 and 117, Kenwood Addition to Omaha, also known as 3542 North Thirty-seventh street, and to assume a mortgage of not to exceed $2,000, the rents and interest on the two properties to be adjusted at the time the transaction was closed at the office of E. G. Severin, and plaintiff paid $1 down to bind the bargain. The next day Mrs. Snygg signed a statement at the bottom of the contract, as follows:

"September 10, 1938

"I, or we, hereby accept the above proposition on the terms above stated, and agree to deliver and convey said premises, and perform all the terms and conditions above set forth, and pay the regular commission of 5% on sale price.

"Mabel C. Williams Snygg."

The defendant in her answer and cross-petition admits entering into the contract, and admits that the deed was tendered to her; admits that the plaintiff requested defendant to reconvey to him his property, and denies the other allegations. For a cross-petition defendant alleges that she is an unmarried woman; that following the execution and delivery of deeds the respective grantees entered into possession of the respective properties, and have ever since remained in possession thereof; that the defendant,

after receiving a deed signed only by the plaintiff, demanded a conveyance or release of the inchoate right of inheritance of plaintiff's wife; that plaintiff has failed and refused to obtain a conveyance or release of the right of his wife in said property, and thereby the plaintiff has breached the contract, such inchoate right of inheritance owned by plaintiff's wife being an encumbrance upon the property, and in said contract plaintiff had specifically agreed to convey to the defendant his property free and clear of all encumbrances; that by reason of the aforesaid breach of contract defendant cannot convey a good title to said property, and has been damaged in the sum of $1,250, no part of which has been paid, for which amount she prays judgment in her cross-petition.

The court ordered that the cross-petition of the defendant be dismissed without prejudice, finds that the allegations of plaintiff's petition are true, and that plaintiff was induced to enter into the contract for the exchange of real estate by means of fraud and misrepresentation of the defendant's agent, E. G. Severin, who was at all times the agent of, and acted for and on behalf of, defendant Mrs. Snygg, and that said agent represented to the plaintiff that the premises were in good repair, first-class condition, and made other false representations to plaintiff with reference to the condition of the real estate. The court finds that plaintiff relied upon said misrepresentations at the time he signed the contract, and also at the time he executed and delivered the deeds and completed the contract.

The court further found that the statements made by defendant's agent were untrue; that the house was not in a good state of repair, but had settled; that the floors were not level, that the house was improperly wired for electricity, and that the beams supporting the house were defective.

The court further found that, immediately upon discovering the defective condition, plaintiff informed defendant, and immediately offered to rescind the contract and reconvey defendant's premises to her on the condition that she would reconvey plaintiff's property to him, but defendant

failed and refused to agree to the rescission of the contract and the cancelation of the deeds. It was therefore ordered by the court that each of the deeds be canceled, rescinded, and set aside, and that the title to the premises be quieted in Mabel C. Williams Snygg, subject to encumbrances of record and a foreclosure proceeding now pending with reference to said premises. It was further ordered that plaintiff Dyck repay to the defendant, Snygg, the sum of $69.81, which was the cash paid by the defendant to the plaintiff at the time of the delivery of the deeds as an adjustment of the rentals on both properties.

Motion for new trial being overruled, supersedeas bond in the sum of $500 was furnished, and defendant appeals from the decree of the court.

Plaintiff Dyck testified that he was 53 years of age, and that Marie V. Dyck, who was 55 years old, is his wife; that they reside at 5102 North Twenty-second street, Omaha. He says Severin came to him with a contract already drawn up, stating that the Snygg property was worth $4,500, and that he was to trade in his house and assume a mortgage of $2,000; that the house was in good repair, except the south wall, which would need 100 pounds of cement to repair the stucco.

Mr. Dyck testified that they hurried through the house so as not to disturb the tenants, as he would want them to stay; that the basement was badly lighted, with only one ceiling light, and he took it for granted that it was all right; that he signed up the contract on September 9, 1938; that the next day, Saturday, September 10, Severin called him by telephone, and Dyck told him, "You better call it off. My wife does not want this house, and we cannot go through with the deal."

Mr. Dyck testified that on Monday he went through the house again, as he had before, but took everything for granted, and did not see the defects, and on Tuesday, September 13, Dyck signed up the deed, but his wife never signed.

On September 14 Dyck took Roy Herman over and they

patched the stucco spots, using a whole sack of cement. He then noticed that the floor was "saucer-shaped," that the beams in the basement were all rotted out, with new boards put in front of the beams, that the electrical connections were just temporary extension lines.

Plaintiff Dyck admits that he examined the ceilings to determine if the house had settled, but, because the ceilings and walls had been newly papered, the fact that the house had settled was not apparent to him; that the fact that the floors were slanting and sagged was not noticed by him, due to the way in which the furniture and rugs were placed about the room.

Plaintiff testified that the next morning, after patching the stucco, at 8 o'clock he was waiting for Mrs. Snygg at her place of business when she came to work, and told her what he had discovered, and that he wanted to rescind the contract and give her back her property if she would reconvey his to him, and at the time she said that she too was dissatisfied, but later changed her mind and refused to reconvey.

Mrs. Snygg paid to Severin his entire commission of $275, and the testimony indicates that Severin misrepresented the income of the Dyck house to be $20 a month when as a matter of fact it was but $18 a month.

E. G. Severin, a young man who has his real estate office in his home, and has been in the business since 1934, testified that he sold plaintiff Dyck the little house on North Thirty-seventh street in 1936, and thereafter Dyck asked him to dispose of it, and he offered him several trades, which were not completed. Severin's testimony is that, as soon as he heard that the Snygg house could be traded, he went right up and took Mr. Dyck over to look at it. Dyck examined the house thoroughly, and talked to each of the tenants who were at home, went into the basement, and inspected the basement thoroughly after Mr. Severin got an electric light bulb from one of the tenants. In one room where the floor sloped, Dyck asked Severin to look at it, and said it had settled, and Severin told him, "Well, it is a cinch

that a house this age is not going to settle any more," and Dyck said, "He guessed there was something to that." Severin said, "I knew nothing of the place, and neither did he," except "he knew more about it because he lived close to it for such a length of time." Dyck asked Severin whether he was to make the offer to her, or *vice versa,* and asked if it would help any if he made the offer to her. Severin believed it would, and went home and drew the contract and brought it back, and Dyck signed it on September 9. "Q. Did you make any representations to Mr. Dyck relative to the income of the house? A. I did before we went over there, in this way, I said: 'I have not—I don't know the owner; I have never met her, but the party that told me about it says that she is getting $65 a month, and she is living in one apartment.' Everything that was said was said in the house when Mr. Dyck and I was there. He said, 'If I trade this for my small house, I am going to cut this into smaller apartments.' He said, 'I should get at least $125 if I build in some smaller apartments.' And he gave me his figures; he thought it would cost him $2,000 in order to do what he would do in order to make it into those apartments. My estimate of the thing was that it would cost that much."

Severin testified on cross-examination that a Mr. Lycan, of the Midwest Company, told him that he thought Mrs. Snygg would probably sell her property, and without any authorization of any kind from her he went and brought Dyck down to show him the house, as Dyck had told him on numerous occasions to be on the lookout for something.

The plaintiff argues that, after Mrs. Snygg discovered that Severin had sold her house by fraud and misrepresentation, she took advantage of the fraudulent statements of her agent, and refused to deed back the place. Plaintiff insists that the law of Nebraska is that a purchaser has a right to rely upon statements made to him by an agent of the seller as to the condition of the real estate, where the defects are concealed and hidden so that they cannot be observed by an ordinary inspection, providing the purchaser

offers to rescind as soon as he learns of the defects. Plaintiff also contends that, where misrepresentations are made by an agent who is subsequently employed, the principal thereby adopts the statements of the agent, ratifies them, and is bound by them, citing *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Brucker v. Kairn*, 89 Neb. 274, 131 N. W. 382; *Martin v. Hutton*, 90 Neb. 34, 132 N. W. 727; *Furrer v. Nebraska Bldg. & Investment Co.*, 111 Neb. 423, 196 N. W. 680; *General Credit Corporation v. Moore*, 128 Neb. 881, 260 N. W. 368.

This appeal presents a controlling issue of fact. It is difficult to agree with the findings of the lower court if any weight at all is given to the evidence of the young real estate agent, E. G. Severin. We doubt if his testimony is impeached upon any material point.

Let us examine a few of the conflicts in the evidence. Mr. Dyck swears that Severin brought him the contract filled out, all ready to be signed. Severin's testimony is that, after they had examined the Snygg house, Dyck asked, in effect, whether it would not be better, in closing the deal, to have Dyck sign a contract, making the offer to Mrs. Snygg, and Severin thought that would be best, and went to his office, wrote up the contract, returned, and Dyck signed it. Would it not be most unusual for a real estate agent to go to see a mere prospect and take along a completed contract?

The implication of plaintiff's testimony is that Severin knew and concealed many things about the house in the interest of Mrs. Snygg, but her evidence positively confirms Severin's testimony that he received a tip from a Mr. Lycan that she might be willing to sell the place, and on that mere tip he rushed to see his prospect, Dyck, and the first time he ever met the owner was Friday night, when Mr. Lycan brought him to see her, when he produced for her examination the contract Dyck had already signed to trade places, and which she did not accept until after she had first gone and looked at Dyck's little house, and then Saturday noon she accepted Dyck's written offer.

The petition charges that Severin, as agent, represented

to Dyck that the premises were in good repair, first-class condition, recently reconditioned, and it would not be necessary to spend any money on the premises.

The evidence shows that Severin saw the place that morning for the first time, while Dyck had been living just one block away from it for 18 years. Dyck was 53 years old, and had bought and sold real properties for some years. Portions of the conversations between Dyck and Severin, as Dyck examined the Snygg house from top to bottom, have been set out hereinabove, and it is evident that Dyck was in no manner prevented from making any inspection of the house which he desired to make. Should Dyck not have asked himself why new boards were tacked over a sill in the basement? Is his statement that the arrangement of rugs or furniture concealed the fact that a floor was not level to be accepted? No; it is more plausible that Dyck observed, and mentioned to Severin, the sag in the floor, as set out above.

Exhibit No. 2, written by Dyck on his own letterhead, shows a definite knowledge of rentals, taxes, and interest of the two properties, and reads as follows:

"George G. Dyck, Public Accountant
"5102 North 22nd St., Omaha

"Payments due Mr. Dyck
"15.00 Rent from Mrs. Pope
2.50 " " Russell "
81.92 Taxes due on property 5004 No. 22nd St
15.00 half month payment on Mr. Lougee Loan

114.42 Total

"Payments due Mrs. Mabel Snygg.
"29.61 Taxes on #3543 No. 37th as per statement
15.00 Rent " " " " for rent from Sept 15 to Oct 10

44.61 Total

$69.81 Difference payable to Dyck"

To maintain an action for fraudulent representations, it is not only necessary to establish the telling of the untruth, knowing it to be such, or that it was told without knowledge

of the facts, but also to prove that the plaintiff had a right to rely upon it, and did so rely, and altered his condition because thereof, and suffered damages thereby. *Runge v. Brown,* 23 Neb. 817, 37 N. W. 660; *Stetson v. Riggs,* 37 Neb. 797, 56 N. W. 628; *Upton v. Levy,* 39 Neb. 331, 58 N. W. 95; *Peterson v. Schaberg,* 116 Neb. 346, 217 N. W. 586.

"Actionable fraud may not be predicated on the expression of a mere opinion as to value, honestly made under circumstances that do not give another the right to rely thereon." *Leichner v. First Trust Co.,* 133 Neb. 170, 274 N. W. 475.

Statements about the amount of the rentals could have been checked by Dyck, as he visited each of the tenants in each apartment.

"A purchaser of land, to justify a rescission on account of a misrepresentation, must show in some manner that it was material and misled him to his injury and damage." *Realty Investment Co. v. Shafer,* 91 Neb. 798, 137 N. W. 873.

"Misrepresentation of the value or condition of real estate in order to be remedial must have been made under such circumstances that the injured party had a right to rely thereon." *Musgrove v. Eskilsen,* 127 Neb. 730, 256 N. W. 883.

"The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie." *Osborne v. Missouri P. R. Co.,* 71 Neb. 180, 98 N. W. 685.

In the opinion of the court, the plaintiff has not supported by sufficient evidence the facts which entitle him to a rescission of his contract and deed. The decree of the trial court is clearly against the weight of the evidence, and is contrary thereto. The decree is set aside and the cause remanded.

REVERSED.

MONROE SEINER V. STATE OF NEBRASKA.
292 N. W. 112

FILED MAY 17, 1940. No. 30853.

1. **Criminal Law.** It is a general rule that alleged prejudicial remarks made by the court in the course of a trial must be seasonably objected to in order to save the question for review.
2. **Witnesses.** Cross-examination is a leading and searching inquiry of the witness for further disclosure touching the particular matters detailed by him in his direct examination.
3. ———. Questions calling for evidence tending to show the improbability of or to throw doubt upon statements made in the examination in chief are proper.
4. ———. While a wide latitude should be given in cross-examination, there are limits beyond which the court need not permit counsel to go, such as needless repetitions, or endeavoring to make out his case in chief by cross-examination of opponent's witnesses.
5. **Criminal Law.** No prejudicial error occurred by the trial court refusing to continue the trial of a felony case for two days while the handwriting expert for the state made exhaustive microscopic examinations at his office of the handwriting contained on certain exhibits, which points had already been covered in minute detail, so far as the unaided eye could ascertain.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Donald O. Shurtleff, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

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

PAINE, J.

Plaintiff in error was tried and found guilty of forging and uttering certain bank drafts under section 28-601, Comp. St. 1929. Motion for new trial was overruled, and the court sentenced plaintiff in error to ten years in the penitentiary.

The principal assignments of error are: (1) The court,

in answering a question asked by a juror, stated that exhibits Nos. 1, 2, 3 and 4 (being the questioned bank drafts) were forgeries; (2) the court erred in denying plaintiff in error the right to make a sufficient cross-examination of Lewis E. Harris, the state's handwriting expert; (3) the court erred in overruling the motion for a new trial.

The facts are that during 1937 the plaintiff in error was in the state penitentiary, and his cellmate was Blanchard Beemer, who was a witness for the state in this case. Beemer testified that, while they were cellmates, shortly before he was to be released, he was told by Monroe Seiner to get some blank checks and a signature, and bring them over to Mr. Balis, who would bring them out to the penitentiary, and that Seiner would prepare forged ones, and then Balis would pass them. Beemer testified that he secured a genuine draft of $1.03 from E. W. Biggs & Co., a hide company at Fremont, by having a "floater" sell them a hide; then he broke into the office of E. W. Biggs & Co., stole some blank drafts, and the genuine draft and the blank drafts were delivered to Arthur Balis to be taken out to the penitentiary. The manager of the hide company, George Robinson, testified that the exhibits, Nos. 1, 2, 3, and 4, were all made from the blank drafts from the books of drafts which were stolen from the office, and that they were not signed by him, but he said "it was a good job because it looked like my signatures."

We now come to a consideration of the first error charged in this case, when the trial judge answered the question asked by one of the jurors: "Exhibits 1, 2, 3 and 4 received in evidence, shown to the jury, and the same are made part of this bill of exceptions and found on the pages immediately following. By the Court: (to the jury) You will have a chance, gentlemen, to examine these more at length later. Juror No. 4: These are forgeries we are looking at now? By the Court: As I understand now." Then, after a remark by an attorney, the court added: "They are described and charged upon in separate counts of the information."

The plaintiff in error contended, by his plea of not guilty,

that he had not signed the drafts in evidence. George Robinson, manager of the Fremont branch of E. W. Biggs & Co., of Kansas City, who was on the witness-stand at the time these exhibits were introduced, had testified that he did not sign them.

It cannot be denied that it is improper for a trial court to express to a jury its opinion regarding one of the facts in issue. *Goldman v. State,* 128 Neb. 684, 260 N. W. 373. This is because jurors are usually alert to discover the attitude of the court respecting the merits of the case, and this is particularly true in criminal cases. *Bowman v. State,* 19 Neb. 523, 28 N. W. 1; *Kraus v. State,* 102 Neb. 690, 169 N. W. 3.

The two statements of Judge Shepherd, taken together, indicated to the jury that they were looking at the drafts described in, and claimed to be forged in, the information. The statement made by the court on the spur of the moment, in response to the inquiry of a juror, is strenuously objected to as an improper statement for the court to have made.

If the statement is erroneous, the attorney for plaintiff in error should have taken advantage of it by at once entering a proper objection, but the record is entirely silent, no objection having been made, at the time when it should have been made, to establish the contention, neither was any mention of it made in the motion for a new trial, and the first time that objection is made to these statements of Judge Shepherd is to be found in the petition in error.

It is due to the lower court that its errors, if any, be promptly pointed out, so that it may immediately retrace its steps while the record is yet under its control and the jury are present. *Horbach v. Miller,* 4 Neb. 31. It is our conclusion that, if counsel did not object to the remark of the court at the time it was made, it is too late to complain about it now in this court.

The present attorney for plaintiff in error now says that Attorney Charles Ledwith, the attorney for plaintiff in error during the trial, just could not object at the time, for it would have deeply offended the juror who asked the ques-

tion. A sufficient answer to that is that he could have quietly dictated an objection into the record, out of the hearing of the jury, and preserved all his rights in the matter.

The judge should, during the course of a trial, refrain from remarks that are calculated in any way to influence the jury. If material remarks are made by the court, they may under some conditions be prejudicial. Some states have statutes under which it is error for the trial court to express an opinion as to a fact in issue, which a judge is allowed to do in a federal court.

"It is the general rule that prejudicial remarks in the course of a trial made by the court must be seasonably objected to and an exception noted in order to save the question for review." 26 R. C. L. 1030, sec. 31. See, also, *Pelton v. Spider Lake Sawmill & Lumber Co.*, 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963, Ann.; *State v. Tully*, 31 Mont. 365, 78 Pac. 760, 3 Ann. Cas. 824.

We doubt if the language used by the experienced trial judge was understood by the jury to be more than an identification of the exhibits with those described in the information. In any event, timely objection was not made.

Let us now examine the second objection urged for a reversal, which is, that the court erred in denying the counsel for plaintiff in error the right to make a sufficient cross-examination of Lewis E. Harris. Upon examination by Mr. Farley Young, Harris stated that he was a chemist and scientific criminologist, including six years' study as a handwriting expert. He gave one answer, six pages long, describing the handwriting on the exhibits Nos. 1, 2, 3 and 4, alleged to be forged. His entire direct examination is found in 12 pages, while Mr. Ledwith's cross-examination occupies 57 pages, the entire bill of exceptions being but 198 pages in length. Upon this record, it is charged in the motion for new trial that the court erred in denying the right to make a sufficient cross-examination of Lewis E. Harris.

The term "cross-examination" does not strictly import anything more than a leading and searching inquiry of the witness for further disclosure touching the particular mat-

ters detailed by him in his examination into other facts touching the merit of the cause.

The importance of the right of full cross-examination can scarcely be overestimated, and this court has said: "When testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right." *Larson v. Hafer,* 105 Neb. 257, 179 N. W. 1013.

"But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination." Wellman, Art of Cross-Examination, 1.

"Questions calling for evidence tending to show the improbability of, or to throw doubt upon, statements made in the examination in chief are proper upon cross-examination, especially where such statements were in the nature of expert opinions." *Schrandt v. Young,* 62 Neb. 254, 86 N. W. 1085.

But, while the widest latitude compatible with the law of evidence is allowable upon cross-examination, the court may still impose reasonable restrictions.

A wide latitude is to be extended to defendant's counsel in cross-examination, but there is a limit beyond which court will not permit counsel to go. *State v. Pippi,* 59 Mont. 116, 195 Pac. 556.

Under pretense of cross-examination of a witness, one party to an action cannot make out his case by witnesses for the other side, by bringing out evidence not brought out on direct examination. *State v. Smith,* 57 Mont. 349, 188 Pac. 644; *Vonault v. O'Rourke,* 97 Mont. 92, 33 Pac. (2d) 535; *Roy v. Clark,* 215 Pac. (Mont.) 232; *State v. McConville,* 64 Mont. 302, 209 Pac. 987.

Cross-examination should be in conformity with well-recognized rules of evidence, have a reasonable limit as to nature of inquiry, and tend to throw light upon witness'

attitude upon the subject under investigation. Therefore, it is a general rule, with some qualifications, that a witness, other than a party, may only be cross-examined on matters and facts upon which he has been examined in chief, and upon such matters as are likely to affect his credibility, test his memory or knowledge, show his relations to parties or cause, his bias, or the like. *Panitz v. Webb,* 149 Md. 75, 130 Atl. 913; *State v. Stegner,* 276 Mo. 427, 207 S. W. 826; *Sturm v. Sturm,* 111 N. J. Eq. 579, 163 Atl. 5.

In the light of these rules, let us briefly review the situation in the case at bar.

The direct examination of Harris had taken 12 pages; Mr. Ledwith first cross-examined him as to definite letters and points for some 24 pages, and then asked the expert to make comparisons between the writing on the questioned drafts and other exhibits, including one written in the court-room by George Robinson, manager of the Fremont branch. Mr. Harris said it would take him two days in his office, with instruments of various kinds, to make the desired comparisons.

Thereupon, Judge Shepherd said he could be excused for half a day to make the examination. Mr. Young: "I think he can get something done in a half day. By the Court: Stand down for the present, then. Exception." By the witness: "Yes, sir; and it will take two days time. I never give an opinion in less period than that. By the Court: No use doing— (interrupted). Mr. Ledwith: No use doing that. * * * By the Court: Let's have the question you want answered. Exception." Thereupon Mr. Ledwith continued his cross-examination of the witness, securing his offhand opinion on individual points, like the "o" in "Geo." and the initial "T" and both small "j" and capital "J," and continued to cross-examine this expert for 15 pages more as to certain letters, and, as Mr. Ledwith stated, he had exhausted all of the possibilities of comparison with the naked eye.

The witness was then excused at 10:30 a. m., and another expert witness was called, and at 2:00 p. m. the handwrit-

ing expert, Lewis E. Harris, was recalled to the stand for further cross-examination by Mr. Ledwith, and stated that he had taken exhibits Nos. 1, 2, 3, 4, 14 and 18 and had examined the terminal letter "d" in the six exhibits, telling the power of the microscope, and being cross-examined for 13 pages more, there being no further demand at the close of the evidence by Mr. Ledwith for any further study, and immediately upon Mr. Ledwith telling the witness, "That is all," the state rested, and the defense thereupon rested, calling no witnesses, and the arguments were made to the jury.

From this minute examination of the record made on cross-examination, we have reached the conclusion that a very wide latitude was allowed by the court, that further cross-examination would have unduly taken up the time of the court and jury, and have been largely repetition of matters already covered several times.

In such cases the extent of the cross-examination is committed to the sound discretion of the trial judge, who in the case at bar allowed the expert to be excused for nearly half a day to go to his office to make examinations of a very few words and letters appearing on the six small exhibits.

We have reached the conclusion that the trial judge did not err, and that any further delay of the trial would not have been warranted under the circumstances of this case.

AFFIRMED.

ETHEL F. LEIDIGH, APPELLANT, V. CITY OF NEBRASKA CITY ET AL., APPELLEES.

292 N. W. 115

FILED MAY 17, 1940. No. 30814.

1. **Municipal Corporations.** A conveyance of real estate to a city for park purposes for the benefit of the public, without charge, constitutes a governmental or legislative function.
2. ———. A mayor and commissioners of a city, having more than 5,000 and less than 25,000 inhabitants, are not empowered to pledge the credit of the city beyond their respective terms of office by purchasing real estate for park purposes and accepting

a deed of conveyance, containing provision for instalment payments to be made beyond their respective terms, and, in addition thereto, containing a provision that, in the event of failure to pay the instalments, a forfeiture may be declared and title revert to the grantors or their successors.

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

Thomas E. Dunbar, Lloyd E. Peterson and *O. G. Leidigh,* for appellant.

Varro E. Tyler, contra.

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

MESSMORE, J.

This is a suit in equity to enjoin the city of Nebraska City, having more than 5,000 and less than 25,000 inhabitants, and its mayor and commissioners from making or ordering any payment from the funds of the city for the purchase of certain real estate and for cancelation of a deed to the city, obligating the city to make certain payments aggregating $7,500. The deed expressly stated that no bond, note, promise to pay, or evidence of indebtedness was given or received for said consideration, but the same would be discharged and satisfied by payment to the grantors, or their successors in interest, $500 on January 15, 1939, $500 on July 15, 1939, and $1,000 on July 15 of each year thereafter until a total sum of $7,500 was paid, without interest. The deed further provided that, upon the default of any instalment for six months, title to said real estate should, at grantors' option, revert to grantors, or their successors in interest. There was no other contract or agreement between the grantors and the city than the conditions stated in the deed. The real estate in question consists of 24 acres of land adjoining the driving park in the city. The trial court decreed and adjudged valid the purchase of the real estate as made. From this judgment, plaintiff appeals.

Plaintiff, hereinafter called appellant, alleged in her

amended petition, in substance, that the mayor and city commissioners of the city have pledged, and are attempting by the purchase to pledge, the credit of the city beyond the term of office of said mayor and city commissioners, and that their action in such respect is unlawful and *ultra vires*. Defendants' answer denied such allegations. The court's finding is in substance as follows: That the purchase of said real estate for park purposes is a business or proprietary function of the city, as distinguished from a legislative or governmental function, and the city council has lawful right and authority, from year to year, to make the necessary amounts available in said fund in future years for the payments of said consideration, required by the conditions of the deed to be paid within the time limits specified therein; that the acceptance of the deed by and on behalf of the city was lawful and that the defendants have lawful right and authority to pay the instalments as set forth therein from funds now available, and hereafter to be made available, from the park fund of the city.

Appellant contends that the city is without power or authority to pledge its credit beyond the terms of office of its mayor and commissioners.

Appellees support the purchase on the theory that the acquisition of real estate for park purposes is a business function and not a governmental or legislative function, and cite 1 Elliott, Contracts, p. 883, sec. 603, also cited by appellant, as follows:

"The power of a municipal board to appoint or attempt to appoint officers or to make contracts extending beyond its own term is a question that frequently arises. The power of a board to do this may be either express or implied. It is well settled that the legislature may authorize municipal boards to enter into contracts which will extend beyond their own official term. Whether such board has the implied power so to do depends largely upon the nature of the contract. The distinction has been thus expressed: 'A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign,

the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their offices because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances.' (Citing *Omaha Water Co. v. City of Omaha,* 147 Fed. 1, 77 C. C. A. 267.)"

"In its capacity as a governmental agency the city is charged with the duty of determining the necessity and the extent and general character of all public improvements, including streets, sewers, public buildings, lighting works, waterworks, and other public works, and of providing for their construction and maintenance; and on its proprietary side it lets contracts for the erection and construction of all public works and carries on many activities of a kind which in a general way resemble those of a private corporation, although everything inures to the benefit of the people. This distinction as to the different capacities in which municipal corporations act is important and is so well grounded as to be a part of the law of the land. *Oliver v. Worcester,* 102 Mass. 489; 1 Dillon, Mun. Corp. (5th ed.) sec. 110; *Covington v. Kentucky,* 173 U. S. 231, 19 Sup. Ct. 383; *State ex. rel. McCurdy v. Tappan,* 29 Wis. 664." *City of Milwaukee v. Raulf,* 164 Wis. 172, 159 N. W. 819.

"The question whether a system of public parks is owned and operated by a municipality in its proprietary or in its governmental capacity is one upon which the authorities are not in agreement. On one side it is said that the use of the park is in kind analogous to those confessedly public. It closely resembles roads and bridges. * * * The enjoyment

of a public park can hardly be restricted to residents of a particular city or town. It cannot be made a source of revenue as may a system of waterworks or sewerage, or gas, electric light, or markets. * * * Historically, the advantages derived from parks never have been treated as proper subjects for private enterprise as have the other functions which, when assumed by the city or town, have been regarded as private. On the contrary, parks, in the proper sense to which the public are regularly admitted, have been inseparably connected with a public agency. The dominant aim in the establishment of public parks appears to be the common good of mankind, rather than the special gain or private benefit of a particular city or town." 19 R. C. L. 763, sec. 68.

There is no doubt that in the instant case the city, by its mayor and commissioners, made the purchase of the real estate for the establishment of a park, or an addition to a park already established, without revenue to be collected from persons using the park. We do not believe that it is contemplated by the authorities that every purchase of real estate by a city is a business or proprietary function. Whether the mayor and city commissioners have the implied power to enter into a contract, such as the one at issue in this case, depends upon the nature of the contract. As heretofore stated, there are distinctions which have been expressed as being two powers; the one, legislative or governmental power, being in the control of its people; the other, proprietary or business power, the latter being the power by which it acts and contracts for the private advantage of its inhabitants. In the case of strictly governmental powers, the city officers or commissioners are trustees, and they may make no grant or contract which will bind the municipality beyond the terms of their office. See *Omaha Water Co. v. City of Omaha, supra.* This was held because they shall not unlawfully circumscribe the legislative powers of their successors. In their exercise, the city is ruling its people and is bound to transmit its powers of government to its successive officers unimpaired. The estab-

lishment and maintenance of public parks have been held by majority rule to constitute an exercise of a governmental or legislative power, as distinguished from the business of a city for private benefit and gain to the city and its citizens. See *Caughlan v. City of Omaha*, 103 Neb. 726, 174 N. W. 220; *Toft v. City of Lincoln*, 125 Neb. 498, 250 N. W. 748.

The agreement in the instant case, expressed by its terms, is an outright obligation on the part of the city to pay the amounts at the various times therein stated. Paragraph 5 of the deed does contain a forfeiture which may be declared upon the breach. The deed, when analyzed, is one providing, first, for conveyance; second, terms of payment; third, security for the payment of the several instalments therein provided. The fact that no bond, note or other evidence of indebtedness is given and received would not relieve the city of its obligation to pay. In the event of default of the agreement, the grantors would have at least two remedies against the city: Enforcement by specific performance, or to declare a forfeiture and recover back the title. Either one of the remedies would be determined by a different administration than the one now serving, depending upon whether or not the city made the payments, as provided by the deed, and, upon its failure to do so, the right of the grantors to exercise the option to declare a forfeiture. This constitutes, without question, a pledge of the credit of the city beyond the respective terms of the mayor and commissioners now in office, and, a governmental or legislative function being here involved, the law expressly denies the mayor and city commissioners such power and authority.

Other assignments of error are stressed, but need not be here discussed.

We conclude the trial court erred. Its judgment is hereby reversed, with directions to cancel and vacate the deed in question.

REVERSED.

CARTER, J., concurs in the result.

JOHNSEN, J., dissenting.

The deed to the city recites that the conveyance is made

for a consideration of $7,500, "for which no bond, note, promise to pay or evidence of indebtedness is given or received, but which will be * * * satisfied" by the making of certain specified payments on the part of the city, and that, if any of such payments is not made, the grantor may declare a forfeiture. The majority opinion declares that this is an attempt to create an outright or absolute obligation on the part of the city that would bind future administrations and that would be enforceable by specific performance.

It seems to me that this construction ignores the plain language of the deed. The instrument provides in express terms that the city has made no promise to pay. There is no obligation to which a future council or commission is committed. There is nothing that can be enforced against the city by specific performance. The deed simply reserves a lien upon the property until the grantor shall have received the sum of $7,500. There is no attempt to obligate any one to make the payments upon which the grantor has conditioned the discharge of his lien. Each council or commission is left free to decide whether it desires to pay the sum provided in the deed for any particular year. If any council or commission decides that it is unprofitable or inadvisable to continue the payments, it is free to discontinue them at any time. The practical effect of each annual payment made is simply to continue the city's right to occupy and use the property for that year.

I have no quarrel with the rules announced in the majority opinion that the acquisition of a public park by a city is a governmental and not a proprietary function, and that, in the exercise of a city's governmental functions, no council or commission, except where statutory or charter authority exists, can create an obligation binding upon future administrations. These rules, however, do not control the present case, because, as I have indicated, no obligation of any character was created against future councils or commissions. Obviously, the transaction by which the city took title to the property was expressly shaped to escape the rule upon which the majority opinion relies. I think it legiti-

mately does escape that rule. The court may not like the method by which the council or commission handled the transaction, but it is not the court's job to administer the affairs of the city. Nor does the court have the right to say that the city ought not to pay a sum as large as the annual payments provided for in the deed, for the mere use of the property, until the last payment has been made, since that, again, is solely for the council or commission to decide.

The council or commission could, in my opinion, legitimately make a contract that gave each future council or commission the option to pay a certain sum annually for the occupancy and use of park property. The fact that the agreement also contained a provision that, after a certain number of payments had been made, title to the property would be vested unconditionally in the city would not change the legal effect of the situation. No actual obligation would exist against any future council or commission, and any payment made, until the last one provided for had been discharged, would, as I have previously indicated, operate in practical effect to continue or extend the city's right to occupy and use the premises for a particular year. Since it was within the power of the city council to enter into such a contract, the court would have no right to concern itself about its wisdom or desirability.

LEONARD HILTON, APPELLANT, V. GUY L. CLEMENTS, EXECUTOR, CROSS-APPELLEE: WILLIAM H. BERGER ET AL., APPELLEES.

291 N. W. 483

FILED MAY 24, 1940. No. 30648.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. Opinion on motion for rehearing of case reported in 137 Neb. 791. *Former opinion modified.*

Harry Grimminger and *Lloyd E. Peterson,* for appellant.

H. G. Wellensiek and *W. A. Robertson, contra.*

Guy L. Clements, pro se.

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

PER CURIAM.

The defendant Guy L. Clements has filed a motion for a rehearing in this case. The opinion heretofore filed herein on March 29, 1940 (137 Neb. 791, 291 N. W. 483) is modified so that the last sentence thereof shall read as follows:

"In addition thereto, equity and good conscience require that the executor account to the district court for such distributive share of William H. Berger, and, upon failure to do so, judgment shall be rendered in favor of the plaintiff and against the executor personally for an amount equal to the amount due on plaintiff's judgment including accrued interest and costs, but in no event in an amount in excess of the distributive share of William H. Berger in the estate of George L. Berger, deceased."

As so modified, the opinion is affirmed and the motion for a rehearing

DENIED.

MILES S. KLEMENT, APPELLEE, V. H. P. LAU COMPANY ET AL., APPELLANTS.
292 N. W. 381

FILED MAY 24, 1940. No. 30875.

1. **Workmen's Compensation.** Award of compensation for 300 weeks for a permanent partial disability of 35 per cent. caused by an accidental injury arising out of and in the course of a traveling salesman's employment by a wholesale grocer affirmed as supported by the evidence.
2. ———. Mere suspicion that an employee simulated an automobile accident for the purpose of procuring workmen's compensation is not sufficient to defeat a claim therefor, where the suspicion arises alone from his recovery of compensation for two former accidents of a similar nature.
3. ———. Fee for $150 for employee's attorneys in a proceeding

to recover workmen's compensation, *held* not excessive on facts stated in opinion.

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

Herbert E. Story and *John H. Roper, Jr.*, for appellants.

Hawxby & Griffiths and *Lee Kelligar, contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, sec. 48-101.

Miles S. Klement, plaintiff, a traveling salesman in the employ of H. P. Lau Company, defendant, presented by petition to the compensation court a claim for an injury in the sacroiliac region of his back as the result of an automobile accident while in the performance of his duties as employee February 3, 1939. He sued also the Maryland Casualty Company, insurance carrier, defendant, alleged his wages at the time were $200 a month and claimed compensation of $15 a week.

The answer of defendants to the petition was a general denial.

Upon a trial of the cause, the compensation court found that plaintiff, as a result of the accident February 3, 1939, sustained a permanent partial disability; that his disability thereafter was 50 per cent. and compensable at $15 a week, but that he had entered into a duly approved lump sum settlement, September 27, 1935, with a former employer for a 15 per cent. permanent partial disability caused by accidental injury to his back and that consequently his compensation was limited to a 35 per cent. permanent partial disability as a result of the accident February 3, 1939, or $5.25 a week. The award of the compensation court conformed to its findings and was reviewed and affirmed by the district court, where plaintiff's attorneys were allowed

$150 for their services. Defendants appealed to the supreme court.

Defendants contend that plaintiff did not prove a compensable injury as the result of an accident arising out of and in the course of his employment as a traveling salesman for his employer, a wholesale grocer. The claim of plaintiff is also assailed as fraudulent and, in the argument on this defense, defendants emphasize the fact that plaintiff had previously entered into a lump sum settlement with a former employer for three accidental injuries, two of which are asserted to be identical with the accident described in the case at bar. There is little dispute in the testimony relating to material facts, but the evidence is too voluminous for detailed discussion herein. None of it has been overlooked. It tends to prove the following facts:

Traveling by automobile as salesman and collector for H. P. Lau Company, plaintiff, in the performance of his duties as such, was crowded by another car as he approached a narrow bridge on a highway about four miles west of Auburn in the early morning February 3, 1939. Plaintiff's car was damaged as the front end struck the right side of the bridge, but could still be operated. His back was injured and he suffered pain, but was able to drive to a hospital at Auburn, where Dr. F. M. Tushla examined him and taped his back for an injury in the sacroiliac region where ligaments had been strained. About noon plaintiff appeared at a garage in College View and there exchanged the car he had been driving for one he had left there for repairs. The garage owner commented on the damages to the car and on the appearance of injury to plaintiff, who called in the afternoon at the office of his employer in Lincoln and there told the sales manager of the accident and of resulting personal injury. This report, however, was denied at the trial by the sales manager, but the circumstances and testimony of other witnesses support plaintiff's version of what occurred at the office of the employer on the day of the accident. Two examining physicians expressed the opinion that plaintiff suffered a permanent partial disability as a result of the acci-

dent but declined to state the percentage of such disability. Plaintiff continued in the employ of H. P. Lau Company and in the performance of his duties, handicapped as he was by his injuries, from the date of the accident, February 3, 1939, until March 25, 1939, when he was discharged. He received his regular salary during that period. He testified he was disabled owing to back injuries which caused fatigue when driving and inability to carry sample cases of the same weight as formerly. He said he could fully perform the duties of his employment before the accident but was limited in capacity to perform them thereafter. He estimated his disability at half of normal, and a physician called to the witness-stand and examined by defendants estimated the permanent partial disability at 50 per cent. From the time of the accident to the trial in the district court plaintiff was treated regularly by his physician and his injured back was continuously supported by standard belts. Treatments did not result in permanent improvement. The record contains ample evidence of the facts thus narrated.

The facts relating to the lump sum settlement between plaintiff and a former employer are stated in the contract of the parties. The settlement reciting the claims of plaintiff, the denial by employer of liability therefor, the approval of the settlement by the compensation court and by the district court are all in the record and disclose the following facts: While employed as traveling salesman for the Manchester Biscuit Company, plaintiff claimed compensation for accidental injuries occurring January 24, 1933, December 23, 1933, and July 26, 1935. The employer did not admit liability for any of these claims, but entered into a lump sum settlement of all of them for $1,094.11 to avoid litigation. The record as a whole in the case at bar shows that plaintiff, while a traveling salesman, had four automobile accidents in seven years, two of them similar to the one now in issue. Travel by automobile on public highways is a known peril. Narrow bridges are frequently scenes of motor accidents. A human impulse to preserve life and avoid personal injury is an attribute common to motorists,

whether on business or pleasure. The substitution of a salary of $200 a month for workmen's compensation of $5.25 or $15 a week would not be much of an inducement for a normal traveling salesman to simulate or to deliberately cause an accident resulting in compensable injury. There is nothing in the record to impute such abnormal conduct to plaintiff. The evidence does show, however, that sales in plaintiff's territory had decreased rapidly in amount prior to the accident February 3, 1939; that the reasons for the losses were under investigation and that his employment was in known jeopardy. Either a real or feigned disability would handicap him in seeking employment as a traveling salesman, his means of livelihood. This mere inference or suspicion of fraud is not sufficient to prove a defense to the case made by plaintiff for compensation.

Defendants insist further that the award is erroneous in allowing compensation from the date of the accident. The evidence sustains the finding and judgment of the compensation court that plaintiff sustained a permanent partial disability of 35 per cent. as a result of the accident February 3, 1939. He was therefore entitled to compensation for a period of 300 weeks from that date. Comp. St. 1929, sec. 48-121, subdivision 2. The assignment of error presenting the point thus raised is therefore overruled.

The district court allowed a fee of $150 for the services of counsel for plaintiff and it is condemned by defendants as excessive. The nature, extent and vigor of the defenses urged imposed arduous duties on attorneys for plaintiff. Evidence before both the compensation court and the district court, including expert testimony, required attention. The law applicable to the facts called for skill and time of counsel upon the trial of the cause in the district court. In view of the voluminous record and the professional services performed, the fee is considered fair and reasonable.

For services of counsel for plaintiff in the supreme court a fee of $100 is allowed. Error in the proceedings and judgment below has not been found.

AFFIRMED.

HAROLD HART, APPELLANT, V. AMERICAN COMMUNITY STORES CORPORATION, HINKY DINKY, APPELLEE.
292 N. W. 387

FILED MAY 24, 1940. No. 30879.

Workmen's Compensation. Record examined *de novo*, and *held* to require that the judgment of the district court, viz., that plaintiff has failed to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment, be affirmed.

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

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

Kennedy, Holland, De Lacy & Svoboda and *Edwin Cassem, contra.*

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

EBERLY, J.

This is a compensation case. Harold Hart, appellant here, was plaintiff in the Nebraska workmen's compensation court and the American Community Stores Corporation was defendant therein. In plaintiff's original petition filed May 25, 1938, in the compensation court, it is alleged that, while in the employ of the defendant on or about February 4, 1938, as store manager, and while carrying a crate of vegetables from the main storeroom of defendant to the basement, he stepped on a lettuce leaf causing his feet to slip and him to fall on the basement steps; that the crate struck him in his right groin, bruising the same; that at first the injured condition was not serious, but a few weeks later it developed a "gas bacillus infection" and necessitated his going to the hospital and leaving his employment on March 19, 1938; further, that plaintiff has not recovered and his injuries are permanent. There was a trial before a single member of the Nebraska compensation court, and from an adverse ruling therein, plaintiff waived hearing before the

compensation court (*en banc*), and appealed directly to the district court for Otoe county, filing, in said cause, his amended petition on appeal on January 19, 1939. On August 14, 1939, the cause having theretofore been tried, argued and submitted to the district court, that court adjudged that plaintiff had not sustained the burden of proof required of him, and had failed to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment, and decreed that plaintiff's petition be dismissed and the judgment of the Nebraska compensation court be affirmed. Plaintiff appeals.

The evidence discloses that plaintiff was employed by the defendant approximately seven years at the time the accident in suit is alleged to have occurred. He acted first as a store-helper, then later as assistant manager at Plattsmouth, until July or August, 1933, when he was transferred to Auburn, Nebraska, where he opened up a store for the defendant. He remained at that place in defendant's employ until February, 1934, at which time he was transferred to Nebraska City and took over the management of defendant's store located then in that city, and continued there until March 19, 1938, when, on account of his then condition, he was compelled to cease the rendition of his services. During all this time, and in fact for a period of thirteen years, he had not lost a day on account of illness or injury. His wages were $37.50 a week at the time he says the injuries in suit were suffered. Plaintiff's testimony is that on or about February 4, 1938, at about 10:30 o'clock in the forenoon of that day, he was carrying a crate of vegetables from the main store-room to the basement where he was employed; at the head of the stairs at that time there were lettuce leaves or trimmings on the floor; plaintiff stepped on these, his feet slipped out from under him, causing him to fall, and he bumped down the steps; he thought there were seven steps; when he fell the crate of vegetables struck him on the right leg in or near the groin, causing a severe bruise and skin abrasion so that the blood oozed out; both hips and his lower back struck on the steps, and were bruised; plain-

tiff experienced "quite a lot of pain" and had difficulty in getting up. His wife testifies that, when plaintiff came home "that day at noon," when he got out of the car he "was sort of humped over with his hands on his hips." An examination by her found "the skin was peeled up on his leg" and "it was red all around there and back here (indicating)," and on three different places on his hip and on his backbone it had started to turn blue. The evidence offered by plaintiff was to the effect that Dr. Westover of Plattsmouth had been plaintiff's family physician for about twelve years, and that on February 9, 1938, plaintiff consulted him about the injuries he suffered. Thereafter this doctor "saw" plaintiff on the following dates: February 13 and 16, office calls made by the patient; and on February 21, February 27, March 3, 6, 11, 13, 16, 21 and 23, house visits were made by Dr. Westover.

Dr. Westover testified that when plaintiff first came to him he was complaining with pain in the lower back, in the sacroiliac region, pain in both hips and considerable pain in the right groin. Plaintiff, in giving the history of his condition, told the doctor of the accident occurring as is hereinbefore set forth. The doctor administered treatments in the form of hot packs, diathermy and some medicine. He continued to see plaintiff off and on for a period of time until when he saw plaintiff in his home where he was bedfast. On March 31, 1938, he was sent to the Clarkson Hospital at Omaha by Dr. Westover.

As to sending plaintiff to this hospital, Dr. Westover testified as follows: "About three or four days previous to my sending him up there, the condition in the groin had progressed to the point where I thought there was a collection of pus there. I might say that that had been gradually developing over quite a long period of time, that is, several weeks; and three or four days before I sent him to the hospital I made a two-inch incision over the inguinal glands there to go in and evacuate this pus. Before going in too deep, I inserted a large needle and was rather surprised to find the syringe fill up with gas so I put a sterile dressing

and made arrangements to send him to the hospital immediately, realizing it was a gas bacillus infection."

On cross-examination the following evidence was elicited from this witness: "I have it written down here the day he came in; bruised left hip, right hip, sacroiliac, lumbar region, right groin bruises, discoloration right thigh and groin." After giving the dates on which witness had seen Hart, the following question was asked and answer given on cross-examination: "Q. What do you contend was wrong with Harold Hart? In other words, what was your diagnosis of Harold Hart's condition? Is it your contention that he had nothing except bruises about the 4th of February, from which, on the 21st of March, he developed a gas bacillus infection? A. My contention is that the corner of the vegetable crate striking him in the right groin caused a traumatic adenitis; that is, a traumatic injury to the inguinal glands in that region with subsequent swelling or suppuration. The gas bacillus infection was a complete surprise to me. It is true that the groin was crushed; the skin not lacerated but scraped, and we had the gas bacillus present. Now, from the time I took charge of Mr. Hart, I do not know that he consulted any other physician nor did he have any other injury that I know of, so I can only assume that this infection was secondary to the bruising and scraping of the skin in that region and the gathering of pus in the groin, the adenitis. Some of the joint trouble could have been secondary to the infection and secondary to the original injury, in view of the knowledge I have of it. I can assume or come to no other conclusion."

The conclusions stated by Dr. Westover are, in a measure, supported by Dr. Eaton who testifies as plaintiff's witness.

The testimony of defendant's witnesses presents a different view of the factual situation, and takes issue with conclusions of plaintiff's witnesses above set forth.

We are inclined to the view that plaintiff met with an accident substantially as alleged in his petition on February 4, 1938, but do not feel that the injuries so received de-

veloped into or caused the "gas bacillus infection" as alleged in his petition.

The two physicians at Clarkson Hospital in Omaha (Drs. Hicken and Kos) to which hospital plaintiff was taken on March 31, 1938, when in an exceedingly serious condition, testify that the following is the substance of the medical history given by plaintiff: (Dr. Hicken) "Here is the history which I obtained from the patient when he came in. He was acutely ill. Here is the history: About four weeks ago the patient had an acute venereal infection, following which he developed a stricture * * * in Nebraska City. They also found he had a positive serology and began to treat him with various arsenical and bismuth preparations. The man did very well for about two weeks, when he began to notice some pain in his right leg, swelling of the inguinal glands; these they hot packed and continued to give him specific treatment for gonorrhea and lues. About a week ago he became dissatisfied with his treatment because he was making no progress and went to Dr. Westover. He found some swollen, enlarged lymph glands in the right inguinal area, some supraclavicular and supratrochlear lymph glands, and in view of the fact that he had this positive serology he thought this lymphadenopathy was on the basis of a luetic infection superimposed or aggravated by a specific bacterial infection of the lower inguinal glands."

Dr. Kos, who was present in the Clarkson Hospital where the history was taken by Dr. Hicken, is corroborative of Dr. Hicken, and testifies that this history so taken disclosed that: "Patient has been under antiluetic treatment for some time. Also receiving treatment for gonorrhea. About two weeks ago sounds were passed transurethrally and four days ago the patient noticed swelling with extreme tenderness in right groin. An incision was made but no discharge of any character exuded. Condition became so unbearable that patient was advised to hospitalization."

It should be said that plaintiff denies he made any of the statements at this time which would justify the foregoing record. But, a Dr. C. Eugene Brown was produced by

defendant, and he testified that in 1938 his first contact with plaintiff Hart was on February 23 at which time Hart gave him the following history: "On 2-23-38. Six weeks ago a small sore came on penis. Went to doctor. The doctor gave him a wash and powder for it. Has been getting worse since. Cannot sleep and is in constant and severe pain." Dr. Brown's records show that he saw Hart on February 23, 24, 25, 26, 27, 28, March 1, 2, and 3, 1938. That a "dorsal incision" which Hart claims was performed by Dr. Brown in January was actually performed on February 27, 1938. It also appears that a "Wassermann" taken March 1, 1938, was submitted to the Nebraska Public Health Laboratory, and reported on March 3, 1938, as "strong positive." Dr. Brown testifies as to plaintiff's then condition, viz.: "Glans penis swollen and hard. Entire distal half red and swollen. Foreskin cannot be retracted." It appears from his testimony that, after the "dorsal slit" made by him, the entire glans was pitted by infectious material and the foreskin near the frenum was all infected, and that a foul, purulent, copious discharge from the penis was noted, and the breaking out of a suspicious rash was noted the day after the "Wassermann" was taken by this doctor. Dr. Brown's testimony is that he did not give him any treatment for dilating the urethra, but there is evidence in the record which tends to establish that Hart was treated by another physician before coming to Dr. Brown, whose evidence is not in the record.

Dr. E. L. MacQuiddy, who is connected with the University of Nebraska, and whose specialty is internal medicine and diagnosis, examined Hart on June 7, 1938, and again on March 29, 1939, preceding the trial. He testifies that "the nature of the infection developing in Mr. Hart's right groin is a very peculiar one following trauma such as he described. A gas bacillus infection usually follows an open wound. According to the man's statement there was no open wound at the time of this injury. It would certainly seem that there was some secondary factor entering this case between the time of the accident and the time Mr. Hart went to the

hospital. * * * I believed that the man was suffering from a neuritis principally affecting the nerves of the left leg. It was my opinion that this neuritis was the result of the inflammation and subsequent scar tissue formation following the gas bacillus infection." With reference to the period of development of the infection after inoculation, Dr. MacQuiddy testified: "It would be a period of four to five days before March 31; a period of four to six days when that thing began. I mean before March 31. If it runs true to the form of gas bacillus infection with which I am familiar, it would occur two days, or four days before the origin was found, which in this case, I think, was March 26. * * * Q. Could a swelling of the lymphnode follow it? A. Yes." This witness also testifies that the dilation of the urethra, by the use of a sound, if performed, might furnish an opportunity for a gas bacillus infection if the mucous membrane of the urethra was torn in the operation.

Without setting forth this evidence at length, it is but fair to say that the testimony of defendant's medical witnesses fully sustains the conclusion that, while plaintiff's physical condition is due wholly to the result of "gas bacillus infection," there is no causal connection established between the accident or fall of February 4, 1938, and the gas bacillus infection which caused plaintiff's physical impairment. This, we accept as true, in the light of all the facts and circumstances disclosed by the record before us.

It follows that the finding and judgment of the trial court that plaintiff had failed to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment are fully supported by the evidence, and, upon trial *de novo,* we agree therewith.

The judgment of the district court is, therefore, correct and is

AFFIRMED.

PERRY TAYLOR V. STATE OF NEBRASKA.
292 N. W. 233

FILED MAY 24, 1940. No. 30890.

1. Criminal Law. An instruction defining "fleeing from justice," as used in section 29-110, Comp. St. 1929, as "a departure by a person from his usual place of abode, or from the place where he has committed an offense, with the intent to avoid detection and prosecution for such public offense," is approved.
2. ———. The terms "fugitive from justice," as used in the extradition statute, and "fleeing from justice," as used in the statute of limitations, are not synonymous terms under the Nebraska law.
3. ———. The evidence upon the question of felonious intent being sharply conflicting, the finding of the jury thereon will not be set aside.

ERROR to the district court for Knox county: CHARLES H. STEWART, JUDGE. *Affirmed.*

E. A. Houston, E. T. Houston and *Arthur L. Burbridge,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

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

PAINE, J.

The defendant was convicted by a jury of cattle stealing in Knox county at the October, 1939, term, and by a proceeding in error brings his conviction and sentence of three years to the penitentiary to this court for review.

Among the errors relied upon for reversal are: That the verdict is not sustained by the evidence; the alleged error of the court in overruling motion for an instructed verdict at the conclusion of the state's evidence, and also at the conclusion of all the evidence; that the court erred in giving instruction No. 8, in which the jury were instructed that the defendant admitted taking the cattle described in the information; and, last, for errors in the admission of incompetent and immaterial exhibits in evidence.

The amended information, filed October 21, 1939, recites

that the defendant on October 3, 1930, did wilfully, unlawfully and feloniously steal four heifers of the value of $145, which were the property of Adam Stoural, against the will of the owner and contrary to the statutes, and that on or about October 7, 1930, the defendant did leave his place of residence in Knox county, and did flee from justice and conceal himself to avoid detection and prosecution for the aforesaid offense, and returned to the state about June 26, 1939.

The evidence discloses that the defendant, then about 26 years of age and a single man, resided on a farm with his father and sister, and in the pasture there were cattle belonging to his father and to his brother, and in an adjoining pasture there were cattle belonging to the complaining witness, Adam Stoural, and also cattle belonging to others.

The evidence discloses that the defendant was not a cattleman, but rather a farmer, although he owned a few sheep, and that, his father being in ill health, the defendant did all of the work on the farm, his sister helping pick corn, and the evidence indicates that he was not very familiar with the cattle belonging either to his father or his brother, as he did not take care of them.

The defendant testified, and called more than a dozen witnesses in his own behalf. His counsel and witnesses were provided by the state upon a poverty affidavit. The testimony of the defendant was that his father looked after the live stock. His brother, Bert Taylor, lived northeast of Verdigre on the Bigelow place, less than ten miles from the South Dakota line, and had made arrangements to move to South Dakota, and asked the defendant, in the presence of his wife and Amil Klippham, to sell his cattle, as he wanted to make a payment on his tractor, which was mortgaged, so that he could move it out of the state. Defendant went to Creighton and employed Frank Kimble, a trucker, to take the load of cattle to Sioux City. He went home and drove some eight head of cattle into the barn that Friday afternoon, and the trucker came about 5:30 to 6:00 and loaded up seven white-face two-year-olds and one white calf, all

of which the defendant thought belonged to his brother, and the trucker drove the load to the stockyards at Sioux City. The defendant drove over the next morning, and the cattle were sold, and the defendant drew $50 in cash from the commission firm of Hudson & Gibbs, and told them to mail him a check for the balance to Verdigre. When the check arrived defendant indorsed it, and told his sister to cash it, as he was going over to Holt county to buy some sheep. When he returned about three days later, he was told that he had gotten some wrong cattle, and the sister gave back the money to the banker which she had received on the check, and Frank Molle told him he "got some wrong cattle out there."

Defendant testified that this occurred on October 3, 1930, and that he continued his usual work, and husked corn around the neighborhood. About the middle of January, 1931, defendant left for Missouri. He said an officer was out at his place once, but not to arrest him; that he came back from Missouri in 1934 to attend the funeral of his sister's child, and that in 1936 he came back on business. He swore that he never intended to take any of the cattle belonging to the complaining witness, and that it was all a mistake.

Frank Kimble, the trucker, was called as a witness for the state, and said that he remembered that in the fall of the year 1930 he trucked a load of cattle from a barn on the Horton ranch (which ranch was rented by the defendant's father) to Sioux City; that they were loaded up about 5:30 or 6 o'clock in the evening, and that he took them to Sioux City, consigned to Hudson & Gibbs, as directed by the men who loaded them up. He said there were one or two children playing in the yard, and that the shipping tag was made out in the name of Perry Taylor; that he arrived at the stockyards about midnight, and that the next morning when they were sold he drew his money from Hudson & Gibbs for trucking them. He was not able to identify the defendant as the Perry Taylor who hired him or signed the ticket. He said that the defendant was about the same height, but was

not as heavy a man as the one who was out there with him about nine years before.

Much is made of the fact that no one saw the defendant bring in the cattle from the adjoining pasture to the Horton ranch. The trucker who took them did not identify the defendant, but the defendant, by taking the stand in his own behalf, cleared up all question of his identity, and rested his defense on a lack of any intention to steal the cattle, and the four cattle charged in the information were loaded by a mistake pure and simple, as he thought they belonged to his brother, and the defense argued strongly in his behalf was that he never had any intimation that the officers wanted him; that he knew of no complaint made against him, and then he went to Joplin, Missouri, and has lived with his sister, Mrs. Vina Siders, since then, but returned twice, meeting many people on these trips, and that he had no idea that he was considered a fugitive from justice, and that the statute of limitations had run against the offense.

The evidence of the state was that the cattle were missed almost immediately, and it was found that the fence between the Horton ranch, occupied by the defendant's father, and the Elbrook pasture adjoining had been let down, and the tracks of cattle showed where they had been driven through, and the fence between the Elbrook pasture and the Schienost pasture, where the Stoural cattle were, had also been let down, and the fences had been put back up, using nails to fasten the wires to the posts instead of staples. The tracks of cattle led toward the barn where the defendant admitted loading the cattle. Immediately after learning these facts, the owner of the cattle went to Sioux City, and found the cattle and positively identified them. There was one heifer in the lot that was a pet, and one had a crooked horn, which was injured in a dehorning operation, and the others were identified. Each of these animals, except the white sucking calf, had a "V" cut mark in the lower right ear, and a "T. B." tag in the upper right ear to show that they had been vaccinated for tuberculosis, and all of these "T. B." tags had been torn out recently, for the blood clots

were still there. The owner took the cattle from Sioux City back to their pasture.

The state claims that the defendant did not satisfactorily account for his leaving the country, or for his remaining in Missouri. This question was put to the jury in instruction No. 6, which read as follows: "It is charged by the information in this case that the defendant did on or about the 7th day of October, 1930, leave his place of residence in Knox county, Nebraska, and did flee from justice and concealed himself to avoid detection and prosecution for the offense charged in the amended information until the 26th day of June, 1939. You are instructed that this charge is a material element in this case and before the defendant could be found guilty of the offense charged in the amended information the state must prove from the evidence and beyond a reasonable doubt that the defendant did flee from justice and conceal himself to avoid detection and prosecution for this offense in the manner and during the period stated in the amended information. You are instructed that the words 'Fleeing from justice' as used in the law of Nebraska, implies a departure by a person from his usual place of abode, or from the place where he has committed an offense, with the intent to avoid detection and prosecution for such public offense. You will first consider this question and if the state has failed to prove from the evidence beyond a reasonable doubt that the defendant was a fugitive from justice during the period above stated and did flee from justice and conceal himself to avoid detection and prosecution for this offense, then it would be your duty without going further into the evidence to find the defendant. not guilty. If, however, you do find from the evidence and beyond a reasonable doubt that the defendant was a fugitive from justice and did flee from justice and conceal himself to avoid detection and prosecution for the offense charged, as alleged in said amended information, then you shall further consider all of the evidence in the case and determine the guilt or innocence of the defendant upon the general charge of cattle stealing."

This question of being a fugitive from justice is clearly a question of fact for the jury. Section 29-110, Comp. St. 1929, provides for a limitation of three years within which such a prosecution must be begun, by filing an information, or having an indictment returned by the grand jury, which limitation, however, does not apply in case any person flees from justice. It is said that such statutes of limitation are to be liberally construed in favor of the defendant. *Hogoboom v. State,* 120 Neb. 525, 234 N. W. 422.

In *Colling v. State,* 116 Neb. 308, 217 N. W. 87, it was said that fleeing from justice implies a departure from his usual place of abode, or from the place where he has committed an offense, with the intent to avoid detection or prosecution for a public offense. In this case it was held that the term "fugitive from justice," as used in statutes pertaining to extradition, is not synonymous with the term "fleeing from justice," as used in the statute of limitations (Comp. St. 1929, sec. 29-110) ; that the term "fugitive from justice," as used in statutes pertaining to extradition, applies when he has gone from the jurisdiction where the offense was committed. The term "fleeing from justice," as used in the statute of limitations, is correctly defined in instruction No. 6 as set out above. In 6 Neb. Law Bulletin, 423, the distinction drawn by our court is discussed. See, also, 10 Neb. Law Bulletin, 337.

It seems to the court that the question of whether the defendant was fleeing from justice when he went to Missouri, not on October 7, 1930, as charged in the amended information, but something over three months after the cattle were taken, the conditions under which he remained in Missouri, the two very hurried visits that he made up to his old home, and his final arrest, were all submitted to the jury under a very complete and satisfactory instruction, which made it clear to the jury that the first question they were to consider was the one of whether the defendant had been a fugitive from justice during the nine-year period, and without going any further into the evidence they could find him not guilty if they were not satisfied beyond a reasonable

doubt that he was a fugitive from justice, and while this court on this evidence might entertain some doubts on this question, yet the credibility of all these witnesses, especially of the defendant himself, and the weight to be given to the testimony of each of them resting with the jury, this court feels bound to abide by the verdict which they returned.

On the question of the felonious intent which must be shown in such a case, the evidence of the defendant himself shows an entire absence of any intent at all to steal these cattle, and that it was a case of mistaken identity pure and simple as to the cattle he gathered up and shipped to Sioux City, but the jury had also before it many other facts and circumstances, such as the taking down of the fences, the driving of the cattle out of the pasture they were in, then through another pasture, and then into the pasture of the defendant's father, and driving them into the barn, and the fact that some one vitally interested in the matter removed all of the identifying tags from the ears of the animals by tearing them out. These facts, together with other circumstantial evidence, would be sufficient, if believed by the jury, and found to be entirely unexplained by the testimony of the defendant, to satisfy the jury of the felonious intent alleged in the case.

This case, by reason of the delay of nine years in the prosecution, and by reason of other facts and circumstances, presents several very close questions to this court, but criminal cases are for the jury, and we are supported by section 29-2308, Comp. St. 1929, which says that no judgment rendered in a criminal case shall be set aside for certain errors if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred, and the jury having passed upon these close questions, under proper instructions given by an experienced trial judge, we have reached the conclusion that the verdict and sentence should be affirmed.

AFFIRMED.

STATE, EX REL. HORACE CARY ET AL., APPELLANTS, V. R. L. COCHRAN ET AL., APPELLEES.

292 N. W. 239

FILED MAY 24, 1940. No. 30774.

1. **Venue.** An action against a public officer for any neglect of official duty must, under the provisions of section 20-404, Comp. St. 1929, be brought in the county where the cause or some part thereof arose.
2. ———. An action for mandamus against the administrative officers of the state to compel the proper enforcement of the irrigation laws, and thereby prevent unlawful diversions of water by junior appropriators, is properly maintainable in the county where the resulting damages occur.
3. **Waters.** The state may regulate and control irrigation by virtue of its police power to prevent waste, to protect senior appropriators against unlawful diversions by junior appropriators, and to enforce all adjudicated water rights in accordance with their terms.
4. ———. In so doing, administrative officers of the state perform ministerial duties only, and must give full recognition to the vested rights of all appropriators.
5. ———. Junior appropriators may use available water within the limits of their appropriation so long as the rights of senior appropriators are not injured or damaged.
6. ———. The use of water by a junior appropriator does not become adverse to or damage a senior appropriator until it results in a deprivation of his allotted amount, or some part thereof.
7. ———. A senior appropriator is entitled to water as against an upstream junior appropriator as long as water in usable quantities can be delivered to him.
8. ———. Whether a quantity of water passing a given point on the stream would, if not interrupted or diverted, reach a senior appropriator downstream is a complicated question of fact to be determined by the proper administrative officers of the state.
9. ———. Unless such determination of fact be unreasonable and arbitrary, the findings are final and not subject to review by the courts.
10. ———. Where all the available water passing a certain point on the stream would not, if not diverted or interrupted, reach a senior appropriator downstream, junior appropriators may lawfully divert water within the limits of their appropriations, and such diversions are not in law out of priority diversions.

11. ———. The doctrine of reasonable use has no application in a case where delivery of a usable quantity of water can be made to a senior appropriator downstream, even though the losses of water suffered in so doing are great.
12. ———. While the duty of the administrative officers of the state is to enforce existing priorities as adjudicated, yet, in regulating the distribution of water, they may determine as an incident to such regulation whether a senior appropriator is injured by a diversion above him.
13. ———. Evidence examined and *held* that relator power company has not, under the evidence in the record, waived or abandoned any part of its appropriation for power purposes with priority date of September 10, 1882.
14. Mandamus. To warrant the issuance of a writ of mandamus against an officer to compel him to act, the duty must be imposed upon him by law; it must exist when the writ is applied for and the duty to act must be clear.
15. ———. The issuance of a writ of mandamus is within the sound judicial discretion of the court.
16. ———. A court will not ordinarily issue a writ of mandamus where the alleged failure to act is general and not specific, and where the dereliction of duty is not clearly shown to exist at the time the application for the writ is made.

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

King & Haggart, Cleary, Suhr & Davis and *Hamer, Worlock, Randall & Tye,* for appellants.

Walter R. Johnson, Attorney General, Bert L. Overcash, John L. Riddell and *Rush C. Clarke, contra.*

T. M. Morrow and *T. F. Neighbors, amici curiæ.*

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

CARTER, J.

This is an action of mandamus brought by a number of irrigators under the Kearney canal, on behalf of themselves and others similarly situated, and by the Central Power Company, which, with the exception of one small user of water, is the owner of the oldest water appropriation on the Platte river and its tributaries. The respondents are the

governor, the state engineer, and the chief of the bureau of irrigation and his subordinates. The petition prays for the issuance of a writ of mandamus compelling the proper administration and enforcement of the irrigation laws of the state for the purpose of protecting the irrigation and power rights of the relators from alleged unlawful diversions of water above relators' canal by junior appropriators. The trial court denied the writ and dismissed the petition of the relators. Relators thereupon perfected an appeal to this court.

It is not disputed that the waters of the Platte river and its tributaries are subject to appropriation for irrigation and power purposes upon the principle that priority of time bestows priority of right, and that pursuant to such principle the Central Power Company, through its predecessors in interest, was adjudicated and given a priority upon the Platte river, as of September 10, 1882, of 140 cubic feet per second of flow of water for power purposes, and a further appropriation, as of February 12, 1920, of 485 cubic feet per second for the same purposes. It is also admitted by the pleadings that 22 second-feet of water have been adjudicated to certain lands in Buffalo county for irrigation purposes with a priority dating of September 10, 1882, and which, for the purposes of this suit, will be treated as the property of certain of the relators claiming to be the owners thereof in this litigation. The foregoing appropriations of water, bearing the priority dating of September 10, 1882, are prior in time to all appropriations on the Platte river and its tributaries in Nebraska except an appropriation to the Nelson Radcliffe canal in Morrill county with a priority dating of June 1, 1882, for 2.77 cubic feet of water per second of time.

The Central Power Company, in reliance upon its adjudicated water rights, reconstructed and rebuilt its power plant and diversion dam, and installed new machinery, appliances and equipment at a cost of $225,000 or more, to make it of sufficient capacity to beneficially use water to which it was entitled under its appropriations adjudicated

and allowed as of September 10, 1882, and February 12, 1920. The remaining relators are owners of land in Buffalo county, which is irrigable and irrigated from the waters carried in the Central Power Company canal during the irrigation season, said water being the 22 second-feet adjudicated to certain lands in Buffalo county under the priority dating of September 10, 1882, and appurtenant to said lands subject only to the payment of a carrying charge to the Central Power Company. That relators have constructed laterals leading to and upon their respective lands, and made beneficial use of all of the 22 cubic feet per second of flow under their appropriation whenever it was available in the river, is alleged in the petition. For the purposes of this suit only, this allegation will be considered as true.

The respondents, as officers, agents and employees of the bureau of irrigation, are charged by law with the duty of the administration and enforcement of the irrigation laws of the state and the distribution of the waters of the Platte river and its tributaries within the state in accordance with adjudicated priorities. It is the contention of relators that respondents, in administering and enforcing the irrigation laws of the state and in the distribution of water for irrigation, have continuously permitted and allowed junior appropriators, situated above the headgate of the Central Power Company, to take and use water for irrigation, storage, and other purposes, without regard to priority and to the prejudice and damage of the relators.

It is urged that the district court for Buffalo county was without jurisdiction to hear the case. The applicable statute provides: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: * * * Second. An action against a public officer, for an act done by him in virtue of or under color of his office, or for any neglect of his official duty." Comp. St. 1929, sec. 20-404. The case at bar is clearly one seeking a remedy for the alleged neglect of official duty on the part of a public officer. Does the cause of action or some part thereof arise in Buffalo county? Generally speaking, a cause of action consists of a

wrong and a resulting damage. A wrong which does not result in a damage is not ordinarily actionable. In the instant case, the alleged wrongs occurred in the counties where junior appropriators upstream were permitted to divert water belonging to relators. The damage occurred in Buffalo county when relators' lands were deprived of needed irrigation water and the water-power plant of the relator power company was shut down for the reason that water alleged to belong to the power company was taken by junior appropriators. Without the subsequent damage, no cause of action could exist. It seems clear, therefore, that the "cause or some part thereof" arose in Buffalo county. We have examined *Platte Valley Irrigation District v. Bryan,* 130 Neb. 657, 266 N. W. 73, cited by respondents, and find nothing therein contained inconsistent with this view.

It will be noted that the priority date of the appropriation of 140 cubic feet per second of flow for power purposes is September 10, 1882. The appropriation of 22 cubic feet per second for irrigation purposes bears the same priority date. Under the holdings of this court, these water rights became vested as of that date. At the time of the vesting of these rights, no distinctions had been made between appropriations for irrigation and appropriations for power purposes. It is plain, therefore, that the irrigation laws of this state, the first of which was passed in 1889, and the Nebraska Constitution of 1920, do not divest the owners of these two appropriations dated September 10, 1882, of their vested interests in them. To hold otherwise would invite the exercise of the restraints imposed by the Fourteenth Amendment to the Constitution of the United States. *Enterprise Irrigation District v. Willis,* 135 Neb. 827, 284 N. W. 326. We think, therefore, that distinctions cannot be made between the power and irrigation appropriations involved herein, bearing the date of September 10, 1882. For all practical purposes, relators have an appropriation of 162 second-feet of water with a priority dating of September 10, 1882, as against all junior appropriators on the stream whether for irrigation or power purposes.

The North Platte river is a nonnavigable stream which has its source in the mountains of Colorado and flows across a part of Wyoming and Nebraska to a point approximately 200 miles from the Wyoming-Nebraska line, where it joins the South Platte river to form the Platte river. The present case involves the administration of irrigation and power rights on the North Platte and Platte rivers from the Wyoming-Nebraska line to the headgate of the Kearney canal located 13 miles west of Kearney, Nebraska. The water discharged into the Platte river from the South Platte river also has its place in the problem before us, but it does not appear to have been treated as of major importance by the parties in the present suit. The North Platte and Platte rivers will therefore be treated as the primary subject of the litigation. For the purposes of this suit, the upper end of the river is at the Wyoming-Nebraska line and the lower end at the headgate of the Kearney canal, it being the last point of diversion for irrigation and power purposes on the river.

That the state in the exercise of its police power may supervise and control the appropriation, diversion and distribution of the public waters of the state, and impose that duty upon administrative officers, is well settled. *Farmers Canal Co. v. Frank,* 72 Neb. 136, 100 N. W. 286; *Enterprise Irrigation District v. Willis,* 135 Neb. 827, 284 N. W. 326. The first irrigation laws in this state were enacted in 1889. In 1895 a comprehensive irrigation code was enacted which, as amended, appears as chapter 46 of the Compiled Statutes of Nebraska for 1929. The various statutory provisions thereof, providing for the distribution of water among different appropriators according to their respective priorities by administrative officers of the state, were undoubtedly enacted in the furtherance of a wise public policy to afford an economical and speedy remedy for those whose rights are wrongfully disregarded by others, as well as to prevent unnecessary waste and useless diminution of the waters of streams, and to avoid unseemly controversies that may occur where many persons are entitled to share in a limited

supply of public water for irrigation and power purposes. It is the duty of the state under our irrigation code to administer the waters of streams and rivers to prevent waste, to protect prior appropriators against subsequent appropriators, and to enforce all adjudicated water rights in accordance with their terms. In so doing, the officers of the state perform ministerial acts only, even though findings of fact may have to be determined before proper control and regulation may be intelligently exercised. The quasi-judicial powers conferred upon the department have application only to the granting and cancelation of appropriation rights and priorities. With these general propositions before us, the question to be determined is whether the state through its proper officers has failed to administer the waters of the North Platte and Platte rivers in accordance with the irrigation laws of this state, and, if so, whether relators are entitled to the issuance of a writ of mandamus.

A proper regulation and control of the segments of the North Platte and Platte rivers involved in this case require a consideration of all the factors entering into the administration of the waters of these rivers for the benefit of appropriators for irrigation and power purposes. In considering these factors, the two rivers and their tributaries will be treated as one, thereby obviating the necessity of referring to both when speaking of the whole.

The flow of the river even in the summer months is affected by the amount of snow falling in the mountains of Colorado within its drainage basin. The river passes through parts of Colorado and Wyoming, both of which states require irrigation water in excess of the available supply. Storage and control dams under the control of the federal government also exist along the river west of the point where the river enters Nebraska. Water rights, both senior and junior to existing rights and priorities in Nebraska, coupled with the uncertainty of their accurate administration, add to the indefiniteness of the amount of water that passes at any given time across the state line and under the control of the administrative officers of this state.

Losses from evaporation and transpiration are heavy, due to the wide and shallow character of the river. Changes of temperature and varying types of wind add to the uncertainty of the losses resulting from these changing conditions. Losses from percolation vary along the various sectors of the river. The evidence shows that the river valley from the Wyoming-Nebraska line to North Platte or thereabouts is underlaid with impervious formations which do not permit losses of subterranean waters into other watersheds. At some unknown point between North Platte and Gothenburg, the river cuts through the impervious formations and runs into the sheets of sand and gravel with which the territory is underlaid. Losses begin to occur at this point due to the percolation of river water through this sand and gravel formation, in a southeasterly direction into the basin of the Republican river. It was estimated by Professor A. L. Lugn, an expert on geology, stratigraphy and ground-water hydrology, that the loss to the Republican river basin would be from 50,000 to 100,000 acre-feet of water each year. It is true that a large part of this loss occurs below the headgate of relators' canal. This estimate is recited for the purpose of giving some idea of the nature and degree of the loss, without any hope of accurately measuring such losses occurring above the headgate of the Kearney canal. Experts with experience on the river estimate that the loss in delivering water from North Platte to the headgate of the Kearney canal with a wet river bed amounts to three times the amount of delivery, and with a dry river bed that it is almost impossible to get water through without a flood or a large sustained flow. In other words, it requires approximately 700 second-feet of water at North Platte to deliver 162 second-feet at the headgate of the Kearney canal when the river bed is wet. The underlying sand and gravel beds thicken as the river moves east. With the bed of the river on the surface of these sand and gravel deposits, it requires a huge amount of water to recharge the river channel and surrounding water table after the river bed once becomes dry. Until the water table is built up to the surface of the

river bed, the river channel will not support a continuous flow. It is also shown that the water table has been affected materially by pump irrigation. It was estimated that there are 500 irrigation pumps in Dawson county alone, which pump as much as 40,000 acre-feet of water in a single season. The evidence bears out the statement that the Platte river east of Gothenburg is a very inefficient carrier of water. In addition to the subterranean losses noted, the river spreads out, causing a broad surface of water and channel bed to be subjected to large evaporation losses. It is further established by early settlers along the river that it was not unusual for the river to go dry in July and August before irrigation was generally practiced along the river. That the river is generally considered a gaining stream, and can be so established by an examination of the statistical records of the mean flow for the calendar year, is borne out by the record. But it is just as clearly shown that the river is ordinarily a losing stream during the months of July and August, when the mean flow for that period is considered. These conditions and activities establish the cause of the huge losses of water between Gothenburg and the Kearney canal. They are important only as factors that must be considered by the officers of the state in distributing an insufficient supply of water to appropriators in the proper order of priority.

Appropriations of water are made throughout the length of the river. The priority dates of these appropriations have no relation whatever to their location on the stream. Hence, very early appropriations may be found at the upper and lower ends of the stream, while very late appropriations are likewise found at both ends. In times of water shortage, the later appropriators are the first to be deprived of water. The closing of canals in accordance with the inverse order of their priority dates necessarily requires certain canals to close their headgates all along the stream at the same time. Water moves down the stream at approximately 25 miles per day with the result that it requires approximately ten days to deliver water from the state line

to the Kearney headgate under normal conditions. The resulting lag therefore becomes an important factor to be considered. During the lag period, conditions over which the administrator of the river has no control may change or disrupt all calculations. Excessive heat, continued drouth, and unusual winds may greatly reduce estimated quantities of river-flow, or, on the other hand, low temperatures, rains and floods in the lower river basin may relieve immediate demands. These elements of uncertainty must be considered in protecting the rights of all on the stream. The position of relators at the lower end of the stream is in itself a recognized condition, and while they have the second oldest priority on the river, it is inescapable that their location subjects them to unfavorable conditions which are practically impossible to eliminate.

It must also be borne in mind that the amount of flow in the river at any given time during the irrigation season is nothing more than an estimate based on spot measurements. Accurate figures are not obtainable until several weeks after the immediate problem has been determined. The best available basis for the determination of the facts therefore is often very uncertain. The effect of the use of the river as a carrier of storage water also enters into the calculations. The best estimates of the administrator are often affected by unlawful diversions by junior appropriators, injunctions and restraining orders issued by the courts, errors of judgment by the administrator and his subordinates, dilatory compliance with closing orders, and inaccurate reports of rains, floods and weather conditions generally. All of the factors hereinbefore mentioned contribute to the uncertainty of an efficient and accurate distribution of water in accordance with adjudicated appropriations in the order of their priority.

The use of water for irrigation in this state is a natural want. The inadequacy of supply to meet the demands of the public requires strict administration to prevent waste. It is therefore the policy of the law that junior appropriators may use available water within the limits of their own ap-

propriations so long as the rights of senior appropriators are not injured or damaged. And so, in the instant case, junior appropriators may lawfully apply water to their lands within the limits of their adjudicated appropriations until the Kearney canal fails to receive its full appropriation of 162 second-feet. Until the senior appropriator is injured, there is the ever-present possibility of changed weather conditions, precipitation, or other sources of water supply which might alleviate the situation and supply the needs of the Kearney canal. To pursue any other rule would greatly add to the loss by waste of the public waters of this state. We conclude therefore that the use of water by a junior appropriator does not become adverse to or injure a senior appropriator until it results in a deprivation of his allotted amount, or some part thereof. This rule is supported, we think, by our decisions as well as the decisions of other states.

The real question to be decided, however, is the determination of the duty imposed upon the officers of the state in administering the waters of the stream when the available supply of water at the headgate of the Kearney canal is reduced to an amount less than the 162 second-feet to which the relators are entitled. The rights of relators to the use of this water as against all appropriators subsequent to September 10, 1882, cannot be questioned. It is the duty of the administrative officers of the state to recognize this right and to give force to relators' priority. This requires that junior appropriators be restrained from taking water from the stream so long as such water can be delivered in usable quantities at the headgate of the Kearney canal. If it appear that all the available water in the stream would be lost before its arrival at the headgate of the Kearney canal, it would, of course, be an unjustified waste of water to attempt delivery. Whether a definite quantity of water passing a given point on the stream would, if not diverted or interrupted in its course, reach the headgate of the Kearney canal in a usable quantity creates a very complicated question of fact. It therefore is the duty of the administrative officers

of the state to determine from all available means, including the factors hereinbefore discussed, whether or not a usable quantity of water can be delivered at the headgate of the Kearney canal. It necessarily follows that this finding of fact must be determined in the first instance by the officers charged with the administration of the stream. The finding of fact thus made is final unless it appears that it was unreasonable or arbitrarily made. The determination of the facts is an administrative function, and an order or course of conduct based thereon raises only the question whether the administrator was supported in his finding by evidence indicating his action was not unreasonable or arbitrary. The rule is that where the action of the administrative officer of the state is not unreasonable or arbitrary, and does not exceed the duties and powers imposed, this court will not interfere with the findings of fact so made because to that extent they involve an administrative, as distinguished from a judicial, function. The necessity of prompt, efficient and fair administration of the waters of a stream in a territory where irrigation is practiced has been demonstrated on many occasions. Such administration requires the exercise of judgment, experience, training, and statistical knowledge. The factors to be considered are numerous and intricate. Unless such findings be promptly made, it is ordinarily not necessary that they be made at all. The very necessities of the case require that the findings of the administrator be final unless shown to be unreasonable and arbitrary.

After determination that a given quantity of water passing a certain point on the river would not, even if uninterrupted, reach the headgate of the Kearney canal in usable quantities, the administrative officers of the state may lawfully permit junior appropriators to divert it for irrigation purposes. This results ofttimes in having junior appropriators receiving a head of water at a time when an appropriator farther downstream is getting none, though he is prior in time. Such situations are not therefore conclusive evidence of unlawful diversions.

Amici curiæ urge that the doctrine of reasonable use is in force in this state and that it should be applied to the case at bar. We recognize the principle that the public has an interest in the public waters of the state and it is the use thereof only that may be appropriated. Even though an adjudicated appropriation may be vested, it may be subjected to regulation and control by the state by virtue of its police power. It may likewise be circumscribed to the extent that a limited diversion for a specified purpose will not permit of an undue interference with the rights of other appropriators on the stream. But we cannot agree that the doctrine of reasonable use can be applied in a case where delivery of a usable quantity of water can be made, although the losses suffered in so doing are great. To permit the officers of the state the right to say whether prospective losses would or would not justify the delivery of usable quantities of water would clothe such officers with a discretion incompatible with the vested interests of the relators, and destroy the very purpose of the doctrine of appropriation existent in this state. When upstream appropriators applied for and received adjudicated priorities, they did so with the knowledge that there was an earlier appropriator at the lower end of the stream whose rights had to be recognized. When the relators applied for and received their adjudications, they are likewise presumed to have known that other appropriators would obtain inferior rights above them that would have to be recognized. Each is required to respect the vested rights of the others, even though some hardships may be thereby imposed. We therefore hold that the doctrine of reasonable use does not extend so far as to authorize the administrator of the waters of the stream to refrain from delivering a usable quantity of water to a senior appropriator because it might appear to him that excessive losses would result. The duty of the administrator, in administering the waters of the stream by virtue of the police power of the state, is to enforce existing priorities, not to determine, change or amend them. But in regulating the distribution of water it may become incidentally necessary for him to as-

certain for that purpose only whether a prior appropriator is injured by a diversion above him. This finding of fact must be made, not to change existing priorities, but in order to determine whether or not a distribution of water may be made to a junior appropriator in accordance with existing priorities.

It appears that, during the irrigation season of 1925 and following, water belonging to irrigators under the Kearney canal was diverted through the Dawson county canal into the Kearney canal by way of Buffalo creek in order to avoid the large losses that would have been sustained by using the river channel. These diversions were not objected to by the Central Power Company and were consented to by the water users under the Kearney canal. The contention is advanced that the Central Power Company thereby waived its power right. We fail to find any merit in this contention. The diversion by way of the Dawson county canal seems to have been made as an emergency measure and as a means of averting exceptional losses. No water for power purposes was ever routed through the Dawson county canal; in fact, this route did not have the capacity to carry water to which the Central Power Company was entitled under its first appropriation for power purposes. While it is true that diversions were made through the Dawson county canal when there was water in the river at the headgate of the Kearney canal, we fail to find any of the elements of a waiver on the part of the Central Power Company as to its appropriation for power. The Central Power Company has in fact been objecting to these diversions for several years last past and has insisted upon all deliveries being made by the river channel. An examination of the evidence on this subject requires our holding that none of the appropriation rights of the Central Power Company bearing the priority date of September 10, 1882, has been lost by waiver or abandonment.

The law imposes on the administrative officials of the state the duty to administer the water of the stream, as heretofore mentioned. The chief administrative officer, R.

H. Willis, testifies that he has so attempted to administer the waters of the stream. The petition points out no specific administrative act which relators desire to have performed. The evidence does show that in the summer of 1937 a large quantity of water passed the state line as a result of heavy rains and floods in Wyoming. That this water should have reached the Kearney canal and provided water at a critical period cannot be denied. Relators complain that they never received any of this water. The water administrator testifies that the failure to deliver some of the water to the Kearney canal was due to incorrect advices as to the amount of water passing the state line, and to mistaken judgment in estimating the losses from the state line to the Kearney canal. Clearly, relators should have received 162 second-feet of water from these flood waters, which they did not receive. That they failed to obtain it because of an error of judgment is not controverted by evidence, although relators claim the failure was due to the continuation of a long-existing unlawful practice. In any event, the water administrator concedes that the water should have been delivered and that he intended it to be delivered.

The record shows that the petition of relators was filed on January 29, 1938, after the close of the irrigation season. Consequently, we fail to see how respondents could at that time be in default of an administrative duty imposed upon them by law. All alleged defaults occurred long before the petition was filed. The correct rule in this state is: "To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear." *State v. Barstler*, 122 Neb. 167, 240 N. W. 273. Relators contend that it was impossible to commence the suit at the time of the actual default because of the limited time for preparation. While it is true that relators probably were unable to make preparation for trial during the period of default, we fail to see how this would excuse the timely commencement of the action. We doubt not that, if a default had existed at the

time the writ of mandamus was applied for, the court would have jurisdiction to determine relators' right to it even if the default no longer existed when the case came on for trial. Neither do we doubt the right of the court, if default exists, to issue the writ of mandamus and make it effective as to the performance of similar duties in the future. Any other rule would require the courts to administer justice piecemeal. But we are obliged to adhere to the rule that a default must exist when the writ is applied for, to properly invoke the extraordinary writ of mandamus. The administration of the waters of the stream must be in accordance with the law announced in this opinion. The administrator testifies to his willingness to so administer the stream and, in fact, contends that he has so administered it. We doubt not that he will endeavor to so administer it in the future. That the application for a writ of mandamus in case of default of duty on the part of respondents is the correct remedy cannot be questioned. The pleadings and evidence, however, fail to disclose a default of any ministerial duty on the part of respondents at the time the writ was applied for. In addition thereto, respondents indicate a willingness to administer the waters of the stream in accordance with established law. A writ of mandamus requiring the respondents to enforce all the irrigation laws and appropriation rights of relators is too general in character to invoke coercive processes and subject respondents to summary proceedings for a violation thereof. The issuance of the writ is subject to the sound judicial discretion of the court. After a consideration of the pleadings, the evidence, and all the circumstances surrounding the case, we think the trial court was justified in the exercise of such discretion in denying the writ prayed for. We likewise believe that the action will accomplish the desired end without the issuance of the writ at the time and in the form in which it was asked. We therefore hold that the district court did not err in denying the writ.

AFFIRMED.

MARY THOMPSON, APPELLEE, V. ANDREW G. EDLER, APPELLANT.

292 N. W. 236

FILED MAY 24, 1940. No. 30711.

1. **Automobiles.** In an action for gross negligence under the automobile guest statute (Comp. St. Supp. 1939, sec. 39-1129), where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.
2. ———. Evidence required submission to jury of question of gross negligence under automobile guest statute, where it showed that defendant's automobile, while being driven at 40 miles an hour, on a straight, graveled road, just as daylight was breaking, was allowed to drift to the edge of the road and to a position of possible peril; that, when defendant observed the situation, he attempted to ease the car over into the main traveled portion of the highway, but discovered for the first time that, in his extreme position on the road, he was in a direct line with the railing of a bridge, which was part of the channel of traffic, and only 10 to 12 feet away from it; that he then pushed his accelerator down to the floor board, plowed through the railing, continued across the bridge, completely stripped off the railing, tossed pieces of timber 60 to 70 feet beyond the bridge and drove others through the floor board of the car; and that his car finally dropped into the creek bed at the far end of the bridge and overturned.

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

Beatty, Maupin, Murphy & Davis, for appellant.

Stevens & Stevens, contra.

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

JOHNSEN, J.

The question for determination is whether the evidence is sufficient to support a finding of gross negligence under the automobile guest statute.

A jury returned a verdict for plaintiff, in the sum of $1,300, for personal injuries received while riding as a guest, with defendant and his wife, in the front seat of defendant's Chevrolet sedan. Defendant has appealed on the ground that the trial court should have sustained his motion for a directed verdict.

The accident occurred about 4 o'clock a. m., on July 5, 1938. Daylight was breaking, but the headlights on defendant's car were still lit. The parties were returning from Indianola, where they had gone to attend a fourth of July dance. While defendant was driving south on a straight, dry, graveled road, he ran his automobile into the right-hand railing of a wooden bridge, which was located about a quarter of a mile south of the limits of Indianola. They had come over the same road on their way to the dance. The bridge was about 15½ feet wide and was slightly narrower than the road and shoulder, but it was located in a straight line with the traveled portion of the highway. Defendant sheared off the railing, which was three feet high and constructed of 2 by 6 and 2 by 8 timbers, for the full length of the bridge—a distance of 62 feet—tossing pieces of timber 60 to 70 feet beyond the bridge, driving others through the floor board of the car, and finally causing the automobile to drop and overturn in the creek bed at the south end of the bridge. Plaintiff sustained somewhat severe injuries, including a brain concussion, and claimed to have no recollection of anything that happened from the time the automobile had crossed some railroad tracks at the edge of Indianola. She admitted, however, that up to that time there had been no occasion to find fault with defendant's driving.

These facts, it seems to us, were susceptible of such implications and inferences, as to excessive speed, failure to keep a proper lookout, lack of effort or ability to control the car, and apparent disregard of consequences, as might reasonably be found by a jury, in the absence of some other controlling explanation of the accident, to constitute negligence in a very high degree. The trial court, therefore, did

not err in denying defendant's motion for a directed verdict at the close of plaintiff's evidence.

Nor, in our opinion, would the court have been justified in directing a verdict in favor of defendant, at the conclusion of the case, on the basis of the evidence which he submitted.

It appeared that, north of the bridge, the west shoulder of the road had been widened somewhat by the dumping of garbage. Photographs in evidence show, however, that the garbage deposit did not constitute a part of the usual traffic channel, although it was possible for an automobile to proceed upon it. Whether he had become drowsy or for other reason had failed to keep a proper lookout, defendant apparently allowed his car to drift to the edge of the road, and then suddenly became conscious of his peril. He testified as follows: "The first thing I remember, my car, for some reason, was a little bit too close. * * * I noticed I was too close to the weeds; I started to sway the car back a little more toward the center. * * * I saw the car was easing too close to the weeds; I started to ease it back toward the center. * * * What I first remember was that I thought I had the car a little dangerously close. I started to guide that car back more towards the center because it was hugging too close to the row of weeds. Just as I was pulling over, I remember that is when I first saw the bridge straight ahead of me."

From this testimony, the jury were entitled to infer, as we have indicated, that defendant had carelessly allowed his car to drift too close to the west edge of the road, and that he suddenly came to realize the possible danger of his position. They were entitled to infer, also, that he had not been keeping a proper watch ahead, for, while, by virtue of its extreme position in the road, his car was traveling in a direct line with the west railing of the bridge, he stated that he did not see the white painted structure until the car was only 10 or 12 feet away from it. In fact, it was only after he had become concerned about getting the car back toward the center of the highway that he first observed the bridge. His counsel, in extenuation, sought to create the impression

that possibly the weeds along the edge of the road had obscured his vision, but the jury were not bound to accept this attempted justification, in view of his statement that "I don't know that they did, but for some reason I never noticed the bridge until I was practically on it."

According to defendant's testimony, the car had been proceeding about 40 miles an hour. When he discovered the bridge, he stated that, instead of slackening the speed of the vehicle and attempting to swing it over slightly onto the 15½-foot floor of the bridge, he decided, in apparent disregard of consequences, to crash through the railing, and so he immediately pressed the accelerator down to the foot board. He accordingly drove into the railing, with all the speed that he could command, and plowed across the structure in this manner, with the results which have already been set out. He summarized his own impression of what he had done, on the witness-stand, as follows: "It might have been foolish—I know it was now, if I had it to do over."

The situation was, of course, not one where he could escape the consequences of his act of plowing directly into the railing of the bridge at top speed, under the emergency rule, for the jury would be warranted in finding that the peril with which he was confronted had been created by his own previous negligence. It was, then, simply a question whether his conduct which occasioned the peril, and the course of action which he took in dealing with it, when judged in the light of all the circumstances and its possible and actual results, were such, as together, might properly be found by a jury to constitute negligence in a very high degree. The facts and their implications are such that it cannot be held that defendant was free from gross negligence as a matter of law. We need not determine whether the acts of which defendant was guilty, severally, would constitute gross negligence. Together, however, they made such a composite as required them to be submitted to the jury. A series of acts of ordinary negligence combined may, under certain circumstances, operate to produce gross negligence. In this case, though the jury were not bound to

find that defendant's acts amounted to negligence in a very high degree, they were clearly entitled, from the things which he did, the circumstances which surrounded them, and the results which were produced, to pass upon that question, and it is not our privilege to disturb their verdict.

Defendant cites *Johnk v. Scanlon,* 136 Neb. 187, 285 N. W. 488, as being similar in its facts. There, the defendant failed to negotiate a turn onto a bridge, which was constructed at a sharp angle and to the right of the general line of the highway. In this case, the bridge was in a straight line with the traveled portion of the road. An analysis of the *Johnk* case will show that one of the controlling factors in the decision was the fact that the loose gravel was regarded as making the skid marks an unsafe determinant of the speed of the car, and that, as the opinion states, "The record does not establish such speed as would amount to gross negligence under the circumstances." If the other evidence had been regarded as sufficient to establish excessive speed, the circumstances probably would have supported a finding of gross negligence. We find nothing in that decision that conflicts with this case.

It must be borne in mind, always, that no decision on gross negligence can constitute an absolute precedent in any other case. Each case necessarily differs somewhat in its particular facts and circumstances, and in the composite which results from them. A dissection of the individual facts may, therefore, be misleading, because, in the attempted segregation, part of their real significance may become lost. While it may be regrettable that no perfect yardstick for measuring gross negligence has ever been devised, the numerous decisions, which the guest statutes have produced, seem rather clearly to demonstrate that this is as close as it is possible to come to a judicial solution. If the tapeline of past decisions seems at times to be somewhat inaccurately applied, and the processes of logic to be a bit variable in their result, this may be largely because the observer is looking at the facts in isolation and not in context. Here, both the bench and the profession must be

on guard. Courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. But, if there is adequate proof of negligence, a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. In this case, the question was properly left to the jury.

Defendant has assigned, as a further error, the refusal to declare a mistrial, for an incident that occurred on the trial. A review of the facts shows that the ruling of the trial court was so clearly proper that it could serve no useful purpose to lengthen this opinion to discuss it.

AFFIRMED.

RALPH BARTEL, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

292 N. W. 383

FILED MAY 24, 1940. No. 30807.

1. **Pardon.** The board of pardons, in paroling a prisoner, may permit him to go outside the state and still retain jurisdiction over him.
2. **Extradition.** A prisoner, who accepts such a parole and violates it by committing a crime in the state to which he has gone, becomes, upon revocation of the parole, a fugitive from justice, and may be apprehended and returned to the penitentiary to complete his sentence.
3. **Habeas Corpus.** He cannot under these circumstances obtain his release from the penitentiary by habeas corpus until his original, valid sentence has been completed.

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

Ralph Bartel, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

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

JOHNSEN, J.

Petitioner has appealed from an order of the district court, denying his right to a release from the state penitentiary, on habeas corpus.

He was sentenced to the penitentiary in 1931, for a term of 15 years, after conviction upon charges of felonious assault and robbery. He was paroled by the board of pardons on April 12, 1934. On June 23, 1934, he committed an aggravated robbery in Denver, Colorado. On June 27, 1934, the board of pardons revoked his parole, and, on May 11, 1937, presumably after he had served a term in the Colorado state penitentiary, he was taken into custody at Canon City, Colorado, by the state parole officer, and was returned to the penitentiary at Lincoln.

His parole agreement had authorized him to go to Denver, Colorado, where his father resided. It provided, however, that, during the period of the parole, he should "remain in the legal custody and under the control of the Board of Pardons of the State of Nebraska," and that he would be "liable to be retaken and again confined within the enclosure of the Penitentiary * * * for any reason or reasons that shall be satisfactory to the Board of Pardons, and at their sole discretion, until he receives a copy of the final discharge through the said Board." He signed a written acceptance of all the terms and conditions of the parole, and an agreement that, upon any revocation of the parole, he would "freely and voluntarily accompany any officer of the Board of Pardons * * * as a * * * fugitive from justice from any place that I may be apprehended in any state in the United States to the Nebraska Penitentiary."

He now insists that he is being illegally confined in the penitentiary, on the ground that, when the board of pardons permitted him to leave the state, it lost all jurisdiction over him, and that his parole therefore was equivalent to a final discharge, by operation of law. The brief, which he has

prepared in his own behalf, states the issue thus: "The sole and only question presented here for the court's decision * * * is, did the state of Nebraska relinquish, through its agents the * * * 'Board of Pardons' on April 12, 1934, the jurisdiction of the state of Nebraska over the person of appellant by paroling him to a place without the state, Denver, Colorado."

If the board had no authority to allow petitioner to leave the state, then its consent thereto was a nullity. It would not make the parole equivalent to a discharge, because petitioner had agreed to conform to the rules of the board, no matter where he was, and for any violation thereof, wherever committed, he had agreed that his parole might be revoked and that he would then be a fugitive from justice. But, since the question of the board's power to allow a paroled convict to leave the state has been expressly raised, we may as well dispose of petitioner's appeal on that basis. The legislature has not prohibited the board of pardons from allowing a paroled convict to leave the state. Comp. St. 1929, sec. 29-2623. Such a limitation might, in many instances, seriously handicap the purpose of rehabilitation which the parole statute was designed to serve. The provision in section 29-2629, Comp. St. 1929, for a penalty against any convict guilty of "leaving the state of Nebraska *without authority of the board*" is in fact a direct recognition by the legislature of the power of the board to give such consent. The terms of a parole agreement are equally effective and operative, whether the convict has left the state with or without the consent of the board of pardons, and, on any violation of the parole, and its revocation, he becomes a fugitive from justice. *Ex parte Hamilton*, 41 Okla. Cr. Rep. 322, 273 Pac. 286.

The suggestion is made that petitioner "was forced to leave the State of Nebraska," because the terms of his parole agreement required him to report to his father in Denver. Petitioner can hardly claim that he was removed from the state against his will. He left of his own accord and after purchasing his own railroad ticket. No officer accompanied

him. The only fair inference from the parole agreement is that the board, in allowing him to go outside the state and to return to his parental home in Colorado, was doing him a personal favor. But, in any event, there was no proscription or banishment, because he voluntarily accepted the terms of the parole agreement and the board, on its part, specifically retained jurisdiction over him. Whether it ever would be a material consideration, in a situation such as this, that a convict had been removed from the state against his will, where he has in fact again been returned to the penitentiary and part of his original sentence period remains unexpired, need not be determined here. Petitioner did not leave the state under legal compulsion.

The trial court properly refused to release him from the penitentiary.

AFFIRMED.

CLARA WOODGATE ET AL., APPELLEES, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
292 N. W. 461

FILED JUNE 7, 1940. No. 30816.

1. **Eminent Domain: Damages.** "In a condemnation proceeding, dual or speculative or excessive damages are not recoverable for consequential depreciation in the value of land not taken, though severed from an entire tract of the owner by an exercise of eminent domain." *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593.
2. ———. "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.
3. ———. In a proceeding to condemn for public use unimproved land adapted to and used exclusively for farm purposes, evidence that land not taken will produce crops after the taking the same as before must be considered in determining consequential damages.

4. ———. In a proceeding to condemn land for public use, an excessive verdict for consequential damages to land not taken, as a result of the jury's prejudice, may be set aside on appeal.

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

R. O. Canaday, R. H. Beatty and *M. M. Maupin,* for appellant.

J. C. Hollman, E. H. Evans and *Urban Simon, contra.*

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

ROSE, J.

The Central Nebraska Public Power and Irrigation District, a public corporation, hereinafter called the "District," commenced this proceeding in the county court of Lincoln county to condemn and appropriate to its own use 9.40 acres of land owned by Clara Woodgate, plaintiff.

The public enterprises or works in which the district is engaged are the construction, operation and maintenance of projects for the purposes of irrigation and generation of electrical energy for light and power. For these purposes the district is constructing a canal for the diversion of water at the junction of the North and South Platte rivers in Lincoln county. The canal crosses a tract of plaintiff's Lincoln county land, consisting of 84.92 acres.

For the purpose of determining the damages suffered by plaintiff, the county court appointed appraisers who viewed the premises, heard the parties and awarded plaintiff $3,750 as damages for the land taken and for depreciation in the value of the land not taken.

There was an appeal from the county court to the district court, where a spirited trial resulted in a verdict of $822.50 for the 9.40 acres taken and of $3,171.84 for damages to the 75.52 acres of land not taken, or a total of $3,994.34. From judgment on this verdict the district appealed to the supreme court.

On appeal the assignments of error are directed to the verdict as excessive, as unsupported by evidence of damages in the sum of $3,994.34 and as the result of prejudice.

The district itself proved that, under the power of eminent domain, it had taken 9.40 acres of plaintiff's land for its canal and that the construction and maintenance thereof would result in consequential damages to the remainder of her tract, 75.52 acres. There was no controversy over the right of plaintiff to recover damages. The controverted issue was the amount of damages suffered by plaintiff through the condemnation and appropriation of her land for public purposes. Rules for the determination of this question were recently stated thus:

"In a condemnation proceeding, dual or speculative or excessive damages are not recoverable for consequential depreciation in the value of land not taken, though severed from an entire tract of the owner by an exercise of eminent domain.

"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.

Most of the material facts are shown without controversy. Before the district instituted this proceeding, plaintiff owned 84.92 acres of land in Lincoln county in the Platte valley south of the Platte river. It was practically level except that it sloped slightly to the north toward the river. It consisted of two 40-acre tracts in regular form, extending lengthwise north and south, and in addition 4.92 acres. It was all fertile, tillable land adapted to farming. There were no buildings or other improvements on this land except a fence around it. There is a public highway along the east side, affording access to and egress from the premises. A store called "Bignell" is located a short distance north of this land, but the nearest general market is Maxwell, about nine miles away. Prior to condemnation, drouth had affected

the crops on plaintiff's land in some seasons and floods in others. Across other lands south or southwest of this tract, rain waters falling on hills and in canyons still further south or southwest follow the general slope toward plaintiff's lands and the Platte river.

The right of way for the canal is 240 feet wide and the ditch will be 12 or 13 feet deep, measured from the natural surface of the ground, and 18 feet wide at the bottom. By means of artificial banks or compacted fills 3½ feet high, the surface of water in the canal when filled to capacity will be 3 feet above the natural surface of the ground and 108 to 110 feet wide. At or near the western boundary of plaintiff's land, a 36-inch drain or siphon has been constructed under the canal to convey flood waters in the natural course of drainage from the south side of the embankment to the north side of the ditch. A flange on the south end of the siphon collects the waters and a flange on the north end spreads them out on the surface of level ground.

The alignment of the canal followed the elevation or contour of the ground and prevented the crossing of the plaintiff's land at right angles or from west to east. The general direction of the right of way across the land described is northwest to southeast. The center of the land taken by eminent domain is near the center of the entire tract of 84.92. The southwest corner of the north 40 is south of the canal and the northeast corner of the south 40 is north of the canal. According to calculations about which there is no controversy, the district has taken from plaintiff 9.40 acres of her regular tract and left her two separated irregular tracts, the one north of the canal containing 40.82 acres and the one south of the canal containing 34.70 acres.

The husband of plaintiff was her principal witness. He testified generally to the character and productivity of the soil, to crops raised, to elements of damage caused by the appropriation of the land, to rainfall and to obstruction of drainage. He expressed the opinion that the fair and reasonable market value of the land before the taking was $100 an acre, including the land actually taken; that after the

taking the value of the land south of the canal was $50 an acre and the land north of the canal $20 an acre. Among the elements of damage to which he testified were the following: The 36-inch drain will back up the flood waters at the south end and wash a ditch at the north end. Irregular rows resulting from sharp angles in the lands not taken will interfere with farming and decrease their value.

Other witnesses who testified on behalf of plaintiff generally estimated the value before the taking of the land at $100 an acre and the remainder afterward at $20 to $35 an acre. By these witnesses elements of damages causing the depreciation in values were enumerated as follows: Unsightly land banks; weeds, insects and other pests along the canal; severing of original tract into two parts; short, pointed rows, an inconvenience in farming; pump irrigation requiring two pumps instead of one; danger of seepage from canal; possibility of flood waters interfering with natural drainage; inadequacy of 36-inch drain to prevent flood waters from damming back at the south end and washing a ditch at the north end. These factors in the depreciation of values were repeated time and again before the jury.

On the other hand, an engineer in the employ of the district testified from engineering data collected in the field by actual survey to the adequacy of the 36-inch drain to convey flood waters from the south end to the north end without material backing of water on the south side of the canal or washing of ditches on the north side. The husband of plaintiff admitted on the witness-stand that it had been six or seven years since much water from the hills had come onto plaintiff's lands. There is evidence, however, that in a flood waters might back up 70 feet south of the canal but would drain off quickly. There is also evidence that the entire acreage south of the canal will produce as much for farm purposes since the taking as it did before.

A real estate agent who qualified himself to testify to values said that the fair market value of the entire 84.92-acre tract before it was severed by the canal was $85 an

acre; that the value of the 75.52 acres not taken was $85 an acre before any of the land was condemned for the canal and $68 an acre thereafter. The import of the testimony of all the witnesses who testified on behalf of the district, though not the same, was similar.

Giving full credence to all material testimony relating to the elements of damage depreciating the fair and reasonable market value of the separate tracts of land not appropriated by the district, these outstanding facts remain: The entire acreage south of the canal will produce practically as much for farm purposes after the taking as before. The greater part of the acreage north of the canal will produce as much for farm purposes after the taking as before. What the land will produce is the factor most likely to engage the attention of a prospective purchaser. There are no buildings on the land. What is left of it is adapted to farm purposes. When all the evidence is considered in its true light, there is no reasonable view in which it will sustain a finding that the value of the land south of the canal was depreciated by the district from $100 an acre to $50, as witnesses for plaintiff testified, or to sustain a finding that the land north of the canal was depreciated from $100 an acre to $20 an acre, as a witness testified, or to sustain the verdict that the district damaged the two remaining tracts of 75.52 acres to the extent of $3,171.84, or $42 an acre.

The verdict is clearly excessive beyond any reasonable view of the evidence and must necessarily have been reached through some form of prejudice. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF JOSEPH JOSEPHSON.
CARL JOSEPHSON ET AL., APPELLANTS, V. GUST STROM, ADMINISTRATOR, APPELLEE.
292 N. W. 595

FILED JUNE 7, 1940. No. 30831.

Executors and Administrators. An order of the county court, approving a final report and discharging an administrator, can only be set aside on proof of such fraud as would justify the setting aside of any other judgment.

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

G. H. Seig and *M. L. McBride,* for appellants.

Henry J. Beal, Peter E. Marchetti and *Raymond E. McGrath, contra.*

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

PAINE, J.

This was an action in equity, commenced in the county court, to set aside an order approving the final account and discharging an administrator on the ground of fraud alleged to have been practiced by the said administrator and his attorneys. The action was dismissed by the county judge and upon appeal and trial in the district court it was likewise there dismissed, and the heirs appeal to this court.

Joseph Josephson died intestate in Omaha, Nebraska, August 8, 1930, leaving seven children, who were all adults, and none of whom lived in Douglas county. Two of them lived at Holdrege, Nebraska, others lived in Colorado, California, and Montana.

Gust Strom, the brother of the deceased (although bearing a different name), lived in Omaha, and followed the trade of a carpenter, and he was agreed upon after the funeral, which was held at Holdrege, as the one to handle the estate, and thereafter was appointed administrator, and

took charge of the two pieces of residence property and a small farm of 44.36 acres in Sarpy county, as well as the personal property, among which were two mortgages. No inventory was filed for several years after the administrator was appointed, but the administrator collected the rents and kept the property in repair, and finally filed a final report, which was approved, and a final decree was entered December 1, 1936, and the administrator was discharged on December 15, 1936.

The final report, covering the period from September 13, 1930, to July 31, 1936, set out that he had collected rents from the

Duplex at 2590 and 2592 Ellison avenue of	$3,281.15
Rents from 4421 California street of	1,047.25
Rent from Sarpy county farm of	715.00
Compromised a $500 mortgage for	170.00
Received from foreclosure sale of the other mortgage,	300.00
Cash on hand September 13, 1930,	66.00
Miscellaneous collections,	31.90
Total receipts,	$5,611.30
Then there are listed three pages of over 80 items of itemized expenditures of all kinds to keep up the property, and miscellaneous expenses, amounting to a total sum of	5,384.22
Balance on hand,	$ 227.08

In the case at bar, the seven heirs filed the amended petition in equity in the county court on June 24, 1938, setting up that they are the sole heirs at law of Joseph Josephson, deceased; that they had confidence in the integrity and ability of their uncle, Gust Strom, and being nonresidents of Douglas county they believed that the estate would be honestly administered by him; that Mamie Valine, one of the seven heirs, retained Dora Nelson, an attorney of Holdrege, Nebraska, to investigate the affairs of said estate, to attend the hearing upon final account of said administrator, to file objections, and require a proper accounting as the facts might warrant; that when the hearing was held on

December 1, 1936, said Dora Nelson attended the hearing, made no objections to the final report, and consented to the approval thereof, whereupon the administrator was discharged.

The seven heirs further represent to the court that said administrator and said Dora Nelson and the attorneys for the administrator perpetrated a fraud upon the court and the heirs in that said report was false in many particulars, and that said administrator had failed to account for all of the property coming into his hands; that he made a false report of the rents collected upon the property at 2592 Ellison avenue, and also upon the property located at 4421 California street, in Omaha, Nebraska, and failed to report balance of $992.75; that the estate owned a mortgage upon certain real estate, being two lots in Walnut Hill in the city of Omaha, said mortgage being for $800, and that said mortgage was foreclosed, and bid in by H. C. Schoening, who was a relative of Henry J. Beal, attorney for the administrator, for the sum of $300, although the property was worth approximately $2,000; that said Schoening obtained a sheriff's deed for the property on October 26, 1934, and that on December 28, 1934, said Schoening gave a quitclaim deed to said property to Thyra H. Strom, daughter of administrator Gust Strom, and who resides in his home, and that she now holds legal title thereto; that Gust Strom made application to the Omaha Loan & Building Association for a loan of $1,000 on the real estate, representing that said property was of the value of $2,100, there having been improvements made thereon, and on February 27, 1936, said association made a loan to Thyra H. Strom in the sum of $1,000, all of which is a fraud upon the heirs, who did not become aware of the true situation until after the administrator had been discharged and the statutory time to appeal from the decree on final account had expired, and that they have no adequate remedy at law unless the final decree is vacated and set aside by reason of said fraud, false representation, and wrongful conduct of the administrator and the said attorneys.

To this amended petition, an answer was filed by the administrator, setting up that the same plaintiffs filed a petition on the same alleged cause of action, and that a demurrer filed thereto on October 20, 1937, was sustained, and subsequently plaintiffs appealed that decision to the district court for Douglas county, Nebraska, and thereafter a motion to strike said petition was filed by the administrator, and subsequently the plaintiffs on their own motion dismissed said appeal, and that the said plaintiffs subsequently filed another action in the district court for Douglas county, Nebraska, presenting the same issues, and that demurrer was filed to said last named petition and sustained by the district court, wherefore the answering administrator prays that petition be dismissed for the reason that the matters presented for adjudication are *res judicata,* having already been adjudicated by the county court on October 20, 1937, and having already been adjudicated by the district court, and the administrator prays that the action be dismissed. The reply was a general denial.

On February 20, 1939, trial was had in the county court, the administrator appearing by his attorneys, Henry J. Beal, Raymond E. McGrath and Peter E. Marchetti, and Dora Nelson, attorney for petitioners during the administration, appearing in person, the petitioners appearing by G. H. Seig and M. L. McBride, their attorneys. After the trial Bryce Crawford, county judge, entered an order of dismissal on February 23, 1939, finding that Dora Nelson was retained as attorney for the petitioners; that she appeared upon the final hearing, and that Dave Josephson, one of the petitioners, also appeared on said final hearing and approved the same; that there was no fraud practiced by Gust Strom, administrator, nor by his attorneys, nor by Dora Nelson, attorney for the petitioners, and that there was no evidence before the court that Gust Strom as administrator had purchased the two lots in Walnut Hill at the foreclosure sale; that there is no evidence that said property did not bring a fair price on said sale; that there is no evidence that the purchaser or subsequent owner realized a profit

therefrom. The court further found that there are no grounds shown by the evidence introduced upon which to vacate or set aside the decree on final account entered, nor the discharge of the administrator, and that the amended petition in equity should be dismissed without prejudice.

An appeal was taken to the district court, where a stipulation was entered into on March 23, 1939, that said matter should be tried in the district court upon the pleadings filed in the county court as contained in the transcript.

The trial in the district court began on May 9, 1939, the decree being entered June 13, 1939, by John A. Rine, district judge, which found that Dora Nelson represented all of the heirs of Joseph Josephson in the county court; that she was an attorney, and familiar with all of the proceedings and acts of the administrator, and knew of the foreclosure of the property consisting of two lots in Walnut Hill in Omaha; that Henry J. Beal and Raymond E. McGrath, as attorneys for the administrator, or Dora Nelson, attorney for the petitioners, did not practice any fraud, concealment, or misrepresentation whatever with reference to the administration of said estate, or the closing up the affairs of said estate; that there is no evidence that the administrator has not faithfully and properly accounted for all rents and receipts of money in said estate.

The court further found that there are no grounds shown by the evidence upon which to vacate or set aside the decree on final account entered by the county court of Douglas county, or the discharge of the administrator entered December 15, 1936, and the amended petition in equity of the seven heirs was thereupon dismissed, from which decree the said heirs appealed to this court. The evidence taken in the district court is contained in a bill of exceptions of nearly 500 pages.

The petitioners set out ten errors relied upon for reversal, alleging that the decision of the district court is contrary to the undisputed record of the evidence, that the court erred specifically in finding that the property consisting of two lots in Walnut Hill, Omaha, was not purchased for the

administrator at the foreclosure sale, and in finding that $300 paid at the foreclosure sale was a fair price for these two lots.

The administrator, Gust Strom, testified that he was 62 years of age, had been a carpenter over 50 years, had lived in Omaha 37 years, was a married man with a family, and that Thyra H. Strom was his daughter, and was about 24 years of age; that he took charge of the property, collected the rents, kept the houses repaired; that there were some periods of vacancy, and that even when occupied he was not always able to collect all of the rents from the tenants; that he kept a record in the same book, exhibit No. 26, that his brother left, in which he put down every cent of money collected and every penny paid out; that it was all in his handwriting. More than 60 exhibits of pages from account books, receipts for repairs to the houses, taxes paid, and miscellaneous items were introduced in evidence.

The principal proposition with reference to the fraud charged was in reference to the foreclosure of the $800 mortgage held by the administrator for the estate upon property located at 4355 Charles street, Omaha. The delinquent taxes on this property amounted to $279.41. It was testified to be "just an old gray shanty." H. C. Schoening was in charge of the tax foreclosure department in the county attorney's office, and was present at the sale. A very low bid had been made, and he bid it in at $300, and after receiving a sheriff's deed sold it to Thyra H. Strom, who owned it at the time of the trial in the district court. This court is unable to discover any reason why she did not have a right to buy it, or in what way the estate was defrauded in any way in this transaction.

It may be admitted that this court has held that, where a trustee actually deals with trust property in the name of another, or by means of an agency which he himself controls, he will be deemed to have transacted the business in his individual name and as an individual. *Rotzin v. Miller*, 134 Neb. 8, 277 N. W. 811. However, the facts of the case at bar do not bring it within this holding.

In a guardianship case this court recently held that an order of a county court approving a final settlement between a guardian and his ward can only be vacated on such proof of fraud as would justify the setting aside of any other judgment, and, further, in such a case it must be shown that the facts on which the petition was based were unknown to the petitioner until after the decree approving the final settlement, and a mere allegation of ignorance coupled with an admission of facts sufficient to put petitioner on inquiry will not suffice. *In re Guardianship of Protsman,* 136 Neb. 192, 285 N. W. 494.

"In an action to vacate a judgment on the ground that it was obtained by fraud the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence." *Secord v. Powers,* 61 Neb. 615, 85 N. W. 846. See, also, *Miller v. Estate of Miller,* 69 Neb. 441, 95 N. W. 1010.

It is axiomatic that an administrator must strictly account for everything he receives, and if any of the acts in handling a trust estate are fraudulent, or if the administrator personally profited from his handling of the affairs of the estate, his final report and discharge should be set aside, and the whole matter opened up for the fullest examination. However, the mere fact that the daughter of an administrator purchased two lots of the man who originally bid them in, and secured a sheriff's deed, does not on the face of it appear wrong. Neither is it shown that the estate lost in any way by this transaction. To charge fraud by strong allegations in a pleading is one thing; to prove it is quite another.

A careful examination of the evidence fails to disclose that there has been a breach of trust, or violation of any duty, either wilful or fraudulent, on the part of this administrator. Nor do we find that he has made any personal profit out of the trust property at the expense of the estate.

Having reached this conclusion, the order of the trial court in dismissing the amended petition is hereby

AFFIRMED.

PAUL HOLTHUS V. STATE OF NEBRASKA.

292 N. W. 603

FILED JUNE 7, 1940. No. 30736.

1. **Criminal Law.** In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.
2. **Larceny.** In prosecutions for larceny, nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances, the same as any other essential fact.
3. **Criminal Law.** It is not necessary under the law of this state to first warn a prisoner under arrest that any statements he may make may be used against him as a condition precedent to proving inculpatory statements made by him.

ERROR to the district court for Pawnee county: VIRGIL FALLOON, JUDGE. *Affirmed.*

Kenneth S. Wherry, for plaintiff in error.

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

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

CARTER, J.

Plaintiff in error, hereafter referred to as the defendant, was convicted of the crime of cattle stealing, and sentenced to serve from three to five years in the state reformatory.

The record shows that on November 22, 1938, one Addie Hull purchased some cattle at Fairbury, Nebraska, which were transported to Pawnee City, Nebraska, by trucks during the night of the same day. The cattle were unloaded at the Fink stockyards shortly after midnight. On the following morning four of the cattle were missing. They were described as a white-faced cow, weight 1,165 pounds; a white-faced polled heifer, weight 845 pounds; and two small red steers, weighing 1,586 pounds. It was subsequently dis-

covered that four head of cattle of approximately the same description and weight were sold to the Lincoln Packing Company in Lincoln, Nebraska, on November 23, 1938, by one Keith Avery. Checks were given to Keith Avery for the cattle in the total sum of $177.24, which were cashed the same day at the Continental National Bank in Lincoln. The state called Keith Avery as a witness, and he promptly claimed immunity from testifying on the ground that he might incriminate himself in so doing.

The record shows that after Addie Hull unloaded the cattle which he himself had hauled from Fairbury, he went to a restaurant, and there at about 2 a. m. saw defendant in company with Keith Avery and one Virgil Ireland. Defendant's empty truck was parked in front of the restaurant.

The record shows that the sheriff of Pawnee county requested the sheriff of Johnson county to take the defendant into custody, and in response to that request Edgar Mahoney, sheriff of Johnson county, on November 29, 1938, called defendant on the phone and asked him to come to Tecumseh. Defendant and his wife thereupon went to the sheriff's home in Tecumseh, at which time the sheriff walked out to the car and said: "Paul, you are in trouble, aren't you?" The sheriff says he answered: "Yes;" while the defendant and his wife testify that no reply was made. Defendant was thereupon taken to the courthouse, where a statement was made in which he confessed his guilt. Much of the record is taken up with testimony as to the admissibility of this confession in evidence.

When the confession was made it appears that, in addition to the defendant and his wife, there were present Edgar Mahoney, sheriff of Johnson county; M. J. Donahue, sheriff of Pawnee county; Raymond B. Morrissey, county attorney of Johnson county; and Esther Wolford, stenographer in the county attorney's office. The questions were asked by Morrissey. The questions and answers were taken in shorthand and transcribed by Esther Wolford. The manner of taking the confession was minutely gone into by both the state and the defendant. The record is absolutely devoid

of any evidence of any unlawful inducement or threats made in procuring the statement. In fact, it appears that the statutory penalty for cattle stealing was read to the defendant before any statement was taken. The defendant explained that he thought the statement was necessary in order that he could be taken to Pawnee City. He does not contend that improper inducements or threats were made to procure the statement. As to the contents of the statement, particularly the answers he had given, he seems at the trial to have suffered a complete and convenient loss of memory. Defendant's counsel urges that the confession was not voluntary because the statement itself does not so state. It is also urged that defendant was not advised of all his constitutional rights, and for that reason it is not properly admissible. There is no merit to these contentions. The confession meets all the requirements contained in the holdings of this court on the subject. The correct rule is: In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making of the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. The following cases support this rule: *Grammer v. State,* 103 Neb. 325, 172 N. W. 41; *Bush v. State,* 112 Neb. 384, 199 N. W. 792; *Stagemeyer v. State,* 133 Neb. 9, 273 N. W. 824.

Defendant asserts that the state has failed to prove beyond a reasonable doubt that there was a felonious taking without the consent of the owner. There can be no doubt that the cattle delivered at the Fink stockyards were the property of Addie Hull. Whether the technical custody of the cattle was in Addie Hull or the Fink stockyards at the time of the larceny is not made clear by the evidence. Both Addie Hull and John Fink testified to the loss of the cattle. While it is true that a lack of consent was not shown by express terms, the effect of the testimony is that there was an entire want of consent to the taking. The confession offered in evidence establishes the want of consent to the

taking without any doubt. All the circumstances shown by the record were inconsistent with a taking with the consent of the owner. Want of consent may be inferred from circumstances shown by the evidence, the same as any other fact. We think the cases of *Johns v. State,* 88 Neb. 145, 129 N. W. 247, *Palmer v. State,* 70 Neb. 136, 97 N. W. 235, and *Rema v. State,* 52 Neb. 375, 72 N. W. 474, are controlling on this point.

The evidence is clearly sufficient to sustain the conviction. The confession as made was undoubtedly true, as the subsequently disclosed facts check accurately with it. Many pertinent facts found to be true would never have been discovered but for the confession. The facts considered with all the other evidence in the record adequately support the conclusion at which the jury arrived.

We have examined other assignments of error and conclude that they are without merit. Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

AFFIRMED.

EQUITABLE LIFE ASSURANCE SOCIETY, APPELLEE, V. JOSEPH BUCK, JR., APPELLANT.
292 N. W. 605

FILED JUNE 7, 1940. No. 30867.

1. **Mortgages.** An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.
2. ———. It is not error for a trial court to confirm in 1939 a judicial sale held in 1936, where it does not appear that a resale would obtain a higher bid, the sale being in other respects properly for confirmation.

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

Dryden, Dryden & Jensen and *Ralph W. Slocum,* for appellant.

Winfield R. Ross and *M. H. Worlock, contra.*

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

CARTER, J.

This is an appeal from an order confirming a sale held pursuant to a mortgage foreclosure decree.

The record shows that the decree was entered on October 12, 1935, at which time there was found to be due plaintiff the sum of $9,523.22. The mortgaged premises were sold on August 24, 1936, for $10,317.66. Thereafter the mortgagor was permitted the benefit of two moratory stays under the provisions of section 20-21,159, Comp. St. Supp. 1935, and of a proceeding instituted under section 75 of the bankruptcy act, with the result that the order confirming the sale was not obtained until September 9, 1939. At the time of the confirmation there was due under the decree the sum of $12,874.40. Taxes due amounted to approximately $500, and there was on hand in the office of the clerk of the district court the sum of $186.36, which had been collected as rentals during the pendency of the moratory stays. A deficiency judgment was waived as a condition to the confirmation of the sale.

The evidence offered at the trial fixes the value of the mortgaged property from $8,000 to $16,000. Most of the evidence is to the effect that it is worth between $12,000 and $14,000. It was not error for the trial court to enter an order confirming the sale under the rules announced by this court. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, where there was no fraud or shocking discrepancy between the value and sale price, and there is no satisfactory evidence that a higher bid could be obtained in the event of another sale. *Federal Farm Mtg. Corporation v. Bostrom,* 136 Neb. 180,

285 N. W. 490; *Equitable Trust Co. v. Groves*, 133 Neb. 177, 274 N. W. 457.

Defendant contends that a judicial sale held in 1936 ought not to be a basis of a confirmation order in 1939. We fail to see any merit in this contention in the absence of competent evidence that the mortgaged premises would, if resold, bring a higher price. There is no such evidence in the record. Unless a resale would bring a better price, nothing is to be gained by holding it.

We find no error in the record. The judgment of the trial court is therefore affirmed.

AFFIRMED.

LORAINE WEIDEMAN, APPELLANT, V. MILBURN & SCOTT COMPANY, APPELLEE.
292 N. W. 594

FILED JUNE 7, 1940. No. 30897.

Workmen's Compensation. Where an employee, to accomplish a private purpose wholly unconnected with the master's business, creates the necessity for a trip in an automobile which would not otherwise have been taken, the injuries occurring on such trip are not compensable under the workmen's compensation law.

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

Hubka & Hubka, for appellant.

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

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

CARTER, J.

This is a suit in which Loraine Weideman seeks to recover benefits under the workmen's compensation law for the death of her husband, who at the time of his death was an employee of Milburn & Scott Company. The trial court denied an award and plaintiff appeals.

The record shows that Louis Weideman was, at and prior to his death, employed by Milburn & Scott Company as janitor and caretaker of their building in Beatrice, Nebraska. The deceased lived with his family in an apartment on the third floor of the building. All of his work was in and about the building in which he lived. It appears that deceased had no regular hours, he being subject to call at all hours of the day or night on all days of the week. It was a part of his duties to operate the furnace in the building in order to supply heat for the occupants of the building. The evidence shows that deceased could properly leave the building for short periods of time when the furnace did not require his attention. Plaintiff testifies that it was necessary for the deceased to return to the building to tend the furnace at least once each two hours.

On November 27, 1938, deceased and his family attended church, after which they went to the home of his brother for dinner. At 1 o'clock deceased went back to the building in his automobile to fire the furnace, and returned in about an hour. At 3 o'clock deceased again went back to the building and fired the furnace. On his return to his brother's home he was killed in an automobile accident. At the time of the collision deceased was accompanied by Joan Walker, a niece, who was also killed. The evidence discloses that Joan Walker had not been at the home of the brother, Paul Weideman, earlier in the day. There is no evidence in the record as to when she entered deceased's car. The evidence shows that the Paul Weideman home was about fifteen blocks from the building where the deceased worked.

It is the contention of plaintiff that the trip made to defendant's building was incidental to his employment and that compensation benefits are therefore allowable. The record shows that the work of the deceased was solely in and about the building in which he lived. Clearly, when he went to his brother's home he was on a mission of his own. When he returned to his brother's home, after firing the furnace, he was also engaged in business of his own. After he had fired the furnace and left the building he was no

longer engaged in the master's business. The accident occurring during the return trip had no causal connection with the employment. This view is sustained by the following holdings of this court: *Hammond v. Keim,* 128 Neb. 310, 258 N. W. 478; *McNaught v. Standard Oil Co.,* 128 Neb. 517, 259 N. W. 517; *Sheets v. Glenwood Telephone Co.,* 135 Neb. 56, 280 N. W. 238; *Bell v. Denton,* 136 Neb. 23, 284 N. W. 751.

We are obliged to hold that the accident did not arise out of and in the course of the employment. The trial court therefore properly denied an award.

AFFIRMED.

MARTHA PEEKS, APPELLANT, V. P. C. NELSON ET AL., APPELLEES.

292 N. W. 459

FILED JUNE 7, 1940. No. 30830.

1. **Fraudulent Conveyances.** "In a creditor's suit to set aside a conveyance by a debtor to a near relative, alleged to have been made in consideration of a past due indebtedness, the burden is upon the grantee to show that the debt is genuine, that his purpose was honest, and that he acted in good faith in obtaining the title." *Flint v. Chaloupka,* 78 Neb. 594, 111 N. W. 465.
2. ———. Record examined, and the evidence in the instant case found insufficient to sustain the burden of proof required of grantee to show, by a preponderance of the evidence, the *bona fides* of the conveyance.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed in part and reversed in part.*

Le Roy G. Stohlman and *Frank P. Voter,* for appellant.

C. W. Peasinger, contra.

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

MESSMORE, J.

This is an action in the nature of a creditor's bill, wherein Martha Peeks prays to have a real estate mortgage, given by P. C. Nelson and Bertha Nelson to their son Alfred, canceled and declared void. Defendants' answer alleged that the mortgage was given for a valuable consideration to secure a *bona fide* indebtedness owing by P. C. Nelson to his son, the son not being informed of the plaintiff's claim at the time of receiving the mortgage deed and note, and, in addition, alleged that the real estate involved constituted a homestead. The trial judge dismissed the plaintiff's petition; found the conveyance by mortgage deed to be *bona fide* for a valuable consideration, and found the real estate involved to be a homestead. From this decree and judgment, the plaintiff appeals.

Carl Thaden in 1929 loaned P. C. Nelson the sums of $3,100 and $117.60 and received from Nelson two promissory notes dated February 27, 1929, evidencing the indebtedness, which Thaden assigned to his daughter, the plaintiff, the reason for the assignment being that the amounts constituting the loans were moneys earned by her as a school teacher. The plaintiff brought suit on the notes February 23, 1938, and obtained judgment thereon November 2, 1938, in the sum of $3,233.33 and $124.35, and costs. P. C. Nelson owned some 400 acres of land in Pierce county and, due to the depression and drouth, sustained the loss of his lands. However, in 1931, in order to recuperate some of his losses, he endeavored to operate 260 acres of farm land for himself, and borrowed from his son Alfred, who was engaged in the automobile and garage business, certain sums of money over a period of approximately nine years, using the money advanced from time to time for farm improvements, taxes, general maintenance, labor, and other expenses. Separate accounts of the money advanced were presumably noted at the time of the advancements, and later totaled for the year, as shown by exhibit A. Finally a settlement was consummated between the father and son with reference to the indebtedness, amounting to $2,500,

and a note given to Alfred, secured by a real estate mortgage on the homestead of the father, March 15, 1938, within a month after plaintiff brought her suit. The record further discloses efforts on the part of Thaden to collect the indebtedness, due him from P. C. Nelson, by a conveyance to Thaden of the former's home, which failed. Thaden contemplated trading for a new car in 1937 and offered to let the purchase price of the car be credited on the indebtedness. This transaction was had with Alfred. Thaden testified that Alfred agreed to make the trade if the whole indebtedness would be canceled thereby. This arrangement Alfred denied; he told Thaden his father was indebted to him and he could not make such a trade.

The record discloses financial difficulties suffered by both P. C. Nelson and his son Alfred over the period of years in which the advancements were presumably made. The record is void of any checks evidencing any amounts paid out by the son for the benefit of the father for the items claimed to have been paid by the son for labor, repairing the windmill, taxes and other expenses. The evidence with reference to the purchase of cattle and horses in 1931 and amounts advanced for such purpose shows that the son sold the cattle and horses to his father and charged him with the amounts stated. Most of the items are stated to have been paid in cash. Exhibit A, comprising four pages of an ordinary account book, constitutes the sole evidence to sustain the advancements and is extremely general in explanation of the large sums of money advanced over the period of approximately nine years.

Reference is made in the record to a transaction involving a transfer of 80 acres of Iowa land in 1937 to Alfred, who claimed to have received no previous benefits from his father given to other heirs, and this conveyance presumably constituted an adjudication of certain matters between the father and the son prior to 1928.

The sole question for determination by this court is whether or not the defendants have sustained the burden of proof by a preponderance of the evidence that the con-

veyance by P. C. Nelson to his son Alfred was based on a genuine debt and made in good faith.

In *Flint v. Chaloupka,* 78 Neb. 594, 111 N. W. 465, this court held: "In a creditor's suit to set aside a conveyance by a debtor to a near relative, alleged to have been made in consideration of a past due indebtedness, the burden is upon the grantee to show that the debt is genuine, that his purpose was honest, and that he acted in good faith in obtaining the title." See, also, *Farmers State Bank of Smithfield v. Renken,* 129 Neb. 416, 261 N. W. 851; *Riggs v. Hroch,* 133 Neb. 260, 274 N. W. 598. When the testimony relied upon to show good faith is by interested relatives only, as in the instant case, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion. *Flint v. Chaloupka, supra*; *Hilton v. Clements,* 137 Neb. 791, 291 N. W. 483.

We cannot reconcile ourselves to the belief that advancements, aggregating $2,500, would pass between a father and son for a period of nearly nine years without the borrower having some knowledge of the different amounts and the time such amounts were advanced to him. P. C. Nelson was obviously a good business man, as shown by his accumulation of farm lands and town property, and, even though advanced in age (84 years), his losses are not attributable to him but to conditions over which he had no control, such as the depression and drouth, collapse in land values and farm products. It seems incredible he would leave to a son the exclusive right to credit the amounts advanced to him, which he was borrowing and for which he proposed to pay. The son who made the advancements is a business man of 20 years' experience, selling automobiles and accessories and operating a garage. He employed help and a secretary to keep his books. It does not seem reasonable that with such experience he would make advancements of money to pay for taxes, labor, repairs, etc., to different persons furnishing the same, for the benefit of his father, without having some documentary evidence, such as checks, receipts, or accounts presented for such items. It is further noted

from the record that the transfer of the Iowa land in 1937 constituted the only farm land P. C. Nelson owned at the time, and some significance might be attached to the conveyance by mortgage deed of the homestead by Nelson to his son Alfred within a month subsequent to the time the plaintiff brought her action, both conveyances to the son disposing of all of the real estate owned by Nelson.

We recognize that in some instances business negotiations between close relatives are carried on rather loosely and negligently, but, ordinarily, there is evidence of disinterested witnesses to at least corroborate the testimony of the relatives making and receiving the advancements, or some documentary evidence to sustain their testimony. The evidence in the instant case leaves the *bona fides* of the transaction in doubt, and we are required to resolve the doubt against the parties on whom is placed the burden of proof.

"In equity actions involving questions of fact where there is an irreconcilable conflict in the evidence, in determining the weight of evidence this court will consider the fact that the trial court observed the witnesses and their manner of testifying." *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480. We are fully cognizant that the trial court in the instant case had the opportunity to observe the witnesses, their conduct and demeanor, and to weigh their testimony, and we give great credence to its judgment in this respect. However, we are convinced that the learned jurist failed to have proof, by a preponderance of the evidence, of the *bona fides* of this transaction, sufficient, in our judgment, to warrant the entry of the decree of dismissal of plaintiff's petition.

We conclude the trial court correctly determined that the real estate in question constituted a homestead, but was in error in dismissing the plaintiff's petition. The cause is remanded, with directions to set aside the conveyance in question and declare it to be null and void.

AFFIRMED IN PART AND REVERSED IN PART.

HENRY H. FALLDORF, APPELLEE, V. CITY OF GRAND ISLAND ET AL., APPELLANTS.

292 N. W. 598

FILED JUNE 7, 1940. No. 31007.

1. **Municipal Corporations.** A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto, and therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.
2. ———. Municipal corporations do not possess inherent power to levy special assessments. Such authority must be obtained and have its origin either in the provisions of the organic law or in some statute conferring it, either expressly or by necessary and unmistakable implication, and the implication must be so clear as to necessarily reveal a purpose to grant such power.
3. ———. "The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N. W. 643.
4. ———. Where the statutes of Nebraska fix the interest and penalties to be charged on delinquent special assessments, established prior to the adoption of a home rule charter, and such charter, from and after its adoption, likewise fixes the interest and penalties to be charged on delinquent special assessments, the city subsequently is not empowered by general ordinance to remit and cancel interest and penalties charged on delinquent special assessments and accept in settlement thereof the original amount of the assessment. To do so would require a grant of special power.

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

Paul C. Holmberg and *Cleary, Suhr & Davis*, for appellants.

Harry Grimminger, contra.

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

MESSMORE, J.

Plaintiff, owner of real estate in Grand Island, brought this action to enjoin the city of Grand Island and its treasurer from accepting payment of special improvement assessments, less accrued interest and penalties thereon, due the city, claiming that the city council had no power or authority to remit interest and penalties upon special assessments under the city charter or the statutes of Nebraska; that the statutes of Nebraska and the city charter fix a definite rate of interest within limits, and the remission of such interest and penalties constitutes an arbitrary action and an attempt to vary the state law and provisions of the city charter by ordinance. The court found generally in favor of the plaintiff and against the defendants; that ordinance No. 1709, authorizing the remission of interest and penalties on special assessments, is contrary to and in direct conflict with the provisions of the charter of defendant city, and that the city has no power to pass or make effective ordinances contrary to or in conflict with the provisions of said charter, and permanently enjoined the defendants and each of them from waiving interest or interest penalties on special assessments. From this judgment defendants appeal.

The issues were presented to the district court on a case stated, which may be briefly summarized as follows: The city of Grand Island is a city of the first class; John R. Geddes is its treasurer. June 3, 1928, the city adopted a home rule charter. In 1937 the supervisors of Hall county authorized and directed the commencement of foreclosure proceedings involving all general real estate taxes in arrears prior to the year 1932. Such proceedings are now pending, and there is now due upon such properties, with interest and penalties, special improvement assessments in the proximate amount of $193,792.67. The part of the ordinance involved in this case is, in substance, as follows:

Section 1 provides: "Any penalty interest on instalments of special assessments in connection with which the city of Grand Island, Nebraska, has issued bonds or registered

warrants or has assumed obligations therefor and which became delinquent prior to March 19, 1937, shall be remitted and canceled, and the same need not be paid but only in the event that the original amount of such unpaid delinquent instalments, exclusive of penalty interest shall be paid on or before the 30th day of June, 1940, together with interest thereon at the rate originally assessed by ordinance or ordinances. * * * The term penalty interest as used in this ordinance shall be construed to mean that interest charged and provided for in the ordinances levying such special assessments * * *.

"Proceedings for the collection of such delinquent special assessments, whether instituted prior to or after the date of this ordinance becomes effective shall not be affected in any manner, except that the taxpayer may during the interim herein specified, pay the original amount of such delinquent special assessment with interest as aforesaid and such sum shall be accepted in full redemption of such delinquent assessment."

The ordinance then provides the authority for the acceptance, by the city treasurer or the county treasurer, of the payments as designated in the ordinance, and that no liability shall attach to such treasurers on their bond.

The provisions of the city charter with reference to special assessments and interest are in substance as follows: Section 5 of article 7 provides for the assessed cost of paving districts; provides that the total cost of the improvement shall be levied at one time upon the property and become delinquent, as therein provided, one-tenth of the total cost in 50 days after such levy; one-tenth in one year and one-tenth each year thereafter for nine years, and fixes the rate of interest at 7 per cent. from the time of the levy until such payments may become delinquent, and thereafter at 10 per cent. The charter provides for the extension of water mains from time to time and the creation of new water-main extension districts and the manner of assessments for expenses against the lots and lands in the water districts; likewise for sewer districts, sewer assessments and sewer

district bonds; also for sidewalks, the right to build and repair, and that the assessment constitutes a lien on such lots or lands when sidewalks are built and repaired by the city.

Provisions of the statute involved, with reference to special assessments and interest, are in substance as follows: Section 16-614, Comp. St. 1929, as amended (Laws 1933, ch. 136, sec. 18), provides for the cost of improvements, assessed according to special benefits, assessments payable in instalments and at the rate of interest which is substantially the same as the city charter with reference to the same subject-matter, providing for paving assessments, payable over a period of nine years, with interest at 7 per cent. and 10 per cent. upon deliquency. Section 16-649, Comp. St. 1929, as amended (Laws 1933, ch. 136, sec. 19), provides for water and sewer districts, draining, construction of sewers and costs, and assessments payable in four years, with interest not to exceed 7 per cent. and upon delinquency 1 per cent. per month. Sewer district assessments are identical with water-main assessments. Section 16-646, Comp. St. 1929, provides for permanent sidewalks, petition, costs and ordinance ordering improvement, and that such assessments shall be paid in seven years, with interest not exceeding 7 per cent. and 10 per cent. upon delinquency.

Section 1, art. 19 of the city charter provides: "Chapter 44 of the Compiled Statutes of the state of Nebraska for the year 1922 (Comp. St. 1929, ch. 16), and all amendments thereto passed by the legislature of the state of Nebraska prior to August 2nd, 1927, in so far as the same are not inconsistent with, repugnant to or in conflict with the provisions hereof or any amendments hereinafter adopted by the voters of the city of Grand Island, are made a part of this" charter. The provisions of chapter 44, Comp. St. 1922 (now Comp. St. 1929, ch. 16), are pertinent to cities of the first class and refer to governmental powers, officers, election, powers and duties, city council and proceedings, contracts and franchise, public works, improvements, fiscal manage-

ment, debts and bonds. Other relevant statutory and charter provisions involved are section 16-201, Comp. St. Supp. 1939, which reads in part as follows: "Each city governed by the provisions of this chapter shall be a body corporate and politic, and shall have powers: First. To sue and be sued." The home rule charter (art. 2, sec. 1) provides: "To sue and be sued," etc. The fourth provision of section 16-201, *supra,* reads: "To make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers; Fifth. To exercise such other and further powers as may be conferred by law." Section 8 of article 2 of the city charter provides: "To make contracts and do all other acts relating to the property and concerns of the city necessary or incident to the exercise of its corporate powers." The city charter further provides (art. 2, sec. 4): "To purchase real estate upon sale for general or special taxes or assessments and to lease, sell or convey such property so purchased." Section 7, art. 2 of the charter, provides: "To make all such ordinances, by-laws, rules and regulations in addition to the special powers in this charter granted and enumerated—maintain the peace, good government and welfare of the city, its trade, commerce and manufacturers," etc.

The foregoing provisions of the ordinance, the statutes and the city charter constitute the basis for the contentions of the respective parties, presenting the following issue: Does the city council of Grand Island have the power and authority by general ordinance to waive, cancel and remit the interest and penalty interest on special improvement assessments, prior to June 3, 1928, the date of the adoption of the city charter, and subsequent to the adoption of said charter.

Defendants contend that the provisions of the statute and of the city charter, as hereinbefore set out, warrant the remission of interest and penalties on special assessments by the city, and cite *Farnham v. City of Lincoln,* 75 Neb. 502, 106 N. W. 666, on the right of the city to compromise special assessments.

In the cited case, the plaintiff, a taxpayer of Lincoln, brought an action to enjoin the mayor and city council from settling a pending suit between the Lincoln Street Railway Company and the city of Lincoln, which involved the validity of certain paving assessments. The district court found for the plaintiff and awarded a permanent injunction. The decree of the court contained an amount upwards of $111,000, comprising paving assessments. The city council passed a resolution to compromise the assessments for $65,000. The court held: "The power conferred by statute upon cities of the first class to sue and be sued carries with it the power to compromise and settle such suits; and the city council may, when it acts in good faith, accept a less sum in settlement of a litigated case than is claimed to be due the city therein." See, also, *State v. Martin*, 27 Neb. 441, 43 N. W. 244.

In the instant case, there is no controversy concerning the amount of the principal or the amount of the interest due on the delinquent assessments, and the owners of the property are not attacking the validity of the liens. In fact, in *Farnham v. City of Lincoln, supra,* there was a compromise and settlement of a pending suit before judgment, involving the validity of special assessments to pay for local improvements, as distinguished from the instant case.

In the body of the opinion in the *Farnham* case, the court quoted from Cooley, Taxation (1st ed.) ch. 20, p. 416, as follows (p. 506): "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. * * * Special assessments * * * are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it." The foregoing language is in keeping with the defendants' contention that

special assessments are not taxes within the meaning of the Nebraska law and therefore are analogous to claims which the city may compromise or adjudicate.

In further support of defendants' contention, the case of *Tukey v. Douglas County*, 133 Neb. 732, 277 N. W. 57, is cited, which held:

"Penalties for nonpayment of taxes are creatures of statute and the legislative authority creating them may waive or remit them. * * *

"The remission of penalties on unsold delinquent taxes is likewise a method that may be employed to induce payment of such taxes. * * *

"Penalties for nonpayment of taxes are punitive in their nature and their remission by the legislature is an act of grace."

To reach a proper analysis of the case at bar, it is necessary to ascertain just what power or authority a city of the first class possesses, where such power or authority is obtained, in the first instance, and in what manner such authority or power may be exercised.

"A municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power." *State v. Irey*, 42 Neb. 186, 60 N. W. 601; reaffirmed in *State v. Temple*, 99 Neb. 505, 156 N. W. 1063.

In *Interstate Power Co. v. City of Ainsworth*, 125 Neb. 419, 250 N. W. 649, this court held:

"A municipal corporation is a creature of the law established for special purposes and its corporate acts must be authorized by its charter or other laws applicable thereto. 1 McQuillin, Municipal Corporations (2d ed.) sec. 367.

"The powers which a municipal corporation may exercise are: '(1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable.' 1 McQuillin, Municipal Corporations (2d ed.) sec. 367."

In *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N. W. 643, the court, in speaking of the power conferred upon the electorate of a city to frame a charter for its own government, in substance held: The city may do so as fully and completely as an electorate of the state may form a state Constitution, providing the charter is consistent with and subject to the Constitution and the laws of the state. The home rule charter of the city of Lincoln was declared to constitute a grant, as distinguished from a limited power, and for such reason the charter was to be construed according to the same rules as a legislative act, containing the same provisions, as determining the power which is thereby granted the city government. Having concluded that the city charter constituted a grant, rather than a limitation of power, the court stated (p. 69) that the principles of construction applicable thereto are the same as to a grant by the legislature; that is: "A municipal corporation, therefore, possesses no powers or faculties not conferred upon it, either expressly or by fair implication, by the law which created it, or by other laws, constitutional or statutory, applicable to it. *It is a creature of the law established for special purposes and its corporate acts must be authorized by its charter, or other laws applicable thereto.*" (Italics ours.)

The city charters of the cities of Lincoln and Grand Island are similar in many respects, and, in both instances, the power is granted to the cities by the legislature. The language above cited from the case of *Consumers Coal Co. v. City of Lincoln, supra,* is applicable to the case at bar.

The city of Grand Island has received a delegation of power to tax special assessments from the statutory provisions enacted by the legislature, as reflected by the language contained in the following authorities:

In *Trephagen v. City of South Omaha,* 69 Neb. 577, 96 N. W. 248, this court said (p. 585): "It is one of the elementary principles of taxation that the power to tax lies exclusively in the legislature. Without a special legislative enactment, no city, or other municipal subdivision, has any

right to levy a tax or assessment upon the property of its citizens. Cooley, Taxation (2d ed.) 62, 142."

In 44 C. J. 485, it is said: "Since municipal corporations have no inherent power to levy special assessments, such authority must have its origin either in provisions of the organic law, or in some statute conferring it, either expressly or by necessary and unmistakable implication; and the implication must be so clear as necessarily to reveal a purpose to grant the power."

In *Consumers Coal Co. v. City of Lincoln, supra,* this court said (p. 76): "The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects."

We conclude that the statutes of Nebraska fix the interest and penalties to be charged on delinquent special assessments for improvement of districts that were established prior to the adoption of the home rule charter, and that the provisions of the home rule charter likewise fix the interest and penalties to be charged on delinquent special assessments. To hold otherwise would be to read into the language of the home rule charter an alternative not within the intent of the electors adopting the charter, or within the spirit of the law.

Some reference is made to an existing emergency in that, if the city is not permitted to remit interest and penalties on special assessments, then the city would be obligated to buy in the separate properties for the general taxes thereon, to protect itself, which would mean an expenditure of thousands of dollars, which would obligate the city to finance, by bond issue or other procedure, to obtain money with which to buy in such properties, but that, in the event the city was authorized or empowered to remit the interest and penalties on special assessments, then such properties would be redeemed or purchased, with the result that some $35,000 would accrue to the benefit of the city.

Granting all of such statements to be true, we are con-

vinced that the emergency here existing is not of such proportions as would warrant the city in performing the acts or expending the funds beyond the powers specifically granted by the provisions of the state law and the city charter.

The city council, having once fixed the amount of interest and delinquent interest on special assessments, is not empowered thereafter, under the present provisions of the city charter, to reduce or increase such interest without a grant of special power.

AFFIRMED.

IN RE ESTATE OF JOHN W. SHIERMAN.
JOHN E. WILLITS ET AL., APPELLEES, V. ESTATE OF JOHN W. SHIERMAN, APPELLANT.
292 N. W. 606

FILED JUNE 7, 1940. No. 30746.

Executors and Administrators. An executrix and her attorney could not be allowed fees and expenses out of the estate, for the handling of litigation by which the executrix, who also was sole beneficiary under the will, sought to repudiate and cancel a settlement agreement, made with the testator's children, to avoid a threatened contest of the will, providing for the turning over of a certain portion of the testator's property to them after completion of administration, since such litigation could be undertaken by the executrix, not in her representative, but only in her personal capacity.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed as modified.*

McNeny & Sprague, for appellant.

Walter M. Crow and *J. E. Willits, contra.*

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

JOHNSEN, J.

Nettie A. Shea filed a claim against the estate of John

W. Shierman, deceased, for services and expenses as former executrix, in the sum of $1,032.95, and John E. Willits filed one for services and expenses as her attorney, in the sum of $1,042.41. The administrator *de bonis non c. t. a.* filed objections, principally upon the ground that the claims were excessive. The county court allowed each in full, and, on appeal to the district court, a similar order of allowance was made by that court. The claims were consolidated for hearing in the district court, and they have been similarly consolidated here.

The administrator *de bonis non c. t. a.* contends that the claims are excessive, because they include services and expenses in the litigation known as *In re Estate of Shierman,* 129 Neb. 230, 261 N. W. 155, and *In re Estate of Shierman,* 132 Neb. 45, 270 N. W. 841, which arose out of Nettie A. Shea's attempt to repudiate a settlement agreement which she had made with the testator's children. The will made her the sole beneficiary of her deceased brother's estate. When his children sought to contest the will, on the ground of testamentary incapacity, she entered into a settlement agreement, by which, in consideration of their allowing the will to stand without contest, she was to give them certain property out of the estate when the administration was completed. She subsequently tried to revoke the settlement agreement, whereupon the children asked to have it decreed valid and enforceable, and the litigation referred to resulted.

It is argued on behalf of the estate that the estate had no interest in this litigation; that it could neither lose nor profit therefrom, nor be affected in any way, whether the settlement agreement was canceled or enforced; that the matter was wholly a personal contest between Nettie A. Shea and the testator's children, and that, under the circumstances, the estate could not properly be charged with the costs, attorney's fees, and time spent by Nettie A. Shea in the litigation.

The trial court, in finding against the contention of the estate, and in allowing these items as a proper part of the

claims of the former executrix and her attorney, declared: "I think that this litigation and these matters as they stand with these proceedings should be fairly and justly considered as matters belonging to and incidental and necessary to the management of the estate."

We fail to see, however, how it was of concern to the estate whether the settlement agreement was upheld or rescinded. The amount or value of the property to be administered would be neither increased nor diminished thereby. The litigation did not tend in any way to preserve or otherwise to benefit the estate as such. All it could do would be affect the amount of property which Nettie A. Shea was entitled to retain, after administration of the estate had been completed. Such rights as the testator's children might possess under the settlement agreement were created, not by Nettie A. Shea as executrix, but by Nettie A. Shea in her individual capacity. Under the statute, allowances can be made only for such expenses and services as are necessary in the care, management and settlement of the estate. Comp. St. 1929, sec. 30-1410. Costs, attorney's fees, and time spent by Nettie A. Shea in seeking to upset her personal undertaking, even though the subject-matter of the obligation was property which had belonged to the decedent, were purely personal and would not be chargeable against the estate. *In re Estate of Rhea,* 126 Neb. 571, 253 N. W. 876.

Under the circumstances, the total allowance made to Nettie A. Shea for executrix's fees and expenses will be reduced to the sum of $700. In making this allowance, we have not overlooked the contentions of the administrator *de bonis non c. t. a.* with respect to the executrix's responsibility for delay in closing the estate and her attitude of cooperation, but on these questions we agree with the view of the county court and the district court.

The total allowance made to John E. Willits for services as attorney and expenses will be reduced to the sum of $750. This reduction does not equal the amount of the allowance made by the district court for his services and ex-

penses in the settlement agreement litigation, but there are other items of services shown by the record which we feel at liberty to take into account in disposing of his claim. It appears that, in the general statement of the claim which he filed, he listed some miscellaneous services, such as consultations, etc., for which he did not attempt to fix a specific charge in his subsequent itemization, although he testified fully as to their nature and value on the trial. He was willing to waive compensation for these miscellaneous services, if the charges made by him in the settlement agreement litigation were allowed. His testimony showed that he had agreed with Nettie A. Shea that he would look solely to the estate, and that there would be no personal responsibility on her part, for his compensation in this litigation. He was mistaken in his right thus to charge the estate. In this situation, his waiver of compensation for the miscellaneous services referred to was not intended and should not be held to be operative. Without wasting time on formality, we shall terminate the matter by allowing him $750 for all his services and expenses.

With the above modifications, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

ELLIS YORK, APPELLEE, V. MABEL YORK, APPELLANT.
292 N. W. 385

FILED JUNE 7, 1940. No. 30752.

1. **Divorce.** It was not an abuse of discretion to provide in a divorce decree that, for twenty days in each summer, custody of a minor child should be given to the paternal grandfather, in order to permit the child to associate with his father, where the residence of the mother and child was 150 miles from that of the father; where the fitness of the grandparent's home, in which the father also resided, was not subject to question; and where the character and affection of the father and the

grandparent were such that the child could reasonably be expected to benefit from the association.

2. ———. An allowance of $25 a month for the support of a four-year-old child was reasonable, in view of the parties' previous standard of living, as disclosed by the record.
3. ———. It is not an abuse of discretion to provide in a divorce decree that a child may not be removed from the state without the court's consent, unless there is some special and controlling reason why such a provision should not be included in a particular case.
4. ———. Whether a wife should be granted permanent alimony, where there is no accumulated property from the marriage, is not a question solely of the necessities of her situation, but equally one of fairness and justice, as between the parties, under all the circumstances.
5. ———. Permanent alimony of $1,000 allowed wife—though the parties had no accumulated property from the marriage, though the husband had only limited professional earnings, and though the wife was capable of earning her own living and was assured of a home—where she had given nine years of her life to the marriage, where she had made a contribution of $250 out of her own funds to the marital venture, and where the husband's conduct was responsible in a considerable measure for the separation.

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

Stanley Bartos, for appellant.

Cook & Cook, contra.

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

JOHNSEN, J.

Plaintiff instituted divorce proceedings against his wife, to escape his mother-in-law, who, he felt, had made a protectorate of his home, and to quiet title to his peace of mind. The wife filed a cross-petition, and the court, on adequate grounds, gave her the divorce. The decree provided that she should have the custody of their four-year-old son "with the exception of twenty days of each year, during the months of June, July or August, and that during said period of

twenty days in each year the custody of said child is hereby granted to N. M. York, the father of the plaintiff, in order that said child may live with and visit his father." Each party was given the right to visit or talk by telephone with the child, at reasonable times and hours. Defendant was allowed no permanent alimony, but plaintiff was required to pay her the sum of $25 a month for the support of the child, until further order of the court. The decree provided also that the child should not be removed from the state without a court order.

Defendant has appealed from (1) the granting of the custody of the child to plaintiff's father for a period of twenty days during the summer months of the year; (2) the amount allowed her for the support of the child; (3) the prohibition against removing the child from the state without the court's consent; and (4) the failure to allow her permanent alimony.

On the first issue, we feel that it was a proper exercise of discretion on the part of the trial court to allow the child to spend twenty days each summer with his paternal grandparents and his father. A somewhat similar situation was involved in *Carlson v. Carlson,* 135 Neb. 569, 283 N. W. 214. The determining factor necessarily is the child's welfare. *Hobza v. Hobza,* 128 Neb. 598, 259 N. W. 516. The high character of N. M. York and the quality of his home abundantly appear from the record. Plaintiff also has had his abode there since his marital bark foundered. The evidence sufficiently indicates the affection and solicitude, both of the grandparents and of the father, for the child—matters of which the trial judge was able to judge, even more capably than we, from the attitudes and expressions at the trial. The record shows that defendant intended to make her home more than 150 miles distant, so that no opportunity would exist for regular contacts and associations. The ties between an only child and his father, and with grandparents having pride and concern for their lineage, may legitimately be the subject of judicial fostering, through reasonably sustained contacts, under proper surroundings,

where such contacts are merited and may reasonably be expected to be of benefit and pleasure to the child. Indeed, neither the father nor the child should be deprived, more than the necessities of the situation reasonably require, of the opportunity for mutual cultivation, through association, of acquaintanceship and love for each other. *Wilkins v. Wilkins,* 84 Neb. 206, 120 N. W. 907. And what youngster's life would not normally be enriched, in James Whitcomb Riley fashion, by a vacation at his grandparents, joined with the comradeship of his father? In any event, we believe with the trial court, until the contrary has been demonstrated, that the child will profit from the relationships which the decree permits.

On the question of the amount allowed defendant for the support of the child, we agree also with the judgment of the trial court that, in view of the age of the child, and on the basis of the parties' previous standard of living, the sum of $25 a month is a reasonable present allowance. There is nothing in the record to show that any special expenses will be involved in caring for the child. The normal expenditures for clothing and sustenance for a four-year-old child, in the circumstances in which the parties had been living, would be moderate, and for the personal care which the mother might be required to give the child, she could not, of course, expect compensation. *Wilkins v. Wilkins, supra.* If the allowance made subsequently demonstrates its insufficiency, the trial court at all times can soundly control it.

The prohibition against removing the child from the state without the court's consent cannot be said, from the record, to be an abuse of discretion on the part of the trial court. We have previously declared that it usually is best to keep the children in a divorce case within the jurisdiction of the court. *Crandall v. Luhnow,* 137 Neb. 13, 288 N. W. 29. The record must show some special and controlling reason why such a provision ought not to be included in a particular case before we will interfere with the trial court's decree. No such reason is pointed out in this case and none appears from the record.

This leaves only the question of the failure of the trial court to allow defendant permanent alimony for consideration. Plaintiff has no property except a mortgaged Ford and some law books. At the time of the separation, he gave defendant all of the household furniture. There is an accumulation of debts from the marriage of approximately $700. The income from plaintiff's practice has averaged $1,600 to $2,400 a year. Defendant was a teacher in the public high school at Lexington at the time of their marriage. During the early years of the marriage she occasionally served as a substitute teacher, from which she received the sum of $250. These earnings appear to have been contributed to their common livelihood. She intended to return to the teaching profession after the divorce. Her mother testified that she was going to make a home for her and assist in her support.

In the absence of any accumulation from the marriage, and with the somewhat limited professional earnings of plaintiff, there is not much out of which an alimony allowance can be made. It also appears that defendant will be fully able to earn her own living as a teacher. The facts remain, however, that defendant has given nine of the best years of her life to plaintiff, that plaintiff, by his drinking, has been responsible in a considerable measure for the separation, and that defendant has contributed at least the sum of $250 to the marital venture. In this situation she ought not to be required to go out into the world without at least a token of alimony. While, as indicated, she seemingly is capable of earning her own living and apparently is assured of a home, it is not a question solely of what the necessity of her situation requires, but equally what fairness and justice demand, as between the parties, under all the circumstances. *Swolec v. Swolec*, 122 Neb. 837, 241 N. W. 771. We feel that plaintiff, without undue hardship, can and should be required to pay defendant, as permanent alimony, the sum of $1,000, at the rate of $25 a month. She will be allowed also the sum of $100 for attorney's fees in this court.

The decree of the trial court will be modified to include these allowances, and, as thus modified, will be affirmed.

AFFIRMED AS MODIFIED.

FILLMORE M. WOLFINGER, APPELLEE, V. FRED SHAW: IOWA-NEBRASKA LIGHT & POWER COMPANY, APPELLANT.
292 N.W. 731

FILED JUNE 14, 1940. No. 30900.

1. **Electricity.** One who is traveling along a public highway and comes upon electric wires and a fallen pole in the traveled portion thereof, with nothing to show that it is a live or dangerous wire, may voluntarily attempt to remove it from the highway if he does so in a careful and prudent manner; and if the wire is energized and he is injured thereby, he is not guilty of contributory negligence as a matter of law which will bar a recovery of damages, for such acts are an incident of travel along the highway and must be anticipated by those who maintain energized wires alongside of traveled public highways.
2. **Negligence.** It is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the chattels of a third person from harm.
3. ———. In order to relieve a person from a charge of contributory negligence as a matter of law in attempting to save persons or property from harm, it is sufficient if to a reasonably prudent person the existing circumstances create the apprehension of danger, even though danger to a definite person or a definite property was not actually imminent at the moment.
4. ———. The extent of the risk which a person is justified in taking under the circumstances increases in proportion to the imminence of the danger and the value of the advantage that can be realized from encountering the danger and attempting to remove its hazards. Or, stating it conversely, the less the danger to a third person or property, the less the risk which a party may encounter in acting to save life or property without becoming guilty of contributory negligence.

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

Crossman & Barton and *Lee & Sheldahl,* for appellant.

Walker & McArthur and *George I. Craven, contra.*

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

SIMMONS, C. J.

In the district court plaintiff secured a judgment for injuries alleged to have resulted from contact with an energized electric line of the defendant. Defendant filed a motion for a new trial. Pending that motion, defendant filed a motion for judgment notwithstanding the verdict. The trial court sustained the latter motion. On appeal, this court (*Wolfinger v. Shaw*, 136 Neb. 604, 287 N. W. 63) reversed the trial court's order and remanded the case. The trial court overruled the defendant's motion for a new trial. The cause is now here for review on defendant's assignments of error.

Originally the Iowa-Nebraska Light & Power Company, a corporation, and Fred Shaw, its agent, were the defendants. At the close of plaintiff's case in chief, the trial court dismissed the action as to Fred Shaw and the case proceeded against the power company.

There was a conflict in the evidence as to practically all allegations in issue. The jury having found for the plaintiff, unless otherwise stated, we recite the testimony as offered by the plaintiff.

The defendant operates a power line serving farm customers in Seward county. The line involved consisted of two lines of naked number 6 wire, about one-eighth of an inch in diameter, strung on cross-arms, 4 feet long, placed at the top of wooden poles. It was stipulated that the line was a "primary electric light line and energized" on the morning of the accident. Defendant's witnesses testified that the line carried an alternating current with a voltage "nominally referred to as 2,300 volts single phase." At that point where the accident occurred, the line ran east and west along the south side of a graded dirt highway near Pleasant Dale. The surface of the road, prepared for travel, was 16 to 18 feet in width.

On the evening of May 5 or early morning of May 6, 1936, there was a storm consisting of a light rain and wind. A pole on the line in question had rotted at the base, and some time during the night fell so that it laid across at least two-thirds of the traveled portion of the road. The wires were not broken. The pole rested on the cross-arm in the road, and on its base at the point where it was broken off. The pole was visible for a considerable distance from the east. To the west of the pole about 20 or 25 yards, the highway went over the crest of a hill.

The defendant's agent Shaw was notified about 7:45 a. m. that the pole was down and across the highway. He was again notified about 9 a. m. Although there were two points near Pleasant Dale where the current on this line could be cut off, that was not done.

The plaintiff, a man 63 years old at the time, was an employee of a dairy farm situated on the north side of the highway. The broken pole was several hundred yards west of the house. Electricity was used at the dairy farm and by the plaintiff in performing his work about the dairy barn. The plaintiff knew at breakfast time that the pole was down and that Shaw had been notified. Shortly after 10 a. m., the plaintiff left the farm buildings and went west along the highway to cut brush. He saw the pole lying in the road some 300 to 400 yards ahead. At that time, he decided to do nothing about it. Plaintiff knew that other employees would be passing that point with farm machinery during the day, and that the public generally used the highway.

When the plaintiff reached the pole, he suddenly decided to shove it out of the roadway. He approached the pole from the north side, reached for the cross-arm at a point near the pole and about a foot and a half from the top wire. The next he remembers he was south of the wires lying on the ground, his left hand clasping the lower wire. His left elbow was on the ground, and "flame" was about his hand and passing from his elbow to the ground. He tried to disengage his left hand by using his right hand,

again became unconscious, and then came to, free from the wires. There were no blisters or breaking of the skin on his hands, elbow, or other parts of his body although his left hand was brown or black. After the accident, plaintiff walked out into the field where another man was working, who testified that he was dragging one foot, "staggering an awful lot," and that he "kinda hung down on one side." Before the accident, he was a strong, able-bodied man. Following the accident, he was able to be about, but not able to do his work satisfactorily or fully use his left arm. Five days after the accident, he was interviewed by an employee of the defendant and urged to see a doctor. On May 12 he did so. Following that, he was treated by doctors of his own choosing and was examined a number of times by doctors for the defendant, the last examination being made at the time of the trial. Plaintiff's evidence shows that since the accident he has suffered from headaches, aches about his lungs, back, and arms, and general weakness of his arm muscles. His eyes have been painful and his vision impaired. One of plaintiff's doctors testified that plaintiff was totally and permanently disabled. Both of plaintiff's doctors testify that his disabilities are the result of the electric shock which he received. On the other hand, doctors, called by defendant, testify that he has at least part of the disabilities claimed, and one testified that plaintiff was faking in part. Defendant's doctors agree that his disabilities were caused by disease and advanced age, and not by electric shock.

Plaintiff testified he knew that, if he came in contact with an energized electric line, injury might result; that he did not know that this line was energized; that he would not have tried to move the pole had he known it was energized; that the bare wires looked like a telephone line; that he did not know that this line was dangerous to touch; that he did not know that it serviced the dairy farm where he was working; and that his purpose in attempting to move the pole was to get it out of the highway and give a clearance for other employees of the dairy farm to pass with horse-drawn farm machinery, and to avoid the danger of vehicles or animals becoming entangled in the wires or pole.

Plaintiff knew that other vehicles had safely passed the pole by going into the ditch or to the north side of the pole on the graded portion. There were no persons, animals, or traffic on the highway at that point at the time he attempted to move the pole.

On the basis that this was a 2,300-volt line, defendant's witnesses testified that, under the circumstances here, the passage of electricity through a person would seriously burn both flesh and clothes at the point of ingress and egress of the electrical charge. Plaintiff's expert witnesses, admitting that burns might result, testified that they would not necessarily follow in all cases. Defendant's witnesses admitted that, under certain conditions (which they claim did not exist here), a person could be electrocuted without having burns on his body.

Defendant's first assignments of error are that the trial court erred in overruling its motions for a directed verdict at the close of plaintiff's case in chief, and at the time both parties rested their case. These contentions are based upon the propositions that plaintiff's evidence is inherently impossible and clearly against the laws of electricity and the physical facts, and that plaintiff's claim is based upon "a fanciful narrative as to the occurrence of the alleged accident." Defendant in its brief states that its contention is that plaintiff "never was in contact with these wires." There can, however, be no dispute here of the fact that plaintiff came in contact with the wires. Not only does he testify to that fact, but the defendant, by its answer, alleged that the plaintiff "negligently, carelessly, and without any regard for his own safety and with no reason for doing same, took hold of one of the wires mentioned in his petition and attempted to remove it from its then position;" that traffic "had passed around the fallen pole prior to the time that the plaintiff took hold of one of the wires;" that "plaintiff was not acting in any emergency, was not required to attempt to remove said pole and wire, took it upon himself to do so with full knowledge of the dangers present and assumed the risks and danger apparent to his observation

with full knowledge that the wire carried electricity, and that such acts on the part of the plaintiff were gross negligence" which is a bar to a recovery. Defendant cannot now be heard to contend that the plaintiff did not come in contact with the wire. That electric shock and injury would follow from contact with the wires is admitted by expert witnesses on both sides. The dispute comes as to the nature of those injuries and whether or not the plaintiff's then and present condition could result from that shock. As to that, the evidence presented a jury question.

Defendant, on appeal, does not urge that it was not negligent. It does urge that plaintiff's acts in attempting to remove the pole from the highway is negligence as a matter of law which bars recovery.

The decisions of the courts are not in harmony on this question.

In *Workman v. Lincoln Telephone & Telegraph Co.*, 102 Neb. 191, 166 N. W. 550, this court said: "The attribute of human nature which prompts a man, though acting voluntarily, to remove from a public street a menace to the life or to the property of others is not beyond the protection of the law. * * * The authority to remove from a public thoroughfare wrongful obstructions and other dangers is not limited to public officers or to representatives of the wrong-doers. In public places a volunteer, prompted by a purpose to protect the lives or the property of others, may perform reasonable acts necessary to the accomplishment of such a purpose. The freedom to so act implies risks. In commercial enterprises, where dangerous agencies are at work in the streets of cities, such conduct may be anticipated, if the occasion arises. In maintaining conductors of electricity in a city, it is the duty of a telephone company to take proper measures to keep its wires away from public travel and to guard against the escape of electricity by contact with other wires. In the performance of such duties, reasonable attempts of volunteers to remove live wires, if they fall in the streets, should be anticipated. * * * The test of his conduct is the exercise of reasonable precautions to protect himself under the circumstances."

The evidence does not show that plaintiff was negligent or careless in the manner in which he attempted to remove the pole. It was a procedure that one exercising proper care and caution would have followed.

One who is traveling along a public highway and comes upon electric wires and a fallen pole in the traveled portion thereof, with nothing to show that it is a live or dangerous wire, may voluntarily attempt to remove it from the highway if he does so in a careful and prudent manner; and if the wire is energized and he is injured thereby, he is not guilty of contributory negligence as a matter of law which will bar a recovery of damages, for such acts are an incident of travel along the highway and must be anticipated by those who maintain energized wires alongside of traveled public highways. The question of contributory negligence is a matter for the jury to determine. See Croswell, Law Relating to Electricity, 221; *Southern Bell Telephone & Telegraph Co. v. Davis,* 12 Ga. App. 28, 76 S. E. 786; *City of Thomaston v. Atkinson,* 25 Ga. App. 615, 103 S. E. 876; *Fox v. Village of Manchester,* 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. n. s. 474; *Lewis' Admr. v. Bowling Green Gas Light Co.,* 135 Ky. 611, 117 S. W. 278; 18 Am. Jur. 474; Annotation, 84 A. L. R. 694; 20 C. J. 374; *Workman v. Lincoln Telephone & Telegraph Co., supra.*

Defendant contends, because there were no persons, animals, or other property on the highway at the time the plaintiff attempted to remove the pole and wires, that there was no imminent danger to any one, that no emergency existed, that plaintiff was guilty of contributory negligence as a matter of law, and that the trial court should so have instructed the jury. In that respect, the situation in the instant case is no different than the situation in *Workman v. Lincoln Telephone & Telegraph Co., supra.*

Defendant further contends that it was error to instruct the jury on the question of whether or not an emergency existed.

Plaintiff's position is that he undertook to remove the pole because of the danger to persons using the highway

who might become entangled in the wire and pole. True, westbound traffic could see and go around the pole. However, eastbound traffic would come upon it, across their lane of travel, at a distance of 50 to 75 feet after they crossed the crest of the hill. To such traffic it was an obvious hazard. Defendant argues that plaintiff knew or should have realized that the lines were energized, and a source of danger, because of that fact. On that basis, the hazard from the pole and wires to persons and property on the highway is apparent.

An emergency is not the subject of an exact definition. This court has accepted the following definitions:

"Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition." "A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity." *Colfax County v. Butler County*, 83 Neb. 803, 810, 120 N. W. 444.

"It is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the * * * chattels * * * of a third person from harm." 2 Restatement, Torts, sec. 472.

In order to relieve a person from a charge of contributory negligence as a matter of law in attempting to save persons or property from harm, it is sufficient, if to a reasonably prudent person, the existing circumstances create the apprehension of danger even though danger to a definite person or a definite property was not actually imminent at the moment. 45 C. J. 968, citing *Workman v. Lincoln Telephone & Telegraph Co., supra;* 45 C. J. 962, 965.

The extent of the risk which a person is justified in taking under the circumstances increases in proportion to the imminence of the danger and the value of the advantage that can be realized from encountering the danger and attempting to remove its hazards. Or, stating it conversely,

the less the danger to a third person or property, the less the risk which a party may encounter in acting to save life or property without becoming guilty of contributory negligence. See Restatement, Torts, *supra*.

The trial court instructed the jury as follows: "You are instructed that if you find from the evidence that it was not necessary for the pole and wires to be moved at the time plaintiff acted in order that traffic could safely pass along the highway or to save others from an immediate danger, and that plaintiff knew, or, acting as a reasonable man under the circumstances, should have known that the pole was a transmission line and that the wires thereon carried a dangerous electric current but, nevertheless, voluntarily exposed himself to the danger by attempting to move it from the highway, then your verdict should be for the defendant."

The instruction was as favorable as defendant was entitled to have given under the issues and facts of this case.

The trial court did not commit error in overruling defendant's motion for an instructed verdict.

The defendant further contends that it was the duty of the trial court to instruct the jury that (a) the plaintiff "assumed the risk which was apparent to him from his observation and knowledge;" (b) "that there was no emergency requiring any action by the" plaintiff; (c) that the plaintiff "knew that these wires were charged with electricity and dangerous." As to (a) the trial court instructed the jury as follows:

"You are instructed that inasmuch as the employment of electricity is dangerous and liable at all times to cause accidents, that ordinarily those transmitting it should have the right to select their own agents or employees for handling or guarding it, and others coming in contact with it should use ordinary care corresponding to its dangers in order to save themselves and others from injury, and no person should unnecessarily, as a mere volunteer, interfere with it and expose himself to danger. If there is no emergency, one who knowingly and unnecessarily, as a mere volunteer, does

some act exposing himself to danger, he thereby assumes the risk of accident and, in such case, cannot complain of the negligence of other persons. A higher degree of care is required from one who knows of the danger or who, under the circumstances, should know of the danger than would be required from a person without such knowledge or notice thereof. A person who does not have knowledge or notice of the danger is required to use the ordinary care which an ordinarily prudent man would use under the same or similar circumstances."

The proposition raised by (b) has already been considered. As to (c) it would have been error to have so instructed the jury under the facts as testified to by the plaintiff.

The defendant contends that the trial court erred in refusing to give a requested instruction as follows:

"You are instructed that the law places a duty upon a person of full age and in possession of his faculties, to guard against doing an imprudent thing and requires such person to use the senses with which he is endowed to refrain from putting himself in a place of danger."

In addition to the instruction hereinbefore set out, the trial court instructed the jury that:

"By 'negligence' is meant the doing of some act under the circumstances surrounding the accident involved which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken. * * *

"You are instructed that electricity is a dangerous thing, and all persons using, coming in contact with, or handling it in any way, should exercise a high degree of care in proportion to the dangers incident to its use, and failure to exercise such ordinary care according to the circumstances would constitute negligence."

In view of the instructions given and the general nature of the requested instruction, the trial court did not err in refusing to give the tendered instruction.

Finally, the defendant urges that the verdict is excessive.

The judgment was for $2,500. The undisputed value of medical services of the plaintiff was $990. Accepting, as we must from the jury's verdict, the truth of the testimony of plaintiff and his witnesses as to his injuries, their cause, and their extent, the verdict is not excessive.

No prejudicial error is found. The judgment of the trial court is

AFFIRMED.

CARTER, J., dissenting.

This is the second appearance of this case in this court. On the first appeal, the action of the district court in entering a judgment for defendant notwithstanding the verdict was reversed on the authority of *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N. W. 393. I am in accord with the view that the trial court should have granted a new trial instead of a judgment for defendant notwithstanding the verdict.

After the case was remanded, the motion for a new trial was called up for hearing. The trial judge, after having ruled that defendant was entitled to judgment notwithstanding the verdict, overruled the motion for a new trial. It is quite apparent that reason must exist for entering orders so inconsistent.

It appears by the opinion filed in the former appeal that this court not only determined that a judgment notwithstanding the verdict was not an available remedy, but it contained language indicating that the motion for a new trial, not yet passed on by the trial court, ought also to have been overruled. The particular language which undoubtedly misled the trial court is: "The pleadings of plaintiff and defendant formed issues of fact which the Constitution requires be submitted to a jury for determination." *Wolfinger v. Shaw*, 136 Neb. 604, 287 N. W. 63. It is axiomatic, of course, that this court cannot properly rule on a motion for a new trial before it has been presented to the trial court. As a result of these unfortunate circumstances, the defendant has been deprived of the retrial of the case which the

trial court evidently would have granted except for his misinterpretation of the former opinion.

To me the evidence does not warrant a recovery because of the contributory negligence of the plaintiff. His testimony that he did not know the lines were energized does not appear at all convincing in view of his subsequent evidence that he attempted their removal because of the danger to the public. His story of his contact with these highly energized lines without suffering burns or other external evidences of injury, plus his failure to make complaint for several days afterwards, ought to arouse the credulity of an experienced court. It is evident that no emergency existed at the time, as the plaintiff himself says that his attempt to remove the pole and wires was an impulsive one not based on any immediate danger to any one. The evidence shows that he knew the wires and pole were down and that the defendant Shaw had been notified. Traffic had gone around the obstruction as was evidenced by tracks on the highway. With this knowledge and without any imminent danger to the public having manifested itself, plaintiff negligently placed himself in a dangerous position. He ought not be permitted to profit by his own negligence and recover for risks which he assumed.

Under the circumstances of this case, a new trial ought, at least, be granted.

PAINE, J., concurs in the dissent.

FLORENCE A. STEUNENBERG, APPELLANT, V. NATIONAL PROGRESSIVE LIFE INSURANCE COMPANY ET AL., APPELLEES.
292 N. W. 737

FILED JUNE 14, 1940. No. 30838.

1. **Corporations.** "A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction." *Koehler v. Dodge*, 31 Neb. 328, 47 N. W. 913.

2. **Principal and Agent.** "A principal is not answerable for the unauthorized fraud or misrepresentation of his agent, on the ground that the principal might have profited by the wrongful and unauthorized act, where there is no evidence that he either adopted or profited by it." 21 R. C. L. 905, sec. 82.
3. ———. "The rule whereby an agent's knowledge is imputed to his principal is subject to an exception in the case of an agent who is engaged in an independent fraudulent scheme without the scope of the agency." *Houghton v. Todd*, 58 Neb. 360, 78 N. W. 634.

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

Richard C. Hunter and *M. L. Donovan*, for appellant.

Clinton Brome and *Jack Lee, contra.*

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

PAINE, J.

Plaintiff brought suit in equity to cancel an agreement by which she was induced to exchange $15,200 of notes, secured by real estate mortgages, for certificates of stock for the same amount in the Midland National Company. Plaintiff alleges that such agreement was obtained by reason of a conspiracy to defraud her. Plaintiff asks for an accounting, and, if her securities cannot be returned to her, for judgment for the amount due her. Trial court dismissed her petition without prejudice to an action at law to recover damages for fraud.

On March 28, 1935, the plaintiff filed her petition, and on June 25, 1935, filed an amended petition, in which she named as defendants National Progressive Life Insurance Company, Midland National Company, Joseph L. Lehman, Joseph F. Micek, Amos Thomas and Conn W. Moose, director of insurance of the state of Nebraska. In said amended petition she alleged that the first two defendants were Nebraska corporations; that Joseph L. Lehman was vice-president of the National Progressive Life Insurance Company, and in charge of its home office in Omaha, and

president of the Midland National Company; that Amos Thomas was president of the National Progressive Life Insurance Company and its general counsel.

Plaintiff further alleged that on November 15, 1932, she was the owner of notes, secured by seven real estate mortgages, for a face amount of $15,200, and, because some of the interest payments were in default, she was advised by Mabel K. Swanson to consult Joseph L. Lehman at the office of the National Progressive Life Insurance Company, which she did on said date in company with Mabel K. Swanson; that Lehman stated to them that the stock of the National Progressive Life Insurance Company, the World Insurance Company, and the Atlas Insurance Company was all held by the defendant Midland National Company, which holding company would receive all of the profits from the operation of said three companies, and that the National Progressive Company needed a little extra money or securities to increase its reserve fund, and offered to exchange stock in the Midland National Company for her mortgages, which would first have to be approved by Amos Thomas, president, and Dr. A. C. Stokes, director, of the National Progressive Life Insurance Company, and she was induced by such representations to leave four of her farm mortgages, amounting to $8,900, with the defendant.

On November 22, 1932, she returned to the office of the National Progressive Life Insurance Company, and while there one of the office girls came in and said, "Here are the mortgages from Mr. Thomas' office," whereupon Lehman informed her that her mortgage loans had been passed and accepted by Dr. Stokes and Amos Thomas as proper securities for the reserve fund of the National Progressive Life Insurance Company, and if she would deliver him the balance of her securities, which she then secured from her safety deposit box in the Omaha National Bank, he would give her shares in the Midland National Company for the face value of all her mortgages, to wit, $15,200, and that she would then be sure of receiving an income of at least $100 a month for life.

Believing and relying upon all of such representations made by Lehman as vice-president, general manager, and in charge of the home office of the defendant National Progressive Life Insurance Company, she assigned all of her farm mortgages, of the value of $15,200, and from time to time for some months thereafter she received checks alleged to be the earnings on her shares of stock in the Midland National Company, at 8 per cent. interest, as promised.

Plaintiff alleges that all of such representations were known to all of the defendants to be false, and were made in pursuance of an unlawful conspiracy to defraud plaintiff out of her securities. Plaintiff received purported dividends upon her stock in the Midland National Company to the sum of approximately $1,514.61, the last payment being given her on March 6, 1935, in the sum of $29.87, and alleges that all of said sums were paid to her to prevent her from ascertaining that she had been defrauded. Plaintiff prayed that the said contract be set aside and canceled, and that the court order her securities returned to her, and that, in the event that the defendants, or either of them, were unable to return to the plaintiff her securities, a judgment be entered in favor of the plaintiff and against the defendants for the actual value of the securities at the time they were delivered to the defendant National Progressive Life Insurance Company.

The answer of the National Progressive Life Insurance Company (which will be hereafter designated by the words "Insurance Company" alone) admitted its corporate character as a mutual insurance company, and the corporate character of the Midland National Company; admitted that Amos Thomas was at all times mentioned president and general counsel of the Insurance Company; alleged that it had no information or knowledge of the representations made by Lehman to plaintiff, nor any knowledge with regard to any negotiations plaintiff had with Lehman regarding the securities referred to; denied that plaintiff delivered any securities to Lehman as vice-president and manager in charge of the Insurance Company for the purpose of having

the same deposited in the reserve fund of the company, but that, if the securities were delivered to Lehman, it was in his individual capacity, and not for or on behalf of the Insurance Company, and alleged that Lehman at no time had any authority to accept any securities from plaintiff on behalf of the Insurance Company.

Said Insurance Company specifically denied that it entered into any plan or unlawful conspiracy to defraud her out of her securities, or that it had any knowledge of any fraud perpetrated upon her by Lehman, but admitted that plaintiff's mortgages were deposited with the insurance department of the state of Nebraska in the reserve fund of the Insurance Company, but that such securities when deposited were the property of the Insurance Company, having been purchased for a valuable consideration, without knowledge of any claim or right of the plaintiff in and to the same; admitted that on November 3, 1934, the general counsel, Amos Thomas, of the Insurance Company, drew an assignment by which Lehman assigned his interest in premium commissions due him or the Midland National Company to the plaintiff, and admitted that thereafter the National Progressive Life Insurance Company paid her the following checks: November 10, 1934, $4.75; December 10, 1934, $19.80; January 8, 1935, $13.59; February 5, 1935, $23.96; March 6, 1935, $29.87, as set out in her amended petition, but denied that such assignment was given to plaintiff as a part of any scheme or unlawful conspiracy to defraud her, but that it was prepared by Amos Thomas solely at the request of the plaintiff, and further entered a general denial to all other allegations of plaintiff's petition.

Joseph L. Lehman filed answer, in which he admitted that the two companies named as defendants were duly incorporated; alleged that on November 15, 1932, plaintiff, without solicitation on his part, came to him and entered into an agreement with him to purchase 15,200 shares of the capital stock of the Midland National Company, of which he was president, of the par value of $1 each, in exchange for her notes and mortgages, which had a face value of $15,200.

Defendant Lehman further alleges that plaintiff was a mature woman, of business experience, and alleges that no misrepresentations of any kind or character were made to her in connection with the transaction, and that she well knew the nature and character of the stocks she was purchasing; further alleges that during 1932 and 1933 he made various advances of money to plaintiff on account of her ownership of said stock, the exact amount of which is unknown to the defendant. The plaintiff's reply to each of said answers was a general denial.

The decree of the district court finds that the plaintiff exchanged her mortgage securities with defendant Lehman as a personal transaction, and not with him as an officer of the Insurance Company, but with the knowledge that her mortgages were to be made a part of the reserve fund of the Insurance Company, and that never until shortly before the commencement of this action did she make any claim against the Insurance Company to recover the mortgages or the proceeds.

The decree further sets out that to grant plaintiff an allowance of a rescission of the transference of her securities on a mere tender of the stock of the Midland National Company which she received from Lehman would be inequitable and unjust, and it is further ordered and decreed that the plaintiff's action be dismissed as against the defendants, but without prejudice to any action at law against any party to recover damages for fraud which the plaintiff may have suffered.

The plaintiff sets out ten specific errors for reversal, and discusses them under twenty principles of law. The principal contention is that the trial court erred in finding that her transaction was a personal transaction solely with Joseph L. Lehman, rather than as a result of any conspiracy to defraud, participated in by the Insurance Company.

To determine this question, we are required to carefully weigh the evidence relating to the alleged conspiracy. The evidence of the plaintiff tended to support the allegations of the amended petition which have been set out herein, and

clearly discloses that she was entirely misled into exchanging her $15,200 worth of mortgages for 15,200 shares of stock in the Midland National Company.

The plaintiff was urged to go to Lehman's office by Mabel K. Swanson, who was first secretly promised a commission of 10 per cent. by Lehman on all the securities plaintiff could be induced to turn in to him.

Exhibit No. 12 consists of a bundle of 20 checks, given to Mabel K. Swanson by Joseph L. Lehman, and signed by him, with the word "Agt." after his name. The first check was dated November 19, 1932, for $175, and the total of those introduced in evidence is $1,407.90.

Joseph L. Lehman testified that after he received the mortgages from plaintiff he exchanged them to the Insurance Company for some securities which they had. He said he talked the matter over with Mr. Micek and told him about the deal that he had made, and then he and Mr. Micek talked the matter over with Mr. Thomas about making the exchange and putting these mortgages into the Insurance Company, and the plaintiff's mortgages then went into the reserve deposit at Lincoln with the insurance department for the Insurance Company.

Lehman further testified that he remained with the Insurance Company for about two years after that time. In regard to promising her $100 a month on her stock in the Midland National Company, he said that he told her he would personally see to it that she would receive $100 a month for the first year. He said that the Midland National Company had some written and some verbal contracts with the Insurance Company for the production of insurance business. He testified that there might have been a certificate issued to Dr. A. C. Stokes, but the deal did not go through, and it was canceled.

Mr. Lehman admitted on cross-examination that the only assets the Midland National Company had at the time of the transaction with plaintiff were $4.11 in the bank and his contract with the Insurance Company to produce business. On cross-examination Mr. Lehman admitted that he

was in charge of the home office and had charge of sales and the records in the office at the time of taking over the plaintiff's mortgages, and that he was the only officer of the Insurance Company who occupied that office regularly.

Exhibit No. 31 is a seven-page letter addressed to Joseph L. Lehman, vice-president, National Progressive Life Insurance Company, 718 Omaha National Bank Bldg., Omaha, Nebraska, dated November 29, 1932, and signed by Arthur L. Loomis, of the bond department of the Omaha National Company, giving a complete description with ratings from the reports of Standard, Fitch and Moody upon the bonds which were exchanged by the Insurance Company for the mortgages of plaintiff, showing a value of about $10,000 for said bonds at that time.

Amos Thomas testified that he first met Joseph L. Lehman some time in 1930; that he investigated him and found he was an experienced insurance man, and some time in 1931 he went to work for the Insurance Company, and became an officer, and served until his resignation was accepted on August 31, 1934.

Mr. Thomas said that his law firm organized the Midland National Company for Mr. Lehman; that the written contract to write life insurance which Lehman had was assigned to the Midland National Company, with the consent and approval of the board of directors of the Insurance Company; that in the early part of December, 1932, Lehman said his Midland National Company had some farm mortgages that he would like to exchange for securities then on deposit with the state insurance department as part of the trust fund required to be maintained; that he examined the abstracts of title, and location of the property, and went to Lincoln and conferred with Lee Herdman, insurance commissioner, telling him that Lehman desired to exchange the mortgages, which were not liquid, for the bonds, so he could borrow money "to develop an agency organization to produce life insurance for the National Progressive Life Insurance Company."

Mr. Thomas testified that a little later he came back to

Lincoln and brought the specific securities with their appraised value, and upon that second trip Mr. Herdman issued an order to the security clerk to permit the exchange of $12,000 worth of bonds for $12,000 worth of real estate mortgages.

Mr. Thomas testified that the securities were indorsed in blank by Mrs. Steunenberg, whom he later recollected that he had known slightly when her name was Alexander and she was secretary for John L. Webster, but that the first time he ever met the plaintiff in connection with this deal was in September, 1934, when she complained about the transaction she had had with Lehman, saying Lehman had not kept his word as to payment of interest, and she was now penniless. Mr. Thomas testified he told her he was extremely sorry, but as the Insurance Company had paid substantial value for the mortgages, and bought them in good faith, he could not see that there was anything it could do about the matter, and that plaintiff replied that she did not blame Mr. Thomas, or the Insurance Company, for the situation.

Mr. Thomas denied that he knew that certificate No. 31, for 1,000 shares of stock in the Midland National Company, dated January 14, 1933, was ever issued in his name, and said he never received such certificate.

On cross-examination he testified that the offices of the Insurance Company were on the floor immediately beneath his law office, and directly connected by a stairway. He testified that the bonds exchanged for the plaintiff's mortgages had depreciated to a value of about $10,000 at the time the exchange was made.

Exhibit No. 10 is a certified copy of the annual statement as of December 31, 1932, made to the insurance department, showing that the National Progressive Life Insurance Company was incorporated July 28, 1927, and on April 5, 1928, commenced business, and that the following are the officers: Amos Thomas, president; Joseph L. Lehman and L. A. Dillovan, vice-presidents; secretary, John J. Brotherton; treasurer, Joseph F. Micek. All of the above officers were directors except John J. Brotherton.

In this exhibit No. 10 it shows the withdrawal of the bonds of $12,000 from the reserve of the Insurance Company, and in a line opposite each bond, under the heading, "Name of Purchaser," is written, "Florence G. Steunenberg." It is not explained why the plaintiff's name was used instead of that of Joseph L. Lehman.

The next annual meeting of the Insurance Company was held in Omaha, January 18, 1933. The report on the year's business was read, lists of the bonds and securities, receipts and disbursements were presented, and Joseph L. Lehman was unanimously elected to the board of directors to fill the unexpired term of John J. Brotherton, resigned, whereupon Joseph L. Lehman offered a resolution that the acts and doings of the board of directors, officers and committees, as shown by all minutes of previous meetings, and all expenditures as shown by their financial statement, are ratified and approved, and the annual statement for the year was signed by Amos Thomas, president, Joseph L. Lehman, vice-president, also by the actuary and treasurer.

At the annual meeting on January 17, 1934, held in Omaha, it shows that the following officers were present: Amos Thomas, president, Joseph L. Lehman, executive vice-president, Joseph F. Micek, secretary, William Pearlman, treasurer, and the executive vice-president submitted the report of the year's business, including a list of the bonds and securities held, and a statement of all receipts and disbursements, and again the resolution was adopted that all of the acts and doings of the board of directors, the officers and committees were ratified and approved.

While it does not appear in the transcript, it appears to be admitted in both the briefs that the action was dismissed as to Amos Thomas without prejudice during the trial, and that the insurance commissioner made a special appearance, which was sustained by the court.

With this rather complete summary of the evidence before us, the facts show that plaintiff was induced to go to the office of the Insurance Company by a supposed friend, and there was induced to exchange her good mortgages for

comparatively worthless stock by Lehman, the only officer of the Insurance Company regularly occupying that office; that Lehman immediately induced president Thomas, of the Insurance Company, to exchange plaintiff's mortgages for the Insurance Company's bonds, which bonds would be more liquid.

"In a conspiracy there must be a meeting of the minds of the parties charged, for the purpose of bringing about the act charged." *Ashby v. Peters,* 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843. In the case at bar, the evidence does not disclose such meeting of the minds, for Mr. Thomas testifies that he knew nothing at all about how Lehman had gotten these mortgages, and Lehman came to him and told him he needed money and that the mortgages were not good collateral to borrow on, and Lehman suggested an arrangement by which they could substitute the mortgages with the insurance reserve at Lincoln for certain bonds that were held as legal reserve of the Insurance Company in Lincoln. Mr. Thomas admits he examined the mortgages, but only as to their title and value to be taken in exchange for the bonds. So far as shown by the evidence, neither the Insurance Company nor Mr. Thomas got anything at all out of this exchange. It was made just to accommodate Mr. Lehman. The record shows that Mrs. Steunenberg was doing business with Mr. Lehman all the time, and with him alone. She says that she had implicit faith in Mr. Lehman. Mr. Lehman told her that he thought the stock he sold her would pay her $100 a month, which would be about 8 per cent. on her investment in his company, and he carried her along for about two years. Plaintiff continued to take payments from Lehman in small amounts for a long time after she knew that the business of the Midland National Company, in which she held stock, was not very good. Finally she went to see Thomas, and he told her that Lehman had been let out, and the only thing they could do for her would be to pay her any renewal insurance commissions due to Lehman, and they paid her some on these renewal commissions up to the time this suit was brought.

We are cited to the law that "A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." 1 Restatement, Agency, sec. 261.

However, in the case at bar, Lehman did not hold out to plaintiff that she was transacting business with the Insurance Company, but made it very clear that she was receiving stock in the Midland National Company, of which he was president, so the rule cited does not apply.

An officer of an insurance company must act within the scope of his authority in order to bind his principal, unless his acts are ratified. *Kennedy v. Otoe County Nat. Bank,* 7 Neb. 59. No evidence of ratification appears in the record in the case at bar.

This court has held: "All persons dealing with the trustees of such a corporation must, at their peril, take notice of the powers granted by its articles of incorporation." *Horton v. Tabitha Home,* 95 Neb. 491, 145 N. W. 1023.

"A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction." *Koehler v. Dodge,* 31 Neb. 328, 47 N. W. 913.

"A principal is not answerable for the unauthorized fraud or misrepresentation of his agent, on the ground that the principal might have profited by the wrongful and unauthorized act, where there is no evidence that he either adopted or profited by it." 21 R. C. L. 905, sec. 82.

In the case at bar, the transaction was not within the course of Lehman's employment as a vice-president in charge of soliciting insurance, and while the Insurance Company did buy the plaintiff's mortgages of Lehman, it paid full value therefor to him, and knew nothing of the fraudulent transaction by which Lehman acquired them until nearly two years thereafter.

"One seeking to recover from a principal, for an unau-

thorized act of an agent, must establish that the principal obtained knowledge of such act before it had changed its position." *Maixner v. Travelers Ins. Co.*, 133 Neb. 574, 276 N. W. 163.

"The rule whereby an agent's knowledge is imputed to his principal is subject to an exception in the case of an agent who is engaged in an independent fraudulent scheme without the scope of the agency." *Houghton v. Todd*, 58 Neb. 360, 78 N. W. 634.

There is no question but that Lehman, as a vice-president and in charge of its office, could have bound the Insurance Company in the transaction of any business, for and in the name of such corporation, relating to the selling of life insurance, for which purpose alone he was employed. On the other hand, when he transacted his private business for another corporation, and a kind of business which was not in any way connected with the business of a mutual life insurance company, and in which it had no interest and derived no profit, we have reached the conclusion that the trial court was right in its decree, and the same is hereby

AFFIRMED.

ALICE C. LUCAS, APPELLANT, V. ARTHUR W. LUCAS ET AL., APPELLEES.

292 N. W. 729

FILED JUNE 14, 1940. No. 30801.

1. **Trial.** When a defendant moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's evidence to be true, together with every conclusion which fairly and reasonably may be drawn therefrom.
2. **Appeal.** Where a trial court in an equity case erroneously dismisses the suit at the close of plaintiff's evidence, this court ordinarily will remand the case for a new trial.
3. **Trial.** Where a defendant pleads a counterclaim, and upon the conclusion of plaintiff's evidence moves for and procures a dismissal of plaintiff's cause of action, he thereby waives his counterclaim.

4. **Appeal.** But where it appears that such dismissal of plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred.

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

Bernard R. Stone and *Kenneth C. Sutherland,* for appellant.

Barney W. Gill, contra.

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

CARTER, J.

This is a suit in equity brought by Alice C. Lucas, an alleged incompetent person, through her next friend, against Arthur W. Lucas and Theresa Lucas, son and daughter-in-law, respectively, of the plaintiff, for an accounting of certain moneys alleged to have been fraudulently obtained from her. At the close of plaintiff's testimony both defendants moved for a dismissal of plaintiff's cause of action. The motions were sustained and plaintiff appeals.

The record discloses that in 1934 plaintiff received the proceeds of two mortgages owned by her in the total amount of $900, which were turned over to the defendant Arthur W. Lucas. In October, 1936, plaintiff received the proceeds of a judgment for personal injuries sustained in an accident in the amount of $4,315, which were also delivered to Arthur W. Lucas. It is established that Arthur W. Lucas, on and after October 16, 1936, was speculating on the stock market, with the result that the moneys in question were lost. The record further shows that, after the moneys were lost, defendants placed the plaintiff in the Douglas County Poor Farm, where she has since been cared for at the expense of the county.

The evidence shows that plaintiff had lived with Arthur W. Lucas for several years and, at the time of the filing of the petition in this case in 1938, she was more than 80 years

of age. It is contended that she was not capable of handling her own business affairs and, as a result thereof, defendants fraudulently procured plaintiff's money and converted it to their own use.

Defendants pleaded in their answer that plaintiff was engaged in speculating in stocks as a partner of Arthur W. Lucas. An instrument designated "joint account" appears in the record, purporting to have been signed by plaintiff and Arthur W. Lucas. It is provided in the "joint account," among other things, that all securities or proceeds in the hands of the brokerage company to whom the instrument was given shall upon the death of one belong to the other in so far as the company was concerned.

Plaintiff testifies that she repeatedly told Arthur W. Lucas she would have nothing to do with the "board of trade" because of the unfortunate experiences of her husband in making similar speculations. She further testifies that she did sign some papers at the request of Arthur W. Lucas and, upon inquiry as to what they were, his answer was: "Never you mind, never you mind." She further testifies to similar answers to inquiries concerning the whereabouts of her money. She also says that she never knew that Arthur W. Lucas was using her funds until Byron Lucas, a grandson, informed her that "Uncle Arthur was dealing on the board of trade with my money."

At the close of plaintiff's testimony, defendants severally moved for a dismissal, and the motions were sustained. An examination of the record discloses that a case was not made against Theresa Lucas, and that the trial court did not err in sustaining the motion as to her. An entirely different question is raised, however, as to the defendant Arthur W. Lucas.

This being an appeal in an equity case, it is to be tried *de novo* on the record made in the district court. *Dappen v. Weber*, 106 Neb. 812, 184 N. W. 952. It is also the rule when defendant moves for a dismissal at the close of plaintiff's evidence, the defendant thereupon admits plaintiff's testimony to be true, together with every conclusion which

fairly and reasonably may be drawn thereupon. *Schroeder v. Bartlett,* 129 Neb. 645, 262 N. W. 447.

We think the evidence is sufficient to sustain a finding for the plaintiff as against Arthur W. Lucas. The evidence shows that defendant Arthur W. Lucas received the moneys in question. Plaintiff says she did not knowingly enter into a partnership to speculate in stocks and that she in fact forbade its being done. She further states that, if she signed the instrument known as a "joint account," she did not know what she signed. Her testimony further shows that the whereabouts of her money was concealed from her during the period it was being invested by Arthur W. Lucas. None of this evidence is disputed. It is true that the evidence of plaintiff was not very satisfactory, due to her forgetfulness and the infirmities of age. But this is a matter which goes to the weight of her evidence, and where it is undisputed it is sufficient to sustain a finding of fraud. We therefore hold that the trial court erred in sustaining the motion of Arthur W. Lucas to dismiss plaintiff's suit at the close of plaintiff's evidence.

Plaintiff urges that a motion to dismiss, made at the close of plaintiff's evidence in an equity suit, is nothing more than an announcement on the part of defendants that they rested their case at the close of plaintiff's testimony, and by so doing lost the only opportunity available to them to prove affirmatively any defense they might have had. Plaintiff cites *Bridges v. Sams,* 202 Ia. 310, 202 N. W. 558, and *Haggin v. Derby,* 209 Ia. 939, 229 N. W. 257, in support of the rule contended for. While it is true that this court hears an equity case *de novo* on appeal on the record made in the district court, we are not willing to go so far as the Iowa court appears to have gone. It seems to us that such a rule would, from a practical viewpoint, require a defendant to produce his evidence and unnecessarily take up the time of the court, even when he was certain that plaintiff had not made a case. We think that a defendant is entitled to test the sufficiency of plaintiff's evidence without the risk of penalizing himself in the event the trial court

improperly sustains his motion. We hold therefore that the case should be remanded for a new trial.

It appears that the defendants each filed a counterclaim. Plaintiff contends for the rule stated in *Miller v. McGannon*, 79 Neb. 609, 113 N. W. 170, wherein this court said: "Defendant pleaded a counterclaim, and upon the conclusion of the plaintiff's evidence moved for and procured an order of the court directing a verdict for defendant upon the plaintiff's cause of action. *Held*, That defendant was not entitled thereafter to introduce evidence to prove his counterclaim, that the order directing the verdict concluded the trial, and that defendant by moving for a directed verdict and obtaining a favorable ruling thereon waived a hearing on his counterclaim." We think this is the correct rule where defendant moves for and obtains a proper dismissal of the suit at the close of plaintiff's evidence. By so doing, he is held to have waived his counterclaim and accepted a judgment of dismissal. But where the trial court erroneously sustains his motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred.

We conclude that the trial court properly sustained the motion of Theresa Lucas for a dismissal as to her. The trial court erred, however, in sustaining the motion as to Arthur W. Lucas, and as to him the cause is remanded for a new trial.

AFFIRMED IN PART AND REVERSED IN PART.

GEORGE E. WILLIAMS, APPELLANT, V. CITY OF WYMORE, APPELLEE.

292 N. W. 726

FILED JUNE 14, 1940. No. 30924.

Workmen's Compensation. When a city, pursuant to agreement, furnished certain equipment, material, supplies, superintendence and other items for use on a Works Progress Administration project, but had no authority to control the details of the work,

or to direct the mode and manner of doing it, the city is not liable for the payment of benefits under the workmen's compensation law for injuries suffered by an employee on the project.

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

Hubka & Hubka, for appellant.

P. M. Everson and *Vasey & Mattoon, contra.*

Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka and *Alfred A. Raneri, amici curiæ.*

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

CARTER, J.

This is a suit in which George E. Williams seeks to recover benefits under the workmen's compensation law for injuries sustained while in the alleged employ of the city of Wymore. The trial court denied an award, and plaintiff appeals.

It appears from the record that on April 4, 1938, plaintiff was engaged as a common laborer in breaking ledge rock with a sledge hammer and thereafter lifting and placing it in a pile. While so engaged, plaintiff stepped on a small rock which turned and caused him to injure his back. The primary question for determination is whether plaintiff was an employee of the city.

The record shows that a proposal of the city for the construction of improvements on certain of its streets had been accepted by the Works Progress Administration of the federal government, and on the date of plaintiff's injury the improvements were being made. The city had agreed to furnish for such construction work certain equipment, material, supplies and other items, including superintendence, in an amount totaling $4,962, of which $1,100 was for superintendence. The Works Progress Administration furnished superintendence, material, equipment, supplies, all labor and other items totaling $17,037, of which $1,267 was for superintendence.

At the time of his injury, plaintiff was working in a rock quarry a mile and a half east of Wymore. The quarry was leased by the city. The outbuildings and equipment, including the rock crusher, tools, trucks and wagons, belonged to the city, and were being used in connection with the project. The evidence is clear that the project was directed by the Works Progress Administration and not by the city. The record further discloses that the Works Progress Administration employed the plaintiff, and that he was what is generally called a W. P. A. worker. He was under the direction and control of the Works Progress Administration, which fixed his hours of employment, his wages and labor classification, and had the sole right to supervise his work and to discharge him if necessary. In this connection it is pointed out that the plaintiff never applied to any officer of the city for employment; that he had previously been and had continued to work as a W. P. A. worker; that he was selected through regularly established W. P. A. channels; and that the city did not pay or agree to pay the plaintiff. We think the evidence is clear that the city had no control or supervision over the plaintiff on this project, and that the right to direct the manner in which the work was to be done, as well as the result to be accomplished, was in the Works Progress Administration. This is the primary test in determining whether the relation of master and servant existed. *Curry v. Bruns,* 136 Neb. 74, 285 N. W. 88; *Home Savings & Loan Ass'n v. Carrico,* 123 Neb. 25, 241 N. W. 763.

Plaintiff urges that the fact that the city was to provide a part of the superintendence is evidence that it had the right of control. It is true that among the items of estimated cost of execution of the project assigned as part of the city's contribution was the item of superintendence. This was, in a sense, a contribution in kind for which the city was to be given credit on its contribution to the cost. It is not even intimated that the city was to control the manner of doing the work because of this provision. It may be noted that the Works Progress Administration was

also to furnish superintendence; in fact the greater part of the cost of superintendence was to be furnished by it. The proposal, so far as costs are concerned, appears to be nothing more or less than an analysis of estimated costs of the whole project, showing the items or parts of items that the city would contribute to make up the total contribution required of it. The ultimate and actual agreement made by the city was not to execute the work but, as shown in the project proposal, to "finance such part of the entire cost thereof as is not to be supplied from federal funds."

Plaintiff contends that the fact that Clem Hudson, the city's street commissioner, was employed as a superintendent of the project, evidences that the city was the employer of the plaintiff. It appears also that the salary of Hudson was paid by the city. These are, of course, circumstances to be considered. The evidence shows, however, that Hudson was superintendent of the project under the direction and supervision of the area engineer of the Works Progress Administration. He was not acting in his capacity as street commissioner or as an agent of the city. The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. *Curry v. Bruns*, 136 Neb. 74, 285 N. W. 88. While it is true that the result of the project was beneficial to the city, and was the type of construction which the city had authority to undertake, yet the elements necessary to establish the relationship of master and servant are lacking. In this connection it was necessary for the city officials to certify that "This project will not cover work for which funds at the disposition of the sponsor (city) are currently appropriated, or work included in the normal governmental operations of sponsoring agency; it will not result in the displacement of regular employees of this agency."

It is not necessary, of course, that all indicia of the relationship of master and servant be present to sustain a finding that it did exist, and, on the other hand, the fact that some exist does not conclusively establish such a re-

lationship. The test usually invoked in this state is whether the alleged employer has the control of the workman and of the details, mode and manner of doing the work. We are obliged to hold that, under the evidence in this case, the plaintiff was not in the employ of the city at the time of his injury.

In a similar case the Washington court held: "The city's application to the civil works administration amounted to the tender of a project for execution. The administration could, as it did in this instance, impose conditions upon its acceptance of the project, the condition imposed here being that all material required was to be supplied by the city; and, further, that, in so far as required and necessary, the administration should have the use of the city's operating departments. So that any technical employees of the city detailed to the Federal government in the prosecution of the project became, to the extent they were employed, a part of the administration's working organization, even though paid by the city; in other words, they were as much a part of the city's contribution to the project as the material and the site." *Brooks v. City of Seattle,* 193 Wash. 253, 74 Pac. (2d) 1008.

Also, in *City of Los Angeles v. Industrial Accident Commission,* 9 Cal. (2d) 705, 72 Pac. (2d) 540, the court said: "Courts have judicially noticed the fact that the primary objective of the Federal Emergency Relief Act of 1935 (15 U. S. C. A. sec. 728, note) was not to benefit particular municipalities or localities, but to provide relief for unemployment. By contributing a small part of the necessary expense and by contributing the services of a superintendent and a small number of employees the city of Los Angeles was able to obtain the benefit of this project. It was not, however, city work of which the city had control, but was under the rules and regulations of the Emergency Relief Administration."

Other cases sustaining this position are: *Hoover v. Independent School District,* 220 Ia. 1364, 264 N. W. 611; *Shapiro v. Winston-Salem,* 212 N. Car. 751, 194 S. E. 479;

Taylor v. City of Los Angeles, 29 Cal. App. (2d) 181, 84 Pac. (2d) 242; *Dabelstein v. City of Omaha,* 132 Neb. 710, 273 N. W. 43.

Plaintiff contends that *Hendershot v. City of Lincoln,* 136 Neb. 606, 286 N. W. 909, sustains his right to recover. The factual situation was altogether different in the *Hendershot* case. As pointed out in that case, the federal government assumed the role of sole employer of relief workers on Works Progress Administration projects on August 1, 1935. The injury in the *Hendershot* case occurred prior to August 1, 1935, at a time when the state and its governmental subdivisions were the employers under the laws then existing. This alone is such a change as to destroy the applicability of the *Hendershot* case to the one at bar.

Plaintiff contends that the situation existing in the present case constitutes a scheme, artifice or device to enable the city to execute work without being responsible to the workmen under the provisions of the workmen's compensation law, contrary to section 48-116, Comp. St. 1929. We find nothing in the record to sustain any such assertion. Our holding does not leave W. P. A. workmen without a remedy, as the federal congress has provided compensation benefits by federal statute. 5 U. S. C. A. sec. 796. The plaintiff was not unaware of his rights, as is shown by the fact that he looked first to that agency for relief.

We conclude that the trial court, after a careful consideration of the case as evidenced by an able opinion appearing in the record, correctly held that plaintiff was not an employee of the city of Wymore. The judgment is therefore affirmed.

AFFIRMED.

JAMES EVERETT FONDA ET AL., EXECUTORS, APPELLEES, V. NORTHWESTERN PUBLIC SERVICE COMPANY, APPELLANT: EDITH SMITH, ADMINISTRATRIX, APPELLEE.

292 N. W. 712

FILED JUNE 14, 1940. No. 30811.

1. Gas. "When a gas company engages in the distribution of natural gas and the installation and inspection of its equipment, it is incumbent on such company to exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor." *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N. W. 836.
2. ———. A gas company is required by law to maintain an efficient system of inspection and superintendence and must use due and reasonable care in the inspection of its pipes, burners and gas equipment to insure reasonable promptness in the discovery of leaks that may occur from defects therein.
3. ———. "Liability for injuries caused by escaping gas does not depend on notice of defect, where defect is due to improper or careless installation and inspection." *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N. W. 836.
4. Negligence. "A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed." *Tonkovitch v. Indiana Mining Co.*, 153 N. W. 811 (187 Mich. 186).
5. Appeal. "If a party to litigation requests the giving of an improper instruction, he will not be permitted to predicate error thereon. A party will not be heard to complain of an error which he himself invited." *Day v. Metropolitan Utilities District*, 115 Neb. 711, 214 N. W. 647.
6. Master and Servant. Where an employee, an expert and superintendent of installation of gas equipment, is charged jointly with his employer with negligent installation and inspection of gas burner and equipment, and upon trial of the case the employee is released, such verdict, exonerating the employee, does not relieve the master, the employer, where the acts resulting in the injury complained of were committed under the express command of the master, and where other employees, taking part in the installation and various inspections of the gas burner and equipment, were negligent in such respects and not parties to the action.
7. Evidence. Medical authorities are not admissible in evidence as independent evidence of statements therein expressed, but may be used, upon cross-examination, within reasonable limits, which

is a matter largely in the court's discretion, in order to test the knowledge and accuracy of a witness who testifies as to his opinion on scientific questions involved in his profession, where the inquiry is directed to the extent of his knowledge and his familiarity with the accredited standard authorities of his profession upon the subject about which he has testified.

8. **Appeal.** Where the evidence fails to disclose that the decedent died from the effects of carbon-monoxide gas poisoning, funeral expenses are not allowable, but the inclusion thereof in an instruction on the measure of damages, where the evidence shows that the decedent was suffering from the effects of carbon-monoxide poisoning at the time of her death, is not prejudicial.

9. **Trial.** When instructions given, considered in their entirety, fairly and adequately state the law, they are sufficient.

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

Hoagland, Carr & Hoagland, William Suhr and *Dana Van Dusen,* for appellant.

Shuman & Overcash and *Beatty, Maupin, Murphy & Davis, contra.*

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

MESSMORE, J.

Nellie L. Fonda during her lifetime brought this action against the defendant corporation and its superintendent in charge of installation, inspection and distribution of its natural gas service for alleged injuries, claimed to be due to carbon-monoxide asphyxiation, on December 19, 1933, from a convertible gas burner, placed in a Green Colonial furnace, ordinarily used for burning solid fuels, and owned by James H. Fonda and his wife Nellie. The case proceeded in the name of the executors of her estate. The jury returned a verdict for the plaintiffs in the amount of $5,000 and dismissed the action as to the defendant superintendent. Defendant Northwestern Public Service Company appeals.

Plaintiffs' amended petition alleged facts constituting

negligence on the defendants' part in the installation of the gas burner, in failing to strap the clean-out plug at the time of the installation in 1932, and in failing to properly and thoroughly inspect the furnace on December 17, 1933. Defendants' answer contained a general denial and, in addition, alleged the purchase by the Fondas of the convertible gas burner in September, 1932; that the installation was made in a safe, workmanlike manner, in accordance with the standard rules of installation of Sonner burners, and, when completed, was satisfactory and ready for use; and alleged contributory negligence. The reply was a general denial.

The evidence discloses: The defendant public utility corporation was engaged in the installation and servicing of gas and heating equipment and selling, delivering and furnishing of natural gas. Elmer H. Smith was its superintendent in charge. James H. Fonda, a retired railway engineer, and his wife, aged 75 and 74 years, respectively, lived in North Platte for many years. Mr. Fonda investigated the cost of installation of a gas burner in his home. Pursuant to an agreement, on September 10, 1932, a Sonner heating machine was installed in the Green Colonial furnace owned by the Fondas. The installation was checked and approved by the superintendent September 26, 1932, and accepted.

On December 17, 1933, Edna Hall, employed as a maid in the Fonda home from August, 1933, until December 17, 1933, and in charge of the home at the time, during the absence of the Fondas who were visiting in Omaha, was awakened by a noise which she described as sort of a puff, as if "something had dropped on the floor;" the noise "was louder than usual, it sounded more like the back-fire of a car," as if a "lid had dropped on the floor," and the house became cold. She called on the telephone for Clarence Molley, who was and had been for ten years a service employee of the defendant company, in the capacity of "trouble shooter" or utility man; talked to Mrs. Molley, telling her she felt there was something wrong with the furnace. Mr. Molley came to the house about 11 o'clock the same morn-

ing, and the maid told him she thought the burner was out. They both went to the basement. Molley opened the front door of the furnace, looked into it, found the pilot light out, the burner not operating; he started the pilot light, adjusted the valves, and looked at the thermostat. The maid was unacquainted with the operation of the furnace. She did not see Molley go around to the back of the furnace. Molley testified that after finding the pilot light out he closed the main gas valve and closed the pilot valve and the main burner valve; then waited for the furnace to air out, to be sure no gas would escape from the pilot light; turned the valves on again and started the pilot light. He discovered nothing wrong with the part of the equipment which he inspected; he did not go around behind the furnace, where the clean-out plug was located; he knew it was there; he participated in the installation of the burner; he was in the house between 20 and 30 minutes. Upon leaving he informed the maid that if the house did not warm up for her to call him. His conception of her statement to him is that the house was cold and she did not think the furnace was burning. She subsequently called and talked to Mrs. Molley on the telephone and told her the house was warming up. She noticed about noon that she was developing a headache and, while lying down reading, did become faint, nauseated and dizzy, and felt as if something heavy was pushing against her heart and lungs. She then called a friend, who came over and remained in the house with her until about 4 o'clock. Dr. Fetter was called and administered a sedative to the maid. The doctor testified that she had some symptoms of gas, and he went on the assumption that it was probably gas because they had trouble with the furnace. He advised them to get in touch with the gas men to see about it, placed the maid in a room, opened the windows and left. He thought she was subjected to some monoxide gas. She did not mention to the doctor that there was gas in the house; nor did she report to Mr. and Mrs. Fonda that she became ill from its effects. She was taken home by her father, was ill in bed, up and down, for several days,

and did not return to work at the Fonda home. When she left, the house was locked, remained closed and the furnace operating. The key to the house was given to neighbors by the name of Koons, living across the street.

On December 19, 1933, Mrs. Koons saw Mrs. Fonda when the Fondas returned home, and Mr. Koons delivered the key to Mr. Fonda and talked to him for a few moments. The next day the telephone company discovered that the receiver at the Fonda home was down and called the Koons home, requesting them to make an investigation. Mrs. Koons went over to the Fonda home, could not get in, returned and brought her husband and they obtained entrance by unlocking a screen. They found clothes disheveled and scattered about; there was evidence of bowel movements, and neither Mr. Fonda nor his wife was able to give coherent accounts of themselves. A doctor was called. Dewey Tarkington, a son-in-law, and his wife received a call from the Koons December 20, 1933, and in response went immediately to the Fonda home, arriving about 7:30 o'clock in the evening, found Mrs. Fonda in bed, delirious and apparently unable to recognize them. Mr. Fonda was in bed; his tongue was thick; he had difficulty in making himself understood and did not seem to comprehend what was occurring at the time.

A neighbor, Mrs. Fred Waltemath, having learned of the illness of Mr. and Mrs. Fonda, called between 10 and 11 o'clock the morning of December 21, and found them groaning and gasping for breath, and also found Mrs. Blanche Tarkington very sick, and Mrs. Waltemath noticed that the air in the house was offensive. She was there a short time in the afternoon when the air was not so bad and when the windows and doors were open. When she returned to her own home she called the gas company and said there must be gas escaping in the Fonda home and she thought it should be investigated. She saw some men from the company come almost immediately. A nurse, Janice Ryan, who was called on the case the night of December 20, became dizzy and was so nauseated that she was relieved by another

nurse. Miss Ryan remained in bed for two days as a result of her experience.

Dr. James E. Fonda, a son, arrived about January 2, 1934, and found his mother very ill. He testified she had difficulty in breathing, was weak, her pulse low; she was unable to get to her feet except with difficulty, complained of headache, lacked all control of her muscles, and had mental lapses. His father was very sick, complained of terrific pains in his chest and difficulty in breathing. His father died January 11, 1934.

Dr. O. R. Platt testified that he was called to the Fonda home December 20, 1933, treated the Fondas for food poisoning, and called a nurse to attend them during the evening. The next morning he called again, and because other people in the house had become ill, he thought there was a probability of gas poisoning and suggested opening the windows. He treated Mr. and Mrs. Fonda for four days, after which time he left North Platte for a vacation, and it was his opinion that when he left they had recovered. In answer to the question: "It is a fact that at that time they were suffering from the effects of gas, is it not?" the doctor replied: "That was my final opinion, that they had received some gas."

Dr. T. J. Kerr was called to the Fonda home one afternoon at about 5 o'clock to see Mr. Fonda, who was in the living-room on a couch; Fonda complained of pain in his stomach and of some nausea. The doctor made a diagnosis which showed "food poison or ptomain poison;" he treated him for such disease; there was no disarrangement in the house and no odor.

The record fails to show difficulty with bricks on the baffle plate, as claimed. The baffle plate is described as a flat, round, heavy disk, about 15 inches in diameter, below which the gas flames burn; it is used to deflect the heat toward the walls of the fire box. Evidence is lacking that the adjustment of the valves, or the heat-reclaimer, affected the operation of the furnace. This brings us to the inspection of the furnace and the effect of the clean-out plug being out.

Directly below the flue pipe of the furnace was a 10-inch pipe, about 15 inches in length, in the end of which was a clean-out plug, held in place by friction, created by crimpled edges, which fitted into this short pipe. The short pipe was connected with and opened into the furnace. The clean-out plug, when solid substances were burned in the furnace, could be removed in order to take from the furnace soot and other accumulations. When the installation was made, employees of the defendant company removed the clean-out plug, cleaned the pipe,.put the plug back in place, but did not fasten it with screws or strap it. The manner in which the clean-out plug is placed is in controversy. Experts for defendant company testified the clean-out plug need not be fastened with a strap or held in place by screws, and an expert, who dealt in Green Colonial furnaces, so stated. The experts did testify that the clean-out plug should fit reasonably tight and be normally hard to pull out; that if the clean-out plug were removed it would lessen the air through the furnace 15 per cent. and, normally, there would be air and a sufficient amount of combustion as not to injuriously affect the operation of the furnace; however, if insufficient air were present carbon-monoxide gas would form in large quantities. The plaintiffs' expert testified that proper installation required screw fasteners to keep the clean-out plug in place; that installation of a clean-out plug, to permit it to be moved or put in place by hand-pressure, would be incorrect because of the danger of causing leaks in the gas plug opening, due to vibration or slight explosion, and if the clean-out plug was not in place there would be some leakage of the products of combustion from this opening.

Charles Gerkin, an employee of defendant company, whose duty it was to check furnaces and their operation, did, on December 22, pursuant to a memorandum dated December 21, 1933, go to the Fonda home to ascertain if there was a gas leak, and made what he termed a complete and thorough inspection. He found the clean-out plug on the floor close to the furnace and replaced it with his hands. He is reputed to have told Tarkington that the clean-out

plug was all he could find and he thought that was the trouble, and made the remark that it seemed "to fit loose, it should be strapped in." This statement Gerkin denied, but he claimed that the furnace was operating properly; that there was a minus-pressure there to keep the gases from coming out. He was later called back to the house. Complaint had been made that some one had smelled gas and thought there was a leak. He could find nothing wrong on his second call.

Whether gas leaked or escaped through the opening left when the clean-out plug was out, or whether there was an explosion, is in controversy. Gerkin stated that he smelled no gas, and was likewise positive that gas did not escape through the opening. Experts testified that, if the clean-out plug was removed, normally the products of combustion would come out in the basement in an instant or two, but almost immediately a draft would be created, and the gases would be carried back into the flue. When the clean-out plug would first be pulled out, gas which would escape would not be in sufficient quantity to be dangerous. The plaintiffs' expert testified that the tendency of gas to escape through the clean-out plug opening would be increased, and that some gases would escape which contained carbon dioxide, nitrogen, a small per cent. of monoxide gas, a small quantity of oxygen and water vapor; that the gases in the basement would permeate through the house, and carbon-monoxide gas which may escape is very poisonous; that with the clean-out plug down the gas would be reduced somewhat more, causing incomplete combustion.

On December 22, Howard C. Hopkins, manager of the defendant company, came to the Fonda home and talked to Mrs. Tarkington, who testified: "I told Mr. Hopkins how the folks were and I asked him about the furnace, and he said, we have located the trouble, found the difficulty, and everything has been fixed, and the plug has been put back and you will have no more difficulty." In exhibit 38, purporting to be Hopkins' testimony, such conversation is denied. It is true that when the clean-out plug was replaced

and the house aired no further trouble was experienced from the effect of gas, and it is likewise true that from December 17 until December 21 every one who stayed in the house during this period became ill.

Natural gas, in its raw state, does not contain carbon monoxide; it is produced by imperfect, or partially imperfect, combustion. More than two-tenths of 1 per cent. of carbon-monoxide gas is dangerous. There is a very small trace in all flue gases, and the amount of carbon monoxide depends upon the operation and condition of the unit and the combustion. Ordinarily, the operation of furnaces is the same, either with gas or coal. There are contributing factors to heating; the draft through a flue pipe is affected by many things, including atmospheric conditions and trees about the house, and no person knows what gases will do in all cases. Persons who inhale carbon-monoxide gas develop a severe headache and throbbing in and near the temple, followed by nausea, vomiting and dizziness, also by complete relaxation of the muscles controlling the bladder and lower bowels. Dr. Platt testified: Ordinarily, gas poisoning needed no treatment; merely to remove the cause and give the patient air was sufficient; Mrs. Fonda had some monoxide poisoning; however she had recovered. The positive test for carbon-monoxide poisoning is a blood test, which was not taken.

Much conflict arises as to the general health of Mrs. Fonda prior to the accident, and whether or not she suffered any damage by being injured by carbon-monoxide poisoning, if such be the fact. Dr. Stokes testified she had always been a very frail woman and was brought to his office most of the time by her husband. The doctor saw no change in her condition from December 16, 1933, and in April, 1934, and again when he saw her May 21, 1934, when she complained of being dizzy and that her glasses had not been properly fitted by him. Dr. Platt's testimony discloses that on April 14, 1932, Nellie Fonda was suffering from a number of physical ailments. In his opinion she died of chronic Bright's disease, arterio-sclerosis and hyper-tension which

was progressive, and probably died in a uremic coma, and the illness, which she had when he attended her for three days, was not connected in any manner with her death, and she probably lived her expectancy under the circumstances.

The evidence of the neighbors of the Fondas, of Dr. James E. Fonda, Blanche and Dewey Tarkington, was to the effect that, up to the time Mrs. Fonda went through a night and day of suffering when she was asphyxiated, she was a spry, wiry woman for her age, did housework and cooking, took trips and enjoyed life generally; that subsequent to the asphyxiation she suffered lapses of memory, becoming mentally unbalanced at times. When taken to the hospital she was found to be in such a mental state that she could not be treated there; from and after her injury she could not be left alone for more than a moment, but needed a constant watch; she remained in this pathetic condition for about eight months, and died on August 17, 1934.

In the case of *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N. W. 836, this court held: "When a gas company engages in the distribution of natural gas and the installation and inspection of its equipment, it is incumbent on such company to exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor."

In 28 C. J. 591, 592, 593, it is said: "While no absolute standard of duty can be prescribed, it may be said, in general terms, that every reasonable precaution suggested by experience and the known danger of the escape of gas ought to be taken. This requires, in the case of a gas company, * * * that it shall maintain an efficient system of inspection, oversight, and superintendence * * *. A gas company must use due and reasonable care in the inspection of its pipes, to insure reasonable promptness in the discovery of leaks that may occur from defects in or deterioration of pipes and valves, from careless or wrongful meddling with its works on the part of others."

The appellant contends that an action for negligence may not be predicated on an inference drawn from an inference,

if the negligence is only supported by an inference and circumstantial evidence; such inference must be supported by some fact established by direct evidence, or the claim of negligence will fall; that the case of *Mischnick v. Iowa-Nebraska Light & Power Co.*, 125 Neb. 598, 251 N. W. 258, is analogous to the instant case; that each is an explosion case, and that in the *Mischnick* case an explosion was proved by undisputed evidence; that in the instant case the blowing out of the clean-out plug was merely the effect of the explosion; that plaintiffs' case rests upon the fact of explosion and there is no direct evidence that an explosion occurred.

As we view the case at bar, the testimony shows that defendants made the installation according to their own plans, shows further that the clean-out plug may not have been properly installed, and likewise points to this as the source of asphyxiation, and that the clean-out plug constituted the trouble. It dropped out December 17 and remained out until December 21. There is nothing in the record to show any other means by which gas could escape than through the opening left when the clean-out plug fell out. A company, engaged in the maintenance of such a dangerous fuel commodity, must have employees efficient in their line, and it is bound to anticipate injuries resulting from the use of such commodity. The Fondas had a right to trust the workmanship and service and rely exclusively upon the company's knowledge and skill in the installation and inspection of gas burners and equipment. The cases are distinguishable.

From September, 1932, until December, 1933, superintendent Smith and other employees made various calls at the Fonda residence, some of them in response to requests for inspection and others on routine inspection. Molley inspected this furnace when called by the maid December 17. He was an expert. The maid would not be required, under the circumstances, to give him notice of a defect of which she was unaware. Having undertaken this inspection, it was the duty of the employee to exercise ordinary care in

making such inspection and to effect any necessary repairs, or inform the tenant or owner of the defects and afford him an opportunity to make such repairs. See 28 C. J. 594. It is true that the company is not required to keep up a constant inspection, but when its attention is called to the trouble and it undertakes to remedy it, then, where there may be grave danger, the inspection should be thorough and efficient. Molley failed to make a thorough and efficient inspection on December 17. He assumed that he had found the trouble and that it had been remedied. From the time that its employee, acting under its direction in making the inspection, assumed that the trouble had been remedied, the liability of the company attaches.

The cause of an accident, like any other factor, may be proved by circumstantial evidence. Here, sufficient cause of the accident was shown, and the circumstances strongly indicate that it was the real cause. See *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054.

In the case of *Tonkovitch v. Indiana Mining Co.*, 153 N. W. 811 (187 Mich. 186), it was held: "A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed." And in *Markussen v. Mengedoht*, 132 Neb. 472, 272 N. W. 241, it was held: "Where facts and circumstances are established from which the manner of sustaining injuries can be logically inferred, an issue is presented for the jury."

This court held in *Fonda v. Northwestern Public Service Co., supra*: "Liability for injuries caused by escaping gas does not depend on notice of defect, where defect is due to improper or careless installation and inspection."

The appellant predicates error on certain instructions given by the trial court on its own motion and instructions tendered by defendants and refused. The court did not instruct on contributory negligence, and the evidence fails to show contributory negligence on the part of Nellie L. Fonda. In this respect the court did not err.

Instruction No. 17A, given by the court, is objected to. This instruction is identical with instruction No. 12A requested by defendants. Defendants claim that instructions 5 and 6, offered and refused, were necessary and incident to the subject-matter contained in instruction No. 17A. We have examined the instructions here criticized and, without setting them out, conclude that instruction No. 6 withdraws from the jury the question of recovery for damages from asphyxiation. Instruction No. 5, in view of all of the other instructions given, was properly refused, as the subject-matter of such instruction is contained in other instructions. The following authorities are pertinent:

"If a party to litigation requests the giving of an improper instruction, he will not be permitted to predicate error thereon. A party will not be heard to complain of an error which he himself invited." *Day v. Metropolitan Utilities District*, 115 Neb. 711, 214 N. W. 647.

" 'Where a requested instruction is refused by the trial court, but the court embodies the same idea in an instruction given upon its own motion, the party requesting such instruction having suggested it to the court will not be heard to complain that it is erroneous.' *Vorce v. Independent Telephone Co.*, 86 Neb. 27, 124 N. W. 836." *Kovar v. Beckius*, 133 Neb. 487, 275 N. W. 670.

Objection is made to instruction No. 18, setting forth the elements the jury may consider in awarding damages to the plaintiffs, if plaintiffs are entitled to recover. We agree with this instruction, with the exception that it permits recovery for funeral expenses, shown by the evidence to be in the sum of $369. Plaintiffs failed to prove by a preponderance of the evidence that the death of Nellie L. Fonda was caused by carbon-monoxide gas poisoning, resulting in asphyxiation.

We have examined all of the instructions offered and given and conclude that the instructions given, considered in their entirety, fairly and adequately state the law and are not prejudicial. See *Clausen v. Johnson*, 124 Neb. 280, 246 N. W. 458; *Kovar v. Beckius, supra.*

Error is predicated in that the evidence is insufficient to warrant the submission of the case to the jury, or to sustain the verdict. This has required a detailed statement of the evidence, together with the apparent conflict therein. From an analysis of all the evidence, we conclude that it was proper for the trial court to submit the case to the jury.

Appellant further contends that the verdict in favor of defendant Smith, its superintendent in charge of installation and supervision of gas equipment, releasing him from liability, likewise released defendant company, because the plaintiffs' claim of negligence is based upon the failure of defendant company, its agents or employees to fasten or strap the clean-out plug in place, and since the installation was in charge of Smith and he was absolved from all blame, then there is no faulty or negligent installation and, therefore, no negligence on the part of the company.

In this connection, the record discloses that defendant Smith and the employees assisting him in the installation of the convertible gas burner were working under the direction of the defendant company by work ticket. The evidence is not clear as to which one of the employees placed the clean-out plug and failed to strap or fasten it. The record further discloses that at the time of the inspection by Molley on December 17 and the events occurring from and after such time, including December 21, defendant Smith was not present at and had nothing to do with such inspection.

A jury may properly return a verdict in favor of a servant and against a master, where the evidence supports the finding of other negligence chargeable to the master than that of the servant exonerated by the verdict. This, of course, is dependent upon the facts as determined by the testimony in the case. *Curtis v. Puget Sound Bridge & Dredging Co.*, 133 Wash. 323, 233 Pac. 936. The cases cited by the appellant are pertinent when it is shown that the negligence of the employee is the only negligence charged against the defendant. However, where the evidence dis-

closes negligence on the part of other employees of the defendant company, not parties to the litigation, then the principle as contended for by appellant does not apply.

Corpus Juris, after stating the rule contended for by appellant, continues thus: "If the liability is not so based, a finding that the act of the particular servant was not wrongful does not prevent the rendition of a verdict against the master based on the acts of other servants shown to be wrongful and for which the master is liable on the doctrine of respondeat superior." 39 C. J. 1368.

In the instant case, plaintiffs' petition charged negligence on the part of the defendant company other than that charged against defendant Smith, and the evidence discloses that there was negligence on the part of the defendant company other than the negligence charged against Smith. Under such circumstances, a verdict releasing Smith does not release the defendant company.

The defendant company, in the first instance, upon the sale of the convertible gas burner and equipment to Fonda, made all of the representations with reference to the burner and equipment, the installation and inspection, and, in fact, it agreed to inspect the furnace when requested, and did, as shown by the record, inspect it at various times. The defendant company ordered Smith to go to the Fonda home to make estimates as to the cost of equipment. Smith testified that he received the order to go to the Fonda home from the merchandise department where he also obtained the estimates. Mr. Morgan, head of that department, went with Smith. Smith further testified that the work ticket called for the equipment to be installed and contained general directions as to the work to be done. The work ticket was his command to execute the order with reference to installation, as contained therein.

Where an employee acts under the direction of his employer, the employer is liable, not merely under the rule of respondeat superior, but rather as a joint participant in the acts complained of. *McInerney v. United Railroads*, 50 Cal. App. 538, 195 Pac. 958. See, also, *McCullough v. Langer*,

23 Cal. App. (2d) 510, 73 Pac. (2d) 649. The employees and the company are, in fact, principals and joint participants. "So a verdict against the master and an acquittal of the servant will be sufficient to sustain a judgment against the master where the act resulting in the injury complained of was committed under the express command of the master." 39 C. J. 1368.

The record in the instant case discloses that the defendant company at all times controlled and directed the installation of the gas burner and equipment here in question, and the subsequent inspection thereof was done under the defendant company's express command. The business of selling, installing and inspecting convertible gas burners and equipment is far-reaching. Each case presents a different problem in installation and inspection. Therefore, we confine and limit our judicial interpretation to the particular facts in the instant case.

Appellant further contends that the court erred in permitting plaintiffs' counsel, on cross-examination, to call attention to the doctors testifying to certain medical authorities. Upon due examination of such testimony, we find no prejudicial error in its reception or in the argument made to the jury by counsel, in which he read certain paragraphs from medical authorities which were duly in the record.

Cases generally sustain the right to cross-examine an expert witness with reference to what medical or other authorities teach on the subject under investigation, in part reliance thereon by the witness, such cross-examination being regarded as proper within reasonable limits, which is a matter largely for the court's discretion, in order to test the knowledge and accuracy of the witness. The authorities in question were not offered in evidence or any writing therefrom, and the questions were used merely to test the knowledge of the witnesses called by the defendants. See *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113; *Winters v. Rance*, 125 Neb. 577, 251 N. W. 167. The rule of law, as announced therein with reference to cross-

examination on medical authorities, governs. Other assignments of error need not be discussed.

If the plaintiffs will file within 20 days a remittitur in the sum of $369, constituting the funeral expenses, reducing the judgment to $4,631, the judgment of the district court will be affirmed, as thus modified; otherwise the judgment will stand reversed, and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

BLANCHE FONDA TARKINGTON, ADMINISTRATRIX, APPELLEE, V. NORTHWESTERN PUBLIC SERVICE COMPANY, APPELLANT: EDITH SMITH, ADMINISTRATRIX, APPELLEE.

292 N. W. 720

FILED JUNE 14, 1940. No. 30812.

Trial. It is not error for the court to refuse to instruct on contributory negligence, though pleaded, if the evidence fails to show such negligence on the part of plaintiff.

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

Hoagland, Carr & Hoagland and *William Suhr*, for appellant.

Shuman & Overcash and *Beatty, Maupin, Murphy & Davis, contra.*

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

MESSMORE, J.

This is a companion case to *Fonda v. Northwestern Public Service Co., ante*, p. 262, 292 N. W. 712. The pleadings, the issues, the evidence, the witnesses and the briefs on appeal are almost the same in the two cases. In the instant case the jury returned a verdict in favor of the plaintiff in the amount of $813. The assignments of error are in identical language in the briefs of Northwestern Public

Service Company, appellant in both cases. The instant case is under the same set of facts as the companion case. Much of the evidence was read from the record of such case. The propositions of law involved are the same. We will, therefore, refrain from repeating the facts and law as set out in *Fonda v. Northwestern Public Service Co., supra,* with the exception of relating such additional facts as may be necessary to a decision in this case.

The defendant's answer pleaded contributory negligence on the part of James Fonda. Some phases of the evidence, alleged to have constituted contributory negligence, we have previously discussed in the opinion in *Fonda v. Northwestern Public Service Co., supra.* The contributory negligence complained of centers primarily around the following facts:

At the time of the installation of the convertible gas burner, the defendant company's superintendent, Smith, and employees of the company, found located on the flue pipe leading from the furnace to the chimney what is known, and referred to in the evidence, as a home-made heat-reclaimer, a boxlike affair which entirely inclosed the flue from the furnace to the chimney and also had an air duct leading up to the hot-air region upstairs. This was not standard equipment, but had been installed by Mr. Fonda for the purpose of saving some heat which radiated from the flue pipe, and to transport this heat to the hot-air duct upstairs in the house. At this time Smith informed Fonda that the heat-reclaimer would serve no useful purpose and would have to be removed in order to install the gas equipment, for the reason that it was necessary to turn the flue pipe over for the purpose of putting the downdraft diverter in place of the regular chimney draft. Fonda insisted that, if the heat-reclaimer was removed, it should be replaced because it conserved heat. On a number of occasions the defendant company's employees went to the Fonda residence and found the pilot light and main burner valves turned down. Fonda was advised that such practice was dangerous and should be stopped. All of such evi-

dence, together with the evidence of the failure of the maid to inform Molley, the defendant company's expert, of the exact difficulty, and likewise her failure to inform the Fondas in this connection, the defendant company assuming the maid to be the agent of the Fondas, constituted the evidence to be submitted to the jury on the question of contributory negligence.

On January 8, 1934, Dr. Everett Fonda, a son, who came from Chicago, requested that the heat-reclaimer be removed. Two holes were found in the flue pipe where it entered the chimney around the cement of sufficient size to permit two fingers to be inserted in such opening where products of combustion could come out, and two holes in the crimp joint large enough to insert a finger. The heat-reclaimer was not replaced. Dr. Fonda is reputed to have told his sister Blanche, in the presence of defendant company's employees, that they had "found the trouble," referring to the condition of the pipes when the heat-reclaimer was removed. This statement is denied by Dr. Fonda and his sister Blanche. When the foregoing test was made, the clean-out plug was in place. Other tests had been made previously and on different days. At no time during the progress of such tests was any trace of carbon-monoxide gas found. It is apparent from the evidence that no gas was escaping at the place in the chimney heretofore referred to.

The defendant's witnesses, Smith and Molley, fail to show by their testimony that any of the things claimed as contributory negligence had anything to do with the accident in question. As to the heat-reclaimer, Gerkin, an employee of the company, who made an inspection, testified: "Q. And there wasn't any danger, was there, on account of that heat-reclaimer to either himself or his family? A. Not that I know of." Gerkin also testified that, the day after the clean-out plug was replaced and several times shortly thereafter, he was at the Fonda home with Bert Spohn, chief engineer for the company, and they made various complete tests and found no trace of gas. Other evidence

of the alleged contributory negligence appears in the opinion in *Fonda v. Northwestern Public Service Co., supra,* and will not be restated here.

Objection is made that the court failed to instruct the jury on the defense of contributory negligence when proper instructions on such defense were offered. The court did instruct the jury in detail on comparative negligence, as evidenced by instructions Nos. 6 and 7 given, and the last paragraph of instruction No. 19 on the measure of damages. We conclude that the evidence claimed by defendant to establish contributory negligence on the part of James Fonda falls short of being sufficient to submit the question to the jury. So, in any event, no prejudice resulted to the appellant even though it did receive the benefit of instructions on comparative negligence.

We have examined the 34 instructions offered and refused and the instructions given, and conclude that the instructions given fairly covered the subject-matter incident to this case. We find no prejudicial error in such instructions.

Instructions given to a jury must be considered as a whole, and if they properly state the law they are sufficient. *Clausen v. Johnson,* 124 Neb. 280, 246 N. W. 458; *Kovar v. Beckius,* 133 Neb. 487, 275 N. W. 670.

Dr. Fetter, who attended Mr. Fonda in his illness, testified that Fonda died from edema of the lungs, due to some irritant, possibly monoxide gas. Dr. Fetter testified he treated Mr. Fonda for heart failure for years.

We conclude that the evidence in the instant case was sufficient to warrant the jury in arriving at a verdict for the plaintiff, and that this case is controlled by the law stated in *Fonda v. Northwestern Public Service Co., supra.*

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. CARL J. SCHMIDT ET AL.: T. E. STEVENS, APPELLEE.
292 N. W. 723

FILED JUNE 14, 1940. No. 30619.

1. **Banks and Banking.** The mere renewal of a certificate of deposit is not a payment of the original indebtedness and will not operate to discharge the superadded liability, for such deposit, of a stockholder of a bank, who has transferred his stock before the renewal.
2. **Reversal.** Our previous opinion in 136 Neb. 497, 286 N. W. 687, is vacated.

APPEAL from the district court for Washington county: WILLIS G. SEARS, JUDGE. Opinion on motion for rehearing of case reported in 136 Neb. 497. *Former opinion vacated and judgment of district court reversed, with directions.*

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

Wells, Martin, Lane & Offutt, contra.

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

JOHNSEN, J.

This case is here on motion for rehearing. Our previous opinion is reported in 136 Neb. 497, 286 N. W. 687. The question is whether we shall adhere to the rule there adopted that, in enforcing the superadded liability of a stockholder of a bank under section 7, art. XII of our Constitution, the renewal of a certificate of deposit must be regarded as extinguishing the original liability for the deposit, and as creating a new and distinct liability from the date of the renewal.

The previous opinion follows *Harrison v. Ault,* 359 Ill. 75, 194 N. E. 235, and the view there expressed that "the surrender of a certificate of deposit and the issuance of a new one is a new contract of deposit." *Fremont State Bank v. Vincent,* 112 Wash. 493, 192 Pac. 975, is to the same effect.

The opposite view is declared in *Dunn v. Bank of Union,*

74 W. Va. 594, 82 S. E. 758, where it is held that the renewal of a certificate of deposit, like the renewal of a note, is but a continuation of the debt, and that there is no extinction of the original liability, unless the parties so intend or agree. The West Virginia court says: "The certificates originally issued therefor were mere evidences of indebtedness then contracted. In other words, the certificates were, in effect, the notes of the bank, payable to each plaintiff. Although renewed by the subsequent issuance of other certificates, as previously observed, the original liability was not extinguished and a new liability created, any more than a new note pays an antecedent debt."

The view of the West Virginia court appears to have been adopted as a preferred text statement in 7 Am. Jur. 97, sec. 119, where it is said: "A subsequent renewal of bank deposit certificates is not a payment of the original indebtedness and does not operate to absolve from liability persons who were shareholders at the time the original debts were contracted, but who have since transferred their stock." It has similarly been made a text statement in 6 Zollman, Banks and Banking, 301, sec. 3997. There are other judicial expressions, in cases not involving stockholder's liability, such as *Village of Farmington v. Reisinger,* 174 Minn. 56, 218 N. W. 444, and *Barsness v. Tiegen,* 184 Minn. 188, 238 N. W. 161, which recognize that the liability for a deposit, generally speaking, is a continuing one, notwithstanding renewal certificates have been issued. Thus, in the first mentioned case, it was held: "Where a certificate of deposit is taken for village moneys deposited with a bank and such certificate is renewed from time to time, the renewal certificates, nothing else appearing, are not payment of the original deposit." The opinion declares: "The original obligation has remained from the beginning, notwithstanding the renewals of the certificates of deposit, and as a matter of law has never been discharged by payment."

While our previous opinion in this case is the first specific expression we have made upon the question, our

records show that the issue was directly raised in *Peterson v. Strayer,* 121 Neb. 587, 237 N. W. 667. The stockholders in that case contended that their liability was governed by the date that the renewal certificates were issued, and not when the deposits were originally made, while the receiver contended that the taking of a new certificate of deposit was a mere renewal of the old indebtedness and not a payment thereof, where the parties had not agreed that the original debt was to be extinguished. The opinion does not discuss this contention, but the following statement therein indicates that the court must tacitly have adopted the view for which the receiver contended: "Did the liabilities accrue during the time the Strayer group were stockholders of the bank? Clearly, this must be answered in the affirmative." The Washington and West Virginia cases, previously referred to herein, are duly cited in the briefs, and the court takes occasion to quote, though a bit obscurely, from the latter, that "the burden of showing such intention and agreement (rests) resting always upon him who claims the benefit of the discharge."

In *State v. Security State Bank,* 116 Neb. 521, 218 N. W. 405, tacit recognition also appears to have been given to the principle that the liability for a deposit depends upon and is controlled by the original transaction, when the court refused to allow a renewal certificate to be brought within the protection of the guaranty fund, because the transaction initially was not subject to such protection.

Again, investigation discloses that, in past bank receiverships, the district courts of the state, generally speaking, have enforced the liability of stockholders in accordance with the rule in the West Virginia case, especially since the reference to that case in *Peterson v. Strayer, supra.* This circumstance, of course, has no particular significance, except to suggest the trend of the judicial mind in the state, in our consideration of what appears to be the preferable rule for final adoption under all the circumstances.

But, apart from all that has been said, the rule declared in the West Virginia case seems to us the better rule in

accomplishing the purpose which the constitutional superadded liability was intended to serve. The liability obviously was designed for the fuller protection of creditors of the bank. It extends to all liabilities of the bank "accruing while he remains such stockholder." It is a plenary obligation, created by the Constitution, and there is no reason to limit its scope by unnecessary construction. If each of the two rules referred to rested on equally cogent logic, there would be no occasion to make the stockholder a favorite of the law over the depositor. Rather, the depositor should have the fullest measure of protection from the constitutional liability that it is reasonably and soundly possible to give him. To the depositor, certainly, it is pure fantasy to say that, when he renewed his certificate, the money was returned to him, and that he in turn passed it back over the counter to the bank. So far as he was concerned, there was but one controlling transaction, and that was when he parted with his money. The rest of it was incidental detail—collecting interest, and going to the bank to receive a substitute certificate or receipt, so that his interest payments would not be interrupted.

A legal fiction may be resorted to, at times, to bridge the gap of logical imperfection, but there is no necessity to tolerate it, where the stream of actuality can rationally be crossed. We do not mean to imply, of course, that, on the renewal of a certificate, the nature of the transaction may not be so changed as to create a new and different obligation. No such situation, however, is here presented. The certificate-holders in this case, upon whose deposits defendant's liability is made to depend, are not shown to have done anything in renewing their certificates, except to extend the time when they could collect their deposits, just as they would have done if they had renewed a promissory note.

It is our view, therefore, that we should adopt the rule that the mere renewal of a certificate of deposit is not a payment of the original indebtedness and will not operate to discharge the superadded liability, for such deposit, of

a stockholder of a bank, who has transferred his stock before the renewal. Our previous opinion is accordingly vacated, and the judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of plaintiff.

FORMER OPINION VACATED AND JUDGMENT REVERSED.

ROSE, J., dissents.

PAINE, J., dissenting.

I respectfully dissent from the new opinion now adopted. It is said that the previous opinion (136 Neb. 497, 287 N. W. 687) follows two authorities. The opinion now adopted accepts the view of a West Virginia case, *Dunn v. Bank of Union*, 74 W. Va. 594, 82 S. E. 758, saying: "The rule declared in the West Virginia case seems to us the better rule in accomplishing the purpose which the constitutional superadded liability was intended to serve;" and says this West Virginia case has been adopted as a "text statement" in 7 Am. Jur. 97, sec. 119. However, in the same section the "text statement" in the second sentence below entirely supports our former opinion, and reads as follows: "On the other hand, however, it has been held that one who is a stockholder of a state bank at the time of the issuance by it of a certificate of deposit, but who disposes of his stock prior to the renewal of the certificate through the surrender of the old certificate, marking the same 'Paid,' and issuing a new certificate, cannot be held liable to the depositor as a stockholder." See *Harrison v. Ault*, 359 Ill. 75, 194 N. E. 235, 97 A. L. R. 626.

Turning to 9 C. J. S. 140, sec. 76, for the applicable text statement, we find this given as the rule: "Statutory or constitutional provisions imposing a superadded liability on all stockholders or shareholders of banks are usually held to relate to, and only to, those stockholders who are such at the time the liability accrues by reason of the failure or insolvency of the bank. Consequently, unless they have estopped themselves from denying that their ownership has continued, stockholders who have made valid and sufficient transfers of their stock prior to the failure of the

bank are generally relieved from such liability, while transferees holding the stock on the failure of the bank are subject thereto;" citing in support thereof *Bru v. White* (C. C. A. Cal.) 75 Fed. (2d) 729, and cases from Maryland, New York and Ohio.

Following this statement is one to the contrary effect, supported by *Peterson v. Strayer,* 121 Neb. 587, 237 N. W. 667 (modified on other grounds, 121 Neb. 866, 239 N. W. 213), and cases from Illinois and West Virginia.

Stevens sold his bank stock on February 6, 1924, and on June 20, 1924, the bank was taken over and being conducted "as a going concern" for more than three years, and was not declared insolvent by a decree of court until December 17, 1927.

In *Metropolitan Savings Bank & Trust Co. v. Farmers State Bank,* 20 Fed. (2d) 775 (8 C. C. A.), there is a discussion of the two options before the Department of Trade and Commerce, either to have a receiver appointed by the court, or to operate the bank as a going concern, the court saying: "The status of the banking corporation while being operated by the commission as a 'going concern' differs completely from the status of a bank in receivership. In the latter case the bank is in process of liquidation, either by judicial action or by virtue of statutory authority. In the former case the bank continues in business as usual, receiving deposits, paying checks drawn against it, making new loans, renewing old ones, assuming new liabilities, discharging old ones and in every way carrying on its business in the usual manner and with the right to do everything exactly as it could have been done before it was put under the management of the commission."

This court, in passing on the statute (since repealed), held in the case of *State v. Thurston State Bank,* 121 Neb. 407, 237 N. W. 293, the "status and priority" of creditors is "fixed" on the date of adjudication of insolvency, and not when the bank was taken over by the department.

Section 7, art. XII of the Constitution of Nebraska, as then in effect, provided: "Every stockholder in a banking

corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." Does not the liability "accrue" when it is originally incurred by the bank, to wit, at the date of the issuance of a new certificate of deposit, or the making of a deposit, or the delivery of a note?

Remember, there is no competent evidence that this bank was insolvent when it was taken over and run as a going concern. Many such banks were turned back to their officers and stockholders.

It appears from exhibit No. 5, being the record of time certificates, that many of them were paid off during the time it was being run as a going concern.

I am still of the opinion that a bank stockholder, who sells his stock three years and ten months before the bank is declared insolvent, and all certificates of deposit in force at the time he was a stockholder have been renewed by those in charge of the bank, is thereby relieved from all liability for the outstanding certificates of deposit when the bank fails.

ORVILLE CHATT, ADMINISTRATOR, APPELLEE, V. MASSMAN CONSTRUCTION COMPANY, APPELLANT.
293 N. W. 105

FILED JUNE 21, 1940. No. 30859.

1. **Workmen's Compensation.** In making a case for compensation under the workmen's compensation law, more than a preponderance of evidence is not required.
2. ———. Where an employee in performing the duties of his employment is accidentally injured by falling into water cooler than the atmosphere and continues to work in wet clothing and thus suffers a shock which reanimates a dormant disorder resulting in his death, his dependents are entitled to compensation under the workmen's compensation law.
3. ———: DEPOSITIONS. A deposition properly read in evidence

before the compensation court in a compensation case is admissible on the trial of the same case on appeal to the district court, subject to such exceptions as are there taken, though not previously filed in the office of the clerk of the district court. Comp. St. 1929, secs. 20-1257, 20-1261.

4. ———: ATTORNEY'S FEES. Where a judgment for compensation under the workmen's compensation law is affirmed on appeal to the supreme court, a reasonable attorney fee for appellate services of counsel for claimant is taxable against employer as costs. Comp. St. Supp. 1939, sec. 48-125.

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

Thomas E. Dunbar, for appellant.

Chatt & Ellenberger, contra.

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, sec. 48-101.

The petition presented to the compensation court states in substance that August Doescher, an employee of Massman Construction Company, defendant, was engaged in the duties of his employment handling rough stones on a revetment project in course of construction by his employer on the Nebraska bank of the Missouri river in Burt county, near Tekamah, August 13, 1938; that while thus engaged employee slipped and fell into the river, injuring and bruising his right leg just below the knee; that, in wet clothing, he continued to work exposed to chill; that, as a result of the accident, injury, exposure and pain, he became disabled and with a high temperature died August 23, 1938; that he left surviving him as his only heirs at law and next of kin three minor children—Howard, age 18; Marian, age 14, and Donald, age 6; that employee's wages at the time of the accident were $28.80 a week. The claim on behalf of the dependent minor children was pleaded by plaintiff, Orville Chatt, administrator of the estate of August Doescher, deceased.

Defendant alleged in detail the following defenses: For a long time prior to the alleged accident, the employee was afflicted with arthritis; that he did not fall into the river; that he did not sprain his knee; that his death was the result of acute rheumatic fever, which was not an accident within the meaning of the compensation law; that his death was not the result of an accident arising out of and in the course of his employment.

The reply to the answer admitted that employee was afflicted with rheumatism for about 10 years prior to his death; denied that his condition was disabling immediately prior to August 13, 1938; admitted that his system still retained some unknown agent subjecting him to a recurrence of a rheumatic condition as a result of the accident, wetting and exposure August 13, 1938; denied that he suffered disabling bodily pain or injury immediately prior to the accident or previously; alleged that prior to August 13, 1938, he was accustomed to heavy manual labor; denied unadmitted allegations of the answer.

The petition of the administrator, plaintiff, was dismissed in the compensation court. On appeal to the district court the claim for compensation was allowed at the rate of $15 a week during the dependency of Donald Doescher and Marian Doescher, minor children of August Doescher, deceased, but not exceeding 325 weeks from August 23, 1938. From judgment therefor defendant appealed to the supreme court.

The employment of August Doescher by defendant, performance of employee's duties August 13, 1938, and his death August 23, 1938, are facts not in dispute. It was stipulated by the parties at the trial that compensation was allowable at the rate of $15 a week, if employee suffered a compensable injury August 13, 1938. Evidence of disabling, accidental injuries causing death was contradicted by defendant at the trial in the district court. The decision depends on which side a preponderance of the evidence falls.

William Sanders, a coemployee of Doescher, was work-

ing with him August 13, 1938, both making rock revetment or pavement to prevent erosion on the Nebraska bank of the Missouri river. As a witness Sanders testified in substance, among other things, as follows: The river bank was first sloped in a regular grade to the river and covered with a mat of four-inch boards extending beyond the edge of the water. The mat was held in place by anchor pilings in openings through it and by stones at the water line. Sanders and Doescher were cutting and using rough rock. They began paving at or near the top of the mat and worked downward with their backs to the river. The rock was supplied to them on wheelbarrows or by hand from a pontoon below on the river. As they worked downward on the mat the rock was gradually dumped behind them. Between 11 and 12 o'clock, Saturday, August 13, 1938, Doescher was just finishing the paving at the time and place indicated and was going out over the lower edge of the mat which extends beyond the water line. It is there submerged with ballast to prevent the river from cutting under the paving. Approximately 20 feet away, witness saw Doescher getting up. He had his hands on the paving in front of him and was getting off his knees. His clothing was wet from his waist down. The attention of witness was directed to Doescher at the time by George Pearce, another workman, who called, "Doescher is in the river." Doescher continued to work Saturday afternoon and on Monday. On the way home after the accident he limped on his right leg and complained of a localized spot on his right leg hurting him; was in bed Tuesday morning and was attended by a physician Wednesday evening when witness saw the right knee which was swollen.

Harold Hall, another witness, testified he was wheeling rock to the pavers at the time; dumped it behind them; Doescher was down by the water; saw him slip and fall into the river; slipped back into the water; legs under water; wet to waist line; did not change his clothes; worked the rest of the day; worked on Monday; limped on his right leg; saw him Tuesday evening in bed and saw his

right leg; right knee swollen. Another rock wheeler on the same project at the time said he saw Doescher falling into the water and remarked: "Doescher fell into the river;" got out of water, shook himself; rubbed his right knee with both hands and went back to work without changing his clothing; river water was chilly. The circumstances indicate the probability of such a mishap. The proof of the accident and of resulting injury was not overthrown by cross-examination of the witnesses who so testified nor by testimony in support of the defense that a pontoon, rocks and other obstructions in shallow water at or near the bank of the river disproved the accident on which plaintiff relies for compensation.

Dr. Leslie Sauer testified he examined Doescher August 16, 1938; took a history of the injury indicating that the latter's right knee hit on rocks and that he got a wetting; diagnosis, an injured, bruised or sprained and painful knee; other joints not then involved; observed nothing unusual about pulse or temperature; saw patient again August 18, 1938; right knee tender and pain severe; other joints not involved; diagnosis, acute rheumatic fever. Two days later, additional history of rheumatism for a number of years prior to accident; temperature and pulse abnormally high. Doescher was admitted to the Clarkson Hospital, Omaha, August 21, 1938, in care of Dr. Chester Thompson. The evidence shows that with a fever of 108 degrees the patient died August 23, 1938. Dr. Sauer said there was a bruised area about the size of a half-dollar on the knee below the joint and he expressed the opinion that the injury, the wetting and the working in wet clothing caused a flare-up in a dormant, preexistent rheumatic condition, resulting in the fatal rheumatic fever and that the trauma was a contributing cause of the rheumatic fever.

Dr. Chester Thompson, testifying from examinations of patient, from history given by the latter and from hypothetical questions, arrived at the same diagnosis and expressed the same opinion as Dr. Leslie Sauer on the cause of the patient's injury and death.

Dr. M. C. Howard, a witness for defendant, agreed with physicians for plaintiff in their diagnosis, but, in answering a hypothetical question, expressed the opinion that the acute rheumatic fever was not caused by trauma nor by immersion in water nor by the working of employee in wet clothing. He admitted, however, on cross-examination, assuming the existence of such facts, that an acute exacerbation or flare-up of dormant, preexistent rheumatism might be a precipitating factor in acute rheumatic fever, but adhered to his opinion that it was not caused by the accident or resulting shock or exposure. Of similar import is the testimony of another physician.

There is no direct evidence that Doescher did not fall or did not hurt his knee. The better view of the evidence is that, while hard at work shortly before noon on a warm day about the middle of August, he fell into river water cooler than the atmosphere and a little later ate his noon meal in wet clothing. It is not taxing common sense, common knowledge or reason too far to give credence to the opinion of physicians that shock was caused by the fall, by the trauma, and by the sudden change from warm atmosphere to chilly river water and reanimated the dormant disorder, under the circumstances disclosed by the evidence.

"It is sufficient to show that the injury and preexisting disease combined to produce disability." *Gilcrest Lumber Co. v. Rengler,* 109 Neb. 246, 190 N. W. 578; *Skelly Oil Co. v. Gaugenbaugh,* 119 Neb. 698, 230 N. W. 688.

A preponderance of the evidence proves the accident; that it arose out of and in the course of the employment; that the resulting injury was a contributing cause of the rheumatic fever. All other features of plaintiff's case were likewise proved.

Defendant demands the reversal of the judgment on the ground that the trial court erred in admitting in evidence a deposition which had never been filed in the office of the clerk of the district court of Burt county in compliance with law. A statute provides:

"Every deposition intended to be read in evidence on the

trial must be filed at least one day before the day of trial." Comp. St. 1929, sec. 20-1261.

Another section of the statute reads as follows:

"When a deposition has once been taken, it may be read in any stage of the same action or proceeding, or in any other action or proceeding, upon the same matter between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this chapter." Comp. St. 1929, sec. 20-1257.

The two sections quoted should be considered together in the present instance to give effect to both. The deposition in question was read in evidence before the compensation court. On appeal in the same case with the same parties it was submitted to the district court. In one court or the other it was subject to inspection and was available to both parties. It gave in public records its own advance notice of its contents and of its availability before it was offered in evidence in the district court. It served the purposes of both sections of the statute without bearing the filing stamp of the clerk of the district court and was properly admitted in evidence on appeal thereto.

An examination of the entire record fails to disclose an error prejudicial to defendant. It follows that the judgment below must be affirmed. Where a judgment for compensation under the workmen's compensation law is affirmed on appeal to the supreme court, a reasonable attorney fee for appellate services of counsel for claimant is taxable against employer as costs. Comp. St. Supp. 1939, sec. 48-125. Under this statute a fee of $150 is herein allowed.

AFFIRMED.

MARGUERITE T. YOUNG, APPELLEE, V. WILLIAM B. YOUNG, APPELLANT.

292 N. W. 923

FILED JUNE 21, 1940. No. 30834.

1. **Divorce.** When an unconditional judgment for alimony has been entered, it is improper for the court to open up the original

divorce decree, retry the case, and determine anew whether the decree was proper at the time it was entered.

2. ———. When a petition to modify a decree of divorce is filed, and it is found upon the hearing that the original decree contained a direct or implied reservation so that it was not to be considered final, and some of its terms were conditional and subject to change at a later date, the court may, upon proper showing, modify the original decree.

3. ———. Under section 42-324, Comp. St. Supp. 1939, as now amended, provision is made whereby a divorce decree, in which the total amount of alimony is uncertain, may be revised or altered, especially if the interests of minor children will be benefited thereby.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed.*

Thomas J. Sheehan, Jr., for appellant.

Votava & McGroarty and *Eugene F. Fitzgerald, contra.*

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

PAINE, J.

This is an appeal from a decree of the district court refusing to modify a decree of divorce entered in 1924, and finding that the provisions of that former decree are binding in all respects upon the parties and upon the court, and that the court is now without authority to change the amount of the judgment entered in the original decree.

The parties were married in Omaha on September 6, 1916, and lived together continuously until August 14, 1924. The issue of said marriage was William Bruce Young, born July 19, 1917, and Ralph Byron Young, born December 14, 1918, both of whom are now adults.

On September 30, 1924, a petition for divorce was filed by Marguerite T. Young, hereinafter called the plaintiff, and on December 12, 1924, Honorable L. B. Day, then district judge, entered a decree, granting an absolute divorce to the plaintiff, and giving to her the fee title of the home located at 2562 Redick avenue, Omaha, subject to any encumbrances of record, and, further, William B. Young,

hereinafter called the defendant, was ordered to pay plaintiff, for the support of herself and the two minor sons, "the sum of $175 each and every month during the natural life of the plaintiff; provided, however, that in the event that the plaintiff marries again said monthly payments shall at the date of such marriage be reduced to the sum of $100 each, which said payments in said amount shall be for the support, use and benefit of the said minor children only." The decree further provides that the custody of the two sons be awarded to the plaintiff, with leave to defendant to visit said sons at all reasonable times.

On February 11, 1939, the defendant filed a petition in Douglas county to modify this decree, because of changed circumstances,—his remarriage, a daughter to support, the sons of the first marriage had become self-supporting, and because of the financial losses the defendant has suffered, and the meager earnings which he now has.

To this petition the plaintiff entered her special appearance, objecting to the jurisdiction of the court over her person, because she is, and has been for several years last past, a resident of California, which special appearance was overruled by the district court.

Thereafter the plaintiff filed a demurrer for the reason that the petition failed to state a cause of action, which demurrer was overruled, and thereafter the plaintiff filed her answer, setting forth that the original decree provided a judgment for the payment of $175 a month to her during her natural life, and that she has not since remarried; that due to a tumor and a stiff knee she is unable to support herself, and is without means except such alimony, and asks that the application of the defendant be dismissed, with reasonable attorney's fees to her.

Said matter coming on for hearing, it was ordered by the trial court that the original decree stand as an adjudication between the parties, and the defendant is ordered to pay to the plaintiff the sum of $175 a month during the balance of her natural life, or until such time as she remarries, whereupon the defendant filed a motion for new

trial, which was overruled, and the case has been presented to this court.

The evidence discloses that at the time the original decree of divorce was granted the defendant was worth the sum of $150,000; that the home which was given to the plaintiff was worth $10,000, in addition to which she was given the household furniture, fixtures, personal property, including wearing apparel, jewelry, and personal effects; that for the year 1924, being the year in which the decree was granted, the defendant's income was $21,327.02; in 1925, $30,372.40; in 1926, $25,164.08; 1927, $8,432.86; 1928, $7,617.71; 1929, $8,804.20; 1930, $8,828.45; 1931, $9,424.77; 1932, $6,930.17. Then financial reverses came, and the defendant lost the sum of $114,500 in dealing in stocks and cotton on the market, and lost $45,000 in real estate, or total losses of $159,500. It is further shown by the evidence that the defendant has since removed to California, and owns one-half of a small partnership engaged in selling life insurance for the Sunset Mutual Life Insurance Company, from which his income has been as follows: For 1938, $1,110; 1939,—January, $137.88; February, $87.17; March, $101.32; up to April 28, $111.18, the date on which his deposition was taken. That defendant has no other income except some insurance renewals from outside sources, which totaled $121.80 from January 1, 1939, to April 28, 1939; that he has nothing else except some personal property and clothing, and received in the past $350 from an unfortunate oil venture.

Defendant itemized his necessary expenses of approximately $183.70 a month. He owes a doctor bill, the amount of which he did not know. He owes a $1,000 judgment to the plaintiff. He owes $3,000 to his present mother-in-law, and $2,500 to James Rodman, formerly of Omaha, $300 to $400 to his sister, $200 to his partner, Mr. Trapp, making a total indebtedness of about $7,000. His present wife worked and helped support the family, and assisted in making payments on the monthly alimony payments due to plaintiff until the present wife became ill with pneumonia,

since which time she has not been in good condition, and needs further medical treatment. The defendant sustained three jaw fractures about three years ago, requiring the use of false teeth, and due to receding of the gums further dental work is necessary, and he is suffering from hemorrhoids, which need treatment. His present mother-in-law lives with them, which is one way by which he is repaying the loan from her. The note to James Rodman is two or three years past due. The family occupy a five-room furnished house, in which his mother-in-law does some of the work. He has a daughter, Patricia Louise, by his second marriage, who was 11 years of age on February 23, 1939.

The deposition of Mrs. Hertha Young, present wife, shows that she has no property, no expectancy of property, income, or allowance, and is solely dependent upon the defendant for support.

Depositions of R. E. Trapp, the partner, and of Dr. Mueller confirm the testimony of the defendant and his present wife.

The deposition of the plaintiff, taken in Los Angeles May 25, 1939, shows that her two sons are both now employed, one of them earning $18 a week. Plaintiff lives in a furnished apartment, for which she pays $45 a month, which sum includes all of the utilities.

Her judgment for unpaid alimony was entered in the superior court of Los Angeles county, California, and established that $1,000 back alimony was due on November 28, 1938, and the judgment bears interest at 4 per cent. A payment was made in December, 1938, of $19.06, and in addition a payment has been made of $87.50, which has been applied upon the judgment. In addition to such payments, the plaintiff testified that she received direct from defendant's insurance company $160 during January, February and March. She testified that Byron, the younger son, needs a lot of dental work done, and that she needs dental work, at least $75 for the two of them; that Byron needs a pair of glasses; that plaintiff has had a major operation, and on one ovary there is a good-sized tumor, which the doctor

says should be removed, at a cost of $150 for the operation and $150 for hospitalization; that she has a stiff knee, which swells so that she must remain in bed at least two hours each afternoon; that she has no source of income outside of the judgment for alimony.

A divorce decree is usually considered a final adjudication of the property rights of the parties, and may not be revised or altered after the expiration of six months from the date of its entry. *Beard v. Beard,* 57 Neb. 754, 78 N. W. 255; *Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993.

By chapter 94, Laws 1935, the section was amended to the form now set out in section 42-324, Comp. St. Supp. 1939, which clearly provides that the court may, upon the petition of either party, revise and alter such a decree.

The latest expression of this court is found in *Morris v. Morris,* 137 Neb. 660, 290 N. W. 720. In this case the original decree of divorce provided for the payment of $60 a month, except if his income fell below $160 a month it was then to be reduced to 40 per cent. of his earnings, but in no event was it to be less than $35 a month. Some seven months after this decree was entered, the defendant made application to reduce the payments to $25 a month, and the court entered an order changing the payments to $30 a month. In our decision we said "that an application under this section cannot be used simply to review the equities of the original decree. *McIlwain v. McIlwain,* 135 Neb. 705, 283 N. W. 845. Where it is made at a subsequent term, it must be founded, we have said, upon facts or circumstances which have arisen since the decree. *Graham v. Graham,* 135 Neb. 761, 284 N. W. 280. Except where new, controlling conditions have subsequently arisen, the matter is treated as *res judicata. Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993. These principles govern not alone an allowance for the support of the wife, but have been recognized as being applicable to an allowance for child support as well. *Wassung v. Wassung,* 136 Neb. 440, 286 N. W. 340."

From this and other cases, it may be stated that the rule followed has been that, when a definite, positive, un-

conditional judgment for alimony has been entered by this court, it is improper to open up that original divorce decree, retry the case, and determine anew whether the decree was proper at the time it was entered, and in those cases in which a petition to modify has been considered and new evidence introduced and a modification of the decree entered, it will be found that the original decree contained a direct or implied reservation that it was not to be considered final, and that some of its terms were conditional, or subject to change at a later date.

In the case at bar, Judge Day, in entering the original decree, provided that if the wife remarried she should lose her entire monthly allowance of $175 a month, and that it should be changed to a payment solely for the support of the "minor" children. This indicated that it was not an absolute allowance in gross for no one could tell how long the wife would live to draw the monthly amount, and that the needs of the children might also be considered. The present evidence shows that the two sons are no longer minors, but are both adults and now employed, and it further appears to the court that the earnings of the former husband are much less than the $175 which he is required to pay.

It appears from the record that, from the date of the original divorce, December 12, 1924, to the date of the judgment in California, November 28, 1938, the amount which would be due under the original decree at $175 a month would be $29,319.40, and the California court found that he had paid approximately $28,319.40, in addition to which payments have been made since the California judgment was entered of $19.06, $87.50, and $160, making total payments of $28,585.96. Adding to this the home property, which was awarded to plaintiff, and was worth $10,000, makes a total of alimony the plaintiff has received of approximately $38,585.96, without considering furniture, jewelry, and other personal property given her in the original decree. For defendant to continue to pay $2,100 a year when his present commissions in writing life insur-

ance are very uncertain, and sometimes less than $100 a month, shows the absolute impossibility of his keeping up such payments.

The court cannot ignore the defendant's duty to his second wife, who is sickly and in need of medical assistance, and there is the daughter, now 12 years of age, who needs support and schooling. We are first required to consider the condition and needs of the first wife, then the facts in reference to the second wife and her daughter Patricia, and the defendant's duty, solemnly undertaken, to care for both of these wives. The present earnings of the defendant are not sufficient to keep up either home as it should be maintained, yet his present earnings must be parceled out in an equitable manner to meet the situation.

The court has reached the conclusion that the defendant must pay the balance due on the $1,000 California judgment for defaulted alimony payments, with 4 per cent. interest, and is bound to pay the defaulted payments of $175 a month up to the date of filing the petition for modification of the decree, and from that date, to wit, February 11, 1939, defendant shall pay to the plaintiff the sum of $65 a month until the further order of this court. The judgment of the trial court is hereby reversed.

REVERSED.

EBERLY, J., not participating.

GEORGE F. PIERCY V. STATE OF NEBRASKA.
293 N. W. 99

FILED JUNE 21, 1940. No. 30883.

1. **Homicide:** DYING DECLARATIONS. The law looks to the substance, rather than the form, of a dying declaration, and does not require that it be made in any prescribed form or manner.
2. ———: ———. It is wholly immaterial who prepared a dying declaration, if the declarant understood the same and assented to it.
3. ———: ———. In a prosecution for homicide in procuring an abortion, a dying declaration may be admitted in evidence.

4. **Criminal Law.** If there are two counts in an information, under one of which a dying declaration is admissible, it is not reversible error for the trial court to fail to give an instruction to the jury relating thereto when no such instruction was requested.

ERROR to the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Arthur E. Perry, Perry, Van Pelt & Marti and *J. W. Boyd,* for plaintiff in error.

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

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

PAINE, J.

Defendant was convicted of criminal abortion by use of instruments which caused the death of the embryo, or fœtus, as a direct consequence of an unlawful operation.

Motion for new trial being overruled, the defendant was sentenced to the penitentiary for a period of not less than one year or more than three years, and now prosecutes error to this court.

This prosecution of George F. Piercy was founded on an information, the first count of which charged him with having employed upon the womb of Pauline Killough, then pregnant with a vitalized embryo, or fœtus, a certain metallic instrument and a rubber tube, or catheter, and thrust said instrument into her womb, with intent to destroy the fœtus, thereby causing the death of said Pauline Killough, such instrumentation not being necessary to preserve life, and not having been advised by two physicians, as necessary for such purpose. The second count of the information charged the defendant with performing the same operation, using the same instruments, and thereby causing the death of the embryo, or fœtus, as a direct consequence of such unlawful operation. Trial of the case began October 30, 1939, the jury taking the case on the fourth day. The jury remained out for a little over two days, and returned

a verdict of not guilty on the first count, but guilty on the second count.

The defendant's first error alleges that the verdict was contrary to the evidence, and not supported by any competent evidence which requires an examination of the testimony.

The state's evidence tended to prove that Pauline Killough was 17 years of age, and lived with her parents on their farm nine miles north and two miles east of Guide Rock, in Webster county. The family consisted of five daughters and two sons, two of the girls being married and living near Superior. Pauline had always lived at home, except parts of two years when she went to the Superior high school. A young man named Chester Skeers had kept company with her, and she went out with him in February, 1939. Her health was good, and on Wednesday, April 12, 1939, she worked about home, helping paper the kitchen, and in the evening Chester Skeers took her out in a car, and she did not return until late that night. The next day she could not work, but laid around, seemed sick, and by Sunday had become quite sick. The following Thursday, April 20, the mother could smell a bad odor about the girl, she had a temperature, and on Saturday commenced vomiting, and during the night kept getting worse. She had told her mother the cause of her condition, but told her not to tell her father, but about 1:30 Sunday morning, April 23, she told her mother to tell her father, because she was not "going to get over this" anyway. The girl then made a statement to her father, and on Sunday was put in a car and taken to the residence of Dr. W. E. Florea, and the same afternoon entered the Superior hospital, after Drs. Florea and Gartrell had secured a statement, signed by the girl, telling of her condition and its cause, before they would take over her case. She died the next day, Monday, April 24, and an autopsy was performed April 26, four doctors being present and signing the report, which contained these two statements, among others: "Block findings were: a. Inside the uterus we found placental remnants. b. Right

Fallopian Tube infected and perforated. It was enlarged and necrotic."

Dr. J. E. Ingram, a graduate of the Cincinnati Medical School, who had practiced 16 years at Nelson, was present at the autopsy. He testified that the presence of placenta, or afterbirth tissue, in the uterus proved that pregnancy had taken place. He said he saw one shred which was about an inch and a half long, and still attached to the uterus; there was another fragment that was loose, discolored, and had decomposed.

Chester Skeers was called by the state, and testified that he was 22 years of age, lived at Mankato, Kansas, had known Pauline Killough about four years before her death, and had kept company with her once in a while; that he took her to Guide Rock in February to a show, and later in February met her at a dance at Bostwick, from which he took her down to his home, where she stayed all night, and his sister and mother went with him when he took her back to her home on Sunday. In April she wrote him a letter and told him she wanted him to come and see her, and he got her at her home on Wednesday, April 12, about 8:30 in the evening. She was dressed in slacks, and they drove to Superior, and parked the car in front of the second door south of the Nebraska Hotel, and he left her in the car and went into the office to see the defendant, Dr. Piercy, and told him he had a woman out there, and he wanted him to examine her; that "she said she was in the family way," and told the doctor that "she said I was the cause of it," and that the defendant said he "didn't like to do that very well," that it would "get us in bad," but said it would cost $15. Witness told him he only had $5, but would get the rest as soon as he could.

Pauline then came into the office, and went into the back room. She said she was pregnant, and defendant told her to get up on the table, after she took her slacks off. Skeers then described briefly about the defendant taking off her bloomers, putting on a rubber glove, putting a clamp in her private parts, taking a long instrument, that looked

like shears, and putting cotton on the end of it, and inserting it in her private parts, and then putting in a little long rubber tube, six or eight inches long, and told her to leave the tube and gauze in there three or four days. Witness identified exhibit No. 6 as the tube, with gauze attached. He said the doctor told her to be sure and not tell anybody about that. Witness said he had had sexual relations with Pauline in February. Witness testified that he was present in Dr. Piercy's office all the time Pauline was there, and close enough so he could hear all that was going on.

The defendant, George F. Piercy, testified that he was 61 years of age, had lived in Superior 25 years, was a graduate of the Kirksville College, and said that his record of the date of this occurrence was April 10. He denied that he performed an abortion upon her on this occasion; said he never saw her after that evening when she was brought to his office about 9 o'clock; that she did not give her name; that a young man was with her, who said they were from Mankato. He said the young man had called him over the telephone about 15 minutes before, and asked if he could come down to the office, and he went right down; that the young man said: "'Well, Doc, I am in an awful jam.' I said, 'Well, what's the jam?' Well, he said he got married three or four weeks ago and now a girl was accusing him of getting her pregnant, and he says, 'I wondered if you would examine her.' Well, I said, 'I can examine her; yes, I can examine her,' I said, 'I will do that.'" The young man then went out and came back with the girl, and she did not say anything, but just followed back to the "treating" room.

The defendant testified in the minutest detail as to all that he did after she was placed on the "treating" table. He used a sterilized rubber glove, and made a digital examination, then used his vaginal speculum, then took his uterine dressing forceps, and placed a pledget of cotton saturated with an antiseptic solution, and started to clean out the pus and mucus, and had the speculum and forceps in court to show the jury; said he inserted the forceps prob-

ably five times in the vagina; that he took a specimen of the pus with a wooden applicator, and put it on a glass slide, which he had in court, and testified that the next morning he stained it and examined it under the microscope. Defendant testified he told them she had a bad infection, and that there were three or four small red spots around the opening of the womb, which had been punctured, and he said he suspected she had been tampered with, and he asked her if she had, and she hesitated and then finally mumbled no. The defendant testified that he put in a tampon, being a piece of gauze with a string tied around it, and saturated with medication made from Zylol tablets and alcohol, a sample of which gauze and tablets he exhibited to the jury, and he instructed her to take the tampon out the next day, and to go and see her local physician, as she had a bad infection. Defendant testified that he had no way of knowing whether she was pregnant or not, but that he gave her some Acetanilin tablets if needed for pain, and due to the fact that it seemed to be a case of delayed menses he gave her a few Emmenagogue tablets, which help to regulate the menses. His attention was called to exhibit No. 6, being part of a catheter, a rubber tube, which had been received in evidence, and he denied that he had ever inserted that into the sexual organs of Pauline Killough, or that he had ever seen it before, and denied that he had any such rubber tubes in his office, and positively denied that he had inserted any instrument in the uterus at the time of his treatment, for which he said he charged and received five dollars.

On rebuttal, Chester Skeers denied he told defendant on the night of April 12 that he was a married man, but said he told him he was going to be married, and that he was married at Beloit, Kansas, on July 23.

Defendant devotes much of his argument to a discussion of the alleged prejudicial error in the admission of the dying declaration. This 17-year-old girl had been rapidly getting worse for about ten days after the operation; she had a high temperature, 102, she had a terrible odor, she was

vomiting. She told her mother to tell her father, because "I ain't going to get over this anyway." She asked her father to forgive her, telling him she was awfully sick, and said, "I don't think I am going to get over this." Before Drs. Florea and Gartrell would take over the case, the statement was drawn up on a letterhead, for their protection rather than for purposes of a trial. This exhibit No. 1 reads as follows:

"William Earl Florea, D. O. Physician and Surgeon
"Superior, Nebr.
"Affidavit

"State of Nebraska }
} ss.
County of Nuckolls }

"Pauline Killough being first duly sworn upon her oath deposes and says that Pauline Killough of Guide Rock, Nebr., a minor daughter of Sam Killough, of Guide Rock, Nebraska, had an abortion of pregnancy performed upon her the night of the 12th of April, 1939, by Dr. George F. Piercy, of Superior, Nebraska, in his office. Also that she saw no other doctor from that time until her father brought her to the hospital at Superior and called Dr. W. E. Florea because she, Pauline Killough was unable to retain food or water on her stomach, had a high fever, and severe abdominal pains. And that Dr. W. E. Florea and his consultant had no part in the abortion of pregnancy but that they assumed care of the case only to save the life of the girl. That Pauline Killough is at this time of sound mind and judgment.

"The man who was responsible for the pregnancy was/is

Chester Skeers
Mankato
Kansas

Pauline
Killough"

(Signed) *"Pauline Killough*

"Witnessed by medical consultant Dr. I. D. Gartrell.

"Subscribed and sworn to before me this 23 day of April 1939

"(Seal) Oran King, Notary Public."

In this exhibit the words in italics were written by Pauline Killough in bed in the hospital. She died the next day.

The general law as to dying declarations may be stated as follows: "The law looks to the substance rather than to the form, and it does not require that dying declarations must be made in any prescribed form or manner. It is only necessary that the conditions exist which render them admissible as dying declarations, and that their form or manner be such as to render them intelligible. If the rule were otherwise dying declarations would be denied admission in many cases, not because the declarant was not under the sense of impending dissolution and without hope of recovery, but because of the violation of some technical rule. A declarant is not required to prepare his own written declarations in order to have them admissible in evidence. It is wholly immaterial who prepared them if they were read over to him and he understood them and assented to them." 1 R. C. L. 542, sec. 86.

In a prosecution for homicide in procuring an abortion, dying declarations may be admitted in evidence, is the holding of this court in *Edwards v. State,* 79 Neb. 251, 112 N. W. 611, which makes the dying declaration proper in the case at bar under count one of the information. However, the defendant was acquitted on this count.

The statute of Nebraska provides that, if the operation for abortion kills the mother, it is a homicide, and in the case of killing a vitalized fœtus, or embryo, it involves homicide; even though, under our former rulings, a dying declaration might not have been admissible on the second count alone. However, the defendant could have asked the judge to give an instruction to the jury to limit the scope of the dying declaration to the charge set out in count No. 1, but the court did not have to give such limitation instruction unless the defendant asked for it, and as defendant did not ask for it we do not see how it can be reversible error, for the dying declaration was properly admitted under count No. 1. In our opinion, a sufficient foundation was laid for

its introduction, and while it was not a model of what a dying declaration should contain, it gave support upon important facts.

We have examined the errors alleged in the instructions which the court gave on its own motion, and in the refusal to give certain instructions offered by the defendant, and find no prejudicial error therein. We have also examined the alleged error in submitting the second count in the information, and considered whether there was a misjoinder of offenses. Some of these bring up interesting questions for consideration, but we will not extend this opinion to discuss each of them, for we find them without merit.

The defendant was ably defended in the trial in the district court, and his rights were vigorously presented in this court; he was found guilty because the evidence was amply sufficient to convict, in the minds of the jury.

The judgment and sentence of the district court were right, and are in all things affirmed.

AFFIRMED.

JAMES H. HORNEY, APPELLEE, V. CHAUNCEY C. MCKAY ET AL., APPELLANTS.

293 N. W. 98

FILED JUNE 21, 1940. No. 30850.

1. **Appeal.** The order in which proof is introduced is to a large extent within the discretion of the trial court, and its ruling in that regard is no cause for reversal where the rights of the complaining party are not shown to have been prejudiced.
2. **Trial.** A defendant, who is entitled to open and close the oral arguments to the jury, will be deemed to have waived his right where he fails to demand or request that he be given such right.

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

Hartigan & Skultety, for appellants.

Denney & Denney, contra.

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

CARTER, J.

This is an action at law on a note. The defense was payment. The verdict was for the plaintiff for the amount of the note with interest. Defendants appeal.

The evidence of the defendants is that on or about the date of the note they purchased from the plaintiff two 1934 Chevrolet trucks at $400 each, a 1935 Chevrolet tractor at $400, and a home-made trailer at $300. Payment was made by delivering the note in suit in the amount of $800, a check for $200, cash in the amount of $130.60, and the surrender of a note owed by plaintiff to the defendants in the amount of $369.40. Defendants testify that one of the trucks was returned and credited at the agreed price of $400, and that $400 was obtained from the City Investment Company and paid to plaintiff as complete satisfaction of the note.

Plaintiff's evidence is to the effect that plaintiff sold defendants two 1934 Chevrolet trucks at $400 each, a 1935 tractor at $500, and a trailer at $700. Plaintiff also testifies that defendants took tires, oil and gasoline in the amount of $115.10. Plaintiff says that payment was made by the giving of a check for $200, crediting a note due defendants upon which was due $310, and the payment of $5.10 in cash. These items paid the item of $115.10 and provided an initial payment of $400 of the purchase of the trucks, tractor and trailer. One truck was returned for a credit of $400. An additional $400 was subsequently paid by a check signed by the City Investment Company, and the balance evidenced by the $800 note in suit.

The evidence supporting the diverse contentions of the parties was very conflicting and clearly raised issues properly determinable by a jury. In the absence of error, the verdict must stand.

Defendants complain of the action of the trial court in overruling their objection "to the plaintiff's claim that he has the right to open and close in the giving of evidence in

this case for the reason that the issue is based upon an affirmative defense in the answer and the defendants have the burden of starting and going forward with the evidence." We do not think the defendants were prejudiced by the court's ruling. It appears that, after the overruling of defendants' motion, plaintiff laid the foundation for the offering of the note in evidence, then offered the note and rested his case. A trial court is invested with much latitude as to the time and order in which evidence shall be introduced. Ordinarily, the order of proof is a matter of discretion, which will not be disturbed in the absence of prejudice. *Berggren v. Hannan, O'Dell & Van Brunt,* 116 Neb. 18, 215 N. W. 556; *Pennsylvania Co. v. Kennard Glass & Paint Co.,* 59 Neb. 435, 81 N. W. 372.

Defendants urge that the trial court erred in depriving them of the right to open and close the oral arguments to the jury. The record does not show that defendants requested or demanded this right at the close of the evidence, or at any other time. No request or demand having been made, error cannot at this late time be predicated thereon.

We have examined the instructions given by the court, and find nothing therein prejudicial to the rights of the defendants. There is ample evidence in the record to sustain the verdict. The judgment of the trial court based thereon is in all respects correct. The judgment is therefore affirmed.

AFFIRMED.

ABRAHAM B. ALPIRN ET AL., APPELLANTS, V. H. EPSTEIN & SON, INC., APPELLEE.
293 N. W. 103

FILED JUNE 21, 1940. No. 30643.

Compromise and Settlement. A written stipulation, in settlement of a judgment, may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by circumstances surrounding the transaction, conduct of the parties, and by ex-

press declarations manifesting an intent not to claim the advantages of the stipulation.

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

Foster & Yates, for appellants.

Abrahams, McGrath & Frenzer, contra.

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

MESSMORE, J.

The plaintiffs obtained a judgment in the county court against the defendant in the aggregate amount of $1,205. Defendant appealed to the district court. Before the issues were finally made up, plaintiffs and defendant entered into a stipulation to settle the obligation in the amount of $700, to be paid by two checks, one for $400, payable December 3, 1938, and one for $300, payable December 26, 1938. The stipulation further recited:

"Upon the punctual payment of said checks, and each of them, upon presentation of (on) the dates aforesaid, the above-entitled causes and the counterclaim of Abraham B. Alpirn and Morton M. Alpirn, pending therein, shall be dismissed with prejudice, each party to pay his own costs.

"The proceedings in the above-entitled causes shall be continued, pending the punctual payment of said checks. In the event, however, that either of said checks is not fully paid when due and regularly presented, the appeals herein shall be forthwith dismissed and the judgments in the county court of Douglas county, Nebraska, in said causes shall be reinstated; provided, however, that any moneys paid under and by virtue of said checks shall be credited upon said judgments."

The stipulation was not strictly complied with, defendant failing to pay promptly on the day set. The plaintiffs filed a motion to dismiss the defendant's appeal from the county court to the district court, and reinstate the judgment of the

county court, in accordance with the terms of the stipulation. A hearing was had on the motion. The court overruled the same, dismissing the case. From this order, plaintiffs appeal to this court, assigning as error that the order of the court is contrary to the law and the evidence; that time is of the essence of the agreement, and need not be expressly provided therein, but can be ascertained from all the facts and circumstances concerning the agreement.

The record discloses that on the 3d day of December, 1938, when the checks were to be delivered, some conversation was had between the parties, wherein the plaintiffs acquiesced in the delivery of the two checks on December 5, or two days after the date required by the stipulation for delivery, plaintiff Abraham B. Alpirn stating to Sam Epstein, son of defendant: "A couple of days more won't make any difference; it will be all right Monday." The evidence further shows that December 26, 1938, when the check for $300 was to be paid upon its presentation, was a holiday, and on the following day H. Epstein asked plaintiff Abraham B. Alpirn for an extension of time of two weeks to enable him to secure the money to pay this obligation, which was refused. Epstein testified that he said he could not do it because he "put that check in the bank," whereupon Epstein promised to make the check good on the 27th, and Alpirn replied: "Okeh, that check will be, anyhow, in your bank tomorrow." This statement Abraham B. Alpirn denied, and he stated, in substance, that he told H. Epstein that "the agreement was made, the check accepted with that provision, and 'It is up to you to carry out the agreement;' " that Alpirn had made no promises whatever. The defendant did obtain the money, tendered it in cash to plaintiff Morton Alpirn on December 28, 1938; he refused to accept it; it was tendered to plaintiffs' counsel, who refused to accept it, and at the time of trial the money was tendered into court. Upon this evidence the trial court found for the defendant.

We believe that, even though time be considered of the essence of the contract, the evidence here produced and as

found by the trial court was sufficient to waive the condition, either directly or inferentially, by express declaration, and that it was manifest that the plaintiffs did not intend to claim the advantage given them by the contract by the neglect and failure of the defendant to act on December 26, as designated therein, but, in fact, waived such condition.

In *Advance-Rumely Thresher Co. v. Bartzat,* 114 Neb. 35, 206 N. W. 7, the general principle of waiver is announced in the fifth paragraph of the syllabus as follows: " 'A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.' *Fairbanks, Morse & Co. v. Nelson,* 217 Fed. 218."

In the case of *Welsh v. Dick,* 236 Pa. St. 155, 84 Atl. 769, the court said (p. 160): "The right to insist upon time as the essence of a contract may be waived as effectually by implication as by express agreement, and whether there has been an implied waiver in any case depends upon whether the conduct of the party seeking to invoke the strict provision of the contract had been such as to lead the other party to believe he would not be held to it, but might, notwithstanding it, proceed to perform."

Assuming that the contract contained an express condition, making time of the essence thereof, such condition was waived by the declarations of the plaintiffs in not intending to claim the advantage by failure to act on the part of the defendant. The evidence is sufficient to induce the belief that a waiver was intended, and the trial court so found.

AFFIRMED.

EVA POLLOCK, APPELLANT, V. CONSOLIDATED SCHOOL DISTRICT NO. 65, APPELLEE.

293 N. W. 108

FILED JUNE 21, 1940. No. 30726.

1. **Appeal.** The trial court's findings of fact, in a law action tried without a jury, will not be reviewed on appeal further than to determine that they are not clearly wrong.
2. **Schools and School Districts.** The treasurer of a school district is authorized to make payment upon a warrant, as such, only when it is executed by the officers in whom the law has vested the authority to direct payment of the district's funds by this means.
3. ———. A warrant which is not executed in accordance with statutory requirements is not entitled to registration.
4. ———. A public treasurer is authorized to register warrants only where no other reason exists for their nonpayment except the fact that there are not sufficient moneys on hand to the credit of the proper fund with which to pay them. Comp. St. 1929, sec. 77-2403.
5. ———. A warrant is a nonnegotiable instrument.
6. **Limitation of Actions.** A school district has the right to rely upon the statute of limitations as a defense.
7. **Schools and School Districts.** A warrant which is invalid simply evidences and converts into written form the obligation of the transaction out of which it arose.
8. **Limitation of Actions.** The statute of limitations will commence to run against the obligation evidenced by a warrant which is not entitled to registration, but which has in fact been registered by the treasurer, from the date of any payment made upon it, as it does in the case of an unregistered warrant.

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

Moyer & Moyer and *G. B. Hastings,* for appellant.

Butler, James & McCarl, contra.

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

JOHNSEN, J.

Plaintiff has appealed from the dismissal, on a trial with-

out a jury, of her action upon a warrant, purporting to have been issued by defendant school district.

The warrant is dated September 22, 1922; is in the face amount of $541.35; is payable to the order of R. A. Fife Corporation; is indorsed by the payee in blank; is directed to the treasurer of the district; purports to have been drawn by D. G. Newth, as director, and countersigned by H. E. Watkins, as moderator; bears a registration number and a notation over the treasurer's signature, "Registered for payment this 19th day of November, 1923;" and contains an indorsement, dated January 31, 1927, reciting payment of interest thereon to September 30, 1925.

The instrument was actually drawn by the treasurer, who signed the names of Newth and Watkins thereto and delivered it to the payee, for school supplies furnished the district. On February 18, 1924, the payee transferred it, for value, to the now defunct Lincoln Trust Company. The latter in turn made two intermediate transfers and repurchases of the instrument, and finally transferred it to plaintiff, for its face value and interest, on September 7, 1927. Plaintiff does not appear to have attempted to collect interest or otherwise to have made presentation of the instrument, until shortly before the institution of this action in 1938.

Defendant's answer denied liability on the grounds that the issuance of the instrument was unauthorized; that it was an invalid warrant because the signatures of Newth and Watkins were forged; that Watkins in fact was not even moderator of the district on the date involved; that, since the warrant was unauthorized and invalidly executed, it was not entitled to registration; and that any implied obligation arising out of the instrument or the transaction on which it was based was barred by the statute of limitations.

Plaintiff alleged in reply that Newth and Watkins were the regular and proper officers of the district to execute the warrant; that they had duly authorized the treasurer to sign their names thereto, with the same effect as if they

had personally executed the instrument; that, in any event, the registration of the warrant and the payment of interest thereon to September 30, 1925, amounted to a ratification; that, further, when the warrant was presented to the district shortly before the institution of this action, it had given as its sole reason for refusing to make payment that the instrument was barred by the statute of limitations, and that it therefore was estopped to deny liability on any other ground.

The case, as we have indicated, was tried to the court without a jury. The trial court made a general finding in favor of defendant, and thereby resolved every controlling issue of fact against plaintiff. In this situation, we cannot review any question of fact further than to determine whether the trial court's finding thereon is clearly wrong. *Carter v. Parsons,* 136 Neb. 515, 286 N. W. 696; *Linch v. Berggren,* 135 Neb. 530, 282 N. W. 528.

Two questions of fact, determined against plaintiff by the trial court and adequately supported by competent evidence, preclude a reversal of the judgment on our part, without regard to the merits of the legal propositions for which plaintiff contends. The first one is the finding that Watkins was not the moderator of the district at the time the warrant was issued. The statute provides that all district warrants shall be countersigned by the moderator. Comp. St. 1929, sec. 79-401. Hence, even if the warrant in this case had been executed by Watkins personally, instead of by the treasurer in his behalf, it still would not have been a valid warrant, because Watkins was not the moderator. The treasurer would not be privileged to make payments upon it *as a warrant,* either of principal or of interest, since it was not an order on the part of officers of the district in whom the law had vested the authority to direct payment of the district's funds by this means. *State v. Cook,* 43 Neb. 318, 61 N. W. 693. Similarly, because it did not comply with the requirements of the statute, it was not entitled to registration as a warrant. A public treasurer is authorized to register warrants only where no other reason exists

for their nonpayment except the fact that "there are not sufficient moneys on hand to the credit of the proper fund to pay the same." Comp. St. 1929, sec. 77-2403. If there is some other valid reason why a warrant is not entitled to payment, such as a lack of proper execution, it is his duty to refuse payment upon it, as a warrant, on that ground, regardless of whether or not he has sufficient funds on hand with which to pay it. But the mere fact alone that the treasurer had undertaken to register the warrant in the records of the district, before plaintiff's purchase of it, did not improve her legal position, because it was, of course, purely a nonnegotiable instrument. *State v. Cook, supra; Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538, 247 N. W. 433.

The second controlling fact against plaintiff, under the findings of the trial court, is that the members of the school board did not know that the treasurer had registered the warrant or made payments of interest upon it, and that they had no knowledge of any other fact that could afford any possible basis for a claim of ratification. Hence, even if a warrant which fails to meet the statutory prescription for its issuance can subsequently, by ratification, become transformed into a valid warrant,—which we need not decide—there is nothing to help plaintiff here.

All this leads to the simple and perhaps regrettable result that the statute of limitations has run against plaintiff's claim. The school district, however, has the right to rely upon the statute of limitations as a defense. *May v. School District,* 22 Neb. 205, 34 N. W. 377. Since the warrant as such was invalid, all that it could do, in legal effect, was to evidence and convert into written form the obligation of the transaction out of which it arose. The statute of limitations commenced to run upon that obligation at the time the last interest payment was made by the treasurer, which was more than ten years prior to the institution of this action. *Nebraska State Bank Liquidation Ass'n v. Village of Burton,* 134 Neb. 623, 279 N. W. 319. The attempted registration of the instrument did not toll the statute of

limitations, because, as already indicated, it was not entitled to such registration under the statute. If it had been, the limitation would not have commenced to run against it until it was regularly called for payment as a registered warrant, unless there had been a previous repudiation of it. Comp. St. 1929, sec. 77-2403. Defendant's denial of liability on the ground of the statute of limitations, at the time plaintiff made presentation of the warrant, necessarily implied the right to show all the facts of the situation, since it was only because of these that the limitation had run.

Defendant has argued that, even if Watkins had in fact been the moderator and if he and the director had actually authorized the treasurer to sign the warrant for them, the instrument would still not be a valid warrant because this duty was not delegable. Since the case is in any event controlled by the trial court's findings upon the two issues of fact which we have discussed, we shall not pass upon that question. It may be commented that the manner in which the board permitted the affairs of the district to be run, as indicated by the record, is both inconceivable and intolerable as a matter of public responsibility. The treasurer here involved apparently handled all the business affairs of the district. He was allowed to sign the other officers' names to reports and warrants. In the instance in suit, he apparently overlooked the fact that the moderator had been changed just a short time previously. Although he had retired from office some ten years prior to the institution of this action, he had not been called upon to surrender his warrant register record until this controversy arose. Up to that time, no other officer of the district appears to have heard of plaintiff's warrant. Warrants issued subsequent to that of plaintiff had been duly paid. This recitation is made so that officers will be reminded of their duty, if this condition still exists in the district.

The findings of the district court, as we have indicated, are duly supported by competent evidence so that they cannot be disturbed.

AFFIRMED.

FRANK E. ZIEGENBEIN, APPELLEE, V. MARGARETTE ZIEGENBEIN DAMME, APPELLANT.
292 N. W. 921

FILED JUNE 21, 1940. No. 30804.

1. **Divorce.** An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in instalments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment.
2. ———. Such an allowance is not subject to modification under section 42-324, Comp. St. Supp. 1939, providing that the court may from time to time revise and alter the amount of alimony and make any decree with respect thereto which it might have made in the original suit.

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

O'Sullivan & Southard and *Thomas E. Dunbar,* for appellant.

Tyler & Frerichs, contra.

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

JOHNSEN, J.

The question presented is whether the amount of an allowance of alimony in gross, payable in instalments, is subject to subsequent modification under section 42-324, Comp. St. Supp. 1939. That section provides: "After a decree for alimony or other allowance for the wife and children, or either of them, * * * the court, from time to time, * * * may revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof, * * * and the court may make any decree respecting any of the matters which such court might have made in the original suit."

The wife in this case was granted a divorce from the

husband, with a provision in the decree that, "by way of temporary and permanent alimony there is awarded (to the wife) * * * the total sum of Three Thousand Dollars * * * payable * * * at the rate of Thirty-five Dollars per month * * * until said sum is paid in full." Two and a half years later, the husband filed a petition to modify the decree, to relieve him of any further payments, on the ground that the wife had married again and that it was her new husband's duty to support her. The trial court entered an order of modification, providing that, in view of the wife's remarriage, the former husband should be relieved from the alimony obligation of the original decree, as of the date the petition for modification was filed, and that "the remaining instalments of said alimony * * * being fifty-seven in number, should be reduced to the nominal sum of $1.00 each." From this order of modification, the wife has appealed.

In *Beard v. Beard*, 57 Neb. 754, 78 N. W. 255, the first paragraph of the syllabus reads: "Where, in a divorce proceeding, a decree is entered dissolving a marriage, and awarding the wife a judgment against the husband * * * in full of all her claims upon him or his property by reason of their former marriage relations, it seems that the courts have no jurisdiction to vacate or modify such a judgment, after the term at which rendered, solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto." In that case, there was an alimony allowance of $5,000. The opinion states that "certain payments were to be made at certain specified times, and from thence $500 was to be paid annually until the full payment of the said $5,000." Four years later, and while three annual payments of $500 still remained to be made, the husband sought to be relieved from these further instalments, on the ground of a material change in his financial condition. The court held that the statute, now section 42-324, Comp. St. Supp. 1939, gave no right to a modification.

Again, in *Graham v. Graham*, 135 Neb. 761, 284 N. W. 280, in the second paragraph of the syllabus, it was said:

"In a divorce proceeding, where a decree is entered dissolving a marriage, and awarding the wife a judgment against the husband for a definite sum, in full of all her claims upon him or his property by reason of their former marriage relations, courts have no jurisdiction to vacate or modify such a judgment after the term at which rendered (six months), solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto."

The former husband contends that *Beard v. Beard, supra,* and *Graham v. Graham, supra,* are not controlling, because the alimony award in each of those cases was intended as a property settlement between the parties, whereas the allowance here involved was one merely for support. It will be noted that the portion of the decree quoted above contains no such express recitation. The decree merely provided for a division of certain specified property, and then found that the husband should be required to pay to the wife "in addition to a division of the * * * property aforementioned awarded to her and by way of temporary and permanent alimony the sum of Three Thousand Dollars * * * in the way and manner hereinafter set forth." Testimony from the record in the divorce hearing, which was offered in evidence on the hearing here involved, but was not admitted by the trial court, indicates that the parties had agreed upon a property settlement between themselves, of which the agreement to pay $3,000 in alimony was an integral part.

Without attempting to discuss the possible scope or effect of the settlement agreement, it does not seem to us that it is in any event important, under section 42-324, Comp. St. Supp. 1939, just what a gross allowance of alimony may have been intended to represent. If the term alimony is intended to be used in the loose, general sense that it is ordinarily employed, and as it has been commonly used in our past judicial expressions, the language of the statute must be regarded as drawing no distinction between an alimony allowance for support and one in lieu of a prop-

erty division or settlement. In a literal sense, every decree for alimony, no matter what purpose it may be intended to serve, can be said to be within the terms and operation of the statute. In a judicial sense, however, we recognize that the provisions of a decree may so define and limit the rights and obligations of the parties between themselves as to be capable of, and intended as, a present vesting, and hence to possess, in its scope, the attributes of an absolute judgment. Such provisions in a decree are exempt from the operation of section 42-324, Comp. St. Supp. 1939. Obviously, the statute was not designed to prevent domestic misadventure from ever becoming a closed book financially, but it was intended simply to enable the court to retain control over the financial situation of the parties, where it felt it necessary or advisable to do so. No specific words of reservation are necessary, of course, as a foundation for the right of modification, and, indeed, such right will be held automatically to exist, unless, as we have indicated above, the decree defines and limits the rights of the parties with such completeness and finality as to be clearly capable of and intended as a present vesting, and hence to possess in its scope, the attributes of a final judgment.

Obviously, the purpose of both the court and the parties, in providing for or in accepting a gross allowance of alimony, is to define and fix with finality the scope of the rights and the obligations of the parties. In this case, it was designed to set the limits of the wife's right to alimony, and we have no doubt that the husband would have cushioned himself on the doctrine of vested rights, if the wife had attempted to institute proceedings to increase the amount. Without discussing the matter further, it is our view that an unqualified allowance in gross, in a divorce decree, whether payable immediately in full or periodically in instalments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations as to be capable of a present vesting and to constitute an absolute judgment, and the court cannot subsequently

modify the amount thereof under section 42-324, Comp. St. Supp. 1939. If the judgment in this case was intended to be subject to a defeasance in case of the wife's remarriage, it was necessary, since a vested right was involved, to have provided for such defeasance in the decree. While, under *Wassung v. Wassung*, 136 Neb. 440, 286 N. W. 340, the way may be left open, in a proper situation, for the court, in a case like this, to regulate the manner of payment of the various instalments, under section 42-324, Comp. St. Supp. 1939, this is as far as its control extends, in the absence of some qualifying language in the decree.

We deem it unnecessary to discuss the authorities from other jurisdictions upon the question. They are in conflict. We have taken the view which seems to us in line with our past declarations and the previous construction made of section 42-324, as well as with what appears to us to be the practical logic of the situation. We are living in an era of feminine equality, unhesitating separations, and rapid readjustments. In some of the situations which present themselves between husband and wife, it is unquestionably better for both parties that their rights and obligations be definitely fixed, so that the ties between them can be completely severed and they can face with certainty the measure of the final adjustment which they will be required to make. This can properly be done by a gross allowance of alimony. Not every case, however, lends itself to this situation, and it is the responsibility of the trial judge and the attorneys of the parties to give careful consideration to what form of alimony allowance and decree the situation most fairly requires. What has been said has, of course, no application to the separate obligation of child support, where this exists.

The decree of modification entered by the district court is reversed, and the husband's application for modification is dismissed, with an attorney's fee allowance of $100 in favor of the wife.

REVERSED AND DISMISSED.

FRANK C. BEST, APPELLEE, V. CITY OF OMAHA ET AL., APPELLEES: YANT CONSTRUCTION COMPANY, APPELLANT.
293 N. W. 116

FILED JUNE 22, 1940. No. 30994.

1. **Municipal Corporations.** Public administrative bodies possess a discretionary power in awarding contracts, in considering the responsibility of bidders, and in determining questions of public advantage and welfare.
2. ———. Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.
3. **Evidence.** It is presumed that a public administrative body acts in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest.
4. **Municipal Corporations.** It is not the policy of the law to prevent a public administrative body from properly exercising its discretion in administering the affairs committed to its charge for the best interests of the municipality that it represents.
5. ———. In the absence of controlling legislative or judicial direction, when acting within the limits of the general powers which it possesses, a public administrative body has the power to determine questions of public policy that concern primarily its municipality.
6. ———. In the absence of specific statutory direction, a city council, in the specifications for public works, may permit bidders to propose and fix a time for the completion of the proposed works.
7. ———. Likewise, in such proposals a city council may reserve the right to omit any or all of separate items from the contract for which separate price proposals are asked after the bids are opened and before the contract is awarded.

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

Munger & Rhodes, for appellant.

Gaines, McLaughlin & Shoemaker, Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka, L. J. Te Poel and *Alfred Raneri, contra.*

King & Haggart, amici curiæ.

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

SIMMONS, C. J.

This case presents two questions: Did the specifications for the construction of a sewage treatment plant fail to provide for competitive bidding so as to render void a contract based thereon? Was the contract let to the lowest responsible bidder?

In 1937 the city of Omaha was perpetually enjoined from depositing sewage in certain creeks in the city. By stipulation the decree was stayed until October 1, 1939, upon the condition that the city should construct a suitable disposal plant. A site was acquired and between 1937 and 1939 work was done on sewer construction with assistance furnished by the Works Progress Administration, an agency of the United States, hereinafter referred to as the W. P. A.

With the assistance of its engineers, legal staff, and specially employed sanitary engineers, the city prepared and completed in June, 1939, the plans and specifications for the proposed project and submitted the same for bids. All bids received upon the first proposal were rejected on November 8, 1939, because the city had failed to comply with certain statutory requirements. The plans and specifications were readvertised and bids were received and opened December 5, 1939. On January 2, 1940, the contract was awarded to the Yant Construction Company "with W. P. A. participation" and was executed by the parties on January 9, 1940. The necessary bond was furnished.

Subsequent to the preparation of the plans and specifications, the city, with W. P. A. assistance, began to do some of the work described in the proposals and continued to do so until the contract was executed. A small amount of excavation had been done when the first publication was ordered. A considerable part of the work on two items had been completed when the bids were opened December 5, 1939, and additional work had been done when the contract

was let. This resulted in the specifications calling for the contractor to bid on more work on a unit basis than he actually would be called upon to perform (the contractor being paid for only the unit work he performed). The amount of work which the city had completed at the date the bids were received was known to all bidders.

The city has secured an allotment for W. P. A. assistance on this project. It is conceded that this is not a binding obligation upon the federal government, that it may be withdrawn at any time, that, in any event, the commitment expires July 1, 1940, unless the project is underway, and that "with W. P. A. participation" a material saving can be made in the cost of this project to the city.

Plaintiff, as a taxpayer, seeks a decree declaring the contract void and enjoining its execution on grounds hereinafter set out and considered.

The trial court found that the plans and specifications did not afford an opportunity for competitive bidding, held the contract to be null and void, and enjoined the defendants from proceeding under it. The Yant Construction Company appeals.

The following facts enter into a decision of the questions presented: There is no evidence of bad faith, lack of good faith, of fraud, collusion, arbitrary or capricious action, violation of trust, or abuse of discretion on the part of the city officials or the construction company. There is no charge of collusion on the part of any or all of the bidders. All bidders had the same opportunity to bid, all knew all of the facts relating to the plans, specifications, and conditions of the work. No bidder asked for a clarification or interpretation of the plans and specifications. All submitted bids on the alternative proposals, and the conditions and provisions were applied alike to all bidders. The city was required to expedite the completion of this project by (1) the injunctive order which had become final; (2) its obligation to remove a public nuisance and protect the health and property of its citizens; (3) its desire to have W. P. A. participation both as a matter of saving cost to its taxpayers and furnishing

employment to its unemployed. It was to the advantage of the city and its citizens that the W. P. A. work being done prior to the execution of the contract should continue without hinderance or interruption.

The following general principles control the questions presented.

(1) Public administrative bodies possess a discretionary power in awarding contracts, in considering the responsibility of bidders, and in determining questions of public advantage and welfare.

(2) Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body. *State v. Board of Commissioners,* 105 Neb. 570, 181 N. W. 530.

(3) It is presumed that a public administrative body acts in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest.

(4) It is not the policy of the law to prevent a public administrative body from properly exercising its discretion in administering the affairs committed to its charge for the best interests of the municipality that it represents.

(5) In the absence of controlling legislative or judicial direction, when acting within the limits of the general powers which it possesses, a public administrative body has the power to determine questions of public policy that concern primarily its municipality.

That the city has express statutory authority to construct the proposed works subject to the requirement that the contract must be awarded to the "lowest responsible bidder" is conceded. Comp. St. Supp. 1939, sec. 18-1407.

The object of the statute is "to invite competition and prevent favoritism and fraud. * * * To attain that object

it is essential that the bidders, so far as possible, be put on terms of perfect equality, and that they be permitted to bid on substantially the same proposition, and on the same terms." *Fairbanks, Morse & Co. v. City of North Bend,* 68 Neb. 560, 94 N. W. 537.

Plaintiff contends that the specifications followed prevent the realization of the above object and are contrary to law. The objections will be considered in the order stated in the petition.

(First) Because each bidder was required to fix his own time for the completion of the work, the specifications did not permit uniform bids. This proposition was discussed pro and contra but not decided in *Root v. Douglas County,* 105 Neb. 262, 180 N. W. 46. The courts of other jurisdictions are not in accord on the question. Plaintiff cites the following cases: *Armitage v. Newark,* 86 N. J. Law, 5, 90 Atl. 1035; *Jordan v. Borough of Dumont,* 7 N. J. Misc. 476, 146 Atl. 49; *Deutsch v. Oklahoma City,* 133 Okla. 51, 270 Pac. 851. Defendants cite: *Phifer v. City of Bayonne,* 105 N. J. Law, 524, 146 Atl. 463; *Hirsch v. City of Vicksburg,* 141 Miss. 827, 105 So. 492; *Robinson v. City of Saginaw,* 267 Mich. 557, 255 N. W. 396. The city council, being charged with the determination of what is for the best interests of the city, when so acting, should not be restricted by arbitrary rules that might require it to act against what an honest judgment, based upon the situation then being considered, dictates as the best course to follow. In the absence of specific statutory direction, a sound public policy requires that the city council be permitted to determine in the proposals whether or not the work must be completed within a specified time or left open to the bidder to propose a time of completion. To so hold is in keeping with the policy of this state which permits cities to adopt home-rule charters. In the instant case, time is an important element, both because of the injunctive order and because of W. P. A. assistance. It might be that a contractor would propose to do the work more quickly than the city had specified in its proposals. The city should not be prevented from taking ad-

vantage of such a saving of time if the council deem it best to do so. The city council may, therefore, determine which course is for the best interest of its municipality, and, if it so desires, permit bids to be proposed in which the bidder fixes the time for completion. This permits the city council to consider the time of completion in conjunction with and as a part of the other elements that enter into the determination of who is the lowest responsible bidder.

(Second) The plans and specifications are speculative in that each bidder was required to submit two bids, in the alternative, one "with" and one "without" W. P. A. participation. Plaintiff does not contend that alternative bids destroy competitive bidding. Neither is this objection directed at W. P. A. participation. The objection is predicated on the proposition that the plans and specifications provide that "the lowest bid will be determined upon the basis of aggregate cost" with W. P. A. participation; provided, however, that if at any time prior to the time the contract is awarded, it shall be definitely determined that the W. P. A. will not participate in this contract, then, and in that event, the lowest bid will be determined upon the basis of aggregate cost "without W. P. A. participation;" and that by bidding low on the contract "with W. P. A. participation" and high on the contract "without W. P. A. participation," a successful bidder might thereby secure the contract on a higher bid than others. It might also be that, if W. P. A. participation was withdrawn pending performance, the successful bidder based on W. P. A. participation would receive more under that part of the contract completed "without W. P. A. participation." All bidders have the same opportunity to bid on the same proposals. Under the proposals, the determining factor as to which bid is to control depends upon the status of W. P. A. participation at the time the contract is awarded. The objection goes not to the competitive nature of the plans and specifications, but to the question of which bidder is the "lowest responsible bidder." That matter will be hereinafter considered.

(Third) The specifications were speculative in that the

city reserved the right to omit from the contract any or all of several items, aggregating in amount about one-third of the contract, that this provision permitted the city to select a preferred bidder, and in that a bidder did not know what items would finally be included in the contract. This objection is based on the proposition that the city reserved the right to omit the items *after the bids were opened and before the awarding of the contract,* and that in any event the proposal permits of possible favoritism. It does not appear that any items were actually withdrawn before the contract was awarded. Proposals in this form were approved by this court in *State v. Board of Commissioners, supra,* where items were eliminated after the bids were opened and before the contract was awarded. It is common knowledge that such provisions are in many, if not all, contracts for construction of works of any size. It is obvious that it has a legitimate purpose, and that is to enable the administrative body to eliminate, if need be, unnecessary and auxiliary items, and thereby reduce the expense of the construction after the cost of the total project is disclosed. It is obvious that these matters could not be determined before the bids are opened, and likewise obvious that they should be determined before the contract is awarded. In the items reserved for possible omission are slag or gravel walks, roadways, loam, sodding, seeding, and fencing. Certainly it is sound administrative policy for the city to reserve the right to omit such items if for reasons of expense or proper construction, etc., it is determined best to do so. Sinister and illegal motives or intentions will not be imputed to the city officials for so doing. Should a case arise where it is demonstrated that such a provision is used for illegal and improper purposes, the situation can then be met. It is not shown to exist here. Any other rule would require the city to ask for separate proposals and enter into separate contracts on all of such items. Sound public policy does not require that the city follow such a course.

Plaintiff further alleged that the contract was not let to the lowest responsible bidder for the following reasons:

(1) The Yant Construction Company, on the items which the city was performing, submitted unit bids below cost, knowing that it would not be called upon to perform those items fully, and thereby reduced its total bid lower than it actually would have been had it bid proper amounts on those items, and that, because thereof, it was not the lowest bidder on items which it actually had to perform; that its bid was unbalanced and therefore illegal; and (2) the Yant Construction Company was the highest bidder as to performance "without W. P. A. participation," and that the bids were necessarily speculative because there was no certainty of the extent, if at all, of W. P. A. participation.

These objections go to the question of who is the "lowest responsible bidder," not to the legal sufficiency of the specifications. That decision is for the administrative body in the proper exercise of its discretion and judgment.

The legislature did not in the statute define "lowest responsible bidder" nor establish any other yardstick by which the city authorities were to be guided in their deliberations and conclusions. This court, however, in 1921, considering the question of what constituted "the lowest responsible bidder," stated:

"The term 'responsible' as used in the statute is not limited in its meaning to mere financial responsibility, but includes within its purview the general ability and capacity of the bidder to perform the work, his facilities and suitability for the task, and those qualities which he must necessarily have in order that he be able to perform the contract strictly in accordance with its terms." *State v. Board of Commissioners, supra.*

The legislature, having adopted the language, is presumed to have used it as defined by this court prior to the passage of section 18-1407, Comp. St. Supp. 1939.

There were four bids. It appears to be conceded in the briefs that one bid was invalid because the bidder did not propose a completion date for the work. Likewise, there is uncontradicted evidence that a second bidder proposed material on one item that was below the standard fixed by the

specifications. These objections to the two bids may be here disregarded for the record (both petition and evidence) is absolutely silent on the question of who, other than the Yant Construction Company, is the lowest responsible bidder, save and except the one element of the amount of the bid. That, however, as this court has held (*State v. Board of Commissioners, supra*) is not the sole element that must be considered. Accordingly, there is nothing in the record upon which a judicial review of the action of the city council in that regard can be based. Not only is that true, but the record contains the affirmative finding of the city council that the Yant Construction Company is the lowest responsible bidder and recites the basis of that finding. It necessarily follows that, so far as this record reveals, the Yant Construction Company was the lowest responsible bidder.

At the close of the case, the defendants moved that the petition and action be dismissed for the reason that there was neither pleading nor proof to sustain a decree in favor of plaintiff. The motion should have been sustained. The decree of the trial court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

HOME OWNERS LOAN CORPORATION, APPELLEE, V. EVERETT O. RICHARDS ET AL., APPELLANTS.

293 N. W. 111

FILED JUNE 28, 1940. NO. 30870.

Mortgages. Record in a confirmation appeal examined and decree of trial court affirmed.

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

E. E. Richards, for appellants.

R. L. Smith, contra.

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

SIMMONS, C. J.

This case presents the question: Did the trial court err in confirming a sale under a decree of foreclosure? As of the date of the sale, the total due on the decree was $2,775.22. The property was sold for $2,775.22.

Witnesses, with varying qualifications, testified for both parties as experts on values. Plaintiff's witnesses fixed the value at from $2,000 to $2,500. Defendants' witnesses fixed the value at from $3,200 to $4,500. The elements entering into their determination of values were varied. There is no assurance that a subsequent sale would result in a higher bid.

This court has on many occasions declined to set aside a confirmation under these circumstances. In *Equitable Life Assurance Society v. Buck, ante,* p. 203, 292 N. W. 605, this court stated:

"An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale."

AFFIRMED.

JOSEPH R. BASKINS V. STATE OF NEBRASKA.

293 N. W. 270

FILED JUNE 28, 1940. No. 30509.

1. **Criminal Law.** The Criminal Code of Nebraska provides that "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Comp. St. 1929, sec. 28-201.
2. ———. On the issue of intent in a criminal prosecution, an adult sane person accused of a felony may be presumed to intend the natural and probable consequences of his voluntary acts.

3. ———. Criminal intent or felonious purpose may be shown by circumstances.
4. **Assault and Battery.** Evidence outlined in opinion *held* sufficient to sustain a conviction for assault with intent to inflict great bodily injury.
5. **Criminal Law.** In a criminal prosecution, counsel appointed by the court to assist the county attorney *held* not disqualified by prejudice against defendant.
6. ———. The criminal law does not permit counsel for defendant, without reason or excuse, to provoke the prosecuting attorney into unbecoming retorts or breaches of etiquette and thus make such conduct a ground for a new trial without regard to the guilt of defendant, though proved beyond a reasonable doubt.
7. ———. A breach of privilege by a prosecuting attorney in the use of language in his address to the jury is not necessarily a ground for a new trial, where the import of his words was not more severe than legitimate inferences in argument from the evidence before the jury.

ERROR to the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland and *Beeler, Crosby & Baskins,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Milton C. Murphy, contra.*

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

ROSE, J.

In a prosecution by the state of Nebraska in the district court for Lincoln county, Joseph R. Baskins, Clyde D. Macomber and Albert A. Hastings, defendants, were charged in the first count of the information by the county attorney with the kidnaping of the complaining witness, Sam I. Pappas, November 21, 1937; in the second count with robbing him of $275; in the third count with making an assault upon him with intent to inflict great bodily injury.

A motion by Joseph R. Baskins, defendant, for a change of venue was sustained and he was tried in the district court for McPherson county. The counts for kidnaping and

robbery were dismissed with the consent of the state's attorneys. The jury found Baskins guilty of assault with intent to inflict great bodily injury and for that felony he was sentenced to serve a term of two years in the penitentiary. As plaintiff in error he presents for review the record of his conviction.

It is argued as a ground of reversal that the evidence does not prove that defendant committed the assault charged nor the intent to inflict great bodily injury.

The relationship of the three defendants to each other and to the city government of North Platte are important factors in a review of the conviction. At the time of the felony charged, defendant Macomber was a member of the police force, a patrolman. Defendant Baskins was a member of the city council and chairman of the police committee. Defendant Hastings conducted an insurance and loan business in North Platte and was active in city politics. The evidence justifies a finding that the three defendants named had entered into a conspiracy to compel Sam I. Pappas to confess to a felony of which he was not guilty, a confession which might lead to a long term of service in the penitentiary. There is also evidence of the following facts: Macomber and Baskins drove to the home of Pappas in a police cruiser not long before midnight, Sunday, November 21, 1937. Macomber intimated that something for the good of Pappas was contemplated and the latter consented to leave home in the cruiser with the city officials. Pappas had not been accused of any offense and there had been no warrant for his arrest. He was not told he was under arrest. He was taken to Macomber's room, 25 in the Ritner hotel, without knowledge of what was in store for him there. Hastings was promptly called to the hotel by telephone and while the four men, Macomber, Baskins, Hastings and Pappas, were in room 25, with the door closed and bolted on the inside, Macomber made a demand on Pappas to confess he had committed a felony. The latter asserted his innocence and refused to confess. Threats to make him do so were made. Baskins and Hastings held Pappas while

Macomber beat him. Pappas tried to escape, unbolted the door and got into the hall outside, was beaten there, dragged back into the room where the beating was continued. After the beating and turmoil ceased in room 25 with the departure of the four occupants, there was blood on the walls, on the floor, on a rug in front of the bed, on the bedspread, on the drapes, on the walls in the hall and on the radiator. Physical injuries inflicted on Pappas, as described by a physician who examined him in a hospital to which he had been taken promptly and, as related in the majority opinion in *Macomber v. State,* 137 Neb. 882, 291 N. W. 674, were as follows:

"Face badly bruised; eyes swollen shut; deep cut, with ragged edges, an inch long over the left eye; slighter cut over same eye; nose skinned; lip cut on right side; inside of cheek bruised on upper right side; lacerations close to the lips; right side of face puffed with air, passing under the tissues and extending over the entire side of head and face to margin of collarbone; portion of air breathed passed through torn tissues under the skin, over the side of the face and neck; lachrymal bone fractured; whites of both eyes red; bump on head back of ear; stitches required to close wounds."

There is cogent evidence of the foregoing facts. Moreover the logical inference from all the testimony is that the motive for the assault and for the attempt to compel Pappas to confess a felony which would subject him to a long term in the penitentiary was to get rid of him as a gambler whom the trio had unlawfully protected and thus procure for themselves profits of gambling.

The assault was designated by defendant as a fist fight started by Pappas, but the jury reached a different conclusion. Pappas, in advance, was known to be unarmed. Macomber was in uniform and armed. Locked in a room with him, with the city lawmaker and with the local politician, Pappas was helpless. His eyesight had been impaired and his strength had been weakened by a disease of long standing. Naturally the absurdity of such a defense under

the circumstances would not escape the attention of the jury as evidenced by their verdict of guilty.

Defendant contends and argues that he did not strike Pappas and did not intend to inflict great bodily injury and that these elements of the felony charged were not proved. As city officers, Baskins was the superior of Macomber, saw the assault from beginning to end and did not stop it. There is evidence that Baskins and Hastings held Pappas while Macomber made the assault, and thus aided in the commission of it. The law is as follows:

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Comp. St. 1939, sec. 28-201.

On the issue of intent, an adult sane person may be presumed to intend the natural and probable consequences of his voluntary acts. *Ford v. State*, 46 Neb. 390, 64 N. W. 1082. Criminal intent or felonious purpose may be shown by circumstances. *Buckley v. State*, 131 Neb. 752, 269 N. W. 892; *Jurgensen v. State*, 135 Neb. 537, 283 N. W. 228.

Every element of the felony charged was clearly proved and the jury were justified by the evidence in finding Baskins guilty beyond a reasonable doubt.

The appointment of Milton C. Murphy as assistant prosecutor and his conduct in that capacity are criticized as grounds for setting aside the verdict. The record does not show such prejudice against defendant as to disqualify Murphy as a prosecutor. It does show, however, that he was improperly provoked by counsel for defendant at times into unbecoming retorts and breaches of etiquette. Counsel on both sides were repeatedly admonished by the court for misconduct of this kind. In criminal law the right of the state to prove the guilt of defendant by lawful methods is as important as the right of the defendant to a fair and impartial trial. The law does not permit defendant or his counsel, without reason or excuse, to provoke the prosecuting attorney into unbecoming retorts or breaches of etiquette and thus make such misconduct a ground for a new trial without regard to guilt, though proved beyond a rea-

sonable doubt. *Flannigan v. State,* 125 Neb. 519, 250 N. W. 908. For the most part the asperities were directed to counsel and not to defendant. Unless he was prejudiced by misconduct, the statute and the rules of court forbid a reversal on that ground. Comp. St. 1929, sec. 20-853; *O'Connor v. State,* 123 Neb. 471, 243 N. W. 650; *Flannigan v. State,* 125 Neb. 519, 250 N. W. 908. The assignments of error relating to misconduct of counsel have all been examined without finding error prejudicial to defendant. The evidence of guilt makes a strong appeal to common sense, reason and judgment and accounts for the verdict instead of misconduct of counsel.

A reversal is also demanded on the ground that assistant prosecutor abused his privileges as such and prevented a fair and impartial trial by applying epithets to defendant and otherwise using improper language in his address to the jury. The record shows that he used some intemperate language, but, when what he said is considered in connection with the testimony of witnesses, it is no more severe in import than legitimate inferences in argument from the evidence of guilt before the jury. Though open to criticism in some particulars, the address of the assistant prosecutor to the jury was not such as to vitiate the verdict.

There are many other assignments of error, but the record has been considered from beginning to end without finding an error entitling defendant to a new trial.

AFFIRMED.

SIMMONS, C. J., dissenting.

It is not for us to consider disputed questions of fact and intent and determine the guilt or innocence of an accused person. In criminal cases juries determine the facts; courts determine the law. It is our sworn duty to examine the record presented and from that determine whether or not the constitutional and legal rights of an accused have been safeguarded and a fair trial and conviction had.

I join with the majority of this court in condemning the acts of which the defendant, Hastings, and Macomber stand charged. I do not share their opinion that the defendant has

had that fair and impartial trial the law guarantees to every person no matter how depraved he may be or how reprehensible the act with which he is charged. The liberty of the defendant is not alone involved. The liberty of every person depends upon the proper protection by the courts of the rights of every accused person. There must be no exceptions to this rule.

Information was filed jointly against Baskins, Hastings, and Macomber, charging them in three counts with kidnaping, robbery, and assault with intent to inflict great bodily injury. The defendant Baskins was tried separately. The special prosecutor in his opening statement told of the charges of kidnaping, robbery, and assault against the three men, presented the state's theory of the crimes, and related its version of the evidence as to all three alleged crimes in detail. The defendant moved separately to withdraw each count from the consideration of the jury. His motions were overruled. The state then proceeded to offer generally the same evidence, as to all three alleged crimes, that was introduced in the trial of the other defendants. Repeated objections to the introduction of much of the evidence were overruled, and the whole story of all three alleged crimes went to the jury.

At the close of the state's case, the jury were excused. The defendant moved to dismiss count one (kidnaping) of the information. At the suggestion of the state, the court reserved its ruling "for awhile." The defendant then moved to dismiss the count relating to robbery. On this motion the state stated that it had been unable to locate two witnesses, and that, without their testimony, it felt that "perhaps the evidence is insufficient to justify" submitting the issues upon the robbery count to the jury. After a motion to dismiss count three was overruled, the state's attorneys asked time for a conference. Conference was had, and thereafter one of the state's attorneys stated that, although they believed the evidence sufficient to sustain a conviction of kidnaping, in view of the evidence, the severity of the punishment, the age of the defendant, his circumstances, his mental

and physical condition, "the state doesn't feel justified in asking for a conviction," and therefore requested the court to dismiss the kidnaping charge. The court sustained the motion. The defendant then renewed his several motions to strike the testimony of witnesses relative to evidence as to the crimes charged in the dismissed counts. The motions were overruled. (At the conclusion of all testimony, these motions were again made and again overruled.) The jury returned, and the court advised them that it had dismissed the robbery charge for insufficient evidence, "and with reference to count one, it is the opinion of the county attorney that he would prefer not to proceed further with said count."

It is obvious that, at the beginning of the trial, the state knew it could not produce the witnesses necessary to sustain the robbery charge; it is likewise obvious that the reasons that prompted the state to dismiss the kidnaping charge existed before the trial, and yet the state proceeded to offer testimony which it claimed sustained those charges, got to the jury whatever damaging effect that evidence created against the defendant, and then dismissed the charges, and the trial court refused to strike the testimony of the witnesses relating to those charges. This procedure should not be condoned. The evidence as to the two dismissed charges might well have had an important, if not a controlling, effect upon the jury in their finding of guilt upon the felony charge. It is no answer to this procedure to say that the jury could have found the defendant guilty without this evidence. The defendant was entitled to trial, as a matter of right, with the evidence limited to that competent testimony going to establishing the crime with which he was finally charged. This testimony should not have been offered by the state. It should have been stricken by the court and the jury promptly instructed not to consider it.

I shall not further discuss the errors assigned as to the evidence except to point out that the court permitted several witnesses to testify to statements made and acts done on

the night in question by third parties at times when the accused was not present; that evidence of two separate beatings administered to Pappas by Macomber, not in the presence of the defendant, was presented to the jury for their consideration; that Baskins did not strike Pappas; that evidence of the crime of sodomy by third parties, including the identification of the parties present in the courtroom, was submitted to the jury. The repeated objections of the defendant to the admission of all of such evidence and defendant's motions to strike and to instruct the jury not to consider it were of no avail.

The majority opinion entirely ignores the assignments of error relating to the instructions to the jury.

The "intent to inflict a great bodily injury" on Pappas is an essential element of the crime. Comp. St. 1929, sec. 28-413.

The trial court by instruction No. 8 told the jury that "whoever aids, abets or procures another to commit any felony is treated in law as though he was the principal offender," that if they found that Macomber, or Hastings, or both of them committed the crime of assault with intent to inflict a great bodily injury, and that if they further found that Baskins either aided, abetted, or procured Macomber and Hastings or either of them to make the assault and beat Pappas "and at the time of the striking and beating of the said Sam I. Pappas the said Joseph R. Baskins, Clyde D. Macomber, *or either of them,* did so with intent of unlawfully and feloniously inflicting upon the said Sam I. Pappas great bodily injury," then they would find the defendant Baskins guilty.

By instruction No. 11 the court instructed the jury that the intent of Baskins to do great bodily harm to Pappas was an essential element of the crime charged against Baskins and that, if they found that he did not have that intent, they should find him not guilty.

Thus it will be seen that, by instruction No. 8, the jury were told that the intent to do great bodily harm to Pappas of either Macomber *or* Baskins was sufficient to convict

Baskins of a felony, and by instruction No. 11 that Baskins had to have that intent. The conflict and the confusion in the two instructions on the essential important element of intent are apparent. Who knows which instruction the jury followed? Certainly this court does not.

The state argues that instruction No. 8 is correct, that instruction No. 11 was more favorable than the defendant was entitled to, and, therefore, the defendant was not prejudiced.

The instruction is evidently an effort of the trial court to apply section 28-201, Comp. St. 1929, to this case. This court has held: "The unquestioned purpose of the last (above) act was to eliminate the common-law distinction between principals and accessories before the fact, and to provide for the punishment and trial of accessories before the fact as principals." *In re Resler*, 115 Neb. 335, 212 N. W. 765. Under the above act, accessories may be prosecuted and punished under the same rule as to the information, conduct of the case, and punishment that are applicable to the principal. *Scharman v. State*, 115 Neb. 109, 211 N. W. 613.

It is not my understanding that the above cited statute changes or modifies any of the elements that constitute the offense. By instruction No. 8 the jury were told proof of the intent of the principal was sufficient. The question then comes: Is it necessary to prove the intent of the accessory to inflict great bodily harm? This court has held that it is.

In *Wagner v. State*, 43 Neb. 1, 61 N. W. 85, a prosecution was had under the provisions of the former statute which required that the accessory be so charged. An information was filed charging one Koontz with stabbing Salmen with intent to wound. Wagner was charged with aiding and abetting Koontz in the perpetration of the crime and found guilty of being an accessory before the fact of stabbing with intent to wound. This court there said: "We think the general rule is that one who counsels or invites another to perpetrate an act is responsible not only for that act, but for all the probable consequences of such counsel, and we

are aware that if it be shown that several conspire to commit an offense, and if in the act of committing that offense another is committed, there are cases that hold that all engaged in the conspiracy are responsible for the latter crime. This is the effect of all the cases cited by the attorney general in support of this conviction. *But this is a crime of a peculiar nature. The intent to wound by stabbing is an essential element of the principal offense, and where a particular intent is requisite to constitute a crime, one who is not present, in order to be an accessory before the fact, must have participated in that particular intent. Meister v. People,* 31 Mich. 99; *Savage v. State,* 18 Fla. 909. Where a specific intent is not an element of the offense, one who instigates an act, the natural and probable consequence of which is the commission of other acts constituting such offense, may be reasonably charged as accessory thereto. But where a specific intent is essential to constitute an offense, how can it be said that one who instigates an entirely different act, neither knowing nor contemplating the formation of that specific unlawful intention on the part of the person instigated, nor intending to place such intention in his mind, is guilty of having procured, aided, or abetted the offense to which such intent is essential? We think the jury was not warranted from the evidence referred to in finding that Zoeth Wagner either knew of the intention on the part of Koontz to stab and wound Salmen, or that with the intention himself of having Salmen wounded he instigated Koontz to assault him."

The fourth paragraph of the syllabus is: "Where a particular intent is an essential element of a crime, one is not guilty as an accessory before the fact to such crime unless he participates in or has knowledge of such intent." See, also, 16 C. J. 129, and cases there cited.

The failure to prove that intent on the part of Wagner was held sufficient to require a new trial. If it is necessary to prove that the accessory participated in or had knowledge of the intent, then it is necessary that the jury find that the intent existed in the accessory's mind or that he

had knowledge of that intent on the part of his principal. It follows that under instruction No. 8, basing that finding upon the intent of Macomber, not participated in and not known to Baskins, the jury could have found Baskins guilty. It necessarily follows that this instruction is prejudicially erroneous.

Although the majority opinion states: "The evidence justifies a finding that the three defendants named had entered into a conspiracy to compel Sam I. Pappas to confess to a felony," it should be pointed out that the defendant was not charged nor tried as a conspirator, and there is absolutely no evidence that any conspiracy or even discussion of a plan or purpose to assault Pappas was formed by any of the three defendants. As this court points out in *Wagner v. State, supra,* the evidence admissible in conspiracy cases is distinctly different from the evidence admissible in cases such as here charged.

The majority excuse the misconduct of the state's counsel by holding that the defendant's counsel were likewise guilty of misconduct. Even so, such fact does not justify the actions of counsel for the state. Neither does it justify waiving the misconduct which was prejudicial to the accused.

The majority opinion relies upon *Flannigan v. State,* 125 Neb. 519, 250 N. W. 908, to sustain its position that the conduct of counsel for the state was not prejudicial. In the *Flannigan* case, the statements made by both counsel were directed at each other, not to the defendant, and the trial court promptly rebuked them and instructed the jury to pay no attention to the statements. This court there said that, "in view of the rebuke from the bench and the instructions to the jury," the defendant Flannigan was not prejudiced. In the instant case, the remarks and actions complained of were directed at the defendant Baskins, and there was neither rebuke from the bench nor instructions to the jury. The distinction is apparent. In *Cooper v. State,* 120 Neb. 598, 234 N. W. 406, this court in reversing a conviction for prejudicial remarks of the prosecutor (Rose, J.,

dissenting) said: "The court should have stopped this line of argument, reprimanded the attorney, and at least have instructed the jury to disregard it. * * * In a criminal case, the defendant is presumed innocent until he is proved guilty beyond a reasonable doubt. This presumption of innocence is a matter of evidence in favor of the defendant, and continues throughout the trial until he is found guilty from the evidence beyond a reasonable doubt, after a trial surrounded with an atmosphere of fairness, undisturbed by prejudice, passion or ill will. * * * Trial judges and public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial, uninfluenced by prejudice, passion and public clamor."

I shall not further extend this dissent. From its inception down to and including the oral argument in this court, this case has been conducted with a spirit, upon a plane, and in an atmosphere, not in keeping with the high standards of the administration of criminal justice, which courts, lawyers, and citizens alike stand pledged to maintain. The third degree methods employed against Pappas do not justify courts condoning the methods and procedure here used to secure a conviction. This cause should be reversed and remanded for further proceedings *according to law.*

JOHNSEN, J., dissenting separately.

We have previously reversed the convictions in the two companion cases of *Macomber v. State,* 137 Neb. 882, 291 N. W. 674, and *Hastings v. State,* p. 365, *post,* 293 N. W. 236, and I feel that this case should go back with the others for a new trial. There is so much feeling reflected in the records in all three cases, that I am of the opinion that the trial atmosphere bore a community stamp, which subordinated the charges involved. I do not believe that this stamp was removed by a mere transfer of the Thespian performance in this case from Lincoln county to McPherson county. The questions of local political and gambling control should by this time have cooled off sufficiently so that the trial can get down to a simple presentation of the facts that demon-

strate guilt. I have nothing but condemnation for the things with which the defendants are charged, but an accused's civil rights still entitle him to something more than a hand ball game for a trial.

EPPLEY HOTELS COMPANY, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.
293 N. W. 234

FILED JUNE 28, 1940. NOS. 30764, 30765.

1. **Taxation.** The valuation of nonexempt property for the purposes of taxation is its "actual value" which means "value in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201.
2. **Municipal Corporations.** Excessive valuation of nonexempt property, as determined by the city assessor of the city of Lincoln and the city board of equalization, may be corrected by proceedings in error to the district court.

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

Hotz & Hotz, for appellant.

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

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

ROSE, J.

This is a proceeding to review the action of the board of equalization of the city of Lincoln in determining for the purposes of taxation the value of the Lincoln Hotel property and the value of the Capital Hotel property owned by the Eppley Hotels Company, plaintiff. The assessments in controversy were levied for the years 1937 and 1938.

Defendants are the city of Lincoln and the city council sitting as a board of equalization.

The Lincoln Hotel, a 6-story building situated at the

southwest corner of Ninth and P streets on lots 1 to 7, inclusive, block 44, original city of Lincoln, and the hotel equipment, were valued by the city assessor for the year 1937 as follows: Land, $45,000; improvements, $232,950; personal property in hotel, $28,000; 2-story building on lot 8, same block: Land, $6,000; improvements, $8,300; total, $320,250.

The Capital Hotel, an 11-story building situated at the southwest corner of Eleventh and P streets on lots A and C, block 42, original city of Lincoln, and the hotel equipment, were valued by the city assessor for the year 1937, as follows: Land, $44,900; improvements, $246,400; personal property in hotel, $28,000; total $319,300.

On complaints before the board of equalization that these estimates of values were excessive, evidence was adduced by both sides and resulted in a decision in which the valuations of the city assessor were approved. Assessments conforming thereto were levied and plaintiff took its complaints to the district court by petition in error where the cause was heard on a transcript of the proceedings and a bill of exceptions containing the evidence before the board of equalization. The district court found there was no error in the proceedings of the board and affirmed its decision. For the purposes of review in the supreme court, plaintiff filed in the office of the clerk a transcript of the proceedings before the board of equalization and also the evidence adduced before that tribunal.

Values of the hotel properties, both real and personal, for purposes of taxation, are difficult problems presented by the record for determination. On the issues of values, there is a wide divergence of opinions between plaintiff's witnesses, who do not agree among themselves, and witnesses for defendants. It is clear, however, that the values fixed by the assessor, a capable and conscientious officer, are excessive and cannot be permitted to stand, for reasons hereinafter stated. The questions at issue must be determined by evidence conforming to the statutory rule which follows:

"All nonexempt property in Nebraska is subject to taxation and for that purpose must be valued at its 'actual value,' which means 'its value in the market in the ordinary course of trade.'" Comp. St. 1929, sec. 77-201; *Nebraska State Bldg. Corporation v. City of Lincoln,* 137 Neb. 535, 290 N. W. 421.

For proof that the values found by the assessor were excessive and erroneous, plaintiff relies on evidence and opinions of seven witnesses. In testifying to the values of the Lincoln Hotel properties for the year 1937, the estimates of these witnesses varied from $25,000 to $35,000 on the land; from $75,000 to $125,000 on the improvements or buildings; from $5,000 to $22,500 on the equipment or personal property in the hotel. Among these witnesses were hotel builders, hotel owners, hotel salesmen, hotel operators, experts in hotel values. One as receiver in bankruptcy had formerly sold the Lincoln Hotel to plaintiff. Others had managed it for a time. Each had qualified himself to testify to values. Eugene C. Eppley, president of Eppley Hotels Company, plaintiff, and manager of 19 hotels, including the Lincoln, placed a higher value on the land occupied by it than the other witnesses who testified in his behalf. The evidence does not disclose personal interests discrediting the testimony of these witnesses.

Reasons for discrepancies between values found by the assessor and values estimated by plaintiff's witnesses were explained by the latter in their testimony. Among those reasons are the following: Lincoln Hotel building 50 years old and not adapted to present demands; not suitable for other purposes; building out of date; rooms antiquated with plumbing exposed; radiators tipped; floors uneven; elevators, windows, doors, staircases, roof, boiler rooms, engine rooms obsolete; city moving away from hotel and consequent loss in ground-floor rentals; travel by automobile diverts public and trade to newer hotels in better locations; values decreased by new competition; hotel not now on any main line of travel; arterial highways draw traffic and trade away from Lincoln Hotel; operating loss

in 1937, $29,222.47. The effects of deterioration and changed conditions on values are explained in the evidence.

The city assessor was familiar with an expert's audit of values procured by plaintiff in 1934, showing net values of the Lincoln Hotel properties to be $902,244.63, but that was an audit of book values for the year 1933, was not an audit of "actual value," which means "value in the market in the ordinary course of trade," nor an audit conforming to the statutory standard of values for the purposes of taxation for the year 1937. The audit was of little, if any, probative effect as evidence on the issue before the board of equalization. The estimates of the city assessor and of the witnesses who agreed with him did not conform to proper standards of values for the purposes of this proceeding. The clear preponderance of the evidence proves that the values found by the city authorities are erroneous and in excess of actual values in the market in the ordinary course of trade.

The final judgment will not be directed on this appeal. Owing to the wide discrepancies between the values determined by the assessor and the opinions of the experts who testified on behalf of plaintiff, in view of the unsatisfactory and inconclusive evidence adduced by defendants, the judgment is reversed and the cause remanded to the district court for further proceedings at the costs of the city of Lincoln.

REVERSED.

A. V. SORENSEN, APPELLANT, V. CHIMNEY ROCK PUBLIC POWER DISTRICT, APPELLEE.

293 N. W. 121

FILED JUNE 28, 1940. No. 30793.

1. **Electricity.** Transactions set forth in opinion *held* within the powers of the defendant corporation, and not *ultra vires*.
2. ———. A public power district is liable for the reasonable value of electrical equipment which it purchases and retains, provided such district was clothed with power to purchase such property, notwithstanding the fact that the contract is unenforceable because the power was irregularly exercised.

APPEAL from the district court for Morrill county: GEORGE W. IRWIN, JUDGE. *Reversed, with directions.*

Clarence A. Davis, Daniel Stubbs and *James N. Ackerman,* for appellant.

C. A. Sorensen, contra.

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

EBERLY, J.

This, an action at law, was commenced by plaintiff, A. V. Sorensen, doing business as the Midwest Electric Supply Company, to recover of defendant, Chimney Rock Public Power District, the sum of $2,950.62, with interest, as a balance due for a quantity of merchandise and electrical equipment alleged to have been sold at wholesale and delivered by plaintiff to defendant, and by defendant accepted, received and retained. This claim is set forth in plaintiff's petition in seventeen distinct and separate causes of action, in each of which it is alleged that on a date therein named plaintiff sold and delivered to defendant merchandise and electrical equipment therein specified, of the fair and reasonable value therein set forth, which defendant accepted and received, and since retains. Further, it is alleged that no part of the total amount due upon the seventeen causes of action has been paid, except the sum of $720 in cash, and $478.71 by return of merchandise. Plaintiff alleges that after deducting said total payments, including value of merchandise returned, there remains due to plaintiff from defendant the sum of $2,950.62.

In its answer defendant denies generally the allegations of the petition, and specially denied that the property in controversy was ever "ordered, requested, purchased, received or accepted" by it, and that the purchase of no part thereof was ever authorized by its board of directors, or within the scope of the actual or apparent authority of any officer or employee of the corporation to make; that the alleged purchase of such property, set forth in plaintiff's

petition, was beyond and in excess of the corporate powers of defendant and *ultra vires*. To this answer plaintiff filed its general denial. There was a trial to the court, a jury having been waived, and judgment was entered for defendant. Plaintiff appeals.

Plaintiff is a wholesale dealer in electrical equipment, and defendant is a rural power district, which is incorporated and doing business under the provisions of chapter 86, Laws 1933, as amended by chapter 152, Laws 1937 (Comp. St. Supp. 1937, secs. 70-701 *et seq.*). A "public power district" is defined in this act as: "1. 'Public power district,' * * * means a district organized under this act either as originally organized or as the same may from time to time be altered or extended." Comp. St. Supp. 1937, sec. 70-701. "A district may be created as hereinafter provided in this act and when so created shall be a public corporation and political subdivision of this state, and may sue or be sued in its corporate name." Comp. St. Supp. 1937, sec. 70-702.

Its functions and powers are thus, in part, defined by the terms of its constating act, viz.: It "shall have the following powers and shall be entitled to own, have, or exercise the following rights, privileges and franchises, subject to the limitations, if any, of the petition for its creation and all amendments thereto: (1) Such a district shall have all the usual powers of a corporation for public purposes and may purchase, hold, sell, and lease personal property and real estate reasonably necessary for the conduct of its business. (2) Such a district may own, construct, reconstruct, purchase, lease, or otherwise acquire, improve, extend, manage, use, or operate any electric light and power plants, lines and systems, either within or beyond, or partly within and partly beyond the boundaries of the district, and may engage in or transact business or enter into any kind of contract or arrangement with any person, firm, corporation, * * * or with any body politic or corporate, for any of the purposes above mentioned or for or incident to the exercise of any one or more of the foregoing powers, or for the generation, distribution, transmission, sale, or purchase of

electrical energy for lighting, power, heating and any and every other useful purpose whatsoever, and for any and every service involving, employing or in any manner pertaining to the use of electrical energy, by whatever means generated or distributed, or for the financing or payment of the cost and expense incident to the acquisition or operation of any such power plant or system, or incident to any obligation or indebtedness entered into or incurred by the district." Comp. St. Supp. 1937, sec. 70-706.

In this connection, the articles of defendant corporation expressly provide that it "will receive its principal income from the sale of electrical energy."

The defendant is largely engaged in rural electrification. A careful reading of the record and the evidence contained in the bill of exceptions discloses that, eliminating the formalities of pleading, defendant's real contention is that the various items of merchandise, for the furnishing of which appellant seeks to recover, constitute wiring supplies and equipment suitable for wiring farm premises and for connecting up the wiring and electrical equipment on such premises with the electric light and power distribution system of appellee district. It is also appellee's claim that at its own expense it only constructed its transmission line to each of its farmer customers to and including the meter, and all wiring and equipment beyond the meter, necessary to hook up the transmission line with the farmer, with exception of some cases of a light, was to be installed and paid for by the latter. There is no real contest, as disclosed by the testimony, as to the quantity, quality, and reasonable value of the property in suit, and as to the suitability and absolute necessity thereof for the intended use in connection with hooking up defendant's system with its customers.

A careful examination of the petition for the formation of defendant district discloses that its terms in no manner materially restrict the powers delegated to it by the terms of the quoted statute.

The terms of the statute are broad and inclusive. Not only is defendant empowered to construct, acquire, improve,

use and operate (electrical) lines and systems, but it is expressly authorized to enter into any contract incident to the exercise of the enumerated powers and expressly for the transmission or sale of electrical energy. To connect up defendant's system with its customers is not only a necessary incident, but on that act is dependent the realization of the income which the investment must produce. It constitutes an essential part of defendant's main undertaking. It is clearly embraced in the legislative intent evidenced by this statute.

The general rule, even when corporate powers and privileges are strictly construed, is: "Corporations may transact, in addition to their main undertaking, all such subordinate and connected matters as are, if not essential, at least very convenient to the due prosecution of the former." Brice, Ultra Vires (2d ed.) ch. 3, sec. 2, p. 86.

The act of connecting defendant's transmission lines with its customers' appliances is not only essential and fairly incidental to the powers with which it is vested, but the entire success of its corporate business is dependent upon it. Therefore, the defense of *ultra vires* made by defendant must be denied. *Malone v. Lancaster Gas Light & Fuel Co.*, 182 Pa. St. 309, 37 Atl. 932; *Commonwealth v. Philadelphia Electric Co.*, 300 Pa. St. 577, 151 Atl. 344.

This conclusion is in turn supported by the general principle, often announced, that, when a state, by itself or through its corporate creations, embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling. *Western & Atlantic Railroad v. Carlton*, 28 Ga. 180; *Amstein v. Gardner*, 134 Mass. 4; *United States v. Warren Transportation Co.*, 7 Fed. (2d) 161; *Georgia v. City of Chattanooga*, 264 U. S. 472, 44 S. Ct. 369; *Farnell v. Bowman*, 12 A. C. (Eng.) 643, 649; *Sydney Harbour Trust Commissioners v. Ryan*, 13 C. L. R. 358; *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 Fed. 575. See, also,

Nelson-Johnston & Doudna v. Metropolitan Utilities District, 137 Neb. 871, 291 N. W. 558.

It follows that, the transactions upon which plaintiff relies for recovery being clearly within the powers with which defendant is endowed by the terms of its constating act, the question remaining is, has there been an exercise of such powers to the extent necessary to impose liability upon the defendant power district?

It appears without question that on April 27, 1937, the lawful board of directors of the Chimney Rock Public Power District, in a lawful meeting held, selected C. B. Turner as their "temporary project manager," fixed his salary, placed him in immediate charge of their business, and, in addition, particularly conferred upon him special authority, in the following terms:

"3. That C. B. Turner, as such temporary manager, shall act as the District's representative in all relations with the Rural Electrification Administration, except in a legal and engineering nature, that he shall among other things assist customers with the wiring of their premises and installations of electric and plumbing equipment and do all of the things that may be helpful in building up load and getting the proposed electric light and power system of the district constructed as speedily and efficiently as possible."

The authority necessarily implied by the appointment of a manager has been recognized by this court. *Howe v. Provident Loan & Investment Co.*, 130 Neb. 469, 265 N. W. 255; *Bliss v. Falke*, 125 Neb. 400, 250 N. W. 250; *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480, 64 N. W. 1100; 3 Thompson, Corporations (3d ed.) secs. 1690, 1691, 1696.

At this time this board made their manager, Turner, *ex officio* a member of their executive committee. It also appears that under this appointment C. B. Turner continued to occupy the office of manager of this corporation and to discharge the duties of that position until February 11, 1938. It also appears that, while occupying the position of manager of defendant corporation and while the special

authority above referred to remained in full force and effect, C. B. Turner, in behalf of defendant, ordered and purchased the electrical equipment and merchandise set forth in the seventeen causes of action contained in plaintiff's petition; that plaintiff in good faith accepted such orders and sold the electrical equipment to defendant, and shipped the same to Chimney Rock Public Power District, as consignee, to destinations as directed by Turner, the representative of defendant. At the end of this transportation, each shipment of property was by the carrier conveying the same delivered to, and as directed by, C. B. Turner who, as manager of defendant, accepted and received the same. He immediately carried such electrical equipment and merchandise into what plaintiff's witnesses called defendant's warehouse or defendant's storehouse at Bayard, Nebraska. This building was a shed adjoining and attached to defendant's office, in which the manager performed his duties, and in which the keys of defendant's warehouse were kept, under the manager's control. From this stock of electrical equipment and merchandise, under the general direction of the manager, were taken necessary equipment to complete the necessary connections of the customers of the power district to their premises, the electrical fixtures therein, and the wiring of the same. There is no question as to the delivery and storage of this property. Witness Burnham, who is a director and treasurer of defendant district, as well as acting manager, testifying for defendant, says that he had "seen some of this material in the warehouse there;" and the undisputed evidence is that some of the board of directors even issued some of this material out for use.

The total amount of property, thus purchased and delivered, aggregated $4,149.43. Payments made and certain items of property returned reduced the amount due, at the time of the institution of suit, to $2,950.62. Since the time this action was begun, $599.66 had been paid, there then remaining due, according to plaintiff's brief, the sum of $2,350.96. Electrical equipment and merchandise representing this amount were delivered to and received by defend-

ant, but not paid for. None of it has ever been tendered back by defendant. Defendant's exemption from liability is substantially based on the proposition that all corporate powers of its public power district are vested in and can only be exercised by its board of directors; that the officers of a public power district are agents of the state; and that the requirements of law as to entering into contracts for purchase were not complied with. Conceding, *arguendo* only, the claims thus made, still the facts undisputed in the record bring the case clearly within the principle that a district is liable for the reasonable value of electrical equipment which it purchases and retains, provided such district was clothed with power to purchase such property, notwithstanding the fact that the contract is unenforceable because the power was irregularly exercised. *Western Chemical Co. v. Board of County Commissioners,* 130 Neb. 550, 264 N. W. 699; *Omaha Road Equipment Co. v. Thurston County,* 122 Neb. 35, 238 N. W. 919; *Stickel Lumber Co. v. City of Kearney,* 103 Neb. 636, 173 N. W. 595; *Simmons v. Farmers Union Cooperative Ass'n,* 114 Neb. 463, 208 N. W. 144.

Defendant's authorized manager, in its behalf, purchased, received, and retained property suitable for its use in the exercise of its statutory powers, in transactions none of which were *ultra vires.* The property in suit, defendant has either used in promoting its legitimate business, or still retains, and has never tendered back. The value of such property is, in effect, conceded.

We, therefore, conclude that the trial court erred in its denial of a recovery. The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment as prayed.

REVERSED.

MELVIN L. RALSTON, ADMINISTRATOR, APPELLANT, V. LEE W. MARGET ET AL., APPELLEES.
293 N. W. 124

FILED JUNE 28, 1940. No. 30866.

1. **Gifts.** To make a valid and effective gift *inter vivos*, there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee.
2. ———. One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Waring & Waring, for appellant.

Sloans, Keenan & Corbitt, contra.

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

PAINE, J.

Plaintiff, who is appellant, filed petition to foreclose a real estate mortgage. Defendants denied that they owed the note which the mortgage was given to secure, alleging that it was voluntarily canceled, satisfied, forgiven, and destroyed by the payee, Lillian I. Marget. Trial court found generally for the defendants, and ordered said mortgage released of record. Plaintiff appeals, and alleges that the findings and judgment are not sustained by the evidence.

The petition shows that the defendants, Lee W. Marget and his wife Nellie, gave a promissory note for $4,000 to Lillian I. Marget, the mother of Lee W. Marget. Said note was dated March 1, 1928, and matured March 1, 1933, with interest at 5 per cent. To secure the payment of this note, the makers gave a first mortgage on 80 acres of land in Fillmore county.

The petition further alleges that Lillian I. Marget kept said note and mortgage in a safety deposit box in the

Farmers State Bank of Fairmont, Nebraska; that after her death on December 30, 1938, her son, Lee W. Marget, was appointed administrator of her estate, but later, upon his resignation, Melvin L. Ralston, the plaintiff, was appointed administrator *de bonis non,* and charges that Lee W. Marget has refused to turn over said note and mortgage to him. Plaintiff alleges that the maker has never paid any part of the principal sum due thereon, and the same is due and payable to his mother's estate.

The defendants in their answer allege that the note was voluntarily canceled, satisfied, forgiven, and destroyed by said Lillian I. Marget, with the intention of canceling the debt, and that she intended to release the mortgage of record, but failed to do so, by mistake and oversight. Wherefore, the defendants ask that the petition be dismissed, and plaintiff be directed to release the mortgage, and, in default thereof, that the decree itself shall satisfy and release the mortgage. The trial court granted this prayer of the defendants' answer in full.

The facts disclosed by the evidence show that the mother, Lillian I. Marget, left two living sons, Lee and Chester, and the two children of a deceased son, Ward. Lee W. Marget was called by the plaintiff, and testified that his mother kept the note and mortgage in the lockbox in the bank; that all of her papers were kept in that lockbox, and that it was his lockbox. Attorney Waring called his attention to the fact that he had been sworn as a witness in the county court, in the hearing upon this estate, and his evidence had there been taken by a stenographer, and he was asked if he did not testify at that time as follows: "Where was it after you signed it?" and if he did not answer, "We had it in this box." His answer to that question in the district court is that his mother had it in the lockbox that both of them used.

Question: "Was this question asked you in the county court, and did you respond as follows: 'When was the last interest that you paid on the mortgage?' And did you answer, 'I forget the exact date, but it was in 1938?' A. I

don't remember that. * * * Q. Was this question asked you: 'Did you pay all the interest due in 1938?' And did you answer, 'Not all of it?' A. I do not recall that."

In the inventory filed July 20, 1939, by Lee W. Marget as administrator of his mother's estate, he shows that all of the real and personal property she left consisted of the west one-half of lot 4, block 2, Linwood addition to the city of Lincoln, of the value of $100.

After he had been appointed administrator of his mother's estate, he said that he made a search for the note and mortgage in the lockbox and he did not find them; that he looked through all of her papers and personal belongings, and did not find the note and mortgage. He testified that he had not paid the note to his mother, or to any one else since her death.

It appears from the evidence that for the last eleven months his mother lived she was taken care of by Mrs. McAvoy, who was a cousin of Lee W. Marget, who testified that after his mother's death Mrs. McAvoy gave him an envelope containing some papers, but he does not recall what was in the envelope. Upon his memory being refreshed, he admitted there was a life insurance policy in the envelope given him by Mrs. McAvoy for $400; that it was made out to him, and that he collected the money, and he admitted that it was understood that this insurance policy was to cover her burial expenses, but that he had filed a claim against his mother's estate in the county court for telegrams, "Thank-you" cards, funeral expenses, and also for his expense and fee as administrator, in the total amount of $297.17, and this was admitted as bearing upon the witness' credibility. It was stipulated that this claim was filed against the estate August 28, 1939, and that he had collected the $400 from the Metropolitan Insurance Company in January, 1939.

Dr. Albert A. Ashby testified for the defendants that he was the physician who took care of Mrs. Marget; that he had conversations with her about Lee's affairs at different times, in his office or wherever she was staying; that he

cannot recall the time of the conversations, except that it was during the last three or four years of her life. He is then asked the question, "You may relate to the best of your ability what Mrs. Marget said about this, about Lee's affairs and hers." The answer was: "Well, Mrs. Marget was worried about her, more or less about her financial condition, ready cash, and of course, she would come in and discuss about the payment of her bill and care and so forth, and she told me if anything went wrong I was to call Lee, that he was supposed to come in and look after it, which he did, and then when she was,—when—one time when she was sick she was worried about financial conditions and she—." The doctor was then interrupted and asked, "Approximately how many years ago do you think it was? A. Three or four years." He then continued his answer: "Why, she said she had everything straightened up, that I didn't need to worry about my bill, that she—that Will had the farm, was to have the farm, and that she had done a great deal for the boy out west and she thought he had had enough cash to make up his share, and that she had some property in Lincoln and that was to go to the—her Lincoln relatives." However, there is no evidence of Dr. Ashby, that the court was able to find, relating directly to the $4,000 note and mortgage.

Francis F. Putlitz testified that he was president of the Farmers State Bank of Fairmont, and acted as a notary for the mortgage in question, which he acknowledged on March 1, 1928. He testified that some time in 1933 or 1934 Lee W. Marget and his mother came into the bank and took out the lockbox with the papers in it, and she told Lee that he did not have to pay the note. His best recollection is that they were in the back room of the bank. He does not have any recollection of the exact language, or anything else that took place. This testimony as to a conversation heard in the back room of the bank between the mother and her son occurred after the note matured in 1933, and the mother may have indicated that her son need not pay the past-due note at that time.

The evidence of Mrs. Olive McAvoy, called by the plaintiff on rebuttal, brought out the following facts: That she lived in Fairmont, was a cousin of Lee W. Marget, and that Lillian I. Marget was her mother's only sister; that defendant Nellie Marget made arrangements to bring her mother-in-law over, and that she lived there from January 18, 1938, to her death on December 30, 1938, approximately 49 weeks; that the son, Lee, visited her a few times when she first came there; that his visits grew less frequent, and from the last of May until the first of September he never came to see her at all; then in November his mother sent for him to get her glasses fixed, and he saw her a time or two before her death.

Witness said that Lillian I. Marget often talked with her with reference to the money that her son Lee owed her, but he never offered to pay one cent to take care of her all the time she was at Mrs. McAvoy's home. Witness testified that her aunt had papers in a Manila envelope that she kept by her until her death; that one of the things in the envelope was a funeral benefit insurance policy, and another was an insurance policy upon her house, and that there were other papers in this envelope, but she did not know what they were because she never examined them, and she handed this large Manila envelope to Lee W. Marget when he asked for it within an hour after his mother's death.

On cross-examination she admitted that she filed a claim for $96 against the estate, and when asked the question, "You don't have any great amount of love for your cousin Lee?" her answer was, "Not any too much, considering the way he treated his mother, I do not."

Lee W. Marget testified on cross-examination that the $4,000 which he borrowed from his mother was money that she received from her father's estate, and was not money she received from her husband's estate. On direct examination, when asked if he had ever paid this $4,000 note, he answered, "No, sir." He was asked the question, "We want to know why you didn't pay it?" and the answer of the witness was: "One reason I didn't have the money to pay it.

Q. Was there any other reason why you didn't pay it? * * * A. I wasn't supposed to pay it." And another answer was: "My mother said that note was to be canceled, I wasn't to pay it. * * * Q. When did she say that? * * * A. Oh, some five years ago."

It is rather unusual, but the same counsel appearing in the case at bar were counsel in the case of *Wilkins v. Skoglund*, 127 Neb. 589, 256 N. W. 31, but were contending on opposite sides of the same proposition, and in that case this court held: "When the payee voluntarily destroys a promissory note with the intention of canceling the debt, he thereby discharges the obligation under that provision of the negotiable instruments act which states, in effect, that a negotiable instrument may be discharged by intentional cancelation thereof by the holder, although another provision of said act declares that the holder may renounce his rights under the instrument, but that a renunciation must be in writing."

In *Henley v. Live Stock Nat. Bank*, 127 Neb. 857, 257 N. W. 244, in discussing the gift of a savings account evidenced by a bank pass-book, this court held that to make a valid and effective gift *inter vivos* there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee. See, also, *Smith v. Pacific Mutual Life Ins. Co.*, 130 Neb. 501, 265 N. W. 534; *Andersen v. Luikart*, 127 Neb. 256, 255 N. W. 18; 12 R. C. L. 932, sec. 10.

"One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory." *Hild v. Hild*, 135 Neb. 896, 284 N. W. 730.

There appears to the court to be but one question in this case: Did Mrs. Marget forgive the $4,000 note and mortgage given to her by her son Lee?

It appears from the evidence that the state needed a little strip of land for highway No. 6 from the 80 acres belonging

to Lee W. Marget and wife, who gave a warranty deed therefor to the state of Nebraska. Exhibit No. 5 is a partial release of the $4,000 mortgage held by the mother, in so far as it affects the 2.441 acres of land deeded by Lee W. Marget to the state of Nebraska for the highway, and the last clause in this partial release, which was made on October 17, 1936, reads as follows: "The said Lillian Marget retains her lien upon the remainder of the premises described in said mortgage to secure the principal sum unpaid, with all interest on the same remaining unpaid, according to the terms and conditions of said mortgage;" same being acknowledged before the deputy county clerk of Fillmore county, and recorded in book 83 of mortgages, page 475.

If, as claimed by the defendants, the mother made the statement in 1933 or 1934, in the back room of the bank, which was overheard by the banker, it is certainly true that in her partial release of the mortgage made in 1936 she declared under oath that the remainder of the land should be held for the payment of the $4,000 mortgage, which proves that she had not at that time forgiven the payment of any part of this mortgage. The evidence clearly indicates that her son Lee did not understand in 1933 or 1934 that his mother had forgiven the entire debt at that time, for he paid her interest on the loan up to 1938, in which year he paid a portion of the interest on the loan, and this voluntary payment of interest by him, coupled with the first answer he made as to why he had not paid the note, that he did not have the money, is very important.

The decision in this case depends upon the sufficiency of the proof that the mother forgave the son the payment of this $4,000. From a very careful reading of the bill of exceptions and an examination of the exhibits in the case, the court has reached the conclusion that the claim of the defendants was not established by clear and convincing testimony, and the holding of the trial court to that effect is hereby

REVERSED.

ALBERT A. HASTINGS V. STATE OF NEBRASKA.
293 N. W. 236

FILED JUNE 28, 1940. No. 30494.

Criminal Law. Where an information contained two counts, the first one charging defendant with kidnaping, the second with assault with intent to commit great bodily harm, and there was no evidence to support the charge set forth in the first count, it was error, which was calculated to confuse and mislead the jurors, and prejudicial to the defendant under the information, to submit to the jury the question of the guilt or innocence of the crime charged in the first count, although he was not convicted of such crime.

ERROR to the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Hoagland, Carr & Hoagland and *Beeler, Crosby & Baskins,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Milton C. Murphy, contra.*

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

MESSMORE, J.

The defendant, Albert A. Hastings, together with Clyde D. Macomber and Joseph R. Baskins, was charged in the district court for Lincoln county in the first count of the information with the kidnaping of the complaining witness, Sam I. Pappas, November 21, 1937; in addition thereto with robbing him of $275 (this count was subsequently dismissed); and in the third count with making an assault on him with intent to inflict great bodily injury. Upon a separate trial of Albert A. Hastings, the jury found him guilty of assault upon Sam I. Pappas with intent to inflict great bodily injury, and for this felony he was sentenced to serve a term in the penitentiary. As plaintiff in error, defendant Hastings has presented for review the record of his conviction.

The case of *Macomber v. State,* 137 Neb. 882, 291 N. W. 674, discloses the facts which constitute the basis of the

charge of kidnaping as filed against this defendant. We shall refrain from unnecessarily lengthening this opinion by a detailed recital of the facts, and for a statement of the facts refer to *Macomber v. State, supra,* especially so as to the facts stated therein which have been held by this court to be insufficient to prove beyond a reasonable doubt the crime of kidnaping, within the meaning of section 28-417, Comp. St. 1929.

The offense of kidnaping, as charged in the information, was submitted to the jury by the trial judge in the instant case. The following authorities are apparently conclusive of the point of law involved in the instant case and have not been modified or changed from the pronouncement of the rule:

In *Botsch v. State,* 43 Neb. 501, 61 N. W. 730, this court held: "Where an information contained two counts, one of assault with intent to commit murder and the second of an assault with intent to do great bodily injury, and there was no evidence to support the charge set forth in the first count, it was error which was calculated to confuse and mislead the jurors, and prejudicial to the parties on trial under the complaint, to submit to the jury the question of the guilt or innocence of such parties of the crime charged in the first count, although they were not convicted of such crime." See, also, *Russell v. State,* 66 Neb. 497, 500, 92 N. W. 751; *Runyan v. State,* 116 Neb. 191, 195, 216 N. W. 656; *Pembrook v. State,* 117 Neb. 759, 222 N. W. 956; *Broquet v. State,* 118 Neb. 31, 223 N. W. 464; *Clark v. State,* 131 Neb. 370, 268 N. W. 87.

In the instant case, in instruction No. 2, the court set forth the information containing the charge of kidnaping; in instruction No. 4 informed the jury that the state must establish beyond a reasonable doubt certain elements of the offense of kidnaping in order to convict the defendant of the offense; and in instruction No. 11 informed the jury as to the statutory conception of the offense of kidnaping. It is therefore obvious that the trial court did submit to the jury the offense of kidnaping.

The defendant Hastings moved the court to dismiss count one of the information, being the count involving kidnaping, upon the ground that the evidence was insufficient, as stated by the special prosecutor in his opening statement, to warrant the court in submitting the offense of kidnaping to the jury, and that to allow evidence of it to be taken would be highly prejudicial. The court overruled this motion. At the close of the state's evidence, defendant's counsel moved the court to direct a verdict in defendant's favor on count one of the information, for the reason that the evidence offered by the state would in no manner warrant returning a verdict of kidnaping, as charged in count one of the information. This motion was overruled. At the close of all of the evidence, defendant's counsel again moved the court to instruct a verdict upon count one of the information, for the reason that the evidence adduced on the trial of the case was insufficient to warrant the submission of the crime of kidnaping to the jury. This motion was overruled. The submission of the offense of kidnaping, under the circumstances, constitutes prejudicial error.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

PAINE, J., dissents.

ROSE, J., dissenting.

In my opinion the evidence of kidnaping was sufficient to justify the submission of the case to the jury on that issue and I dissent from the reversal on that ground.

EBERLY, J., joins in the dissent.

CIRINO MICELI, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.

293 N. W. 112

FILED JUNE 28, 1940. No. 30770.

1. **Insurance.** If an insured's ability to do substantially and practically any of the material acts necessary for the transaction of his usual business or vocation is affected, or if, while attempting

to do all of such acts, he is jeopardizing his health and safety, or ought not actually to be so engaged, he will be held to be totally disabled within the meaning of a disability provision in an insurance policy.

2. ———. The courts will not in such a situation penalize one who heroically or as matter of financial necessity attempts to carry on, if he is not actually able to do so, or if he ought not soundly to be making the attempt.

3. ———. Denial of liability for a particular risk, loss, or disability, under a policy of insurance, is a waiver of the right to insist upon a requirement in the policy for the furnishing of proof thereof.

4. Trial. A judgment will not ordinarily be reversed for refusing to give tendered instructions, where other instructions given by the court fairly and correctly cover the issues involved in the tendered instructions.

5. Appeal. Where the giving of an instruction is assigned as error, but there is no discussion of the assignment in the briefs, and no error is readily apparent on the face of the instruction, the assignment will not be further reviewed.

6. ———. Any error in taxing an attorney's fee or in the amount allowed must first be presented to the district court for correction, before it will be reviewed on appeal.

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

Brown, Fitch & West, for appellant.

Wear, Boland & Nye and *Robert E. McCormack, contra.*

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

JOHNSEN, J.

Plaintiff recovered a judgment for $1,550.24, on a group insurance policy, with a total and permanent disability provision, issued by defendant upon the lives of the employees of the American Smelting & Refining Company. The court also allowed an attorney's fee of $350. Defendant has appealed.

The errors alleged are (1) the denial of defendant's motion for a directed verdict on the ground that plaintiff was not totally and permanently disabled at the time his insur-

ance coverage ceased; (2) the refusal to give certain instructions tendered by defendant; (3) the giving of a particular instruction on the trial court's own motion; and (4) the excessiveness of the attorney's fee allowance.

Defendant's principal contention is that the evidence was insufficient to establish total and permanent disability on the part of plaintiff, within the meaning of the policy, and that its motion for a directed verdict should therefore have been sustained. The disability provision of the policy is as follows: "If proof shall be furnished the Society that any employee insured under this policy has, before having attained the age of 60, become wholly disabled by bodily injuries or disease, and will be wholly and presumably permanently prevented thereby for life from pursuing any and all gainful occupation, the Society will pay six months after receipt of such proof * * * the full amount of the insurance on such life." The policy further provided that the insurance as to any employee should automatically cease upon the termination of his employment.

The evidence shows that the smelting company dropped plaintiff as an employee of its Omaha plant on April 5, 1932. He was actually laid off on March 31, 1932, when the plant was being temporarily shut down. During the twenty-five years that he had worked at the smelter, there had been other temporary shut-downs, but each time he had been called back to work, in his turn, when the plant was reopened. On this occasion, the plant reopened about a month after the shut-down, but, while other employees, younger in service than plaintiff, were returned to work, he was told that they had nothing that they could give him to do.

He contends that the reason his employment was permanently terminated was that, because of arthritis and lead poisoning, he was no longer fit to do the kind of work which the plant required and in which he had for so many years been engaged. It appears that, until 1931, he had worked at heavy manual labor, in what was called the "kettle gang." That year he was shifted to lighter work, such as unloading automobile battery plates, where he was placed on a piece

work basis. He claims that, even at this lighter work, he was unable to keep up his end with the other men, and that he frequently was obliged, during working hours, to go home and go to bed. The only employment he had ever known, from the time he immigrated to this country, was at the smelter, and when he saw that the plant had reopened, he says that he sought to get the personnel officer to allow him to come back and to give him some light work to do, such as distributing towels about the plant.

There is evidence that plaintiff, for a number of years, had been suffering from progressive arthritis, and also some indications that he had chronic lead poisoning. The smelter's dispensary records show that for several years he had been carrying a blue line on his gums. In 1927 an assistant personnel man and safety director had made a notation in the dispensary records that, in view of his lead absorption, plaintiff was a bad plant risk and should be released. In 1928 he had made another notation, suggesting that plaintiff should be released because of a pronounced case of lead poisoning. In 1931 there was a further notation that plaintiff ought to be gotten rid of as soon as it was conveniently possible. It appeared also that plaintiff had been troubled with constipation for a long time, and was suffering abdominal pains, and that he had pains in his legs and arms on motion, all of which were shown to be symptoms of lead poisoning. As early as 1927, he had begun to develop arthritis, which had grown progressively worse, with calcium deposits throughout the joints of the hands, and, in 1932, the physician of the smelter had been giving him repeated injections, for a period of ten to twelve weeks, prior to the termination of his employment.

From the testimony of plaintiff, his wife, and his daughter, it appeared that in 1931 the arthritis had progressed to the point where the knuckles and the other joints in his hands were hard and swollen, and where he had constant pains in his hands, arms and shoulders. He was unable to close his hands, on attempting to grip. The movements of his legs were affected. He vomited and had dizzy spells,

and would come home from the plant at times, during working hours, and would go to bed. A medical expert, whom he employed to examine him in July, 1932, said that he had multiple arthritis to the degree that he was totally and permanently disabled from doing any work, and that such disability, in his opinion, had existed for at least six to twelve months prior to his examination. This doctor further testified that, in whatever attempts plaintiff had made to do manual labor at the plant that spring, "he was overstepping his distance, he was too ambitious to hold his job probably. A lot of times a working man like that might carry on." One of the assistant personnel men of the smelter, whose connection, however, had since been severed, declared that, in 1931, although plaintiff was kept on the pay roll, he was not actually able to do his share of the work. There was testimony also that he had not done and was not able to do any work since his release by the smelter.

There was evidence, of course, on the part of defendant, controverting the testimony as to plaintiff's physical condition and his total disability, which it is unnecessary to detail. The testimony of plaintiff's witnesses, if believed, was such that the jury could properly find that, from 1931, until his employment was terminated, and thereafter, he was unable physically to do the kind of work that had been his sole occupation for approximately twenty-four years; that, because of his condition, the smelter had given him some lighter work for a year or so before he was dropped from the pay roll; that, even this lighter work, he had been unable to carry on satisfactorily, and that he could not hold up his end with the other men; and that, on April 5, 1932, and all times subsequent thereto, he was so disabled by disease that he could not do the essential tasks of a laborer, which was the only occupation for which he was fitted. This was all that was required to create a liability upon the policy.

We have repeatedly held, though in varying language, that a liability will be held to exist under a total and permanent disability provision in an insurance policy, where

there is a disability that renders the insured unable to perform the substantial and material acts of his vocation in the necessary manner. *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276; *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850; *From v. General American Life Ins. Co.*, 132 Neb. 731, 273 N. W. 36; *Bennett v. Metropolitan Life Ins. Co.*, 136 Neb. 785, 287 N. W. 609; and other cases. In *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397, which involved a substantially similar group policy, also issued by the present defendant, it was said: "The term 'total disability' is rarely, if ever, given a strictly literal meaning of absolute helplessness or entire physical disability, but rather inability to do substantially, or practically, all material acts for the transaction of insured's business." In *Schultz v. John Hancock Mutual Life Ins. Co.*, 134 Neb. 885, 280 N. W. 165, recovery was allowed upon a group policy, insuring a meat salesman as, and while he remained, an employee of Armour & Company, although he had been discharged by Armour & Company, and had thereafter worked as a salesman for another packing firm, where the evidence showed that, before he was discharged by Armour & Company, he was suffering from leukemia, which made it necessary for him to come home occasionally during the day and rest for a time before continuing his work. If an insured's ability to do substantially and practically any of the material acts necessary for the transaction of his usual business or vocation is affected, or if, while attempting to do all of such acts, he is jeopardizing his health and safety, or ought not actually to be so engaged, he will be held to be totally disabled within the meaning of a disability provision in an insurance policy. The courts will not in such a situation penalize one who heroically attempts to carry on, if he is not actually able to do so, or if he ought not soundly to be making the attempt. *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903. The trial court properly overruled defendant's motion for a directed verdict in this case.

The principal complaint made as to the refusal of the trial court to give instructions tendered by defendant relates to the question of the furnishing of proof of plaintiff's disability. The policy provided for payment of disability benefits, "If proof shall be furnished the Society that any employee * * * has * * * become wholly disabled by bodily injuries or disease." There is no requirement for a preliminary notice and no specific limitation as to the time within which proof of disability must be furnished. Defendant claimed that no notice or proof of disability had been furnished it prior to the institution of this suit. Plaintiff alleged that defendant had expressly denied liability on the ground that he was not totally disabled, and that it thereby had waived any provision in the policy that required the furnishing of formal proof. His evidence showed that, shortly after the termination of his employment, his wife and daughter had gone to the branch office which defendant maintained in Omaha, to inform defendant of plaintiff's disability and to make claim upon the policy, and that one of defendant's representatives, after taking the certificate into another office, returned and declared that plaintiff was not disabled, and accordingly denied liability upon the policy. The rule is well settled that a denial of liability for a particular risk, loss, or disability, under a policy of insurance, is a waiver of the right to insist upon a requirement in the policy for the furnishing of formal proof thereof. *Serven v. Metropolitan Life Ins. Co.*, 132 Neb. 637, 272 N. W. 922; *Ericson v. Mutual Benefit Health & Accident Co.*, 122 Neb. 580, 241 N. W. 273.

Instructions No. VIII and No. IX requested by defendant, on the question of notice, claim, and denial of liability, were adequately covered in instruction No. IV, given by the court on its own motion. Indeed, had the jury returned a verdict against plaintiff, he might possibly have claimed that the instruction given was less favorable to him than he was entitled, in that it was not explicit on the issue of waiver. As to instructions Nos. XIV, XVI, and XVIII tendered by defendant on the question of total disability, de-

fendant has not assigned as error the giving of instruction No. X in which the trial court attempted to define the term total disability, and in the absence of any claimed error therein, that definition was adequate. A judgment will not ordinarily be reversed for refusing to give tendered instructions, where other instructions given by the court fairly and correctly cover the issues involved in the tendered instructions. *Campbell v. Slater*, 127 Neb. 231, 254 N. W. 897.

The giving of instruction No. XIII by the trial court is assigned as error, but the assignment is not further specifically discussed. In the absence of such discussion, where no error is readily apparent on the face of the instruction, the assignment will not be further reviewed.

It is claimed that the attorney's fee allowance of $350 was excessive. There is some indication that the case has been tried twice in the district court. But, however that may be, the transcript does not show that the question ever was presented to the trial court for reconsideration. Any error in taxing an attorney's fee or in the amount allowed must first be presented to the district court for correction, before it will be reviewed on appeal. *From v. General American Life Ins. Co., supra.*

The judgment of the district court is affirmed and an additional attorney's fee of $100 will be taxed as costs in this court.

AFFIRMED.

The following opinion on motion for rehearing was filed November 16, 1940. *Former opinion adhered to and rehearing denied.*

Insurance. Inability to do any of the material acts necessary for the transaction of an insured's usual business or vocation, which prevent the substantial and practical conduct or pursuit of such business or vocation, is equivalent, in insurance law, to inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner.

Brown, Fitch & West, for appellant.

Wear, Boland & Nye and *Robert E. McCormack, contra.*

Kennedy, Holland, De Lacy & Svoboda, amici curiæ.

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

JOHNSEN, J.

Our previous opinion in this case, reported *ante,* p. 367, 293 N. W. 112, declares that, "If an insured's ability to do substantially and practically any of the material acts necessary for the transaction of his usual business or vocation is affected * * * he will be held to be totally disabled within the meaning of a disability provision in an insurance policy."

On motion for rehearing, it is argued that this statement of the rule is in conflict with *Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841, 248 N. W. 397, *McCleneghan v. London Guarantee & Accident Co.,* 132 Neb. 131, 271 N. W. 276, and *Woods v. Central States Life Ins. Co.,* 132 Neb. 261, 271 N. W. 850. The *Hamblin* case holds that "Total disability, preventing the insured from pursuing a gainful occupation, exists when the injured party is unable to perform the substantial duties of a given occupation." In the *McCleneghan* case we held that total disability, in insurance law, is "such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way." The *Woods* case declares that total disability, under a policy of insurance, "means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner."

The statement of the rule in our opinion in this case is in no way a departure from these previous expressions. Inability to do any act necessary for the transaction of the insured's usual business or vocation, which prevents the substantial and practical conduct or pursuit of such business or vocation, is, to us, inability to "perform the substantial duties of a given occupation," or "to perform the substan-

tial and material acts of his business or occupation in the usual way," or "to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner." It is not important how many individual acts—whether one or several—the insured is prevented from performing, but whether the thing or things which he is unable to do keep him from substantially and practically conducting or pursuing his previous business or vocation. If his ability to perform any such act or acts is thus impaired, then he is unable to do all the substantial and material acts necessary to the prosecution of his business or occupation in his customary and usual manner.

OPINION ADHERED TO AND REHEARING DENIED.

R. A. BOEHMER, ADMINISTRATOR, APPELLEE, V. HENRY HEINEN ET AL., APPELLANTS.
293 N. W. 237

FILED JULY 5, 1940. No. 30829.

1. **Executors and Administrators.** Where an administrator with the will annexed has been appointed by a court of competent jurisdiction in this state, such administrator is the only person entitled to commence and prosecute an action for the foreclosure of a mortgage belonging to the estate on real estate in this state.
2. **Mortgages.** In an action for the foreclosure of a real estate mortgage given to secure the payment of a promissory note, the possession and production of the note for cancelation is not in all cases an absolute requirement as a basis for a decree.
3. ———. It is, however, necessary that the plaintiff prove ownership of the debt, represented by the note, and that the same has not been sold, assigned, or otherwise disposed of.

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

Mockett & Finkelstein, for appellants.

Boehmer & Boehmer, contra.

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

SIMMONS, C. J.

This is an action to foreclose a real estate mortgage. Plaintiff is the administrator with the will annexed of the estate of Hinrich Heinen. The defendants Henry Heinen and wife are the owners of the premises involved, subject to two mortgages; the defendant Martel State Bank is the owner of a junior mortgage; the defendant George Asseln is alleged to be the executor of the Hinrich Heinen estate appointed in Germany.

Plaintiff's petition, in the usual form, alleges his official capacity; that the note and mortgage were executed and delivered to Hinrich Heinen; that the same has not been paid; that he as administrator is entitled to the assets of the estate and is the only person entitled to collect the same; that Hinrich Heinen died in Germany in 1935; that Asseln was appointed executor in Germany; that the note and mortgage are in the possession of Asseln and he has refused to surrender the same to plaintiff. Plaintiff prays for the foreclosure of the same, and that the defendants be barred from any title or interest in, or lien upon, said premises. Defendants Henry Heinen and wife answered by a general denial. Defendant bank answered by general denial and cross-petitioned to foreclose its mortgage. Asseln did not appear in the action. It is assumed in the briefs that service by publication was had upon him as provided by section 20-517, Comp. St. 1929. The transcript does not show that service.

The trial court entered a decree foreclosing the mortgage, decreeing it to be a first lien, foreclosing defendant bank's mortgage, decreeing it to be a second lien, providing that, if the amount found due be not paid within 20 days, the premises be sold, barring defendant Asseln of all interest in, or lien upon, the premises, and enjoining him from instituting any suit or action upon the note or mortgage foreclosed by plaintiff. Defendants Heinen appeal.

Defendants contend that the foreign executor is the only party who can bring the action to foreclose the mortgage.

Section 30-807, Comp. St. 1929, provides:

"An executor or administrator duly appointed in any other state or county may commence and prosecute any action or suit in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may be permitted to sue: Provided, in case any executor or administrator shall have been appointed in this state, such person only shall be entitled to commence and prosecute actions or suits within this state in his capacity as such executor or administrator."

It is patent that any action to foreclose the mortgage must be brought in Lancaster county (see Comp. St. 1929, secs. 20-401, 20-2139). An administrator has been appointed in this state. Assuming that the note and mortgage are assets of the estate, it necessarily follows that such administrator is the only person entitled to commence and prosecute an action for the foreclosure of the mortgage. The statute is controlling. Discussions of this subject may be found in 24 C. J. 1119; 21 Am. Jur. 857, sec. 868; *Smith v. Normart*, 51 Ariz. 134, 75 Pac. (2d) 38, 114 A. L. R. 1456, 1461.

The defendants' general denial put plaintiff upon proof of the material allegations of his petition. Plaintiff proved that he was appointed administrator with the will annexed of the estate of Hinrich Heinen; that the note and mortgage were executed and delivered in 1923; that the debt was due and payable in 1933; that subsequent to 1923 the mortgagee removed to Germany, taking the note and mortgage with him; that defendant bank collected interest on the note down to and including that due in 1931 and transmitted it to the mortgagee in Germany, and that two additional payments were made in 1935 and 1936 and were transmitted to the mortgagee in Germany. Plaintiff testified that the defendant Henry Heinen on numerous occasions had admitted the indebtedness and his liability thereon. The defendant did not deny that statement, although represented by counsel at the trial. The proof is sufficient as to the execution and delivery of the note and mortgage.

Plaintiff on cross-examination admitted that he did not have and never had had the note and mortgage in his pos-

session; and did not know whether it had been assigned or sold by the mortgagee, although he was positive in his own mind that it had not been disposed of by the mortgagee or by any one representing him. This conclusion is based upon correspondence to which reference will hereafter be made.

Defendants contend that before a foreclosure decree can be entered, it is necessary that the note be offered in evidence for the purpose of cancelation, and that the defendant mortgagors cannot be called upon to pay the same until that is done. The danger of suit by a third person is present even in cases where the evidence in a foreclosure action discloses that the note has been lost and foreclosure is decreed. The possession and production of the note for cancelation is not an absolute requirement as a basis for a decree. See *Western Securities Co. v. Naughton*, 124 Neb. 702, 248 N. W. 56. When and if it is established by competent evidence that the note remained in the hands of the mortgagee until his death and is now in the possession of his executor in Germany, we think, under the circumstances here existing, that proof on that point is sufficient to support the decree without the production of the note itself for cancelation.

Over defendants' objection that no proper foundation was laid, there was received in evidence on behalf of plaintiff: (1) Two typewritten exhibits purporting to be copies of translations of letters from Asseln to plaintiff, referring to the death of Hinrich Heinen in 1935, this debt, and the possession of the papers; (2) a typewritten exhibit (undated) purporting to be a copy of a translation of a letter from one Buppelmann to one Welk (not otherwise identified), referring to this indebtedness; (3) a typewritten exhibit purporting to be a copy of a translation of a letter from one Buppelmann to the American Consulate at Bremen, regarding property matters, but making no reference to this estate in the body thereof; (4) a typewritten statement purporting to show this indebtedness to have been inventoried in the estate of Heinen in Germany. Plaintiff further offered a typewritten exhibit purporting to be a copy of the

will of Heinen and the probate proceedings thereon in Germany. This last exhibit is not authenticated as required by section 20-1288, Comp. St. 1929. No foundation whatever was laid for the introduction of these exhibits, and their admission was error. Plaintiff has failed to prove material allegations of his petition, and in particular has failed to prove the ownership and possession of the note and mortgage by the estate of Hinrich Heinen. Defendants assign as error that the decree is not supported by the evidence. The assignment is good. We are not at liberty to assume that those facts were conceded at the trial as they do not appear in the record. We recognize the difficulties involved in securing this proof, but the failure to prove material allegations which are denied cannot be excused for that reason.

The case will accordingly stand reversed and remanded for a new trial as to all issues presented.

REVERSED.

MARK O'SHEA, APPELLEE, V. HERMAN ZESSIN, JR., ET AL.: R. A. JOHNSON, GUARDIAN AD LITEM, APPELLANT.
293 N. W. 240

FILED JULY 5, 1940. NO. 30836.

1. Wills. Where a testatrix by her will devised a life estate in real property to her son, and, at his death, to his "heirs at law," the word "heirs" is to be taken as a word of limitation and the son becomes vested with a fee simple title to the property devised.
2. ———. The rule above stated is a rule of property in this state and does not yield to the expression of intention of the testator.

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

R. A. Johnson, for appellant.

Moyer & Moyer and *R. J. Shurtleff, contra.*

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

SIMMONS, C. J.

This case presents this question: Did Herman W. Zessin receive an estate for life or an estate in fee simple under a clause of his mother's will which provided:

"Having made partial provisions heretofore for all my children with the exception of my son Herman W. Zessin, I give and bequeath unto the said Herman W. Zessin" (describes land), "the said Herman W. Zessin to have and to hold said described premises so long as he shall live and at his death I direct that the same be given to the heirs at law of the said Herman W. Zessin."

Plaintiff, a judgment creditor of Zessin, after unsuccessful efforts to collect his judgment, caused execution to be levied upon the property in question, and brought this action in equity to secure an answer to the above question. Defendants are Zessin, his wife, two married and four minor children. A guardian *ad litem* was appointed for the minor children.

The trial court decreed that Zessin was the owner in fee simple of the property and that the children defendants did not have any right, title, or interest in the same. The guardian *ad litem* appeals.

It is obvious that the testatrix attempted by this provision to devise a life estate to Zessin and the remainder to his heirs at law. The provision, however, comes within the rule of law announced in *Myers v. Myers*, 109 Neb. 230, 190 N. W. 491: "Where a testator by his will devised a life estate in real property to a person, and at her death to her 'lawful heirs,' * * * the word 'heirs' is to be taken as a word of limitation, and that such person becomes vested with a fee." This rule is now a rule of property in this state (*Sutphen v. Joslyn*, 111 Neb. 777, 198 N. W. 164) and does not yield to the expression of intention of the testatrix.

In view of the above determination, the plea of laches is of no avail to the appellant.

The decree of the trial court is

AFFIRMED.

WILLIAM E. FRANK ET AL., APPELLEES AND CROSS-APPELLANTS, V. SAM SMITH ET AL., APPELLEES AND CROSS-APPPELLEES: VERA GARVER, INTERVENER, CROSS-APPELLEE: TERRY CARPENTER ET AL., APPELLANTS AND CROSS-APPELLEES.
293 N. W. 329

FILED JULY 5, 1940. No. 30871.

1. **Waters.** Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
2. ———. Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.
3. ———. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.
4. ———. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Commissioners v. United States*, 270 Fed. 110.
5. **Jury.** An action to quiet title to real estate for the purpose of determining such estate or interest is an action within the contemplation of section 76-401, Comp. St. 1929, and is triable by the court as other equitable actions, as contemplated by section 76-409, Comp. St. 1929.
6. **Adverse Possession.** "The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years." *Lantry v. Wolff*, 49 Neb. 374, 68 N. W. 494.
7. ———. "The rule sometimes announced that the adverse possession of land cannot be extended beyond the calls of the deed means that possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof; but, if land be actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character." *Rice v. Kelly*, 81 Neb. 92, 115 N. W. 625.

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

Mothersead & York, for appellants.

Floyd E. Wright and *Jack E. Lyman,* for cross-appellants.

Jack L. Raymond and *Frank Glebe,* for appellees.

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

MESSMORE, J.

Plaintiffs William E. Frank and George J. Carpenter brought this action against Sam Smith and Anna Smith, his wife, *et al.,* defendants, and Terry Carpenter and Hazeldean Carpenter, his wife, defendants. The purpose of the action is to quiet title to certain lands, described in plaintiffs' petition, in which they claim to own the fee by adverse possession. The plaintiffs prevailed in the district court, with the exception that defendants Smith prevailed as against the plaintiffs. No controversy was presented as between defendants Smith and defendants Carpenter. The plaintiffs cross-appeal from the judgment in favor of defendants Smith, and defendants Carpenter appeal from the judgment against them and in favor of the plaintiffs.

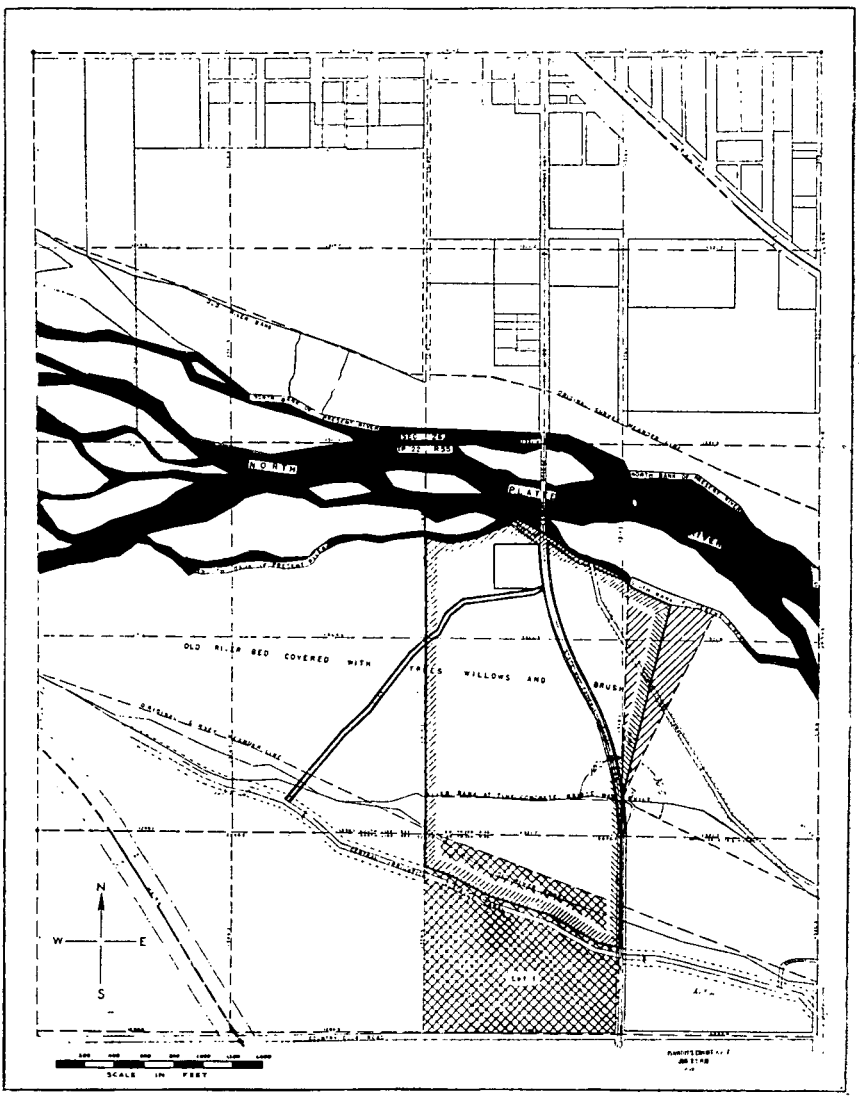
In addition to the foregoing statement with reference to plaintiffs' action, the petition alleges that defendants Sam and Anna Smith are the owners of lot 2, as designated on the map, exhibit 1, but claim to own certain real estate, shown on the map, east of highway No. 29, between Gering and Scottsbluff, Nebraska, and north, in the northeast part of lot 2. Defendants Smith in their answer admit the ownership of plaintiffs in lot 1, except the strip of land, as shown by the map, in lot 2 in which they claim ownership by adverse possession, and admit their ownership of lot 2; and pray that plaintiffs' cause of action be dismissed as to them. Defendant Terry Carpenter admits the ownership of certain land described in plaintiffs' petition, further alleges

that said land extends south of the center of the main channel of the North Platte river as said channel existed prior to the construction of the present cement bridge, denies his ownership casts any cloud on any land that plaintiffs may own, prays the dismissal of plaintiffs' petition with prejudice, and for such other relief as may be just and equitable. In addition to the adverse possession claimed by plaintiffs, the case was tried upon the theory of whether or not there was accretion to the lands of the plaintiffs; this apparently with the consent of the defendants Carpenter, no objection appearing in the record as to the taking of testimony on this issue. Likewise, such issue was argued to this court and appears in the briefs of the parties plaintiff and defendants Carpenter.

Exhibit No. 1 is a map, drawn to scale of 200 feet to the inch, which is here reproduced, and the scale thereon is in exact proportion to the size of the original exhibit.

The map covers all of section 26 and the north 40 rods of section 35. Forty-acre tracts are indicated in each quarter of section 26. The North Platte river is shown by solid black ink and constitutes the part of the river having water in it at the time of the survey, made in the forepart of 1938. The white spaces inside of the solid black portion are islands. The crisscross lines at the bottom, or to the south, of the exhibit comprise lot 1 in section 35, owned by the plaintiffs, consisting of seven acres of deeded land. The diagonal lines north of lot 1, appearing principally in section 26 and slanting from a heavier black line to the point of the present river, and the same lines appearing east of highway No. 29, as designated, and on a part of lot 2 constitute the land claimed by the plaintiffs.

The cement bridge, as designated, running north and south, is the present bridge across the North Platte river between Scottsbluff and Gering, and was constructed in 1920 or 1921. From the cement bridge the angular line, designated "State and Federal Highway No. 29," is the present paved highway constructed at the same time. West of the highway, the direction designated on the map, are


NORTH
PLATTE
OLD RIVER BED COVERED WITH TREES WILLOWS AND BRUSH
N
W
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SCALE IN FEET

two shaded lines running west and southwest, designating an earthen dike, raised on the west and north in some places with concrete blocks. This dike connects with two narrower shaded lines, the latter running from the extreme west line of the map in a southeasterly direction through lots 1 and 2 to the extreme east side of the map, and designated as the "Central Irrigation District Canal." On each side of the river the map discloses block lines, running across the map ("Original Survey Meander Line"), taken from original field notes of the government survey. Close to such lines are solid lines, running across the map, marked "Old River Bank." On the south side of the river is another line, running across the map, which designates the river bank at the time the concrete bridge (the present bridge) was built. The north and south sides of the river are designated as such and denote the outside boundaries of that part of the river having water in it at the time the survey was made. The east line of the map is the section line of sections 26 and 35.

Exhibit 2 is a photograph of the North Platte river between Scottsbluff and Gering, taken in June, 1889, showing the condition of the river at that time. It shows a continuous stream of water from the south to the north bank, designated on the map as the "Old River Bank" (north) and "Old River Bed" (south). The total distance between the meander lines as shown on the map, on the north and south sides of the river, is 3,250 feet. The distance between the old river line on the north side and the old river line on the south side, as shown by the map, is 3,090 feet. The distance from the present north bank of the river to the point of intersection of the long dike, as designated on the map, is 1,050 feet.

The first bridge across the river was built in 1889-1890 on the east section line of section 26. An old mill was located at the south end of the bridge, as well as a spillway, shown on the map, in the southeast corner. At such point the Central Irrigation Canal came up to the old river bank, as designated on the map, and made the fall for the old mill

race. The second bridge across the river was constructed in 1908 or 1909 on a line between lots 1 and 2 of section 35, west of the first bridge. At the time the second bridge was constructed, a fill, approximately 800 feet long, was put in on the south side of the river, and at the time of the construction of the present cement bridge and fill the old fill was extended until it was approximately 2,100 feet from the old south bank. The present bridge was built approximately 1,050 feet in length. Other physical factors to be considered in connection with the case are the old Pathfinder dam and reservoir, constructed in Wyoming in 1909, and the Tri-State ditch and government canals, not shown on the map. The purpose of the Pathfinder dam was to reserve the water of the North Platte river. The record shows that the reservoir had considerable effect on the river; that when the storage water was released it was then taken up during the irrigation season by ditches, and since the construction of the reservoir the heaviest flow of water was along the north side of the river, the Tri-State ditch and other government canals taking and using water during the irrigation season. The Central Irrigation District at different times constructed seven or eight spillways which extended from the first spillway constructed to a point approximately one mile and a half farther west, on the south side of the river, this having a tendency to cause sediment and silt to form and fill up that portion of the river from which the water was diverted, and, as each spillway was constructed, the same process prevailed. Two miles west of the present bridge, and not shown on the map, the Central Irrigation District had an obstruction which extended out into the river for a few hundred feet, thus diverting the water to the north. The plaintiffs claim that such obstruction caused accretion to form in the river as far down as the bridge, resulting in building up the south channel of the river and causing the channel to become more shallow and lower by crowding the flow of the river to the center or north.

The North Platte river is a wide, shallow, nonnavigable

stream. The dike, called the longest dike, as designated on the map, was constructed for the purpose of throwing the water in the river to the north, to protect the fill and to force the flow of water under the new concrete bridge. The obstructions placed in the river were so placed by artificial means by parties other than the plaintiffs.

At the time the concrete bridge was constructed, there were channels practically from the line marked "Old River Bed" clear over to the present north bank, and during a period of the year there would be water flowing in all of such channels. During low water, some of the channels would go dry; most of the water would flow on the north side. Due to the nature of the river, it is possible to narrow its channel, and the dikes and obstructions referred to did narrow its channel, the result being that, by lessening the amount of water, the land, referred to on the map and claimed as accretion, together with other lands, became usable; trees, willows and brush grew on this land, cattle and horses were pastured on this land for 20 years or more. There remains some water on certain parts of the land used by the public for fishing and swimming, and some people picnicked on this land. The foregoing constitutes the substance of the evidence in this voluminous record with reference to accretion.

"Accretion is the process of gradual and imperceptible addition of solid materials, called alluvion, thus extending the shore line out by deposits made by the contiguous waters." *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647.

"This loss of contact of a certain line with the water results from one of three causes: First, accretion, or the gradual and imperceptible addition to the land by the deposit of silt and sediment along the edge of the water, so that the land is extended into the water. Second, reliction, or the gradual withdrawal of the water from the land, by the lowering of its surface level from any cause." 1 Kinney, Irrigation and Water Rights (2d ed.) p. 928.

The formation of land by accretion has been repeatedly

defined, and we shall not add to the long list of authorities by further citation. Avulsion is defined in 6 C. J. 876, as follows: "The removal of a considerable quantity of earth from the land of one proprietor and its deposit upon, or annexation to, the land of another suddenly and by the perceptible action of water; the sudden and rapid change of the channel of the stream which is the boundary, whereby it abandons its old and seeks a new bed."

The facts in the instant case fail to disclose avulsion in any particular; rather, the process was gradual and imperceptible by the deposit of the solid material called alluvion. Such deposits attached to plaintiffs' land. The additional effect of the obstructions during the course of time caused the land to become uncovered by the gradual subsidence of the water. This would be reliction, and the same law applies to both of these forms of addition to real estate which are held to be the property of the abutting landowner. See 1 R. C. L. 226, sec. 1.

"Where the water of a river gradually recedes, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor." *Topping v. Cohn*, 71 Neb. 559, 99 N. W. 372; followed in *Conkey v. Knudsen*, 135 Neb. 890, 284 N. W. 737. That the accretion or reliction was caused by other than natural causes does not affect the rule of accretion.

In the case of *County of St. Clair v. Lovingston*, 23 Wall. (U. S.) 46, the question involved was the right to accretion which had been formed by reason of obstructions placed in the river, the contention being that the accretion was caused wholly by such obstructions, and that the rules upon the subject of alluvion would not apply. The court said (p. 66): "The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial. (Citing *Halsey v. McCormick*, 18 N. Y. 147; 3 Washburn, Real Property, 58, 353.) * * * The test as to what is gradual and imperceptible in the sense of the rule

is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." There is generally in all matter of increase of banks always a more gradual and imperceptible process, especially so in a river possessing the character of the North Platte river, and the evidence in the instant case meets the test, as stated in the above case.

In 1 R. C. L. 233, sec. 7, it is said: "But if the accretion is indirectly induced by artificial conditions created by third parties it would seem that the right of the riparian owner to such accretion would not be affected, and such appears to be the holding of a majority of the cases." In support of the foregoing are cited *Lovingston v. County of St. Clair*, 64 Ill. 56, 16 Am. Rep. 516, and note (*County of St. Clair v. Lovingston, supra*); *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151, and other authorities.

County of St. Clair v. Lovingston, supra, was cited with approval by this court in *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104, to the effect that whether the accretion is from natural or artificial causes makes no difference; the result as to the ownership in either case is the same.

In *Wiltse v. Bolton*, 132 Neb. 354, 272 N. W. 197, an ice gorge formed along land owned by the plaintiffs, and as a result the river shifted its main channel westward. When the ice disappeared there was left a narrow channel, a slough, along plaintiffs' land, and then a large sand-bar between the slough and the main channel of the river. As a result of the deposit of soil-building material during high water, the slough had gradually filled so that there was no channel and had not been for many years. By the same process the sand-bar had been built up until at the time of trial a large portion was suitable for cultivation. The court held that the lands in controversy were formed by accretion. The foregoing case sustains plaintiffs' contention on the above proposition of law.

The evidence in the instant case shows that the land involved was formed by accretion by the river receding from its former south bank in a gradual process, brought about

purely by the construction of irrigation works, dikes and the fills for the bridges. There was no rapid and sudden change of channels and the seeking of a new bed, as required in avulsion. We believe that, under the circumstances and evidence as disclosed, plaintiffs are entitled to the land in controversy, and as described in their petition, by accretion, and that in such respect the trial court did not err.

Defendants Carpenter objected to proceeding with the trial of this action as an action in equity, and to trial without a jury, and demanded a jury trial, which was not granted by the court. They cite section 6, art. I of the Constitution, which in part reads: "The right of trial by jury shall remain inviolate," and in support thereof *Krumm v. Pillard,* 104 Neb. 335, 177 N. W. 171. A careful reading of this case discloses that it does not support appellants' contention in such respect. The following sections of the statute govern:

Section 76-401, Comp. St. 1929, provides: "An action may be brought and prosecuted to final decree, judgment or order, by any person, or persons, whether in actual possession or not, claiming title to, or an estate in real estate against any person or persons who claim, or apparently have, an adverse estate or interest therein, for the purpose of determining such estate or interest; and canceling unenforcible liens, or claims against, or which appear to be against, said real estate, and quiet the title to real estate." And section 76-409, Comp. St. 1929, provides: "The court shall try such cause in like manner as other equitable actions and shall enter therein such orders and decrees as the parties may be entitled to. Appeals from final orders may be had as in other actions."

Each party in the case at bar is seeking equitable relief and each invoking the aid of a court of equity. The court properly denied a trial by jury. See *Sittler v. Wittstruck,* 122 Neb. 452, 240 N. W. 562; *Morse v. Cochran,* 131 Neb. 424, 268 N. W. 307.

Defendants Carpenter further contend that the boundary

line between the two tracts of land, that is, the tract owned by them and that owned by plaintiffs, is the center of the bed of the North Platte river at the time the survey was made and the lands were patented. The following language from the case of *Commissioners v. United States,* 270 Fed. 110, expresses the general rule on this subject: "(1) That where the thread of the main channel of the river is the boundary between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel." The opinion further explains a change by sudden and violent processes of avulsion, with which we are not here concerned, and states: "To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream." And in further support of their contention defendants Carpenter cite *Courter v. Lincoln Park,* 101 N. J. Eq. 572, 138 Atl. 99. The proof in the two cases above cited comes within the exception to the rule as heretofore announced. The proof on the part of defendants Carpenter is insufficient to come within this exception.

The United States supreme court in *Nebraska v. Iowa,* 143 U. S. 359, 12 S. Ct. 396, said: "It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion,

the riparian owner's boundary still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. United States,* 10 Pet. 662, 717, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' " See, also, *Bouvier v. Stricklett,* 40 Neb. 792, 59 N. W. 550, which quotes and approves the language as above stated in *New Orleans v. United States, supra*; and *Gill v. Lydick, supra,* holding: "Where the water of a river recedes slowly and imperceptibly, changing the channel of the stream and leaving the land dry theretofore covered by water, such land belongs to the riparian proprietor. In case the alteration takes place suddenly, the ownership remains according to former bounds."

The trial court did not err in refusing to adopt the contention of defendants Carpenter with reference to the boundary line between the two tracts of land.

Plaintiffs cross-appeal from that part of the judgment in favor of defendants Smith, who own lot 2 and claim adverse possession of that part of lot 1 lying east of the highway fill and north of the river, as shown by exhibit 1. Plaintiffs contend that the evidence fails to prove adverse possession in Smith prior to the commencement of this action, but concede that Smith has had adverse possession of the disputed land since he acquired title in 1935.

An examination of the evidence discloses that Smith's predecessors in title, as well as he, at all times held such land as their own actually, openly, notoriously and exclusively, and remained in continuous possession thereof under claim of ownership during a period of more than 10 years. The land was inclosed and rent collected for pasture for

18 years. Some billboards were placed on the disputed land, and the parties owning them paid Smith and his predecessors in title rent during their respective ownership of the land, and all contracts with reference to the billboards were passed on to the succeeding owners, which included Smith.

In furtherance of their contention, the plaintiffs state that no privity existed between the possession of the Sowerwines, previous owners of the disputed land, and that of Smith, and, regardless of the possession the Sowerwines had, that Smith cannot tack such possession onto his possession for the purpose of completing 10 years of adverse possession.

"The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years." *Lantry v. Wolff*, 49 Neb. 374, 68 N. W. 494.

The proposition that a grantee may not take the adverse possession of his grantor over a strip of land not included in his deed is only a presumption of fact which yields to proof of the actual facts, and when overcome by such proof disappears. It is the fact when established that governs.

In *Rice v. Kelly*, 81 Neb. 92, 115 N. W. 625, this court held: "The rule sometimes announced that the adverse possession of land cannot be extended beyond the calls of the deed means that possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof; but, if land be actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character."

In the instant case, Smith did not claim privity under the deed alone, but also claimed that the area in dispute was actually occupied by his predecessors in title under claim of ownership, and the possession of the same was turned over by Mrs. Sowerwine to her children, and in turn by them to

him, when the different conveyances were executed. It is an actual occupancy which is turned over to each successor. The cross-appellants never occupied any of the disputed land, or made any claim to it, at least from and after the time the fill was constructed in 1921, but the defendant Smith and his predecessors did occupy the disputed land in such manner as to meet the requirements for vesting title by adverse possession. The trial court did not err in denying the cross-appeal.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

EMMA S. DOWNING, APPELLANT, V. W. J. SCHWENCK ET AL., APPELLEES.
293 N. W. 278

FILED JULY 5, 1940. No. 30852.

1. **Automobiles.** Statute providing that the use of a street or highway by a nonresident motorist or his agent shall be deemed an appointment of the secretary of state as his attorney for service of process in all actions growing out of such operation, *held* not to have application to the personal representative of a deceased nonresident motorist so as to permit service of process upon the secretary of state as his attorney.
2. ———. Mere liberal construction cannot, for the purpose of embracing other persons than those to whom a statute is expressly made applicable, supply that which the legislature has, either deliberately, or inadvertently, or through lack of foresight, omitted.

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

Fred H. Free and *Crary & Crary*, for appellant.

Mapes & Mapes and *Burkett & Robinson, contra.*

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

JOHNSEN, J.

This is an action for personal injuries sustained by plaintiff, while riding as a guest in an automobile owned and operated by Peter Metzger. Metzger, who was a resident of Ohio, is alleged to have been guilty of gross negligence in driving onto a narrow bridge in Cedar county, Nebraska, and colliding with a truck. He, as well as his wife, were killed in the collision, and this action was attempted to be brought in Cedar county, Nebraska, against his executors, who were residents of Ohio and had been appointed by the courts of that state, by service of process upon the secretary of state, under the nonresident motorists statute, section 20-530, Comp. St. 1929. The executors filed a special appearance on the ground that the statute authorized service of process upon the secretary of state only as against the owner or operator, and not as against his personal representatives. The trial court sustained the special appearance, and, upon plaintiff's election to stand upon the service made, her action was dismissed. She has appealed.

Section 20-530 provides: "The use and operation by a nonresident of the state of Nebraska or his agent of a motor vehicle over or upon any street or highway within the state of Nebraska, shall be deemed an appointment by such nonresident of the secretary of state of the state of Nebraska as his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him, growing out of such use or operation of a motor vehicle over or upon the streets or highway within this state, resulting in damages or loss to person or property, and said use or operation shall be a signification of his agreement that any such process which is so served in any action against him shall be of the same legal force and validity as if served upon him personally within this state. Service of such process shall be made by serving a copy thereof upon the secretary of state or by filing such copy in his office, together with payment of a fee of two dollars ($2.00), and such service shall be sufficient service upon the said nonresident; Provided, that notice of such service and

a copy of the process shall within ten (10) days after the date of service be sent by the plaintiff to the defendant by registered mail at defendant's last known address and it shall be the duty of the plaintiff to file with the clerk of the court in which the action is brought an affidavit that he has complied with such requirement."

Plaintiff argues that, since it was the purpose of section 20-530 to subject a nonresident motorist to the jurisdiction of the courts of this state, in the same measure as a resident, the statute should, by liberal construction, be held to have application also to the personal representative of a deceased nonresident motorist, in view of the fact that the personal representative of a resident is subject to suit and service of process for the torts of his decedent. The question has been passed upon a number of times, under substantially similar statutes, in other jurisdictions. Some of these cases are *State v. Davison,* 216 Wis. 216, 256 N. W. 718, 96 A. L. R. 589; *Dowling v. Winters,* 208 N. Car. 521, 181 S. E. 751; *Donnelly v. Carpenter,* 55 Ohio App. 463, 9 N. E. (2d) 888; *Young v. Potter Title & Trust Co.,* 114 N. J. Law, 561, 178 Atl. 177; *Lepre v. Real Estate-Land Title Trust Co.,* 11 N. J. Misc. 887, 168 Atl. 858; *Riggs v. Schneider's Exr.,* 279 Ky. 361, 130 S. W. (2d) 816; *Minehart v. Shaffer,* 86 Pitts. L. J. (Pa.) 317; *Vecchione v. Palmer,* 249 App. Div. 661, 291 N. Y. Supp. 537. All of these decisions have refused to recognize the application of such a statute, without the use of more specific terms, to the personal representative of a deceased nonresident motorist. We can find no cases that sustain plaintiff's contention, and none has been cited to us.

It is unnecessary to discuss the various reasons stated in the cases cited for the conclusion reached. We rest our decision upon the ground that the language used cannot, as a matter of sound statutory construction, be held to have application to any person except the owner or operator himself. A nonresident motorist, by using the streets or highways of this state, simply appoints the secretary of state as his attorney or agent for the service of process upon him.

Such a simple appointment, without the use of other controlling language, would, by well-established legal principles, ordinarily terminate on his death. It may be that it would have been wise to have made provision against this contingency, but this does not justify us in adding language to the statute. It is neither useless nor unworkable merely because personal representatives are not subjected to its provisions. In this situation, it is entirely possible that the legislature may have had some reason for not attempting to subject a foreign personal representative to the burden of defending a lawsuit in this state. But whether the omission was deliberate or inadvertent, or whether the legislature simply failed to foresee or to contemplate the situation, "it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." *Denn v. Reid,* 10 Pet. (U. S.) *524, 9 L. Ed. 519.

Plaintiff argues that we should give consideration to section 20-2219, which provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice." This statute may warm the current of a legislative stream, but it cannot bridge its banks. Liberal construction cannot, for the purpose of embracing other persons than those to whom a statute is expressly made applicable, supply that which the legislature has either deliberately, or inadvertently, or through lack of foresight, omitted. *Chicago, B. & Q. R. Co. v. Amack,* 112 Neb. 437, 199 N. W. 724.

The judgment of the trial court must accordingly be affirmed. We are not here concerned with the language necessary to be used to include a personal representative within the operation of the statute, nor with the valadity of such an attempt.

AFFIRMED.

CHARLES A. WALLING ET AL., APPELLEES, V. CITY OF FREMONT, APPELLANT.

293 N. W. 226

FILED JULY 5, 1940. No. 30835.

1. **Municipal Corporations**: NUISANCE. One who without consent of or compensation to the owner of an adjacent, previously established residential and business property erects and maintains a nuisance, such as a large coal pile and mechanical appliances for the handling and distribution of coal, and thereby causes dissemination of coal dust in such manner and quantities as to cause damage and injury to the adjacent property, reducing the usability and market value thereof, is liable to respond in damages.
2. ———: ———. Instructions to the jurors informing them in substance that, if they found from the evidence that the maintenance or operation of defendant's coal yard caused coal dust to be scattered over plaintiffs' premises in such amounts as to damage their property, or interfere with the natural use and enjoyment thereof by persons of ordinary sensibilities and mode of life, such maintenance and operation of the coal yard would constitute a nuisance; and that, if the operation of the appliances created loud and grating noises such as would disturb or cause discomfort to a person of ordinary sensibilities residing upon plaintiffs' premises, they should take that also into consideration in determining whether a nuisance exists; and that the coal pile, appliances, operation of machinery and yards is not to be considered a nuisance in itself, but if the operation thereof is such as to destroy the comfort of those living on the adjoining property, the same may constitute a nuisance as a matter of fact, sufficiently and properly, in connection with other instructions, defined and described the nuisance sought to be established in the case.
3. ———: ———. Where a nuisance is found to exist, by the establishment and operation of a coal pile and machinery used in connection therewith, an instruction to the jury to the effect that, if they find from the evidence that the history of the operation of such coal pile and machinery, coupled with the presence thereof immediately adjacent to the plaintiffs' premises, would constitute such a threat to the use of the premises as to impair its value in the market, irrespective of any assertion or evidence that the present or future operation is such or will be such as to eliminate or greatly reduce the amount of the coal dust emitted from the coal pile and machinery, then such injury to the market

value of the premises is permanent and damages may be based on such depreciation in the market value as they find results from the nuisance of the defendant, is proper.

4. Nuisance: DAMAGES. Where one creates and maintains a nuisance and the direct and proximate results thereof to the adjacent residence and business property are permanent injuries to the property, the owner is entitled to be compensated for the resulting inconveniences, for discomforts and the annoyances and burdens of cleaning, and for the injury to the land and improvements the proper measure of damages is the difference between the fair and reasonable market value thereof immediately prior to the time the injury occurred and immediately after the injury had become complete; and for like injury to the stock of merchandise the measure thereof is the difference between the fair and reasonable market value of the same immediately before the occurrence of the injury and immediately after such injury had become complete.

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

John F. Rohn and *A. C. Sidner,* for appellant.

Flansburg & Flansburg and *E. L. Mahlin, contra.*

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

BLACKLEDGE, District Judge.

In this, an appeal from the district court for Dodge county, the plaintiffs sue to recover damages arising from the claimed creation and operation of a nuisance, alleging in substance that plaintiffs were the owners of certain premises upon which were situated a lumber and coal yard together with a residence and office building combined, which premises were used for the business and residence of the plaintiffs, and that there were situated thereon buildings and structures used in carrying on a lumber and building material business, and a part of which was used for residence property and business office; that the defendant city, owning and using adjacent property for the purpose of a coal yard, did in December, 1936, install thereon a tipple and

various machinery for the unloading and moving of coal, and that the operations carried on by defendant in unloading the coal from railroad cars and the subsequent handling of it caused large quantities of fine penetrating coal dust to fall upon plaintiffs' premises and as a direct and proximate result thereof their furniture, fittings and the whole interior of the dwelling-house, buildings and office have at all times since the erection of the tipple continued to be covered with coal dust so that incessant cleaning was made necessary, and that because of the coal dust they were forced to keep their doors and windows closed. Plaintiffs further allege that the tipple caused loud, annoying noises at different hours of the day and night and ask damages in respect of the foregoing matters, but more particularly on the grounds that as a direct and proximate result of the nuisance created by the defendant the lumber and other merchandise of plaintiffs were constantly covered and blackened with coal dust which materially damaged the salability thereof and rendered the carrying on of the plaintiffs' lumber business burdensome and unprofitable, rendering the plaintiffs' premises unfit as a location therefor or for a dwelling-house or office use. The plaintiffs claim damage by reason of defendant's acts to plaintiffs' property and improvements and the stock of lumber, asking a recovery in the total amount of $19,000.

The defendant answered denying plaintiffs' allegations and claims and alleging that plaintiffs themselves were engaged in the retail coal business, and that coal dust from their own coal and also from the near-by premises of the Fremont Ice and Fuel Company and from railroad trains operated in the vicinity were responsible for conditions complained of by plaintiffs, and that whatever coal dust emanated from defendant's coal yard was only a small part of the total which settled upon the plaintiffs' property. Defendant also alleged that plaintiffs lived in a noisy neighborhood near three railroad tracks and the noise from engines and passing trains was of more consequence than any emanating from the machinery of the defendant and denied

that the operation of the coal yard had at any time constituted a nuisance.

The trial of the case occupied approximately ten days' time, a large number of witnesses testified on both sides and resulted in a verdict in favor of the plaintiffs in the sum of $3,000, for which amount judgment was entered and this appeal by the defendant city follows.

The property involved and which it is claimed constituted the nuisance is a coal yard and tipple. According to the testimony this coal yard is of irregular shape approximately 150 by 150 feet in area which was "pretty well all covered" by coal and the pile in some places was higher than the near-by lumber sheds or "16 to 18 feet high, perhaps more," and distributed by means of a drag line arrangement. The "Tipple" is an elevator-like structure some 60 feet in height and used to put coal into the yard when unloaded from railroad cars and to distribute it around therein. The processes in this operation are stated as: Dumping from the car, elevating to the top of the tipple, pouring out through a spout onto the pile, dragging out into the yard, dragging back, raising to the container, dumping again and running out through the spout into a truck. All the coal used at the city plant comes through the tipple. The tonnage purchased by the city from the previous August first to the time of the trial in June, 1939, was in excess of 11,000.

In the presentation of the case in this court in the appellant's brief, ten propositions are urged. Preliminary to the particular discussion, however, it may be well to call to mind the principle of law succinctly stated in 20 R. C. L. 463, sec. 80, to wit: "It seems to be undisputed that a person may maintain an action at law for damages caused by a nuisance; and this, without praying an abatement of the wrong." It is also stated therein furthermore that in a court of equity where jurisdiction is acquired "of an action to enjoin a nuisance and for damages, the fact that the nuisance has been abated voluntarily since the bringing of the action and that it is not likely to be renewed are held not to deprive the court of jurisdiction to retain the cause

to award damages for the injury already done." *Id.* 483, sec. 96.

Proposition 1 is to the effect that there was error in that the trial court in instructing the jury did not use the terms "reasonable" or "unreasonable" in reference to the annoyances caused or quantity of coal dust distributed, and did not use the words "seriously" or "material" in reference to the damage inflicted. In support thereof are cited *Francisco v. Furry,* 82 Neb. 754, 118 N. W. 1102; *Rush v. Smith-Lockwood Mfg. Co.,* 95 Neb. 133, 145 N. W. 268; *Mathews v. Mozer,* 111 Neb. 71, 195 N. W. 943; *Grzelka v. Chevrolet Motor Car Co.,* 286 Mich. 141, 281 N. W. 568; *Steele v. Rail & River Coal Co.,* 42 Ohio App. 228, 182 N. E. 552. The Nebraska citations are all of cases wherein injunctions were sought and, although stating propositions applicable in general to this sort of situation, are not particularly applicable to this litigation. Thus, in the *Francisco* case it is said: "The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself. * * * A feeding yard is not necessarily a nuisance, and it becomes such only after being improperly maintained or conducted." In the *Rush* case we find: "We doubt very much whether the odors which escape therefrom (a tannery) are so noxious and injurious and have so reduced the value of plaintiffs' property or the comfort of their residence as to warrant the issuance of an injunction." In the *Mathews* case, in which it was sought to obtain an injunction and recover damages, the court found that the plaintiff did not suffer pecuniary damage, but defendant did at times fail to exercise proper care in the conduct of his business, and enjoined defendant from killing animals on the premises or permitting the accumulation of refuse and in any manner maintaining the plant as a nuisance, and the judgment of the trial court was affirmed except in the matter of taxation of costs.

We find nothing in these Nebraska cases to operate against the prosecution of the present action, but rather the contrary; and they in no wise foreclose the situation to

the plaintiffs so far as concerns the prosecution of an action to recover damages.

An instruction derived from the *Grzelka* (Mich.) case was tendered, but in it the facts recited are the reverse of the present situation. These plaintiffs did not move into a neighborhood and find a nuisance there. The nuisance came to them. Also, that instruction came too close to argument or comment upon the evidence to be permitted in this jurisdiction. The instruction derived from the *Steele* (Ohio) case, in so far as proper, was covered by instruction No. 8, given by the court, which also was No. 5 requested by defendant and is hereinafter set out.

We find no necessity for the use in the instructions of the particular words in reference to which complaint is made; and we are of the opinion that the trial court adopted the better course that, instead of directing the jury toward a problem of deciding just how much annoyance or noise or how much coal dust might be reasonable under the circumstances, or how much damage might be substantial or material, their attention was directed to the fundamental questions of what it took to constitute a nuisance, which was properly defined to them, and the determination of what amount of damage, if any, had been suffered.

Propositions 2 and 3 are to the effect that the nuisance, if any was established, was not a permanent but a continuing or temporary nuisance subject to abatement and that under a petition based upon the theory of a permanent nuisance no recovery could be had. The brief states: "It is our contention that since no competent evidence was offered by the plaintiffs as to a continuing nuisance, if any, and no instruction from the court applicable to a continuing nuisance that plaintiffs have failed to make out a case even if the facts are sufficient to show a continuing nuisance and that therefore regardless of whether there was or was not a continuing nuisance, plaintiffs have no cause of action." In support of this are cited the cases of *Conestee Mills v. City of Greenville*, 160 S. Car. 10, 158 S. E. 113, 75 A. L. R. 519; *McGill v. Pintsch Compressing Co.*, 140 Ia.

429, 118 N. W. 786, 20 L. R. A. n. s. 466; *City of Ada v. Melberg*, 135 Minn. 130, 160 N. W. 257; 20 R. C. L. 466, sec. 82. In this last citation it is said: "It is conceded to be a difficult and complicated task to distinguish between nuisances that are permanent in character and those that are not permanent, within the rule above stated," and we are in agreement with that proposition. Furthermore, we perceive no necessity to judicially attach to the nuisance in the present case any particular label.

We turn to the jurisdiction of Iowa in the case of *Irvine v. City of Oelwein*, 170 Ia. 653, 150 N. W. 674, where we find:

"The trial court had considerable difficulty with the case, and we too find it full of trouble, because of the conflicting character of the cases from other states, and an apparent want of harmony in our own decisions. This is due largely to the fact that there are all kinds of nuisances and that the distinction between trespass and nuisance has not always been preserved."

The court then states that, as a general rule, if the thing determined to be a nuisance is so erected that it is intended to remain in the condition in which it was erected until destroyed by the elements, and the damages are to the land itself, the damage is treated as original and is to be recovered in one action, and proceeds: "As heretofore pointed out, it is sometimes optional with the party injured to treat the nuisance as permanent or continuous, at his election, but much depends upon the character of the nuisance. If the erection or structure be permanent, but injurious because of the use made of it, or if the nuisance be a mere trespass, and the trespasser did not have and could not acquire any rights in the premises, save by grant or prescriptive use, it is, as a rule always permissible for the party injured to elect what remedy he will pursue. If he cares to have the nuisance remain or to recognize the trespass, he may have as his damage that which will make him whole because of the depreciation in the value of his property; but in such cases he is not entitled to have the nuisance abated."

Also, the case of *Risher v. Acken Coal Co.*, 147 Ia. 459, 124 N. W. 764, wherein it is said: "We have heretofore held that the plaintiff may elect whether he will treat the injury as permanent or continuing, and that the defendant may not complain of such election." In *Bartlett v. Grasselli Chemical Co.*, 92 W. Va. 445, 115 S. E. 451, we find: "In actions against counties, cities, towns and other municipal corporations, and railroad companies and other public utility corporations, clothed with the power of eminent domain, for injuries inflicted upon or done to real estate owned by private persons, by reason of the negligent or wrongful construction of their works, the cause of the injury is generally deemed to be permanent."

The right of election finds further support in the cited cases of *Chicago Forge & Bolt Co. v. Sanche*, 35 Ill. App. 174, and *Rhodes v. Durham*, 165 N. Car. 679, 81 S. E. 938.

Our own court in *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N. W. 585, has, we believe, recognized the rule that should govern in this case. The syllabus is:

"As a general rule, if a nuisance is permanent in character, is intended to remain in the condition in which it was erected until destroyed by the elements, and the damages are to the land itself, especially where the erection is for a public or semi-public purpose, the damage is treated as original, to be recovered in one action, and not continuous in character.

"The measure of damages for the injury to the land is the difference in value before and after the dam was erected, taking into consideration the uses to which the land was put and for which it was reasonably suitable. To determine any such loss, the present condition of the soil proximately caused by the damming of the water and all the effects up to the present time would be relevant to determine its value."

There are many parts of the opinion particularly pertinent to the present inquiry. We paraphrase: Could the plaintiffs sell their land or merchandise for its full value

under the rule advanced by the defendant? Would a purchaser pay full value knowing he must continually be threatened with invasion by large quantities of coal dust from the yard and tipple? Even conceding the present efficient operation of the tipple and the use of a better quality of coal, would a purchaser, knowing that if the defendant or its employees failed in the future in that regard his property would be damaged, either temporarily or permanently, pay full value for the same? Obviously not. It follows that there has been permanent damage to plaintiffs' property.

Proposition No. 4 is to the effect that a showing of past transactions or profits of the business involved may be admitted in evidence, not as an independent element of damage, but for the purpose of showing the volume of business. This is what the plaintiffs sought, and were allowed by the court, to do; and the complaint in reference to this is not to the statement of the law as given, but concerning the admission of exhibit C in evidence. This exhibit C is a condensed statement of the transactions, volume and income covering the plaintiffs' business for the years 1934 to 1938, inclusive, and the criticism is that the court did not give an instruction limiting the consideration by the jury to that purpose, and that the showing as to the years after the construction of the claimed nuisance should not have been allowed; but we think the appellant was wrong on both propositions. As to loss of profits no contention of that kind was submitted in the case, so that the jury could not have been misled in reference thereto, and the showing for the later years of 1937 and 1938 was proper as an element indicating the effect had on plaintiffs' business following the construction of this coal yard and tipple. Proposition No. 5 is to the same effect.

Supporting proposition No. 6 the appellant argues that the damages the owner of the property might recover from the operation of the coal pile must come directly from that source and that any dust or noise coming from other coal yards, operation of trains, streets and roads must be elimi-

nated or nor considered. We can agree in substance with this proposition, but we fail to perceive that it offers any proper criticism of action taken in this case, and, in fact, the appellant cites in his brief a quotation from 46 C. J. 749, that, "Where damage is the result of the act of several persons acting independently, and not in concert, they are not jointly liable; but each is liable only for his proportion of the damages, and the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule, nor make any one liable for the acts of the others, nor relieve defendants from liability. The jury may separate the damages with the nearest approach to accuracy under the circumstances."

This the jury appear to have done in the present case and were instructed by the court to the effect that their award, if any, must be based upon the results of the acts of the defendant city in the case. The appellant says in its brief it is its contention that the dirt and dust from all those other sources and the nuisance from the trains including whistling and ringing of bells is much greater than the inconvenience, if any, from defendant's coal pile. That was all included in the things submitted to the jury and there is apparently no dispute between the parties as to what the law is.

By proposition No. 7 the appellant argues that where a nuisance has been abated before the trial there can be no recovery of damages as for permanent injury; but with this we cannot agree, and see no reason why it should influence the recovery of damage for injury actually sustained before this had been done. *Mathews v. Mozer*, 111 Neb. 71, 195 N. W. 943; 20 R. C. L. 483, sec. 96. Also, the question of the abatement of the nuisance did not enter, except incidentally, into the case. The defendant's answer did not plead it except to a limited extent in asserting that certain improvements had been made in the equipment of the plant with new machinery and a change made in the type of coal furnished, so that the distribution of coal dust

by the plant "has been almost completely eliminated and under the plans of operation now in force and to be continued there will be practically no coal dust of any kind in the operation of said coal yard in the future." This can only be construed as an admission that there had existed to some extent the injury complained of and an allegation that it had been to some extent eliminated. The whole matter was submitted in the evidence to the jury and the court authorized by its instructions recovery of only for such injury and damage as had been inflicted by the acts and from the operations of the defendant.

Proposition No. 8 complains that there was included in instruction No. 1, in stating the issues, a reference to the fact that there was situated in the premises a small rental residence. This reference might perhaps as well have been omitted, but the contention that there is no such allegation in the pleadings is not sustained, because while the pleadings do not mention the rental residence specifically they do state that there were business and residential structures on the premises involved, which would allow evidence of such structures of whatever nature. However, there was no attempt to either designate or recover for any particular injuries to the small residential property which was referred to but incidentally in the evidence. Under the circumstances this reference could not have been prejudicial to the appellant.

Proposition No. 9 is to the effect that where there are conflicting instructions, one containing an incorrect and the other a correct statement of the law, the latter will not cure the former. We do not find the instructions given to be vulnerable to this attack and consideration is given in a more general discussion as to claimed errors in the instructions.

Proposition No. 10 is a complaint that the court permitted leading questions to be put to the witnesses, and a citation in support thereof is *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19. It is also urged there was error in the matter of permitting a view of the premises by

the jury. These are both matters largely within the discretion of the trial court. We cannot discover that such discretion was in any wise abused by the court in the present instance.

The appellant also complains of the admission in evidence of exhibit E which was a petition to the mayor and city council signed by these plaintiffs and others, in reference to the coal dust trouble which is the foundation of this suit. This exhibit would not, perhaps, have been proper to be admitted as original evidence, but it was not so offered and was offered on the cross-examination of the witness Wright, superintendent of the city plant, after he on cross-examination had denied knowledge of any complaint in reference to the matter of this coal dust. We think that under the circumstances and the testimony given by this witness on direct examination the exhibit was properly admitted.

Under the title of errors in instructions the appellant continues the argument under proposition No. 9 above stated and makes certain objections to the instructions generally and specifically. In order to consider these, and endeavor to keep this opinion within due bounds, it seems necessary to first outline just how the court did submit the case to the jury.

The court gave in all 13 instructions. There were a number of instructions tendered on behalf of either party, some of which were given and some refused; but those given as instructions of the court may be outlined as follows:

In instruction No. 1 the court outlined the issues in the case substantially as hereinbefore stated; and by instruction No. 2 placed the burden of proof upon the plaintiff, stated the material facts which were established without dispute in the case, and added that the plaintiffs must prove by a preponderance of the evidence that the defendant by the erection of the coal yard and tipple had created a nuisance in so far as plaintiffs were concerned, and that plaintiffs as a proximate result of said alleged nuisance have suffered damage, and the amount of plaintiffs' damage, if any.

Instruction No. 3 states the issues raised by defendant's answer as far as necessary and that the defendant asks for a verdict in its favor. Instruction No. 4 defines the preponderance of the evidence; and instruction No. 5 defines proximate results as those that proceed directly from and as the natural result of the commission of an act. Instruction No. 6 defines what under the circumstances of this case would constitute a nuisance entitling the plaintiff to recover and is as follows:

"If you find from the evidence that the maintenance or operation of defendant's coal yard caused or allowed coal dust to be scattered over the plaintiff's premises in such amounts as would damage his property, real or personal, or would interfere with the natural use and enjoyment thereof by any person of ordinary, normal, or average sensibilities, or of ordinary tastes and mode of living, then you are instructed that such maintenance or operation of the coal yard would constitute a nuisance and the plaintiff would be entitled to recover in this action whatever damages are the natural and proximate result thereof."

Instruction No. 7 then refers to the matter of noise such as would disturb and annoy a person of ordinary sensibilities occupying the premises, and that that should be taken into consideration along with the matter of a charge of scattering coal dust, in making determination as to whether or not a nuisance exists.

Instruction No. 8 was requested by defendant and given as follows: "You are instructed that a coal pile, coal elevator, coal tipple, the operation of machinery in the handling of coal, coal yard, or a like place is not to be considered a nuisance in itself, although it may be located in a populous community, and such an establishment is not to be deemed in itself a nuisance. But if you find that the method of operation is such as to destroy the comfort of those living upon adjoining property same may constitute a nuisance as a matter of fact."

Instruction No. 9 was to the effect that, if the jury found from the evidence that the history of the operation of this

coal pile and machinery coupled with the presence of the coal pile and machinery immediately adjacent to plaintiffs' premises would constitute such a threat to the use of the premises as to impair its value in the market irrespective of any assertion or evidence that the present operation or future operation is such or will be such as to eliminate or greatly reduce the amount of coal dust that will be emitted from such coal pile and machinery, they were then instructed that the injury to the market value of plaintiffs' premises is permanent and they should assess plaintiffs' damages based on such depreciation in the market value of their premises as the jury find results from the nuisance of the defendant.

No. 10 instructed the jury that the determination of the liability of the defendant in this case in no way determines its liability as to any other person and would in no way affect the determination of any subsequent suits by other persons, which, if any, would be tried and determined solely on the basis of the evidence presented therein.

Instruction No. 11 was the usual instruction as to the credibility of the witnesses, and instruction No. 12 states the measure of damages and is as follows:

"If, from the evidence, and under these instructions, you find that the defendant created a nuisance as defined in these instructions, and as a direct and proximate result thereof, the plaintiffs suffered inconvenience, discomforts, and annoyances and burdens of cleaning, as set forth in the petition, then the plaintiffs are entitled to recover damages therefor, and you should include in your verdict such amount as you believe will fully and fairly compensate them for such damage.

"If you find that the defendant created a nuisance as defined in these instructions, and as a direct and proximate result thereof, damage has accrued to plaintiffs' land and improvements, then the plaintiffs are entitled to recover damages therefor, and the measure of such damages would be the difference between the fair and reasonable market value of the land and improvements thereon immediately

prior to the time the alleged injury occurred and the fair and reasonable market value of said property immediately after the alleged injury, if any, had become complete.

"If you find that the defendant created a nuisance as defined in these instructions, and as a direct and proximate result thereof the plaintiffs suffered damage to their stock of lumber, then the plaintiffs are entitled to recover damages therefor, and the measure of such damages would be the difference between the fair and reasonable market value of the stock of merchandise immediately prior to the time the alleged injury occurred and the fair and reasonable market value of the said stock of merchandise immediately after the alleged injury had become complete.

"In no event will you allow plaintiffs anything for damage to their health because no such damage has been proved.

"If you find for the defendant, you will return a verdict of no cause of action."

Instruction No. 13 is simply as to the selection of a foreman and return of a verdict.

There were certain instructions requested by each of the parties, and of those requested on the part of the appellant, number 1 is the instruction taken from the Michigan case of *Grzelka v. Chevrolet Motor Car Co.*, 286 Mich. 141, 281 N. W. 568, to which sufficient reference has already been made. Number 2 requested by the defendant is based upon the same premise as the one just considered, classifies the district in which the property involved in this suit is situate as a railroad district, and adds the proposition that any amount of noise or of coal dust must have been an unreasonable amount in order to be actionable, and that the plaintiff would only be entitled to recover for extraordinary amounts of noise and coal dust, but does not, nor do any instructions tendered, purport to furnish a standard to measure what would be reasonable or unreasonable under the circumstances. The trial court, as before stated and as we think was proper, did not put that feature in the case but let it stand upon the simple proposition that, if the defendant inflicted injury and damage to the plaintiffs

to the extent that it would interfere with the natural use and enjoyment of, and was such as to destroy the comfort of, plaintiffs occupying adjoining property and did lessen the market value of the plaintiffs' premises and merchandise, then the plaintiffs would be entitled to recover whatever damages were shown by the evidence to have been caused by defendant's acts. This, we think, was a proper statement, rather than to direct the jury on to the uncertain ground of speculating as to what would be reasonable or unreasonable amount of noise or dust, and the amount of the verdict returned demonstrates that the jury considered it a substantial injury. Those features may, therefore, be considered properly eliminated from the case.

Instructions Nos. 3 and 4 requested by defendant and refused relate to the defining of a nuisance and the abatement thereof and have been sufficiently considered. Requested instruction No. 6 was to the effect estoppel may have existed by the plaintiffs' knowledge that the defendant was erecting the tipple and had opportunity to object but failed to do so and therefore cannot recover in this action. This instruction is noted as having been offered at a late hour during the closing argument in the case; but its contents prevent it from being proper to have been given for the reason that no matter of estoppel is or had been otherwise raised in the case.

We come now to a consideration of matters pertaining to some of those instructions as to which we are not clear upon the record as to just what did happen. The transcript shows that on June 23 certain instructions requested and given were filed in the office of the clerk. These included Nos. 1, 2, 5 and 9 requested by plaintiffs and No. 5 requested by defendant. Now, those were all included verbatim and given in the instructions heretofore referred to as having been given by the court. The objection here made by the appellant to the giving of those requested by plaintiffs is that by so doing the subjects thereof were by repetition unduly emphasized. Whether these instructions were actually twice read to the jury and twice included in the file we do

not know, but the same thing also happened to No. 5 requested by the defendant and given, and in as much as these were all included in the instructions originally designated as given by the court we would ordinarily assume that a duplicate reading and submission of them would have been discovered and avoided at the time. If, however, they were inadvertently given in duplicate the same thing happened in reference to the instructions tendered by both sides and the contents of none of them are such that a mere repetition could in any manner that we can see work a prejudice to any one. Even assuming that they were so included and twice read to the jury, no complaint except as to overemphasis is made here and, due to the circumstances and the contents of the instructions themselves, we do not think any prejudice resulted to any one.

Considerable argument on behalf of both parties is devoted to a consideration of the evidence and of the weight and credibility that should be given to certain parts of it. As we have stated, this trial consumed approximately ten days, a large number of witnesses were examined and a large amount of testimony appears in the record. Naturally there are many matters of conflict and some, perhaps, of misstatement, but there is without doubt ample evidence in the record to sustain the verdict reached by the jury, and this court would be going far beyond its province to assert that the verdict is clearly wrong. It was the province of the jury to determine the facts. The case on the whole, we think, was properly submitted for that determination upon correct principles, and that no error prejudicial to the appellant has developed or been shown. The judgment of the trial court is therefore

AFFIRMED.

JACK WEBBER ET AL., APPELLEES, V. CITY OF SCOTTSBLUFF ET AL., APPELLANTS.
293 N. W. 276

FILED JULY 5, 1940. No. 30936.

1. **Eminent Domain.** A city of the first class having a population of more than 5,000 and less than 25,000 has power to condemn property outside of and adjacent to the city limits for the purpose of extension of its streets and boulevards.
2. **Municipal Corporations.** The initiative and referendum law for the city of Scottsbluff was adopted in 1911 in substantial compliance with statutory provisions, and remains in force.

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

Straight Townsend, for appellants.

Morrow & Miller, contra.

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

BLACKLEDGE, District Judge.

This case, an appeal from the district court for Scotts Bluff county, arises upon the suit of the plaintiffs to enjoin the defendant city and other defendants who are officers thereof from proceeding to the condemnation of certain real estate adjacent to the city for the purpose of extending Broadway street or boulevard from its junction with Twenty-seventh street which is the northern boundary of the city. The property sought to be so condemned lies immediately adjacent to the said streets at the vicinity of their intersection. The city of Scottsbluff had passed an ordinance commencing a proceeding to appropriate the land sought to be condemned for streets and boulevards. Shortly thereafter there was filed in the office of the city clerk a petition asking that said ordinance be referred to the voters for their rejection or approval under the provisions of the initiative and referendum law, which it was claimed had theretofore been adopted and was in force in the city. Upon

trial of the case the district court found that the initiative and referendum law was in force and that a sufficient petition had been filed and that this condemnation ordinance should be referred to the voters for their adoption or rejection. The court also found that the city had authority to condemn for the purpose of streets and boulevards property outside the city limits.

The plaintiffs appeal from that part of the decree holding that the city has power and authority to condemn land outside of the city limits for streets and boulevards, and the defendants appeal from that part of the decree holding that the initiative and referendum law was in force in the city of Scottsbluff and enjoining the city from enforcing its condemnation ordinance until the same should receive the approval of the majority of the voters on the submission of the proposition.

There is no controversy as to the facts in the case and we find no particular difficulty in determining the propositions of law.

Upon the question of the authority of the city to condemn land outside of the city limits for streets and boulevards we think the same is found in the provisions of section 16-601, Comp. St. 1929, and other provisions of that article. Said section provides:

"The mayor and city council shall have power to purchase or appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, public heating plants, power plants, gas works, electric light plants or water works including mains, pipe lines and settling basins therefor, and to acquire outlets and the use of streams for sewerage disposal; and when necessary for the proper construction of any of the works above provided, the right of appropriation shall extend for a distance of ten miles from the corporate limits of the city."

The objection here raised to the authority of the city to condemn outside property in the present instance is based upon the argument that the word "works" as found in the

quoted section does not include the subject of streets or boulevards, but is limited to the instance in which that word is previously used as in connection with gas works or water works; but we think it plain that such a construction would be over-technical and unwarrantably narrow in view of the contents of the statute itself which is dealing with all the matters of public improvements mentioned, all of which have at one time or another been held to be public works as was the case when this court determined the case of *Union P. R. v. Commissioners of Colfax County*, 4 Neb. 450. Similar usage and application of the term has been recognized in *Mayor and Aldermen of Wetumpka v. Winter*, 29 Ala. 651, 660. We agree in this instance with the argument of the defendants that it seems more reasonable and logical that the word "works" is not used in the statute as a word of limitation, but as an all-embracing term intended to cover all the purposes set forth therein.

Some further contention is made to the effect that condemnation in such case could not be allowed because no means are designated by which payment of damage may be made and this contention is upon a somewhat similar construction of a following provision in the statute, section 16-603, Comp. St. 1929:

"Payment of damages assessed for the appropriation of private property for streets, alleys or boulevards in cities of the first class with a population of more than five thousand (5,000) and less than twenty-five thousand (25,000), may be made out of the general or any other surplus fund."

The argument is that this means the payment can be made only when the property lies wholly within the city. We think that this contention is likewise too narrow and confined and that the statutory provisions authorize both the appropriation of outside property and payment therefor in the manner specified.

Upon the other hand, it is contended that the initiative and referendum law is not in force in the city of Scottsbluff. It is admitted, however, that proceedings were had there to adopt the same. In 1911 a petition signed by 68

persons was filed with the clerk requesting that the question of adopting the initiative and referendum be submitted to the voters at the ensuing election. The record shows that it was moved, seconded and carried that the prayer of that petition be granted and the initiative and referendum be submitted to the voters of Scottsbluff and the clerk had the same printed on the ballot for use in the general election April 4, 1911. The records further show that after that election the canvass of the votes showed 220 for and 15 votes against the adoption of the referendum.

The defendants support their contention that the referendum law was not adopted nor in force upon two propositions—that the petition asking the submission of the proposition was not signed by 15 per cent. of the voters, and that no ordinance was passed calling a special election for the submission of the proposition. The conclusion that the signatories to the petition were less than 15 per cent. of the voters is derived from consideration of the votes cast at the following election for other offices, and not based upon any previous count nor upon the votes cast upon this proposition. In any event the provision of the statute is only that "to be mandatory" the petition shall be signed by at least 15 per cent. of the voters of the city. The council might have acted without any petition, so that the matter of the 15 per cent. requirement in so far as concerns the submission of the question was not governing. Neither was an ordinance calling a special election required, because a following section of the statute, section 18-516, provides that, when such petition does not request that the ordinance be submitted to the voters at a special election, the clerk shall cause the same to be submitted to the voters at the first regular election after the expiration of 15 days from the filing of the petition. This was done and the result was as stated.

The motion adopted by the board of trustees submitting the question was to all intents and purposes a resolution and was sufficient under the decisions. *State v. Babcock,* 20 Neb. 522, 31 N. W. 8; *State v. Marsh,* 106 Neb. 547, 184

N. W. 135; *Hevelone v. City of Beatrice,* 120 Neb. 648, 234 N. W. 791.

The trial court was right in its decision upon both propositions and its judgment is therefore

AFFIRMED.

KATHRYN F. FISCHER, ADMINISTRATRIX, APPELLEE, V. CHARLES P. MEGAN, TRUSTEE, APPELLANT.
293 N. W. 287

FILED JULY 12, 1940. No. 30754.

1. **Trial.** If plaintiff does not make a case for negligence in a suit for resulting damages, it is error to submit that issue to the jury.
2. **Automobiles.** "A motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights is negligent as a matter of law." *Redwelski v. Omaha & C. B. Street R. Co.,* 290 N. W. 904 (137 Neb. 681).
3. **Railroads.** Evidence *held* insufficient to sustain a verdict for plaintiff in an action to recover damages for alleged negligence of a railroad company in blocking, without proper signals, a public street with a freight car, where a truck driver negligently ran his truck into the freight car at night and thus killed his guest passenger, for whose death the action was instituted.

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

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz,* for appellant.

Francis P. Matthews, Earl Hasselbalch and *William P. Kelley, contra.*

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

ROSE, J.

This is an action by plaintiff, Kathryn F. Fischer, administratrix of the estate of her deceased husband, Herman

J. Fischer, to recover from the defendant, the Chicago & Northwestern Railway Company, $100,000 in damages for alleged negligence causing his death.

At St. Edward, Nebraska, Herman J. Fischer became a gratuitous guest on the driver's seat in the cab of a motor truck. The truck was loaded with cattle for the market at Omaha and was in charge of Lawrence Kleve, the driver. When he arrived from the west at the south end of Rivett Siding, near Omaha, on Maple street where it crosses defendant's railway at grade and approximately at right angles, a train with a freight car directly across Maple street was standing on the main line of the railway track. The truck driven by Kleve struck the freight car a violent blow about 1:05 a. m., Monday, November 27, 1934, and Fischer, a passenger in the truck, was instantly killed.

In her petition plaintiff alleged in different forms that defendant was guilty of negligence in blocking the highway, at the time and place and in the manner already indicated, on a dark, cloudy, rainy and foggy night, without stationing a member of the train crew at the place of danger to give warning of it to approaching motorists by signal lights, flares, torches or other means.

Defendant denied the negligence charged to it in the petition, and pleaded in defense of the action that the collision and resulting damages were caused by the negligence of the truck driver and the passenger.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $25,000, and from a judgment therefor defendant appealed.

At the close of the testimony, the sufficiency of the evidence to support a finding in favor of plaintiff on the issue of defendant's negligence was challenged by motion for a peremptory instruction. The motion was overruled and the case submitted to the jury. Failure of the trial court to enter a nonsuit is urged on appeal as a ground for reversal. If plaintiff did not prove actionable negligence of defendant, the submission of the case to the jury was erroneous.

There was a warning signal on Maple street 428 feet west

of the crossing: "R. R. Speed 12 M. State Law." Another signal read: "Stop. State Law." In addition, there was an electric wigwag signal flashing red rays on the north side of the street and 15 feet east of the center of the railroad track on top of a standard 13.8 feet high. Looking west from the crossing, Maple street was straight, was paved and practically level for 900 feet. From a point in the street 75 feet west of the railroad track there was normally an unobstructed view of moving trains for long distances both north and south. Direct evidence to which credence must be given proves that a whistle for the crossing was blown and the bell on the locomotive was rung as the train approached and partially crossed Maple street. Positive testimony of witnesses who so testified was not discredited by other witnesses who went no further than to say they did not hear the train signals. They were evidently handicapped by inattention or by traveling in the cab of the truck with the windows closed. Defendant had a right to cross the highway with its train after giving the proper signals. The statutory signals were given. The evidence does not show that a moving train at the crossing would have exposed the occupants of the truck to greater danger than a train temporarily standing across the highway. Plaintiff did not point out a statute or public regulation requiring the train crew to give additional warning by flares or torches or prove that the crew, after the train stopped, had time to give such signals or move the train from the crossing before the truck struck the freight car. The evidence is that the collision occurred almost instantly after the train stopped. The space between the bodies of the cars in the freight train was two feet or more and it is a fair inference from the evidential facts and circumstances that the red glare of the wigwag flashed through those openings from east of the crossing westward while the truck was approaching and while the speed of the freight train was being lowered to stop for the purpose of switching cars of gravel onto the Rivett Siding.

On the evening before the accident, Lawrence Kleve, the

driver of the truck, with his brother, Marcellus Kleve, left Cedar Rapids for Omaha with a truck load of cattle. When they arrived at St. Edward, Herman J. Fischer joined them, the three occupying the seat in the cab. They traveled through the night until they arrived at the scene of the accident after 1:00 o'clock in the morning. The driver had been over the same route five or six times and said he knew he was in the neighborhood of the crossing. The windows of the cab were closed. It was not raining at the time, but the weather was misty and foggy. The evidence is clear that careful driving at a reasonable speed under existing conditions was safe. Kleve testified at the trial and said he was traveling 12 or 15 miles an hour at the time, did not see any railroad signal and did not see the freight car across the highway until within 20 feet of it, when it was too late to prevent the collision.

A passenger in the cab of a truck which followed the one in the collision testified he saw it there when close to a bridge 163 feet west of the crossing, also saw the freight train and the freight car, stopped about 75 feet from them and walked to the scene of the accident before the men were taken from the wreck or the impacted cars moved.

The law applicable to established facts has been stated as follows:

"A motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights is negligent as a matter of law." *Redwelski v. Omaha & C. B. Street R. Co.*, 290 N. W. 904 (137 Neb. 681) following *Roth v. Blomquist*, 117 Neb. 444, 220 N. W. 572; *Cotten v. Stolley*, 124 Neb. 855, 248 N. W. 384; *Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465; *Hendren v. Hill*, 131 Neb. 163, 267 N. W. 340.

Fog and mist at night increased the necessity for care on the part of the driver and his guest. Kleve drove his truck at such a speed and with such indifference to safety as to prevent him from stopping in time to avoid a collision with the railroad freight car. It necessarily follows as a

conclusion from the evidence and the law that his negligence caused the fatal accident. Legally, liability therefor in damages cannot be visited on defendant. On the part of the railway company, there was no negligent act or series of negligent acts that caused the death of Fischer who was himself negligent in a manner preventing recovery. The driver and guest were strangers when the guest got into the seat in the cab for a long drive at night in front of a truck load of cattle. If the headlights on the motor were insufficient to make highway signals of a railroad crossing visible from the cab of the truck or to throw light on an obstruction in time to stop before running into it, it was the duty of the guest to exercise due care for his own safety and to warn the driver accordingly under such circumstances. He failed to do anything of the kind, took his chances with the driver and rushed to his death without protest. "The standard of the duty of an invited guest riding in an automobile is the same as the driver's," says a former ruling, "but the conduct to fulfil that duty is ordinarily different because their circumstances are different." *Glick v. Poska*, 122 Neb. 102, 239 N. W. 626. In the present instance care of the guest for his own safety was not exercised to any extent and prevented recovery by plaintiff. In any event actionable negligence of defendant was not shown. There was nothing to submit to the jury and the action should have been dismissed. This conclusion makes the discussion of other questions unnecessary.

REVERSED AND DISMISSED.

PROVIDENT SAVINGS & LOAN ASSOCIATION, APPELLEE, V. EDWIN W. BOOTH ET AL., APPELLEES: SECURITIES INVESTMENT CORPORATION, APPELLANT.

293 N. W. 293

FILED JULY 12, 1940. No. 30824.

1. **Interpleader:** LIMITATION OF ACTIONS. In a bill of interpleader, a defendant is chargeable with notice of a cross-petition filed

against him by another defendant before the answer day designated in the served summons issued on the petition of the stakeholder, and such notice may prevent the statute of limitations from running against the claim pleaded by the cross-petitioner.

2. **Corporations:** PLEADING. A corporation cannot legally escape liability for damages caused through its active fraud by merely pleading and proving former dissolution and subsequent incorporation, where its own pleadings in the same case show that it participated in the fraudulent transactions and claimed the fruits thereof after reorganization.
3. **Pleading.** "A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner." *Bonacci v. Cerra*, 134 Neb. 476, 279 N. W. 173.
4. **Interpleader.** A bill of interpleader is an equitable remedy in harmony with statutory provisions, whereby a disinterested stakeholder in possession of a fund or other property claimed by each of rival defendants may require them to litigate among themselves the issue of ownership without embroiling him. Comp. St. 1929, secs. 20-325, 20-329.
5. ———. The statutory rule that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others" may apply to issues in a bill of interpleader. Comp. St. 1929, sec. 20-323.
6. ———. A motion by a defendant in a bill of interpleader to strike from the petition of another defendant a plea for the recovery of damages resulting from fraud, *held* properly overruled under the circumstances narrated in the opinion.
7. **Equity.** "When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all of the matters put in issue by the pleadings." *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Leis v. Beckmark*, 133 Neb. 467, 275 N. W. 679.

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

Francis P. Matthews and *William P. Kelley*, for appellant.

Walker & McArthur, Robert S. Stauffer, Jay O. Rodgers and *Phil L. Sidles, contra.*

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

ROSE, J.

This is a suit in equity in the form of a bill of interpleader. Provident Savings & Loan Association, plaintiff, alleges it has a credit of $274.19 on shares therein which it desires to pay into court for the owner thereof; that Edwin W. Booth and Securities Investment Corporation, defendants, are rival claimants to the credit; that plaintiff is unable to determine which of them has the valid claim; that plaintiff is a mere stakeholder without any interest in the fund, except the duty to turn it over to the owner; that it desires to avoid a multiplicity of suits and to be relieved of responsibility for the fund by paying it into court where defendants may be required to appear, plead and litigate their respective claims to a final determination.

Defendant Booth appeared and in his answer admitted the allegations of plaintiff's petition and alleged the Securities Investment Corporation had no interest in the credit at stake for reasons pleaded in his cross-petition which contains the following pleas: July 30, 1936, the Securities Investment Corporation was dissolved and on August 3, 1936, the Securities Investment Corporation, defendant, was incorporated by the same persons who owned and controlled the dissolved corporation; that such corporate action was taken for the purpose of defrauding Booth; that the new corporation succeeded to the property and rights of the old and assumed its liabilities and is in fact the same; that Booth purchased from the corporation, June 1, 1933, a tractor and trailer for $2,500 on false representations of the seller, with the right to return them if unsatisfactory and not as represented; that the tractor and trailer were not as represented and were tendered back, accepted and resold; that Booth paid on the purchase price $200 and assigned to the seller deposits of approximately $600 in building and loan associations—funds turned over to the seller. There is a prayer by defendant Booth for judgment for $800 with interest against the Securities Investment Cor-

poration, defendant, successor to the Securities Investment Corporation, and for an order on the clerk of the district court to turn over to Booth the fund paid into court.

The Securities Investment Corporation, defendant, answering plaintiff's petition, alleged that Booth purchased from the Motor Exchange and Refinance Company of Omaha, May 31, 1933, the tractor and trailer and encumbered them by chattel mortgage for $2,691 to secure the unpaid purchase price and, as additional security, assigned to the Securities Investment Corporation the deposit with plaintiff; that he failed to pay the chattel mortgage note and that there is due thereon a sum in excess of the fund mentioned in plaintiff's petition; that Booth's cause of action for fraud is barred by the statute of limitations, and prayed that the corporation be adjudged the owner of the credit and plaintiff ordered to make payment accordingly.

William L. Walker, trustee in bankruptcy, was substituted for Booth as a party defendant and interposed a general denial to unadmitted allegations of the corporation's answer.

The corporation filed a motion to strike from the cross-petition of Booth all matter therein except his claim for money paid into court. The motion was overruled and thereafter the corporation by reply denied unadmitted allegations of Booth's answer and cross-petition.

Upon a trial of the issues outlined, judgment was entered in the district court in favor of Walker, trustee substituted for defendant Booth, and against the corporation, for $1,103.06, with an order on the clerk of the district court to turn over to trustee Walker for application on the judgment the fund paid into court by plaintiff. The Securities Investment Corporation has appealed.

The corporation insists that the judgment should be reversed on the ground that the relief granted to Booth and his successor in interest on the issue of fraud was barred by the four-year statute of limitations. After plaintiff instituted this suit and paid the deposit in its possession into court for the defendant entitled to it, the adverse litigants

were the defendant Booth and the defendant corporation. The petition of plaintiff gave notice of litigation between them. The corporation was summoned into court on the petition of plaintiff April 1, 1937, and subsequently appeared therein. Booth's cross-petition praying judgment against the corporation for damages on account of fraud perpetrated by it was filed April 1, 1937. The fraud was first discovered by Booth in June, 1933. The court in a former decision applicable to these facts, after citing cases, said:

"As between co-defendants, therefore, the rule is established that each is bound to take notice of such pleadings as shall be filed on or before the answer day named in the summons issued upon the original petition." *Arnold v. Badger Lumber Co.*, 36 Neb. 841, 55 N. W. 269.

This rule has been recognized in later decisions. It follows that the corporation had notice of the claim of Booth for damages before his answer day and notice of his cross-petition for redress before the time for bringing suit expired and that his cause of action for fraud was not barred by the statute of limitations.

The corporation argues that the judgment against it should be set aside on the ground that the fraud alleged, if committed, was chargeable to the dissolved corporation and not to the new defendant corporation. The evidence is clear that Booth purchased the tractor and trailer from the Securities Investment Corporation; that Motor Exchange and Refinance Company was another name for the defendant corporation; that the sale was the result of fraudulent misrepresentations of the seller on which the purchaser relied; that the implements did not serve the purpose for which they were sold; that the seller tried to remedy the defects and failed; that Booth returned them to the seller and demanded a return of the purchase price paid; that the seller took them back, resold them and refused to repay the consideration received from Booth. Defendant corporation did not escape liability for this fraud by mere dissolution and incorporation in the same name. In its answer to the

petition of plaintiff, the new corporation defendant claims the fruits of this fraud committed by its predecessor—the consideration received through the fraudulent sale; the building and loan association deposits or credits assigned by Booth as part of the purchase price; the unpaid purchase-money note secured by chattel mortgage on the identical tractor and trailer sold to him. The new corporation defendant is bound by its allegations disproving the defense that the fraud of the dissolved corporation is not chargeable to the new. The law has been recently stated as follows:

"A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner." *Bonacci v. Cerra,* 134 Neb. 476, 279 N. W. 173.

The overruling of the motion to strike from the cross-petition of Booth all matters therein except his claim for the money paid into court is challenged as erroneous. This assignment of error seems to be based on the proposition that nothing but ownership of the fund paid into court is cognizable on a bill in the nature of interpleader, a remedy not preventing a jury trial on the issue of fraud in an action for damages. The controversy over the ownership of this fund grew out of the fraud pleaded by Booth. The character of the remedy by interpleader is indicated by the following rule:

"Where one, owing a debt which is claimed by two or more persons, lodges in the district court an application in due form, making the respective claimants of the debt parties to the proceeding, and at the same time brings into court money in an amount equalling such debt and interest, and prays for a determination of the true ownership of the fund and that such applicant be released, and where the respective claimants join issue thereon, such proceeding is one coming within the provisions of sections 8549-8552, Comp. St. 1922, governing interpleader." *Citizens Nat. Bank of Wisner v. McNamara,* 120 Neb. 252, 231 N. W. 781.

The suit is one in equity. The parties to the cause of action for fraud were before the court. A statute provides:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights." Comp. St. 1929, sec. 20-323.

There was no necessity for multiplying litigation. The established rule of equity declares:

"When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all of the matters put in issue by the pleadings." *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Leis v. Beckmark*, 133 Neb. 467, 275 N. W. 679.

Error in the proceedings and judgment below has not been pointed out or found.

AFFIRMED.

IN RE ESTATE OF MABEL FLORENCE MCADAM HERMAN. ROY L. MCADAM, ADMINISTRATOR DE BONIS NON, ET AL., APPELLANTS, V. E. L. HYDE, APPELLEE.

293 N. W. 353

FILED JULY 12, 1940. No. 30796.

1. **Executors and Administrators.** An administrator, on accounting, is entitled to credit for advancements made by him to an adult distributee or legatee, to the full extent of payment so made, whether ordered by the court or not, especially when such advancements do not exceed the payee's distributive share of the estate, and are made in good faith.
2. **Appeal.** Where the evidence on material issues so conflicts that it cannot be reconciled, this court considers the fact that the trial court observed the witnesses and their testimony, and must have accepted one version of the facts rather than the opposite.
3. **Executors and Administrators.** Payment of $75 to obtain an extension of the real estate mortgage on the real property belonging to said estate, expenditures for premiums on administrator's bonds amounting to $40, payment of real estate taxes accrued on the real estate of the deceased for 1932, 1933, 1934, and 1935, and personal taxes for 1933 and 1934, examined, and each approved.

4. ———. The general rule on the subject of compensation for a fiduciary is that the amount thereof, or whether for maladministration he should be denied all compensation, if within the limits of the controlling statute, is within the sound judicial discretion of the court, to be exercised according to the circumstances of the particular case.
5. ———. The refusal of the trial court, under the circumstances of this case, to exact compound interest, approved.
6. ———. An administrator is not entitled to charge against the estate attorney fees incurred by him in a contest with the heirs and representatives of the estate as to his alleged mismanagement and misappropriation of the funds of the estate.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Affirmed in part and reversed in part.*

Golden P. Kratz, for appellants.

Neighbors & Danielson, contra.

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

EBERLY, J.

It appears that Mabel Florence McAdam Herman, a resident of Greeley, Colorado, died on August 24, 1930. On September 28, 1931, her husband, Fred Louis Herman, filed a petition in the county court for Cheyenne county, Nebraska, asking for the administration of decedent's estate, and praying that E. L. Hyde be appointed administrator thereof. It was alleged that the deceased was the owner of a quarter-section of land in Cheyenne county, Nebraska, at the time of her death, and also of personal property situated therein. Letters of administration were issued on said estate on October 16, 1931, out of the county court for Cheyenne county, Nebraska, to E. L. Hyde, who qualified as administrator, and in due time filed his inventory, in proper form, scheduling the real estate of deceased, and money in the sum of $3,639.60.

Without detailing the delays and derelictions for which Hyde was responsible, it may be said that he tendered his resignation on the 28th day of May, 1938; that it was ac-

cepted by the county judge on the same day, and thereafter Roy L. McAdam was duly appointed as administrator *de bonis non*. On the hearing of Hyde's final account and report as administrator, the same was disallowed, and the county court further adjudged that there was due and unpaid from Hyde to the estate the sum of $4,820.49. Hyde thereupon prosecuted an appeal to the district court for Cheyenne county. On trial of the issues in the district court it was finally determined that there was but $671.71 due from Hyde to the estate of Mabel Florence McAdam Herman, deceased, which amount it was adjudged that he should pay to the administrator, and further comply with certain directions as to transfers to be made to the last-named party. From this judgment the objectors appeal.

With commendable frankness the appellants have clarified the issues to be decided on this appeal by the following language found in their brief, viz.:

"The difficulties involved in this lawsuit do not in any way touch upon the sums of money received by E. L. Hyde as the original administrator in this case. It is accepted as a fact that all moneys due to the estate in so far as any of the parties know have been reported by him in the course of the litigation and the various reports. The difficulties which have arisen result from the improper handling, use and distribution of such funds, the loss of a portion thereof and the application of a portion thereof to payment of administrator's and attorney's fees."

We reduce the contentions of appellants to eight specific questions.

We are quite in agreement with the trial court that Hyde should not be charged with interest on the advancement of $800 to the husband of the decedent from date of advancement. While the advancement was made without formal sanction of the court, the husband, as such, was an heir and entitled ultimately to share in the estate. There were no claims then allowed, or in fact ever allowed, against the estate. The administrator then had possession of $3,639.60 belonging to his trust. His depositary, the Liberty State

Bank, had not yet closed its doors. The amount advanced did not exceed the distributive share of the accommodated party, and at the time of making the payment the administrator had no reason to believe that the transaction would result in any embarrassment to the estate. It was done in good faith.

"Advancements made by an administrator to an adult distributee or legatee are properly chargeable to him on a final accounting. The amount so advanced should be credited to the administrator against the share of the distributee. 'The accountant is entitled to credit against these to the full extent of payments made to them, whether ordered by the court or not.' 3 Woerner on Administration (3d ed.) 1793, sec. 519." *In re Stewart's Estate*, 145 Or. 460, 28 Pac. (2d) 642, 91 A. L. R. 818.

We are satisfied with the judgment of the trial court allowing the administrator credit for the amount of moneys of the estate kept by him in the Liberty State Bank, which, subsequent to the deposit, "closed its doors." The brief of appellants contains the statement that "there was no evidence to show that Mr. Hyde knew of the precarious condition of the Liberty State Bank at the time when the deposit was made or at any time prior to its closing." They suggest, however, that the deposit of the estate funds was made under the name of "E. L. Hyde, Adm.," and not as E. L. Hyde, administrator of the estate of Mabel Florence McAdam Herman, deceased. Assuming, but not determining, that this difference is material, the record discloses that the original bank books of the Liberty State Bank are lost. Secondary evidence as to the questioned entry is conflicting. Remembering that the trial court saw and heard the witnesses on this disputed fact, this tribunal accepts the conclusion in harmony with the views of the trial court, and determines the issue in harmony with its judgment.

We also agree with the trial court's determination that the payment of $75 to obtain an extension of the mortgage on the real property belonging to said estate, which was due March 4, 1932, was a proper and commendable exer-

cise of power by the administrator. There is no question but what the extension was actually secured, and justice demands that that amount be repaid by the estate receiving the benefit thereof.

Likewise, this court concurs in the allowance by the trial judge of the following expenditures, made after October 16, 1932, viz.: Four bond premiums paid for extension or renewal of administrator's bond of $10 each, amounting to $40; real estate taxes accrued on the estate's real estate for 1932, 1933, 1934, and 1935, in amounts of $52.34, $57.70, $68.68, and $67.46, respectively, and the interest accruing thereon; also personal taxes assessed on personal property owned by this estate, and paid for 1933 and 1934, of $4.28 and $12.47, respectively, and interest accruing thereon.

During the period of the extension of his official bond which the payment of the $40 in premiums secured (though irregularly made) this administrator performed items of service for his trust and made the expenditures from the trust funds in his possession hereinbefore enumerated, which were necessary and resulted in benefit to the estate. In addition, he was enabled from time to time to collect and receive the dividends paid by the insolvent bank in which the funds of the estate had been deposited. In view of all the circumstances disclosed by this record, we are impressed with the view that the district court properly credited the administrator with the expenditures above made.

Under the circumstances of the instant case, this court concurs in the action of the district court in fixing the amount of the administrator's compensation at the sum of $85.69.

"The general rule on the subject of the fiduciary's compensation is that the amount thereof, or, whether for maladministration, he should be denied all compensation, is within the sound judicial discretion of the court, to be exercised according to the circumstances of the particular case." *Cannon v. Searles*, 150 Va. 738, 143 S. E. 495.

See, also, *In re Estate of Mowrey*, 210 Ia. 923, 232 N. W. 82; *Succession of Gandolfo*, 173 La. 190, 136 So. 561.

The refusal of the trial court, under the circumstances of this case, to exact compound interest appears to be in accord with the principles approved by this tribunal. *In re Estate of Bullion,* 87 Neb. 700, 128 N. W. 32; *Bell v. Arndt,* 24 Neb. 261, 38 N. W. 750.

It may be said that Hyde claimed credit for the sum of $350 for an administrator's fees and for an attorney's fee (for services performed by himself) and also credit for the sum of $35 expended by him in payment of what is described as the "Bates note." These claimed credits amount to $384.89 ($385). The district court exacted interest from Hyde at the statutory rate on all moneys of the estate in his hands on October 16, 1932 (the time allowed for closing the estate to October 25, 1938, the date of hearing in the county court). The interest so exacted aggregates the sum of $472.51. The total amount which the accounts of the administrator were surcharged thus amounted to the sum of $857.40. However, the district court credited this administrator's account with the following: Administrator's fee allowed Hyde, $85.69; attorney's fee allowed Hyde, $100; total $185.69. This left a net balance due the estate by Hyde of $671.71.

We are not in accord with the order of the district court in its order of allowance of an attorney fee for services performed as attorney for the administrator in defending his final account against the attack of the heirs of the estate and the administrator *de bonis non.* These charges for attorney's services were incurred not for the benefit of the estate and those interested therein, but for the benefit of the appellee, the ex-administrator thereof. In principle, the question here presented was settled by this court adversely to the contention now made, as will be seen from the following excerpt from the opinion of this court in *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316. In the *Wilson* case the controlling facts were quite similar to the facts in the instant case. We announced our conclusion in the following terms, viz.:

"In the supplemental report of 1911, which was duly ap-

pealed from, the court allowed the administrator fees for attorneys employed by him in the contest between himself and the estate as to the settlement of his account and in the various appeals therefrom to the district and this court. Under the former holding of this court in the appeal referred to, these items were improperly allowed. The fees appear to be reasonable and just, but they were incurred by the administrator, not for the benefit of the estate, but in the contest against the estate, and such fees are chargeable to the administrator himself. These fees and costs paid by his attorneys as allowed by the county court amounted to $932.25. There is one item for services in making first settlement in county court which is not shown to be improperly allowed, amounting to $100. The remainder of these items should be charged to the administrator."

We do not find that the trial court erred in taxing costs accruing in the district court (other than attorney fees) to the administrator *de bonis non,* but do determine that error was committed in the allowance of an attorney's fee to the appellee for defense of his final account in the district court.

The judgment and decree of the district court, entered upon consideration of the final account of the administrator, except as to allowance of attorney fees, is approved. In so far as this judgment directs the allowance of the sum of $100 as attorney fees for services of appellee's attorneys, the same is reversed. The case is hereby remanded to the district court, with orders to conform to the findings and directions herein contained.

AFFIRMED IN PART AND REVERSED IN PART.

JAMES A. BAUER ET AL., APPELLANTS, V. STATE GAME, FORESTATION AND PARKS COMMISSION ET AL., APPELLEES.
293 N. W. 282

FILED JULY 12, 1940. No. 30855.

1. **Statutes.** "General laws are those which relate to or bind all within the jurisdiction of the law-making power, and if a law is

general and operates uniformly and equally upon all brought within the relation and circumstance for which it provides it is not a local or special law in the constitutional sense." *People v. Borgeson*, 335 Ill. 136, 166 N. E. 451.

2. ———. A statute is not special or local merely because it prohibits doing a thing in a certain locality. It is, notwithstanding this fact, a general law if it applies to all the citizens of the state, and deals with a matter of general concern.

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

R. A. Robinson and *Robins & Yost*, for appellants.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

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

PAINE, J.

The legislature of 1939 enacted a law for a game refuge on the Platte river, and both sides thereof, from the west boundary line of Dodge and Saunders counties as far east as the Venice bridge near Yutan, and making it unlawful to hunt therein. Plaintiff filed petition in equity, asking that said law be declared unconstitutional and void, and that the State Game, Forestation and Parks Commission be enjoined from carrying out its provisions. Demurrer of defendants was sustained, and plaintiffs refusing to plead further, their petition was dismissed, from which ruling plaintiffs appeal.

This case involves a constitutional question, and section 2, art. V of the Constitution of Nebraska, provides in reference to this court passing upon the constitutionality of statutes: "A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges." There being but six judges sitting, it was stipulated by counsel in open court that Justice

Eberly, who was out of the state, should participate on briefs.

However, rule 6-b of this court provides, in reference to constitutional questions: "All judges of the court, however, shall participate in all decisions of such questions as if the case had been argued to the full bench, whether having heard oral argument or not." In accordance with this rule, Justice Eberly participated in this decision.

Legislative Bill No. 205 was introduced by Richard N. Johnson, of Dodge county, and M. E. Westley, of Butler county, the title of the act reading as follows: "An Act to create and establish additional state game refuge on each side of the banks of the Platte river between the counties of Dodge and Saunders in said state; to regulate and prohibit the coursing or killing of game birds or other birds therein; to provide penalties for the violation thereof; and to declare an emergency." Laws 1939, ch. 43.

The three sections of the bill to which exceptions are taken read as follows:

"Section 1. For the better protection of birds and the establishment of breeding and resting places therefor, the following area within the state of Nebraska is hereby set aside, designated and established as a state game refuge: All that portion of the state of Nebraska on the Platte river, and for ten rods on each side of the banks of said stream from the west line of Dodge and Saunders counties east and southeast to a point on said Platte river to the bridge on U. S. Highway No. 16 south and east of Yutan.

"Sec. 2. The Game, Forestation and Parks Commission is directed to place suitable signs showing the boundaries of the refuge and on all roads leading thereinto.

"Sec. 3. It shall be unlawful for any person or persons at any time to hunt, kill, capture or chase with dogs, any game birds, game animals or other birds or animals of any kind or description whatever, or to carry firearms of any kind or to have dogs within the limits of said game refuge, as designated in the second preceding section: Provided, this shall not prevent any one carrying firearms or dogs

across the preserve at any point on said refuge, nor shall it prevent any person taking fur-bearing animals by the use of traps during lawful open seasons on same, nor shall it prevent the Game, Forestation and Parks Commission from issuing such permits as it may be deemed necessary for the killing of animal or bird predators that may endanger game birds or game animals or the domestic property of adjacent landowners."

It is contended by plaintiffs, as ground for reversal, that the trial court erred in holding that this law was not in violation of section 18, art. III of the Constitution, which provides that the legislature shall not pass local or special laws for the protection of game or fish.

Plaintiffs argue that there is no distinction between the areas within and without the area described as to desirability or usefulness for a game refuge; that the selection of the area designated is an arbitrary selection, without reference in any way to any element which would make the lands and river within the area more desirable than the area outside for a game refuge, and therefore the limits are based on a purely arbitrary selection by the legislature.

Plaintiffs insist that the act sets up a provision in paragraph 2 directing the game commission to put up suitable signs showing the boundaries of this refuge, and thereby, in putting these markers on private property, without any remuneration to the owner of the land, it in a way takes private property. If any markers or signs should be attempted to be put on plaintiffs' lands that amounted to a taking or damaging of their property, plaintiffs would, of course, be entitled to compensation. Nothing is here shown, however, which would justify this court in declaring the law unconstitutional, or in granting an injunction on that ground.

It is admitted that this question has never been passed upon by our court, but plaintiffs cite us to the case of *People v. Wilcox*, 237 Ill. 421, 86 N. E. 672. This decision discussed a legislative enactment entitled "An act to encourage the propagation and cultivation and to secure the

protection of fishes in all the waters under the jurisdiction of the state of Illinois." Appellee was convicted, and appealed to the circuit court. It was claimed to be unconstitutional because it excluded Lake Michigan from its operation, thereby conflicting with a clause of the Constitution which prohibits the passage of local or special laws for the protection of game or fish.

The Illinois court said: "It is strongly urged upon our consideration by appellant that the proper protection of fish in our state requires laws of local application, owing to the differences existing in the kinds and habits of the fish found in the different waters of the state. Strong arguments along this line are made, the effect of which is merely to show what might reasonably have been the intention of the framers of our Constitution. But such arguments can have no weight where the intention is clearly expressed by the words used;" and it was held that any classification by which a law is made to affect any territory less than a whole state must be based on a reasonable distinction, and not on an arbitrary one.

Plaintiffs also cite *State v. Scott*, 70 Neb. 685, 100 N. W. 812, and *State v. Hall*, 129 Neb. 669, 262 N. W. 835, in which it was held that a law to be general must operate on all persons and localities of a class brought within the circumstances described.

We find there have been at least four game refuges set up by law in Nebraska. See Comp. St. Supp. 1939, secs. 37-419, 37-423. It is argued by the state that, if this law is held to be local and special legislation and void, it will doubtless affect the validity of the acts establishing these other refuges, upon which the state has expended considerable sums in development work. This argument, which is given some weight by counsel for the state, cannot be considered in passing upon the establishment of this particular game reserve. The purpose of the law is simple, and clearly provides for a permanent closed season in this restricted area along the Platte river.

There is the presumption that a law enacted by the legis-

lature is valid, and that the legislature had before it all of the facts necessary to warrant the provisions inserted in the act.

This method of protecting game has been used in Nebraska for a number of years, otherwise the game would have been gone before this time. Other states have enacted similar laws, and they have been upheld generally.

If this law provided that no one living in Dodge county could hunt or fish in that area, it would naturally be unconstitutional, but this law applies to all of the people of the state of Nebraska, whether they reside in Dodge or Saunders county, or within the area mentioned, or any place without the area in the state. It affects every one exactly the same.

In the prevention of disease, such as anthrax, or bovine tuberculosis, this state permits the department of agriculture to quarantine any single county, or part thereof, in this state (Comp. St. 1929, sec. 54-901) under the general police power, as essential to public safety and health.

An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the legislature has a basis in reason, and is not purely arbitrary.

In *Waterman v. Chicago Bridge & Iron Works* (1931) 328 Mo. 688, 41 S. W. (2d) 575, the court said: "If a law affects equally all persons who come within its operation it cannot be local or special within the meaning of the Constitution."

To the same effect is *Arps v. State Highway Commission* (1931) 90 Mont. 152, 300 Pac. 549, in which it is said: "The object of the prohibition of special or local laws is to prevent a diversity of laws relating to the same subject. 1 Lewis' Sutherland on Statutory Construction (2d ed.) sec. 199; *People v. Wilcox,* 237 Ill. 421, 86 N. E. 672. A law is not local or special in a constitutional sense that operates in the same manner upon all persons in like circumstances. 'General laws are those which relate to or bind all within

the jurisdiction of the law-making power, and if a law is general and operates uniformly and equally upon all brought within the relation and circumstance for which it provides it is not a local or special law in the constitutional sense.' *People v. Borgeson*, 335 Ill. 136, 166 N. E. 451; *State ex rel. Garvey v. Buckner*, 308 Mo. 390, 272 S. W. 940; note to *State v. Ellet*, 21 Am. St. Rep. 772."

From a study of these and many other cases, we think the true rule may be stated in this form: A statute is not special or local merely because it prohibits doing a thing in a certain locality. It is, notwithstanding this fact, a general law if it applies to all the citizens of the state, and deals with a matter of general concern.

For a case almost directly in point, we suggest an examination of *Maitland v. People* (1933) 93 Colo. 59, 23 Pac. (2d) 116, in which the supreme court of Colorado said: "It is said that the defendant, who is the owner of a ranch situated within the limits of the game refuge, has a hunting license; that the act makes it a crime for him to kill a deer at any time within the refuge limits, whereas his neighbors just outside the refuge who kill deer during the open seasons designated by our game laws are guiltless of any offense; that the act thus denies to the inhabitants of a certain locality the right to share equally in the privilege enjoyed by the inhabitants of other localities; and therefore that the act is a special act within the meaning of the Constitution. This objection is not sound. All persons, including the defendant, are forbidden to kill, etc., at any time, birds or animals, with certain exceptions, within the limits of a game refuge, and all persons, including the defendant, may kill, etc., at certain times called open seasons, birds or animals outside of such limits. The act applies to all persons alike. It is not special legislation. *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938."

Applying this decision to the case at bar, we see it does not deny plaintiffs equal protection under the law, but all the citizens of Nebraska, including the plaintiffs, are prohibited from hunting in this area.

Plaintiffs seem to contend that those owning land within this refuge, or reserve, have had property rights taken from them in not being able to hunt upon their own property. But it has been uniformly held by courts that there is no property right generally in wild game, for the ownership therein is lodged in the state.

But, notwithstanding this more general rule, the owner of the premises on which wild game is located, if outside a state game refuge, has a qualified interest therein, for without his permission no hunter can go upon the private premises of another and take such game. 24 Am. Jur. 374, sec. 3.

Several other questions are presented by the appellants, which we have considered, but which we do not regard as controlling in the case, and a discussion of them is therefore omitted.

It is a proper exercise of power for the legislature to enact such laws as are necessary to protect, conserve, and replenish the failing resources in game and fish, which were once so plentiful in our state.

The legislature was within the provisions of our Constitution in enacting the law in question, and the trial court was right in sustaining the demurrer of the defendant.

AFFIRMED.

SIMMONS, C. J., dissenting.

The majority "fail to see any merit" in plaintiff's contention that the act authorizes and directs a violation of his constitutional rights.

The act provides: "The Game, Forestation and Parks Commission is directed to place suitable signs showing the boundaries of the refuge and on all roads leading thereinto." Plaintiff contends that this directs a violation of the constitutional provision that "The property of no person shall be taken or damaged for public use without just compensation therefor." Const. art. I, sec. 21.

Certainly the state has no right to enter upon private land and exercise rights of ownership by erecting signs thereon without compensation to the owner. Such an act

is both a taking and a damaging of property. The amount of the damage may not be large, but that is immaterial. If the door is left open slightly, it will be more easily entered the next time by those who desire to take and damage private property. The door is locked by the Constitution. The only key is "just compensation" to the owner. This court has repeatedly enjoined the taking and damaging of private property by public agencies for a public purpose where no provision is made for compensating the owner. It should not refuse to do so here.

To sustain this act is to invite a disregard of constitutional provisions in the future. The observance of constitutional rights and limitations is more important than the propagation of game birds, no matter how much we may favor the latter activity.

ROSE, J., concurs in the dissent.

JOHNSEN, J., concurring.

It may be desirable to eliminate the possibility of any confusion from a reading of the dissenting opinion filed since the majority opinion was adopted.

The majority opinion does not hold, as the dissenting opinion implies, that the game commission is authorized to go onto plaintiff's lands or the lands of any other person, place signs thereon, and deprive the owners of, or interfere with, the use of a portion thereof, no matter how slight, without compensation. On the contrary, the opinion expressly states: "If any markers or signs should be attempted to be put on plaintiffs' land that amounted to a taking or damaging of their property, plaintiffs would, of course, be entitled to compensation."

Equally untenable is the view that the legislature has directed the game commission to violate the Constitution and to attempt to place signs upon private property without compensation. A direction "to place suitable signs showing the boundaries of the refuge and on all roads leading thereinto" is hardly a mandate to go upon private property, place signs thereon, and ignore constitutional rights to compensation. If it is necessary that any such signs be

placed on private property, the legislature has by other means provided funds for carrying on the work of the game commission and has declared that "All funds rendered available by law * * * may be used by it in administering and developing said resources." Comp. St. Supp. 1939, sec. 81-6505.

A simple illustration may serve to demonstrate the fallacy that has been indulged in. If it can be contended that the statute here involved is unconstitutional because it does not specifically instruct the game commission to make payment of any obligation that may arise out of this phase of its activities, the argument must ultimately reach the logical absurdity of contending that a statute, such as that which imposes upon the clerk of the supreme court the duty to have the opinions of the court published in official reports, and to have them printed, is unconstitutional because it does not specifically instruct him to see that payment is made for the printing.

WILBER F. BEISNER ET AL., APPELLANTS, V. ROBERT L. COCHRAN ET AL., APPELLEES.
293 N. W. 289

FILED JULY 12, 1940. No. 30921.

1. **Constitutional Law.** There is no vested right in an existing law which precludes its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law.
2. ———. It is a general rule of constitutional law that a person has no vested right in statutory licenses, permits or privileges.
3. ———. A legislative enactment under the police power of the state which is regulatory in character is not violative of the due process clauses of the state and federal Constitutions because it reduces or destroys the value of property acquired under a former law.
4. **Eminent Domain.** Neither does such an act amount to the taking or damaging of private property for public use without just compensation within the meaning of constitutional provisions on the subject.

5. **Constitutional Law.** A legislative enactment which compels the owner of property to donate the use thereof without compensation is prohibited by the due process clauses of the state and federal Constitutions, and is therefore void.
6. ———. Where a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of a court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.
7. **Eminent Domain.** Section 6, ch. 78, Laws 1939 (Comp. St. Supp. 1939, sec. 60-421) construed as not requiring inspection stations and garages to make motor vehicle inspections without compensation therefor.
8. **Statutes.** If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate section 14, art. III of the Constitution, providing that no bill shall contain more than one subject and the same shall be clearly expressed in the title.
9. ———. That portion of section 14, art. III of the Constitution, relating to amendments has no application to an act complete in itself and not in effect amendatory, even though it may modify or destroy the effect of previous legislation.

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

Max Kier, for appellants.

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

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

CARTER, J.

This is a suit brought by plaintiffs, on behalf of themselves and others similarly situated, to obtain a declaration of the rights, status and legal relations of the parties under sections 60-435 to 60-444, Comp. St. Supp. 1937, as affected by chapter 78, Laws 1939. The defendants are the administrative officers of the state who are charged by law with the enforcement of the statutes in question. The trial court

sustained a general demurrer to the petition and dismissed the action. Plaintiffs have appealed from the adverse judgment entered against them.

Prior to 1937 the statutes of Nebraska provided that motor vehicles should be equipped with adequate brakes and lights. In 1937 a statute was passed requiring resident owners of motor vehicles to procure annual certificates of inspection showing that the brakes, lights and other equipment comply with the statutes of the state and the regulations of the administrative department having charge of the enforcement of the law. The statute provided further that any public garage, by meeting certain requirements, could become an authorized inspection station and make a charge of 25 cents for each complete inspection, of which 20 cents might be retained by it. Comp. St. Supp. 1937, secs. 60-435 to 60-444. The plaintiffs are operators of public garages who made investments in special machinery and equipment and secured sufficient space and personnel to qualify as official inspection stations and thereby became qualified to inspect motor vehicles and to make the statutory charge therefor.

In 1939 the legislature passed a new statute with more rigorous requirements with respect to brake and light equipment, and repealed the provisions of the 1937 act requiring compulsory inspections and authorizing official inspection stations. Laws 1939, ch. 78. It is the contention of plaintiffs, among others, that the repeal statute destroyed the value of their special machinery and equipment in a manner violative of the due process clauses of the state and federal Constitutions and also constituted a taking or damaging of private property for public use without just compensation contrary to constitutional prohibitions.

We think the rule is, that a citizen has no vested right in statutory licenses, permits and privileges. This being true, a license to carry on a particular trade may be recalled by legislative action at any time. No one has a vested right to be protected against consequential injuries arising from a proper exercise of public powers. That the state

under its police power may regulate the use of motor vehicles on the public highways cannot be questioned. Consequently, any incidental damage resulting from a legislative invocation of its police power does not give rise to a right to enjoin the act or to claim compensation from the public. And, likewise, the amendment or repeal of an existing police regulation must necessarily follow the same principle. The applicable rule is well stated in *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205, as follows: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is

abated; in the other, unoffending property is taken away from an innocent owner."

The licenses issued to plaintiffs under the 1937 act, permitting them to operate official inspection stations, created no contractual relationship between them and the state. Plaintiffs are presumed to have known that the continued existence of the license was dependent upon the willingness of the legislature to keep the statute creating it in force. The statute authorizing the licensing of official inspection stations and requiring annual inspections of all motor vehicles using the public highways of the state is a proper exercise of the police power of the state and any incidental restraints imposed thereby upon the use of property is not in contravention of the due process clauses. Likewise, the repeal of such police regulation constitutes a proper exercise of legislative power and any incidental damage to property resulting therefrom is not inhibited by the due process clauses, nor does it constitute a taking or damaging of property for public use within the purview of constitutional provisions on that subject. *Marsh & Marsh v. Carmichael,* 136 Neb. 797, 287 N. W. 616.

We concur with plaintiffs' contention that the repeal or amendment of a statute cannot have the effect of destroying vested rights acquired under a former law. But the license or permit granted in the instant case, authorizing the plaintiffs to operate an official inspection station, does not convey a vested right. *Martin v. State,* 23 Neb. 371, 36 N. W. 554; *Effenberger v. Marconnit,* 135 Neb. 558, 283 N. W. 223.

We necessarily conclude that the legislature could lawfully amend or repeal sections 60-435 to 60-444, Comp. St. Supp. 1937, without violating the provisions of the state and federal Constitutions hereinbefore mentioned. Neither are the plaintiffs entitled to redress by injunction or compensation for the damage, if any, caused by the repeal of the designated sections of the former law. 2 Cooley, Constitutional Limitations (8th ed.) 792-796; 11 Am. Jur. 1200, sec. 372. A license or permit granted by the state is

a mere privilege which the legislature can take away at any time. The grantees must rely solely upon the faith of the sovereign grantor for its continuance.

Plaintiffs argue that section 6, ch. 78, Laws 1939, violates section 21, art. I of the Constitution of Nebraska, in that it provides for the taking or damaging of property for public use without just compensation. The questioned part of the section provides: "The chief officer and all members of the division of highway safety and patrol and all other peace officers mentioned in section 1 of this act shall have the power: * * * To require the drivers of motor vehicles to present their vehicles at the nearest inspection station or garage for inspection without charge upon reasonable belief that such motor vehicle is being operated in violation of the statutes of Nebraska pertaining to light and brake equipment or the rules and regulations of the Director of Motor Vehicles pertaining to loads." That this portion of the act is somewhat confused is quite apparent. The power granted to require drivers of motor vehicles to present their vehicles at the nearest inspection station or garage when operated in violation of law is particularly subject to this criticism in view of the fact that subsequent sections of the act abolish official inspection stations. However, we do not feel that the complaint of plaintiffs is warranted. We think the section is subject to more than one interpretation. We quite agree that any attempt on the part of the legislature to require plaintiffs to furnish free inspections would amount to a taking or damaging of their property without just compensation. The act, however, states that the inspection is to be free of charge to the driver of the motor vehicle to be inspected. While the section might be interpreted to mean that the official inspection station or garage was to make the inspection free, yet it can just as well be interpreted to mean that the inspection was to be at the cost of the state, or made by the officers of the state itself. The only requirement appears to be that the vehicle shall be delivered at the nearest inspection station or garage for inspection. It has long been the rule in this state that, where

a statute is 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. *Nelsen v. Tilley,* 137 Neb. 327, 289 N. W. 388. Applying this rule, we interpret the portion of the section under consideration to mean that a driver of a motor vehicle, operating it in violation of law, may be required to present it at the nearest inspection station or garage for inspection, either by the officers of the state or by the operators of the inspection station or garage, at the expense of some person other than the driver of the motor vehicle. In any event, we hold that this section does not require the inspection station or garage owner to inspect motor vehicles without compensation. This being true, no constitutional inhibitions have been violated.

Plaintiffs urge that the statute herein described as chapter 78, Laws 1939, violates section 14, art. III of the Nebraska Constitution, in that it contains more than one subject, and that it amends earlier laws without reciting all the sections amended and without repealing all the sections so amended. An examination of the title reveals that the act contains only one general subject—the regulation of motor vehicles. Each part of the statute is germane to this general subject. The statute is clearly an independent act, even if it does amend certain sections and repeal other sections of the 1937 law not recited in the title. An act complete in itself which covers the whole subject to which it relates may properly modify, change or destroy the effect of other statutes without contravening the provisions of the Constitution. *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365; *Mehrens v. Bauman,* 120 Neb. 110, 231 N. W. 701; *State v. Hevelone,* 92 Neb. 748, 139 N. W. 636; *Scott v. Dohrse,* 130 Neb. 847, 266 N. W. 709.

We are of the opinion that the act in question meets constitutional requirements, and that the trial court properly sustained defendants' demurrer to plaintiffs' petition.

AFFIRMED.

BERTHA JACOBSON ET AL., APPELLANTS, V. ANNIE D. FORSTER ET AL., APPELLEES.
293 N. W. 336

FILED JULY 12, 1940. No. 30839.

1. Contracts: REFORMATION. A written instrument is not subject to reformation except upon proof that clearly, convincingly and satisfactorily overcomes its positive recitations and provisions.
2. ———. The evidence set out in the opinion was insufficient to entitle a husband, by way of reformation, to have the name of his deceased second wife stricken from a deed as one of the grantees.
3. New Trial. A new trial on the ground of newly discovered evidence is properly denied, where it is not shown that the facts constituting the newly discovered evidence can be established by anything but hearsay.

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

Kimball, Peterson, Smith & Peterson, Frank F. Aplan and *Wear, Boland & Nye,* for appellants.

A. C. Plantz, contra.

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

JOHNSEN, J.

This is a reformation suit on a deed in which the trial court entered judgment for defendants and plaintiff has appealed.

The action was instituted by Friedrich Feldhahn against the children, by a former marriage, of his deceased wife, Bertha Feldhahn, and their spouses, to have her name stricken from a warranty deed, running to Friedrich Feldhahn and Bertha Feldhahn, as grantees, and to have it decreed that neither she nor her children as heirs at law ever had any actual interest in the property. The petition alleged that Bertha Feldhahn's name had been inserted as a grantee by mistake on the part of the scrivener, and that Feldhahn did not discover that fact until four years later,

when, on Bertha Feldhahn's death, her children sought to have a one-half interest in the property administered as part of her estate. After trial and decree in the district court, Feldhahn died, and the action has been revived, for purposes of this appeal, in the names of his heirs at law, consisting of his children by a previous marriage. Friedrich Feldhahn and Bertha Feldhahn had no children together. For convenience, we shall refer to Feldhahn as the plaintiff throughout this opinion.

Defendants' answer denied plaintiff's right to reformation, claiming that it had always been the intention that the deed was to run to Friedrich Feldhahn and Bertha Feldhahn as grantees jointly, and not to Friedrich Feldhahn alone. Laches and estoppel were also set up as defenses.

The trial court denied Feldhahn's right to reformation, on the ground that his proof of the alleged mistake was not sufficiently clear, convincing and satisfactory to meet the standards required for the reformation of an instrument.

The evidence in support of the right to reformation showed that Friedrich Feldhahn and Bertha Feldhahn had married in 1905, after the death of the former spouse of each; that each at that time owned property in his and her own right; that the real estate covered by the deed in suit, which was located in Sheridan county, was acquired by Feldhahn in his own name, some time after their marriage, in exchange for other property which he owned; that Feldhahn had always exercised exclusive control over it; that he advertised it for sale in his own name, listed it with real estate agents, carried on negotiations for exchanges of it, made the leases, and paid the taxes; that in 1931 he sold and conveyed the property to Fred Niemann and Emma Niemann, with Bertha Feldhahn joining in the execution of the instrument as his spouse; that he received as consideration for the conveyance a deed to some land in Shelby county, Iowa, and a purchase money mortgage on the Sheridan county land in the sum of $12,000; that this mortgage ran to him as sole mortgagee and did not include the name of Bertha Feldhahn; that in 1932 he instituted foreclosure

proceedings against the Niemanns in his own name, as plaintiff; that these proceedings were later dismissed upon the agreement of the Niemanns to convey their equity in the property for the sum of $500; that he personally paid the $500 and received a deed from the Niemanns which is the instrument sought to be reformed; that in the granting clause of the deed the name Friedrich Feldhahn was typewritten, as was the rest of the body of the deed; that the words "& Bertha Feldhahn" appear in ink in the granting clause, following the name Friedrich Feldhahn; that another clause in the deed provides, without any mention of Bertha Feldhahn's name, that "Friedrich Feldhahn however takes the title subject to a first mortgage now on said premises amounting to Twelve Thousand Dollars ($12,000) —interest taxes all costs and whatever is against the above lands;" that similarly there is a further provision that "Insurance to be assigned free of charge and Friedrich Feldhahn is to pay assessments thereon;" that, after the reconveyance by the Niemanns, Feldhahn again exercised sole control over the property, paid the taxes, collected the rents, etc., down to the time of Bertha Feldhahn's death; and that, so far as the tenants were concerned, Bertha Feldhahn had never made any assertion of rights or interest in the land.

The record further shows, however, that in the deed to the land in Shelby county, Iowa, given by the Niemanns as part of the consideration for the conveyance to them of the Sheridan county land in 1931, Bertha Feldhahn was named as a joint grantee with Friedrich Feldhahn, as she was in the deed in suit, and no attempt was made to explain this circumstance. It further appears that, while Bertha Feldhahn was not named as a mortgagee in the purchase money mortgage given by the Niemanns upon the Sheridan county land, she was made a payee with Feldhahn in the note which the mortgage was given to secure. Her name also appears in two places, with that of Feldhahn, in the deed here involved, in regular typewritten form. Thus, in the recital of the consideration, the deed reads, "to me in hand

paid by Friedrich Feldhahn and Bertha Feldhahn." The covenant provisions similarly recite that "we covenant with the said Friedrich Feldhahn and Bertha Feldhahn," etc. The only place where her name appears in ink is in the granting clause; the other places where it is found, it is in typewriting. Again, Feldhahn's own testimony indicates that Niemann made personal delivery of the deed, and that Feldhahn forwarded it to the county clerk of Sheridan county for recording, in the form in which it now appears. Even more significant than all this, however, are Feldhahn's actions in connection with a forcible entry and detainer suit brought to oust a tenant on the land some time before Bertha Feldhahn's death. He had a notice to quit signed and served in the names of Friedrich Feldhahn and Bertha Feldhahn, as owners. He had a petition filed in the county court in both their names as plaintiffs, alleging that they were the joint owners of the land by virtue of the deed from the Niemanns. He personally signed this petition as follows: "Friedrich Feldhahn and Bertha Feldhahn by Friedrich Feldhahn." The county judge of Sheridan county, before whom the forcible entry suit had been tried, testified that in that case Feldhahn had taken the witness-stand and given the following testimony: "As I remember it, he was asked who were the record owners of the land, or who was the owner of the land, and he testified that he and his wife owned this farm."

Whatever implications there may have been in the evidence offered by plaintiff, they are not sufficient, as against the facts just recited, to establish clearly, convincingly, and satisfactorily the right to reformation. There was no testimony on the part of either the Niemanns or the scrivener. The confusion and inconsistency in plaintiff's testimony and in his past actions are probably accounted for by his age and instability. He was 78 years old at the time of the trial in the district court, and the trial judge's memorandum on the overruling of the motion for a new trial declared that "Feldhahn * * * was at the time of trial very old and has lost some of his faculties and counsel himself stated that

he was one of the most difficult witnesses he had ever tried to handle."

The rule is so well settled, as perhaps hardly to require the citation of authority, that a written instrument is not subject to reformation except upon proof that clearly, convincingly and satisfactorily overcomes its positive recitations and provisions. *Oft v. Dornacker,* 131 Neb. 644, 269 N. W. 418; *Wheeler v. Brady,* 126 Neb. 297, 253 N. W. 338. We fully agree with the trial court that, on the evidence submitted and under the rule just stated, plaintiff was not entitled to reformation. This makes it unnecessary to discuss the questions of laches and estoppel raised by defendants.

Plaintiff complains also of the overruling of his motion for a new trial on the ground of newly discovered evidence. The witness, upon whose affidavit plaintiff was relying to show his ability to produce new evidence, appears to have died before the hearing on the motion for a new trial, and there is nothing to indicate that his testimony had ever been competently preserved. In this situation, the trial court could not properly have granted a new trial for newly discovered evidence, since it was obvious that plaintiff had nothing but hearsay testimony upon which he was intending to rely. *McNeal v. Hunter,* 72 Neb. 579, 101 N. W. 236. The motion for a new trial on the ground of newly discovered evidence was therefore properly denied.

AFFIRMED.

ERNEST C. GRANNELL, APPELLANT, V. NETTIE GRANNELL, APPELLEE.

293 N. W. 280

FILED JULY 12, 1940. No. 30832.

1. **Divorce.** "If the circumstances of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter to any extent, the decree so far as it concerns the care, custody and maintenance of the

children or any of them." Comp. St. 1929, sec. 42-312.

2. ———. The reduction in defendant's income and the employment of the plaintiff are changes in the circumstances of the parties that justify a prospective modification of the decree under the power granted the court.

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

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

Beatty, Maupin, Murphy & Davis, contra.

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

BLACKLEDGE, District Judge.

In 1934 in a divorce action between these parties in the district court for Lincoln county the defendant was granted a divorce upon her answer and cross-petition and was also awarded the custody of a minor son then 17 months old. The decree provided that until further order of the court the plaintiff pay to the defendant for the support of the child the sum of $15 a month.

In October, 1938, the defendant filed in said court an application for an increase in the amount allowed for the support of the child, which application was finally heard in July, 1939, and an order was then made and entered in the case modifying the original decree to the extent that the amount of such allowance for the support of the child was increased from $15 to the sum of $25 a month. This appeal is by the plaintiff from the order increasing such allowance.

The contention of the appellant is, in effect, that there has been no such change in the situation of the parties or the interests of the child as would require or authorize an increase in the amount of money to be paid by him for the support of his son now seven years old, and in the custody of his mother, the defendant.

These facts are apparent from the record and are without substantial dispute therein: Prior to their marriage both parties had been previously married and each had children, all of whom have heretofore attained their majority and do not enter into consideration in this case. The child, Maurice, is the son of these parties and the proper allowance to be made for his support is the matter in controversy herein. There is no charge of unfitness on the part of the mother to have the custody of the child, nor of any misconduct on her part. Before their marriage they each owned a residential property in North Platte; that of the plaintiff encumbered to the amount of $700, and that of the defendant encumbered to the amount of $1,700, which properties each respectively retained upon the granting of the original decree and the defendant was given the right of occupancy of the plaintiff's property, which had been their home, for the period of six months and $450 in cash. Later she was married to a Mr. Lantz who died within a year leaving to the defendant a small estate from which she realized $700 and an automobile. The defendant soon thereafter moved to Denver in search of employment and has since had part time employment with the Denver Dry Goods Company from which she realizes from $8 to $10 a week, except that it seems that her work is somewhat seasonal and at the time of the hearing of this application she was out of employment for approximately two months. Defendant still retains ownership of her North Platte property which is rented for the sum of $25 a month from which she pays $22.70 a month accruing on the $1,700 encumbrance to the building and loan association. It also appears that she traded in the automobile she received from her husband's Lantz estate and some of the money toward the purchase of a small property also in North Platte and valued at approximately $1,000; and that she is still in debt on that property, but the amount, if any, she is realizing from it does not appear. On her removal to Denver she first occupied a residential property at the rental of $50 a month, but soon afterward and for some time preceding this last

hearing she was occupying a small apartment at the rental of $18 a month, and in connection with her work employed assistance to care for the child during her absence at work for which she paid $2 a week. She is not shown to have any other resources or sources of income, so that it appears that at the end of six years her financial means are reduced to the sum of $100, she has this part time employment and her interest in the North Platte property above referred to.

It also appears that the husband is, and during all the period covered by this investigation has been, employed by the Union Pacific Railroad in a responsible capacity, he being rated as a conductor, but during certain stages of the employment has worked also as a brakeman. The testimony shows that at the time of the original trial his earnings were approximately $140 a month, and that at the time of this hearing his earnings are approximately $200 a month. In the meantime he has reduced the indebtedness on his North Platte property from $700 to approximately $400, and is himself living in a room. What he realizes from his residential property which is a seven-room house is not shown. He has no other dependents nor any one in whose support he seems financially concerned except he occasionally assists his mother who resides at Julesburg. He also maintains an automobile.

The law in this case is well settled both by statutory provision and the decisions of this court. By section 42-312, Comp. St. 1929, it is provided:

"If the circumstances of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

In *Wassung v. Wassung*, 136 Neb. 440, 286 N. W. 340, in the opinion it is stated: "The reduction in defendant's wages and the employment of the plaintiff are changes in the circumstances of the parties that justify a prospective modification of this decree under the power granted the

court in section 42-312, Comp. St. 1929, and section 42-324, Comp. St. Supp. 1937."

In the case of *Connett v. Connett,* 81 Neb. 777, 116 N. W. 658, the first paragraph of the syllabus is: "Where, in a decree of divorce, the court includes an order concerning the custody or maintenance of minor children, those infants in a sense become wards of that court, and it has authority at any subsequent period of their minority, upon application of either parent and sufficient notice to the other, to revise and alter the decree so far as it relates to the care, custody, or maintenance of the children."

It was also further held in the *Wassung* case above cited that provisions for the maintenance of children in divorce cases are for the benefit of the child or children and not for the benefit of the parent.

In the interim between the granting of the original decree and the time of the hearing from which this appeal comes, the child had progressed from the age of 17 months to approximately 7 years. He was attending school. No complaint is made of the manner in which the mother has taken care of the child except, as it is now made, that she does not need any more money in order to do so. The boy needs care of a different kind now and it is somewhat more expensive than it was at the age of 17 months. The mother is entirely justified in that, in order to hold her own employment, she employs some one to assist at their home in caring for the child while she is busy at work. The child must have something that answers as a home as well as the mother.

We think it clear from the record in this case that the circumstances of both parents and the child have sufficiently changed since the granting of the original decree to warrant the present application for a modification thereof, and we are convinced that the plaintiff father, who is shown to be in good health and to have a good job and without other dependents, should contribute a greater share than he has been doing to the support of his son; and we find that the amount of increase allowed in the district court is not excessive, and approve it.

The appellant might have had this same result had he abided the order of the district court. He had the right of appeal, of course, which he exercised, and he now owes the duty to pay appellee's counsel a reasonable fee for services in this court which we fix at $100.

AFFIRMED.

ISABELL R. BRIDGE, APPELLEE, V. CITY OF LINCOLN, APPELLANT.
293 N. W. 375

FILED JULY 19, 1940. No. 30856.

1. **Constitutional Law.** Where a city charter is susceptible of two constructions, it is the duty of a court to adopt the construction which, without doing violence to the fair meaning of the charter, renders it in accord with the Constitution.
2. **Eminent Domain.** An unliquidated claim, as that term is used in the charter provision, set out in the opinion, does not include a claim based upon the constitutional provision that "The property of no person shall be taken or damaged for public use without just compensation therefor."
3. ———. In an action to recover compensation for the taking or damaging of private property for a public use, based upon the constitutional provision, it is not necessary for plaintiff to plead or prove that she filed a claim therefor with the defendant city as provided by the charter.

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

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

Lloyd E. Chapman, contra.

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

SIMMONS, C. J.

In grading and improving Forty-eighth street, defendant city, without permission or proceedings at law to au-

thorize its acts, went upon plaintiff's land, made excavations, changed the natural drainage, removed dirt therefrom, and damaged the same otherwise.

Plaintiff sues for damages, basing her action upon the constitutional provision that "The property of no person shall be taken or damaged for public use without just compensation therefor." Const. art. I, sec. 21. Plaintiff prevailed in the trial court. Defendant appeals.

By the force of the constitutional provision, a cause of action existed in favor of the plaintiff and against the defendant, no legislative enactment being necessary to give effect to the above section of the Constitution. *Douglas County v. Taylor*, 50 Neb. 535, 70 N. W. 27.

Defendant's charter provides: "In order to maintain an action for an unliquidated claim it shall be necessary, as a condition precedent, that the party file in the office of the city clerk within thirty days from the time such right of action accrues, a statement of the amount of the claim, giving full name of the claimant, the time, place, nature, circumstances and cause of the injury or damage complained of."

Conceding that no one can suffer a loss or damage to his property without just compensation, defendant contends that the charter provision provides a reasonable procedure for the enforcement of the constitutional right; that the filing of a claim is a condition precedent to the maintenance of the action; and that the plaintiff's failure to plead and prove that she had filed the claim bars a recovery.

Defendant cites *City of Lincoln v. Grant*, 38 Neb. 369, 56 N. W. 995; *City of Lincoln v. Finkle*, 41 Neb. 575, 59 N. W. 915; *City of Lincoln v. O'Brien*, 56 Neb. 761, 77 N. W. 76; *City of Lincoln v. Mays*, 2 Neb. (Unof.) 204, 96 N. W. 484; *Henry v. City of Lincoln*, 93 Neb. 331, 140 N. W. 664; *City of Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955; *Bartels v. Drainage District*, 122 Neb. 340, 240 N. W. 434.

Plaintiff contends that, in an action to recover damages, based upon the constitutional provision, it is not necessary to plead and prove a compliance with the charter provision.

Weinel v. Box Butte County, 108 Neb. 293, 187 N. W. 939; *Douglas County v. Taylor, supra; Wong Kee Jun v. City of Seattle*, 143 Wash. 479, 255 Pac. 645; *Johnson v. City of Duluth*, 133 Minn. 405, 158 N. W. 616; *City of Omaha v. Clarke*, 66 Neb. 33, 92 N. W. 146, are cited.

It seems a bit incongruous that the defendant should advance the proposition that it has not received a statement of the claim including "the time, place, nature, circumstances and cause of the damage complained of," when the defendant better than any one else knows those facts, for it, through its representatives, caused the damage, and obviously must have expected to compensate the owner in compliance with the mandate of the Constitution. However, a decision is not made upon that basis.

By a series of opinions based upon the constitutional provision herein cited, this court has held that, where a public agency undertakes by statutory methods to appropriate private property for public use and the owner of the property fails to file a claim for damages within the time fixed by law, notwithstanding that failure, the owner may either enjoin the appropriation of the property until provision for compensation has been made, or may recover damages therefor. *Pawnee County v. Storm*, 34 Neb. 735, 52 N. W. 696; *Livingston v. County Commissioners of Johnson County*, 42 Neb. 277, 60 N. W. 555; *Hodges v. Board of Supervisors of Seward County*, 49 Neb. 666, 68 N. W. 1027; *Propst v. Cass County*, 51 Neb. 736, 71 N. W. 748; *Hogsett v. Harlan County*, 4 Neb. (Unof.) 310, 97 N. W. 316; *Weinel v. Box Butte County, supra.*

The above being true, where a public agency proceeds under color of law, certainly the rule should apply with greater vigor to the taking of private property for public use without lawful warrant or claim of right.

In *Livingston v. County Commissioners of Johnson County, supra*, this court said: "To give section 21 of article 1 of the Constitution full effect it is necessary that a corporation which proposes to appropriate private property for public use shall take such steps as may be necessary to de-

termine the amount of damages resulting from such appropriation and provide payment therefor. This duty should be in no way dependent upon whether or not a claim for damages has been filed by the person whose property is to be taken."

"The law should be construed in such a way as to do justice and no strict rule applied that will rob a party of his property." *Pawnee County v. Storm, supra.*

If there is a conflict between the two, the city charter must yield to the constitutional provision.

Where a city charter is susceptible of two constructions, it is the duty of a court to adopt the construction which, without doing violence to the fair meaning of the charter, renders it in accord with the Constitution. *Beisner v. Cochran, ante,* p. 445, 293 N. W. 289.

An unliquidated claim, as used in the charter provision, does not include a claim for compensation for the taking or damaging of private property for public use. It follows that, in an action to recover compensation for the taking or damaging of private property for a public use, based upon the constitutional provision, it is not necessary for plaintiff to plead or prove that she filed a claim therefor with the defendant city as provided by the charter.

It is recognized that certain holdings of this court, in cases cited by the defendant, may be construed to be in conflict with this conclusion. No fine distinctions will be made. Any statements in our previous decisions contrary to the conclusion here are expressly overruled.

We find no reversible error in the assignments with reference to the amount of the verdict and the admission of evidence.

AFFIRMED.

MESSMORE, J., concurring.

I concur in the result reached in the majority opinion. The provisions of the home rule charter of the city of Lincoln are sufficiently contained in the majority opinion.

At the close of plaintiff's evidence, defendant moved the court to dismiss the petition in that she failed to allege and

prove that she filed a claim for damages with the city in the office of the city clerk within 30 days after the acts of which she complains were committed, as provided by the home rule charter, the same being a claim for unliquidated damages. This motion was overruled, and this ruling is assigned as error.

Defendant cites *City of Lincoln v. Grant,* 38 Neb. 369, 56 N. W. 995, and *City of Lincoln v. Finkle,* 41 Neb. 575, 59 N. W. 915. The majority opinion, in effect, overrules these two cases in so far as they conflict with the opinion in the instant case. The foregoing are cases that had to do with the changing of a grade, resulting in damage to property. In *City of Lincoln v. Grant, supra,* on page 373, we find the following language with reference to notice:

"It is true the right to recover for damage to private property in like cases is reserved by the Constitution, but there is no doubt that the legislature may regulate the remedy and prescribe the forms to be observed in order to enforce that right. The only limitation upon the legislative authority is that the regulation must be reasonable and provided by general laws of uniform operation." (Italics ours.) The plaintiff in the *Grant* case failed to file a notice as required by the charter of the city of Lincoln. She having failed to meet the requirement of the charter, the city prevailed.

Section 21, art. I of the Constitution of Nebraska, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." This constitutional provision is referred to in the italicized language above. In the instant case the city actually appropriated a strip of land, using the same for a borrow pit, taking and using 2,000 feet of dirt, and rendering the land useless. In *City of Lincoln v. Grant, supra,* and in *City of Lincoln v. Finkle, supra,* there was no appropriation of land. This is the distinction between those two cases and the case at bar, and the former need not be overruled.

I believe the facts in the instant case come within the italicized language quoted from the *Grant* case, and consti-

tute a limitation upon the legislative authority (the city) in that the regulation, which the city seeks to apply and enforce with reference to requiring notice, is unreasonable.

Under the circumstances, plaintiff is not required to plead or prove that she filed a claim as provided for by the city charter.

MARJORIE H. BAKER, APPELLEE, V. GERTRUDE L. SOMERVILLE ET AL., APPELLANTS: ERNA MAE BRADLEY ET AL., INTERVENERS, APPELLEES.
293 N. W. 326

FILED JULY 19, 1940. No. 30821.

1. **Constitutional Law.** A city zoning ordinance does not operate retroactively to deprive a private lot owner of previously vested property rights.
2. **Judgment.** "A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose." *Triska v. Miller*, 86 Neb. 503, 125 N. W. 1070.
3. **Municipal Corporations.** A city zoning ordinance based alone on æsthetic standards and so operating as to prevent a lot owner in a residential district from constructing thereon a one-story home does not promote public health, public safety, morals or the general welfare and in that particular is void as beyond the police power of the city.

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

Votava & McGroarty and *Eugene F. Fitzgerald*, for appellants.

Brome & Thomas and *Harold A. Moore, contra.*

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

ROSE, J.

This is a suit in equity commenced by Marjorie H. Baker, plaintiff, for an injunction preventing Gertrude L. Somerville, Robert S. Somerville and Emil Holmstrom, defendants, from proceeding further in the construction of a partially erected dwelling-house on lot 3, block 77, Dundee Place, in the city of Omaha, on the ground that the building planned fails to conform to zoning ordinances in respect to what is called the "setback" from streets, to two-story houses and to floor space of 2,000 square feet in a one-story house, thus depreciating the value of plaintiff's home and of other homes in an exclusive residential district. The Somervilles are owners of the land on which the partially constructed dwelling-house is situated and Holmstrom is their building contractor. Plaintiff owns an abutting lot with a residence thereon. Other home owners in the restricted district intervened and joined plaintiff in a prayer for an injunction.

Defendants denied they violated any valid zoning ordinance applicable to the dwelling-house they attempted to construct on their lot and put in issue other facts upon which plaintiff and interveners rely for injunctive relief.

The district court found all the controverted issues in favor of plaintiff and interveners and granted the injunction sought by them. Defendants appealed.

Was the injunction which prevents the Somervilles from proceeding with the construction of their partially built home properly granted? This is the sum of the questions presented by the appeal.

If the Somervilles complete their house on their own lot according to their own plans, it will be a one-story, five-room brick veneer building facing Happy Hollow boulevard on a corner lot at the intersection with Cuming street. The structure, as nearly as possible, is in the center of the lot. The garage is part of the house on the north—Cuming street side. The building is approximately 65 feet long north and south and 36 feet wide east and west. Exclusive of the garage the floor area is 1,470 square feet and 1,730

square feet including the garage—more floor space than is ordinarily found in a one-story dwelling-house. The price paid for the lot was $2,400 and the contract price for construction of the building was approximately $10,000, of which $5,000 had been paid to the contractor when this suit was commenced. The foregoing facts are established by the evidence. The record contains a picture of the house and grounds as they will appear, if the work of construction is completed according to the plans. The picture indicates an attractive home. There was no attempt to prove an architectural monstrosity or offensive structure.

The head of the city building department, with the plans of the Somerville home before him, issued the official permit for the construction of the building as planned. Partial construction conformed to the plans, with the single exception that a foot was added to the width of the garage. After complaints relating to the building in connection with the lot reached the building department of the city of Omaha, an inspector visited the premises when the work of the contractor indicated the outlines and location of the building and told the contractor to complete it as planned. These facts are shown by a preponderance of the evidence.

The objections to the building were directed principally to a one-story house among two-story residences, to setbacks from streets and to limitation of floor space less than 2,000 square feet, all in asserted violation of zoning ordinances. Plaintiff and interveners testified that the Somerville dwelling-house, if completed as planned, would depreciate the value of their own residences, by reason of one or more of the objectional features mentioned.

Plaintiff proved deed restrictions in the title of the Somervilles as follows: Occupancy for residence purposes only; dwelling-house not closer than 45 feet from either Cuming street or Happy Hollow boulevard; two full stories required; cost at least $10,000. These restrictions expired by the terms of the deed imposing them at the end of a 15-year period, or on April 8, 1939. The petition in this case was not filed until May 6, 1939. Violation of the deed restric-

tions, therefore, are no justification for the injunction granted herein.

In this situation plaintiff and interveners resorted for equitable relief to a city zoning ordinance requiring the floor space of a one-story residence to contain 2,000 square feet. This provision was extended by a subsequent change in the ordinance to the lot of the Somervilles after they bought it, procured their building permit and invested $5,600 in the building of their home. They acquired vested rights by contract and by expenditure of money before the city extended this regulation to their property. It is well-settled law that an ordinance cannot operate retroactively to deprive them of their previously vested rights. *Kerwin v. Thompson, Belden & Co.*, 110 Neb. 251, 192 N. W. 692; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N. W. 449. In the latter case this rule was adopted:

"A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights."

The supreme court of Iowa held:

"A building permit issued upon full showing of the nature and character of the building to be erected and the use to be made thereof, the plans of which are approved by the proper officers, cannot be revoked by the municipal authorities merely because of protest and opposition by the owners of neighboring property." *Rehmann v. City of Des Moines*, 40 A. L. R. 922 (200 Ia. 286, 204 N. W. 267).

This is in harmony with the weight of authority. See note in 40 A. L. R. 928 *et seq.* Failure to comply with the ordinance requiring a floor space of 2,000 square feet in the one-story home is not, therefore, a ground for the injunction.

Plaintiff and interveners contend the injunction was properly granted on the ground that defendants violated the zoning ordinance requiring setbacks of 45 feet from street lines. On the other side it is insisted that this question is not open to controversy herein for the reason it was

previously determined in a former suit in equity involving the same relief, the same subject-matter and the same parties and interveners. In the former suit an injunction was sought to prevent defendants from proceeding with the construction of their home according to their plans on the ground they were violating a 45-foot setback restriction imposed by deed, but relief under the same restriction of the zoning ordinance then in force was not invoked. Upon a trial of the former suit defendants were enjoined from proceeding further with the construction of their partially erected home until the expiration of the 15-year deed restriction on April 8, 1939. Thereafter the work of construction proceeded with resulting expense. The present suit was commenced May 6, 1939, for a second injunction for violation of the same setback requirement. The second injunction was granted with all the former parties present in court. The rule of equity applicable to this situation has been repeated time and again. One statement of the rule follows:

"A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose." *Triska v. Miller,* 86 Neb. 503, 125 N. W. 1070. See, also, *Schlemme v. Omaha Gas Mfg. Co.,* 4 Neb. (Unof.) 817, 96 N. W. 644; *Slater v. Skirving,* 51 Neb. 108, 70 N. W. 493; *Cunningham v. Lamb,* 101 Neb. 288, 163 N. W. 149; *School District D v. School District No. 80,* 112 Neb. 867, 201 N. W. 964; *Dutch v. Welpton,* 121 Neb. 480, 237 N. W. 579; 34 C. J. 818.

The zoning ordinance requiring a floor area of 2,000 square feet, if the building is only one story in height, is, in that particular, condemned by the Somervilles as an unconstitutional invasion of their property rights, creating no basis for the injunction. The evidence shows that it was a purpose of the restrictions to prevent the construction of

a one-story dwelling-house in this zoning district where the other homes were two stories high. The restriction to prevent construction of one-story homes resulted alone from æsthetic standards of the city lawmakers. Beautiful city residences, homologous lines in architecture and symmetry in construction appeal to artistic tastes and should be respected in connection with substantial zoning regulations for the promotion of the public welfare, but æsthetics alone for the purpose of zoning ordinances do not seem to be a source of police power, according to the weight of authority. The New York Court of Appeals said:

"Aesthetic considerations are, fortunately, not wholly without weight in a practical world. Perhaps such considerations need not be disregarded in the formulation of regulations to promote the public welfare. *Matter of Larkin Co. v. Schwab,* 242 N. Y. 330. 'Public welfare' is a concept which in recent years has been widened to include many matters which in other times were regarded as outside the limits of governmental concern. As yet, at least, no judicial definition has been formulated which is wide enough to include purely æsthetic considerations." *Dowsey v. Village of Kensington,* 257 N. Y. 221, 177 N. E. 427.

The supreme court of New Jersey, as recently as January 15, 1940, ruled as follows:

"Although legislature, under the zoning act, has given municipalities the right to pass ordinances to regulate and restrict the height, number of stories, and sizes of buildings, such ordinances, to be valid, must bear a substantial relation to and be designed to promote the public health, safety, morals, and general welfare. * * *

"An ordinance providing that no building should be erected with its roof ridge less than 26 feet above building foundation in a certain residential zone did not promote public health, safety, and general welfare, and hence ordinance was invalid." *Brookdale Homes, Inc. v. Johnson,* 10 Atl. (2d) 477 (123 N. J. Law, 602).

These rulings conform to the great weight of authority. It follows that the zoning ordinance under consideration,

in so far as it purports to prevent defendants from constructing on the Somerville lot a one-story home containing a floor area less than 2,000 square feet, on the sole basis of æsthetic standards, does not promote public health, safety, morals or the general welfare, and is therefore void. The entire record has been examined without finding any sufficient ground for the injunction granted. The judgment of the district court is reversed and the petition of the plaintiff and the petition of interveners dismissed at the costs of petitioners.

REVERSED AND DISMISSED.

E. H. LUIKART, RECEIVER, APPELLANT, V. PAUL JONES, SR., ET AL., APPELLEES.
293 N. W. 346

FILED JULY 19, 1940. No. 30862.

1. **Bankruptcy.** The discharge in bankruptcy releases a bankrupt from all his claims and debts which are provable against his estate, including a fixed liability, absolutely owed, whether then payable or not, and from debts founded upon a contract, but does not release the bankrupt against such debts as are excepted from the discharge in bankruptcy.
2. ———. The bankrupt's liability as a bank stockholder may form the basis of a provable claim, where the liability is regarded as being contractual in origin and nature, and it is not too contingent or too uncertain.
3. **Banks and Banking.** Stockholders are not liable for acts in an attempted liquidation of a going bank which are unauthorized or *ultra vires*, unless they have assented thereto, or have estopped themselves from denying liability therefor.
4. ———. The double liability of a stockholder in a state bank, formerly imposed by section 7, art. XII of the Constitution of Nebraska, is a secondary and exceptional liability. It is not an asset of the bank, but is for the security of the bank's creditors.

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

F. C. Radke and *Leon L. Hines*, for appellant.

Arthur E. Perry, Perry, Van Pelt & Marti, Butler, James & McCarl and *Victor Westermark, contra.*

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

PAINE, J.

This is an action to recover double liability from stockholders of the Bank of Benkelman by the receiver of that bank, as formerly provided by section 7, art. XII of the Constitution, which was repealed November 8, 1938. After trial the action was dismissed as to the defendants, and they were allowed to go hence without day, from which plaintiff appealed.

The plaintiff's amended petition, filed December 3, 1938, alleges that the Bank of Benkelman was organized September 1, 1887, and given charter No. 38. On March 17, 1932, the bank having been adjudged insolvent, E. H. Luikart, plaintiff, was appointed receiver, and on March 18, 1938, it was adjudged that the bank owed creditors $164,164.10. On May 21, 1938, the receiver reported that he had completed liquidation of the bank, and that the deficiency due to its creditors amounted to $138,201.58, and that there is due from each and every stockholder their double liability; that defendants Paul Jones, Sr., and Robert E. Moore owned 70 and 10 shares of stock respectively, and prayed for an accounting and judgment for the amount due from each of said stockholders.

Paul Jones, Sr., filed answer, setting out that on January 14, 1933, he was adjudged a bankrupt in the McCook division of the United States district court for Nebraska, and on April 26, 1933, he was discharged as a bankrupt; that the causes of action set forth in plaintiff's petition accrued prior to the adjudication in bankruptcy, and are among the debts and claims from which the defendant was discharged as a bankrupt.

Plaintiff files reply, admitting the bankruptcy proceedings, and denying all other allegations, and charges that the claim against the defendant on the ownership of 70

shares of stock in said bank was entirely contingent, and not a provable claim in bankruptcy, as the deficiency was judicially determined by the court on May 21, 1938, and that the defendant has not been discharged from the liability.

Robert E. Moore for answer alleged that he was adjudged bankrupt in the McCook division of the United States district court for the district of Nebraska on June 6, 1935, and on the 14th day of February, 1936, he was discharged as a bankrupt, and that the debts referred to in plaintiff's petition for a double liability on his shares of bank stock are among the debts from which he was so discharged by the federal court.

After trial the court held that the defense of bankruptcy, as pleaded in the answers of the defendants, was a good defense to plaintiff's cause of action, and dismissed plaintiff's petition as to each of the bankrupts.

The plaintiff assigns as errors that the judgment of the district court is contrary to the evidence and contrary to law, and erred in finding that, when the defendants were discharged in bankruptcy, the plaintiff's claim was then a provable claim, and was discharged by said bankruptcy proceedings.

The sole question involved is, whether a stockholder of a state bank who goes through bankruptcy some years after the state bank in which he holds stock has been adjudged insolvent, but before there has been a judicial determination as to the exact amount for which each stockholder is liable under the constitutional double liability clause, is released from his obligation as a stockholder to pay the double liability.

The discharge in bankruptcy means the release of a bankrupt from all his debts which are provable, including a fixed liability, absolutely owing, whether then payable or not, and debts founded upon a contract, express or implied. 7 Remington, Bankruptcy, sec. 3516.

In a case involving the California banking law, it was held that assessment made after filing of petition in bank-

ruptcy could not be rejected on the ground that it was too indefinite and remote a contingency to constitute a debt at the time of filing the petition. "The contingencies of liability upon the assessment of the stock by the superintendent of banks are no more remote, uncertain, or unlikely than the nonpayment of commercial paper or the nonperformance of a guaranteed obligation. * * * We, therefore, hold that the obligation of the stockholder of this insolvent bank to pay to the superintendent of banks the moneys to discharge the bank's creditors is a debt 'founded upon a contract' as that term is used in the bankruptcy statute." *Erickson v. Richardson* (1936) (9 C. C. A.) 86 Fed. (2d) 963.

"Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof." *Luikart v. Paine,* 126 Neb. 251, 253 N. W. 86.

Counsel for the receiver of the Bank of Benkelman insist that contingent claims are not provable as debts in bankruptcy, and that a contingent claim is one where the liability depends on some future event which may or may not happen, and that a bank stockholder's liability is unliquidated until the amount is fixed, and must be liquidated before it can be provable, and that a discharge in bankruptcy does not operate as a release therefrom.

There is no question but that authorities may be found on both sides, for in the receiver's reply brief he cites 6 Am. Jur. 582, sec. 120, reading as follows: "A stockholder's liability which is unliquidated or contingent, or the amount of which is not fixed, is not a debt provable in the stockholder's bankruptcy proceedings. To be provable it must first be liquidated and ascertained within the time allowed for proving claims."

But in examining 8 C. J. S. 1263, sec. 404, it is said: "Unless the contingency or uncertainty is so great as to prevent the claim from being susceptible of liquidation, a claim or demand is not necessarily unprovable because it is

contingent at the time of the filing of the petition, if it can be brought within some provision or subdivision of Bankruptcy Act sec. 63a which contains no express requirement that the claims provable thereunder be a fixed and absolute liability of the bankrupt at the time of the petition."

Referring now to 8 C. J. S. 1258, sec. 399, it is said: "The bankrupt's liability as a stockholder may form the basis of a provable claim, under Bankruptcy Act sec. 63a (4) (11 U. S. C. A. sec. 103 (a) (4)), where the liability is regarded as being contractual in origin and nature and it is not too contingent or uncertain to be susceptible of liquidation."

The circuit court of appeals of the United States, in *Brown v. O'Keefe,* 85 Fed. (2d) 885, has held that claims based upon assessment against the bankrupt to enforce his statutory liability as a stockholder are provable in bankruptcy.

In Justice Cardozo's opinion in *Brown v. O'Keefe,* 300 U. S. 598, 57 S. Ct. 543, being the same case on appeal, it is said: "By the mandate of the statute (Bankruptcy Act sec. 63b; 11 U. S. C. sec. 103b) : 'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate.' The result is to invest the court with a discretionary power that can be fitted to the needs of varying situations. *Maynard v. Elliott,* 283 U. S. 273. *Cf. Foust v. Munson S. S. Lines,* 299 U. S. 77, 83. * * * Liquidation being possible, the claim is not defeated though there was uncertainty as to its amount at the filing of the petition. *Maynard v. Elliott, supra.* Yet even the amount was certain, if we are to credit the defendant's statement. By this it appears that long before the bankruptcy the necessity for an assessment to the amount of the par value of the shares had become obvious to the liquidating agent and indeed to all concerned. The facts are far removed from those in *Miller v. Irving Trust Co.,* 296 U. S. 256, where the claim had its origin in the covenants of a lease."

Years before these defendants filed their petitions in bankruptcy, the bank had been declared insolvent, and placed in the hands of a receiver, and his report had disclosed the amount of stock held by each stockholder, and the amount of the sum to be contributed by each to pay a 100 per cent. assessment on the shares of stock was capable of strict ascertainment. The receiver, being notified, had a right to file a contingent claim.

It has been said that all doubts will be resolved in favor of the provability of claims under section 63 of the bankruptcy law.

It is generally held that, while the provability of a claim in bankruptcy, irrespective of its inherent validity, is a question of federal law, the validity and enforceability of a claim for purposes of provability are determined by the local law. 8 C. J. S. 1228, sec. 390; *In re Estate of Bolton*, 121 Neb. 737, 238 N. W. 358.

It appears to this court that the district court for Dundy county was correct in holding that the discharge in bankruptcy of each of the defendants presented a good defense to the suit of the receiver, and the same should be affirmed.

We have now discussed the nonliability of stockholders Paul Jones, Sr., and Robert E. Moore, who availed themselves of the bankruptcy proceedings. We will now discuss the issues as affecting Herbert E. Gottschalk, Lee T. Hamilton and Samuel M. Ewing, three other stockholders. The amended petition of the receiver of the Bank of Benkelman relating to them shows that Gottschalk owned three shares, Hamilton ten shares, and Ewing ten shares, and the receiver asks for an accounting and judgment against each of them on their stock liability.

These three stockholders rely upon four defenses: (1) That the only indebtedness of the Bank of Benkelman upon which liability was asserted by the receiver was predicated upon an *ultra vires* and illegal contract, as to which the stockholders who were not a party to that contract were not liable; (2) that the contract between the Bank of Benkelman and the Farmers & Merchants State Bank of Benkel-

man, out of which the indebtedness was claimed to arise, disclosed that the exclusive liability for the payment of any deficiency of assets transferred and a promise to pay the liability assumed rested on the three stockholders who alone entered into the contract, to wit, Paul Jones, Sr., who owned 70 shares, G. J. Owens, who owned 66 2/3 shares, and E. L. Campbell, who owned 66 2/3 shares; at least, this was the primary obligation, and it is contended that the liability of stockholders other than these three was secondary, and the release of the three parties primarily liable by compromise and settlement released and discharged the defendants Gottschalk, Hamilton and Ewing; (3) that the proceedings for the receivership of the Bank of Benkelman were collusive and fraudulent as to these answering defendants; that at the time plaintiff was appointed receiver of the Bank of Benkelman he was also receiver of the Farmers & Merchants State Bank of Benkelman; that as receiver of said last-named bank the plaintiff had no other or greater rights than said bank which breached the contract of March 20, 1930, upon which liability is predicated; (4) that all of the assets of the Bank of Benkelman had not been legally exhausted, as certain tracts of real estate without the state of Nebraska had not been lawfully disposed of by the receiver.

On July 12, 1939, Judge Eldred entered a judgment finding generally in favor of the defendants Gottschalk, Hamilton and Ewing, and dismissed the cause of action as to said three defendants.

The evidence discloses that on March 20, 1930, three of the directors and stockholders of the Bank of Benkelman, without the knowledge or consent of the other directors and stockholders, entered into a contract transferring all of the assets of the Bank of Benkelman, in consideration of the assumption by the Farmers & Merchants State Bank of all the liabilities of the first-named bank. The deficiency of any assets to pay the liabilities assumed was guaranteed personally by three directors and stockholders who signed the contract, viz., Jones, Owens, and Campbell. The de-

fendant stockholders insist that there is no evidence to show that the Bank of Benkelman was facing insolvency on the date of this contract, for a receiver was not appointed for it until March 18, 1932, some two years after the contract and transfer of assets were made.

The state bank commissioner, George W. Woods, testified, after searching his records, that there was no written approval of the contract, although it was discussed with him, and if any approval was given it was over the telephone. Gottschalk, Ewing and Hamilton testified that they did not attend any stockholders' meeting, did not receive any notice of such meeting, and knew nothing at all about it before this contract was entered into.

The liability of stockholders is a contractual one, arising out of the payment for the stock subscription, the terms of the stock certificate, together with the provisions of the Constitution and laws relating thereto which are in force at the time. *Luikart v. Heelan,* 136 Neb. 492, 286 N. W. 780; *Kennedy v. Central Power Co.,* 129 Neb. 637, 262 N. W. 504.

This contract of March 20, 1930, provided for a note of $250,000 to be given to the Farmers & Merchants State Bank, in consideration of which they would pay off the depositors of the Bank of Benkelman. It is argued that this indebtedness exceeded the indebtedness allowed by the articles of incorporation and by-laws (Comp. St. 1929, sec. 8-136), and that the transfer of the assets of the Bank of Benkelman was made without the consent of the department of trade and commerce (Comp. St. 1929, sec. 8-160), and made for the purpose of voluntarily liquidating the Bank of Benkelman, contrary to the provisions of the statute governing the same (Comp. St. 1929, sec. 8-169).

If it be found that these acts took place in violation of the strict terms of the law, then the attempted liquidation would be *ultra vires,* and stockholders are not liable for unauthorized or *ultra vires* acts or debts of a bank, unless they have assented thereto, or estopped themselves from denying liability to the same. 9 C. J. S. 156, sec. 80.

It has been held that, when a stockholder is sued by virtue of his constitutional and statutory liability, he is liable only for indebtedness incurred in the transaction of the legal and contemplated business of the corporation, and it is pointed out that "One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation." *Ward v. Joslin,* 186 U. S. 142, 22 S. Ct. 807.

The Constitution formerly provided (art. XII, sec. 7) that the stockholders of a bank should be individually liable to the amount of their respective shares for the bank's debts. This double liability of a bank stockholder imposed by the Constitution was a secondary and exceptional liability, which arose only by the contingency that the bank had become insolvent. It has been held that this double liability of bank stockholders was not an asset belonging to or asserted in behalf of the bank, but was an independent original remedy. *State v. Citizens State Bank,* 118 Neb. 337, 224 N. W. 868; *Assets Realization Co. v. Howard,* 70 Misc. 651, 127 N. Y. Supp. 798; *Leighton v. Leighton Lea Ass'n,* 74 Misc. 229, 131 N. Y. Supp. 561.

It was held that a contract by which a trust and savings bank transferred all its assets to a bank and trust company, which assumed all liabilities but which contract was not approved by the auditor of public accounts, as required by statute, was void, and therefore the bank and trust company was not a creditor within the constitutional provision relating to stockholder's liability, as the banks were without power to make the agreement. A bank has only the powers expressly granted, or necessarily implied from a specific grant. *Continental Illinois Nat. Bank & Trust Co. v. Peoples Trust & Savings Bank,* 366 Ill. 366, 9 N. E. (2d) 53.

In the case at bar, the contract provided in paragraph 6 that the Bank of Benkelman should deliver to the Farmers

& Merchants State Bank an agreement of persons owning at least 70 per cent. of its capital stock, ratifying and approving the execution of the contract and agreeing to carry out the same, and the three defendant stockholders were outside of the 70 per cent. who approved the same and guaranteed to carry it out.

The case which is most similar to the case at bar is a recent Illinois case, released in January of this year. To get the facts before us, we will examine the text of the opinion. The receiver of the State Bank of Orangeville brought action against John Babler and several other stockholders to enforce their constitutional liability as stockholders of the State Bank of Orangeville. The Peoples State Bank of Orangeville and the Orangeville State Bank were each doing a general banking business. The stockholders of the Orangeville State Bank, at a special stockholders' meeting, passed resolutions to liquidate their bank, and for the organization of a new bank to assume the liabilities of the Orangeville State Bank, provided the Peoples State Bank would pass a similar resolution.

In accordance with the resolution of liquidation passed by the two old banks, a new bank, called the State Bank of Orangeville, was duly organized and commenced business. All of said proceedings were duly authorized in writing by the auditor of public accounts. The Orangeville State Bank transferred to the new bank its bills receivable of $136,689.57, indorsed without recourse, together with $168,426.20 and its note for $27,077.80, which together made the amount of its deposit and bills payable liabilities. It was also alleged in the complaint that there still remains due and unpaid on said note more than $20,000. The defendants filed motion to dismiss on the ground that the resolutions for liquidation were void under the statutes of Illinois. The chancellor held that when the transactions took place there was only one method of voluntary liquidation of a state bank. That would be to distribute its assets, surrender its charter, and close up its business by depositing with the auditor of public accounts an amount equal to the whole

amount of debts and demands against it, and that the plan followed in having the State Bank of Orangeville liquidate the Orangeville State Bank was not the manner sanctioned by the banking act, and that such transactions were *ultra vires* and void.

It was held that, if there was a consolidation and not a liquidation, then the State Bank of Orangeville assumed the payment of the note along with the other bills payable and deposit liability of the Orangeville State Bank. This was not a dissolution, because the complaint alleges that the Orangeville State Bank continues to exist as a legal entity. It was held that the action of the new bank, the State Bank of Orangeville, in assuming the liability of the Orangeville State Bank, and in attempting to shift responsibility for its debts, was beyond the power conferred by the legislature, and precluded the appellant from recovering in this proceeding against its stockholders, and the decree for the defendant stockholders was therefore affirmed. *Albers v. Babler*, 303 Ill. App. 324, 25 N. E. (2d) 81.

The contract, exhibit No. 19, dated March 20, 1930, provided that the Farmers & Merchants State Bank of Benkelman would assume and pay on demand all deposits, including certificates of deposit, cashier's certified checks, and bills payable of the Bank of Benkelman, together with the interest on all of the above items, and provided that the Bank of Benkelman "and certain of its stockholders shall give to the Farmers & Merchants State Bank its note, guaranteed by E. L. Campbell, G. J. Owens, Paul Jones, L. T. Hamilton," but the last name is stricken out in ink, clearly showing that the note was to be guaranteed by only three stockholders, and not by L. T. Hamilton.

In the last part of paragraph 6 of the contract, we find this sentence: "In the event that there is still a deficiency, that is, an unpaid part of the Bank of Benkelman note, then and in such event nothing herein contained shall limit the right of the Farmers & Merchants State Bank to seek recovery for such deficiency through the individual liability of the signers and makers of the note, providing such liability obtains under the law."

In the collateral note, being exhibit No. 18, the indorsement upon the back reads as follows:

"Presentment, demand, protest and notice of dishonor waived. Payment of the within note guaranteed.

"G. J. Owens
"E. L. Campbell
"Paul Jones"

We have examined practically all of the cases cited in the very excellent briefs filed in this case, as well as going into the text-writers for their views on the very close questions presented herein. We have endeavored to analyze each of the propositions of law set out by the receiver for a reversal of the judgment of the lower court.

Many of the cases referred to as controlling arose in dire emergencies when a bank was facing instant insolvency. But, in the case at bar, the Bank of Benkelman was not found to be insolvent for months after the contract was given by the three stockholders, without any notice to the stockholders who are sued in this action. We cannot find that this hasty transfer of all the assets of this bank was regular, or carried out in a manner which would bind these stockholders on their double stock liability.

We cannot but realize that the district judge who tried this case was familiar with all of the details, and with the witnesses who testified before him, having held court for many years in that county, and we are inclined to the view that the evidence and the law support the trial court in finding generally for the stockholders Gottschalk, Hamilton and Ewing, and in dismissing the receiver's action against them.

AFFIRMED.